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## THE PRICE OF SUCCESSFULLY CHALLENGING THE FEDERAL INTERPRETATION OF THE CLEAN WATER ACT

By Ronald A. Zumbrun\*

In 2006 I wrote about the United States Supreme Court rendering its highly anticipated decision in *John Rapanos v. United States*. The issue was whether the term “waters of the United States” as used in the Clean Water Act included wetlands on private property not directly abutting navigable waters.

Of particular interest was the effect that the Court’s two newest members, Chief Justice John Roberts and Justice Samuel Alito, might have on the course of our nation—particularly in the area of private property rights.

The *Rapanos* case involved wetlands on private property lying near ditches or man-made drains that eventually emptied into federal navigable waters. Permits were denied by the Army Corps of Engineers, the government agency that issues permits for the discharge of dredged or fill material into navigable waters.

To consider a permit request, the Corps first assumes that any intrastate nonnavigable stream is actually a water of the United States because presumably all waters eventually reach navigable water and would have an effect thereon. The Corps then measures vernal pools and prairie potholes to see if they ever overflow into these intrastate waters. Given this position, “waters of the United States” include all water except nonoverflowing vernal pools, prairie potholes and other such isolated waters. Under this

definition, the federal government remains fully involved in local land use decisions.

Reed Hopper, lead attorney for Pacific Legal Foundation, represented Rapanos before the United States Supreme Court and argued that Congress had not intended that jurisdiction would be so broadly asserted.

Justice Scalia announced the judgment of the Court, joined by Chief Justice Roberts and Justices Thomas and Alito. Justice Kennedy concurred in the judgment. Justice Stevens dissented, joined by Justices Souter, Ginsburg and Breyer.

Justice Scalia and the three joining justices concluded that the phrase “the waters of the United States” includes only those relatively permanent, standing or continuous flowing bodies of water “forming geographical features” that are described in ordinary parlance as “streams, oceans, rivers, and lakes” and does not include channels through which water flows intermittently or ephemerally. Isolated ponds and wetlands are not “waters of the United States” in their own right.

In ruling, Justice Scalia noted that the Rapanos parcel was 11 to 12 miles away from the nearest body of navigable water. Twelve years of criminal and civil litigation had ensued for Mr. Rapanos back-filling his own fields. He faced 63 months in prison and hundreds of

thousands of dollars in criminal and civil fines. Justice Scalia pointed out that this was a small part of the enormous increase in federal regulations of land use that has occurred under the Clean Water Act—without any change in the governing statute—during the past five presidential administrations. He stated that 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 (issued nationally for specific categories) spends 313 days and \$28,915—not counting costs of mitigation or design changes. “Over \$1.7 billion is spent each year by the private and public sectors obtaining wetlands permits.”

At this point, it would appear that Rapanos would be home free as the lower court decision was vacated and remanded. But wait, four votes are not enough to constitute a majority opinion. Justice Kennedy did not join the lead decision but only concurred in its result, which was to vacate the lower court judgment and remand the case.

Thus, the lead opinion represented a plurality of the Court and lacks the binding effect of a majority opinion. Therefore, Justice Kennedy’s concurring opinion, which was joined by no other justice, arguably could remain the guiding opinion until another Clean Water Act case reaches the United States Supreme Court.

Justice Kennedy would retain discretion in the Corps of Engineers. Only absent a significant nexus or connection would jurisdiction under the Act be lacking. Kennedy stated that “in some instances ... the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a ‘navigable water’ under the Act. In other instances ... there may be little or no connection.”

Under Kennedy’s opinion, each affected property owner may still have to spend hundreds of thousands of dollars in attorneys’ fees to clarify their rights and responsibilities under the

Act because no guidance has been given by the courts or anyone else on these significant issues.

Rapanos’ case was remanded back to the federal district court. Having already incurred the costs, delay and distress of having his case go all the way to the United States Supreme Court, Mr. Rapanos had to begin all over again.

Apparently as a result of these frustrations, Rapanos entered into a Consent Decree with the federal government which was submitted to the United States District Judge on December 29, 2008. Under the Consent Decree, Rapanos has agreed to pay a civil penalty and recreate approximately 100 acres of “wetlands” and buffer area to resolve violations of the Clean Water Act. He also has agreed to pay a \$150,000 civil penalty and will spend an estimated \$750,000 in mitigation for 54 acres of “wetlands” that were filled without authorization. In addition, he has agreed to preserve an additional 134 acres of wetlands that were not affected by the unauthorized activity. Under the agreement, the preservation of these acres will be enforced by way of a conservation easement held by the State of Michigan.

A parallel criminal matter is still pending and not affected by the Consent Decree. The proposed Consent Decree is subject to a 30-day consent period and final court approval.

On remand the federal government has ignored both the Scalia and Kennedy opinions. This is a horrible example of injustice and disrespect for private property rights. It is no wonder that Rapanos finally chose to concede and escape his nightmare. Meanwhile, despite all of the litigation efforts made, America still awaits a clear definition of “waters of the United States.”

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