

The Landmark Case, *United States v. John A. Rapanos, et al.*, (E.D. MI.), Resolved.

On March 18, 2009, Judge Friedman, Chief Judge, United States District Court for the Eastern District of Michigan, entered a Consent Decree between the United States and John A. Rapanos, his wife and several wholly owned companies (Defendants) to resolve the civil case *United States v. John Rapanos, et al.*, Court Action No. 94-CV-70788-DT (E.D. MI). The Consent Decree orders the following.

1. Defendants shall pay to the United States a civil penalty of \$150,000.
2. Defendants will complete, at an estimated cost of \$750,000, an off-site wetlands mitigation project ordered by the Court consisting of creation/restoration of approximately 100 acres of wetlands, and donate the mitigation properties to a third party conservation group to manage and maintain the wetlands in perpetuity.
3. Defendants will fund a mitigation endowment, of no less than \$25,000, to assure the selected conservator has sufficient funds to manage the project.
4. Defendants will permanently preserve approximately 34 acres of wetlands not impacted at the Pine River site, and approximately 100 acres of wetlands not impacted at the Hines Road site.
5. Defendants will recognize, accept, and respect established state (Michigan) wetland delineations at the Pine River and Hines Road sites, and agree which other parts of the sites will require a wetland delineation if Defendants continue development.
6. The United States and Defendants acknowledge that Nationwide Permit 32 (NWP 32), found at 72 Fed. Reg. 11092, 11, 187 (March 12, 2007) authorizes any fill that was in place as of April 20, 1999 (as set forth in Exhibits 2 and 3 to the Consent Decree) and may remain in place subject to NWP 32 and the terms and conditions of the consent decree.
7. Defendants are enjoined from discharging any pollutants into waters of the United States unless Defendants obtain any necessary federal permit(s).

This matter was referred to EPA for civil enforcement by the Michigan Department of Natural Resources (k/n/a MDEQ) in approximately 1990 to address significant violations of the Clean Water Act by the Defendants at several locations in or near Midland, Michigan in the late 1980s. EPA initiated administrative enforcement in the matter in 1991 and the Agency subsequently referred the matter to the United States Department of Justice in 1993 for both criminal and civil alleged violations. Criminal and civil proceedings were initiated by the United States in the Eastern District of Michigan shortly thereafter.

While the civil case was filed in 1994, it was stayed for several years pending the substantial resolution of the criminal matter. In the companion criminal case, the Defendant John A.

Rapanos was indicted by a grand jury in 1993, alleging that he knowingly filled wetlands in Bay County, Michigan. A mistrial was declared, and Mr. Rapanos was re-tried in February 1995 and convicted of two counts of knowingly discharging pollutants into waters of the United States without a permit. However, the trial judge ordered a new trial, ruling that the prosecutor had improperly cross-examined defendant regarding his refusal to allow a search of his property. The Sixth Circuit Court of Appeals reversed. See *United States v. Rapanos*, 115 F.3d 367, 374 (6th Cir. 1997). On March 15, 2005, John Rapanos was sentenced to a term of three years on probation and fined \$185,000. Both Mr. Rapanos and the U.S. appealed. The Sixth Circuit held that the trial judge failed to correctly apply sentencing guidelines in allowing the defendant to receive a sentence of probation. See *United States v. Rapanos*, 235 F.3d 256, 261 (6th Cir. 2000). Defendant then sought a writ of certiorari from the United States Supreme Court, but the Supreme Court returned the matter to the trial judge to reconsider the case in light of the Supreme Court's holding in *SWANCC*. The trial judge ruled that the property in question was not wetlands under *SWANCC* and dismissed the case. On appeal, the Sixth Circuit reversed and held that wetlands regulations applied to Rapanos property, and ordered Mr. Rapanos to be re-sentenced. See *United States v. Rapanos*, 339 F. 3d 447 (6th Cir.2003). Mr. Rapanos filed another appeal of the matter with the Supreme Court, which denied certiorari and denied a request for rehearing. On remand, the trial judge again sentenced Mr. Rapanos to probation.

The United States complaint in the civil case was filed in February of 1994 and was subsequently amended twice to add additional defendants and violations at other sites (for a total of 6 sites). After several years of discovery, the civil case proceeded to trial (on liability) in April of 1999. On March 22, 2000, after a multi-week bench trial, the District Court held that the Defendants had discharged pollutants into 54 acres of waters of the United States (wetlands) at three of the subject sites, in violation of Section 301 of the Clean Water Act, 33 U.S.C. 1311. In 2000, the District Court held a second bench trial to determine a remedy in the matter and on October 24, 2000, Judge Friedman ordered the Defendants to complete up to approximately 2.6 million dollars worth of injunctive relief consisting of the construction and donation of an off-site compensatory wetland mitigation project of 100 acres of wetlands and buffer. On February 11, 2003, the Court issued a Final Partial Judgment in the case in favor of the United States and on April 4, 2003, the Defendants appealed this decision to the 6th Circuit. On July 26, 2004, the 6th Circuit affirmed the judgment of the district court and a petition for rehearing was denied on November 2, 2004. Defendants' petition for a writ of certiorari was filed with the Supreme Court on January 28, 2005 and was granted on October 11, 2005. Oral arguments were held in the consolidated "*Rapanos*" cases on February 21, 2006. On June 19, 2006, the Supreme Court issued its plurality opinion for *Rapanos, et ux. v. United States*, 547 U.S. 715 (2006), which remanded to the Sixth Circuit Court of Appeals the entire matter for additional fact finding. Subsequently, the Sixth Circuit Court of Appeals remanded the case to the District Court to complete the additional fact finding. A complete legal analysis of the Supreme Court's opinion may be found in the Agency's [Rapanos guidance documents](#).

In 2007, the parties to the case entered into settlement negotiations to resolve the civil case. On December 2, 2008, after the District Court was notified by the parties that a tentative settlement had been reached in the matter, Judge Friedman ordered the parties to lodge a final executed proposed consent decree with the Court on or before December 31, 2008. The proposed consent

decree was lodged with the Court on December 29, 2008 (docket # 362) and published in the Federal Register on January 12, 2009. 74 Fed. Reg. 1274 (Jan. 12, 2009). Pursuant to 28 C.F.R. § 50.7, the proposed consent decree was available for public comment for 30 days, from January 12, 2009, until February 11, 2009. No comments were received.

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