



October 12, 2005

SUPREME COURT AGREES TO HEAR MAJOR WETLANDS CASE

(Rapanos v. United States)

The United States Supreme Court agreed yesterday to review a court of appeals ruling that held that the federal government had regulatory authority under the Clean Water Act over isolated "wetlands" located over 20 miles away from any navigable waterway. The case presents the Court with an opportunity to rein in federal regulators who have seemingly ignored the Court's ruling four years ago that Congress intended the Clean Water Act's jurisdiction to extend only over wetlands that are adjacent to waterways that are navigable, and not over isolated wetlands that are otherwise subject to local control.

In *Rapanos v. United States*, the U.S. Army Corps of Engineers has been relentless over the last decade in prosecuting both civil and criminal charges against John Rapanos, a small developer, for placing sand on his own property that the Corps deems to be federally regulated wetlands. The linchpin for the Corp's jurisdiction over the property was the fiction that the property was "adjacent" to a river over 20 miles away.

The court of appeals rejected that novel claim, but allowed the Corps to assert jurisdiction anyway on a more attenuated theory that somehow, the isolated wetlands (which are mostly dry) are "hydrologically connected" to the navigable river. In other words, the court held that eventually, all water drains into the rivers, and therefore, federal jurisdiction can be asserted over isolated wetlands. In the meantime, Mr. Rapanos was resentenced earlier this year by the district court judge to probation, despite the Justice Department's vigorous efforts to send him to prison for a substantial term. At the resentencing hearing, the federal prosecutor took issue with the judge's observation that only clean sand was put on the property rather than toxic or dangerous chemicals. Unbelievably, the federal prosecutor retorted that "sand is more toxic and destructive" to wetlands than toxic chemicals.

WLF clients include the Allied Educational Foundation and two environmental scientists, Laurence A. Peterson and Edmond C. Packee, Jr., of Travis/Peterson Environmental Consulting, Inc. of Alaska. WLF's brief was drafted *pro bono* by Mark A. Perry, a partner with Gibson, Dunn & Crutcher, LLP, in Washington, D.C. The case will be heard early next year and decided by June 2006.

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