

District Court Sets Aside CWA Conviction For Filling Isolated Wetlands

The United States District Court for the Eastern District of Michigan has set aside the criminal conviction of a northern-Michigan property owner because the wetlands on his property were not “directly adjacent” to “navigable waters” and, therefore, were not regulated under the Clean Water Act (CWA). The property owner, Mr. John Rapanos, had been convicted of filling those wetlands without a permit, in violation of Section 404 of the CWA.

Mr. Rapanos owns a 175-acre parcel in Williams Township, Michigan. In order to make his property more attractive to potential developers, Mr. Rapanos cleared his heavily-wooded land and filled wetlands—which were located entirely within his own property—with sand. Although the property is not physically contiguous to any navigable waters and, in fact, is “roughly 20 miles from where the Kawkawlin River—the nearest body of navigable water—becomes navigable,” Mr. Rapanos was convicted by a federal jury for knowingly discharging pollutants (i.e., sand) into the navigable waters of the United States without a permit issued under the CWA.

As Mr. Rapanos’s case wound through the federal appellate courts, the United States Supreme Court issued a decision in another case involving wetlands, *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, holding that the CWA does *not* regulate wetlands that are completely isolated from any navigable waters. In light of that decision, the Supreme Court directed the Sixth Circuit, which in turn directed the district court, to reconsider Mr. Rapanos’s conviction. Acting on this direction from the higher courts, the district court requested the parties to file briefs on the issue of whether the wetlands on Mr. Rapanos’s property were directly adjacent to navigable waters? This issue, which was critical to the court’s analysis, had not been resolved in Mr. Rapanos’s jury trial. Rather, the jury instructions allowed

for a conviction if the wetlands on Mr. Rapanos's property "were completely isolated, yet had some impact on interstate commerce."

The United States argued that the Mr. Rapanos's former wetlands were both "hydrologically connected and directly adjacent to navigable waters." As evidence of a direct connection, the United States pointed to a "ditch dubbed the Labozinski drain, which empties into Hollper Creek, which eventually winds its way into Kawkawlin River, which in turn flows into Saginaw Bay." The court, however, found this connection too tenuous to justify regulation under the CWA, noting that the "nearest body of navigable water to [Mr. Rapanos's property] is roughly twenty linear miles away." The court distinguished other Supreme Court cases holding that wetlands that are *directly* adjacent to navigable waters are, themselves, part of the navigable waters of the United States. Despite the Supreme Court's broad reading of the CWA in these other cases, the district court held that "the Supreme Court concluded in *Solid Waste Agency* that the CWA does have limits." Reasoning that Congress did not intend for the term "navigable waters," as used in the CWA, to be "devoid of any meaning," the district court held that "the plain text of the statute mandates that navigable waters must be impacted by [Mr. Rapanos's] activities." The court found that, in this case, there was no direct connection between Mr. Rapanos's property and the Kawkawlin River. Moreover, the court concluded that "even if there is a hydrological [i.e., groundwater] connection, [Mr. Rapanos's] wetlands may be considered 'isolated' for purposes of the CWA."

Accordingly, the district court set aside Mr. Rapanos' conviction.

United States v. Rapanos, No. 93-CR-20023-01, __ F. Supp. 2d __ (E.D. Mich. Feb. 21, 2002)

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