

9-1-2003

## United States v. Rapanos, 339 F.3d 447 (6th Cir. 2003)

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Becky Bye, Court Report, United States v. Rapanos, 339 F.3d 447 (6th Cir. 2003), 7 U. Denv. Water L. Rev. 141 (2003).

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determined that compliance with the writ would not impose a substantial burden upon the Corps because Detroit agreed to both pay all costs associated with disposal and indemnify the Corps for any additional liability. With respect to the fourth factor, the court held that the Corps' assistance was necessary because of the lack of feasible alternatives and exigent circumstances. Finally, with regard to the fifth factor the Corps argued that the National Environmental Policy Act ("NEPA") required an environmental study even though the district court found otherwise. The Sixth Circuit then held that to review the Corps claim the district court should have applied the arbitrary and capricious standard. Because the district court did not apply this standard to the instant case, the Sixth Circuit remanded the case to determine whether the Corps decision to perform an environmental assessment was arbitrary and capricious.

*Karen L. Golan*

**United States v. Rapanos, 339 F.3d 447 (6th Cir. 2003)** (holding wetlands adjacent to a drain and hydrologically connected to navigable waters established jurisdiction under the Clean Water Act).

John Rapanos owned one hundred and seventy-five acres of land in Bay County, Michigan. Wetlands on the property, which were the subject of this dispute, lie between eleven and twenty miles from the nearest navigable-in-fact water. In 1988, Rapanos made plans to clear the trees from the land and eradicate the wetlands on his property. In an effort to sell the plot to developers, Rapanos proceeded to destroy wetlands that thrived on his property. The Michigan Department of Natural Resources ("Department") informed him that a permit would be necessary for development on the area. Later, Rapanos sought to destroy any paper evidence that reported wetlands on his property. Despite Department and Environmental Protection Agency ("EPA") warnings, Rapanos began destroying the wetlands. The EPA charged Rapanos with knowingly discharging pollutants into the waters of the United States without a permit—a violation of the Clean Water Act ("CWA"). The EPA alleged that these wetlands were connected to "navigable waters," which the CWA protects. Rapanos argued that the wetlands on his land were not "navigable waters" because they are not directly adjacent to navigable waters. Rapanos' first trial ended in a mistrial and the second trial in the United States District Court for the Eastern District of Michigan concluded with a guilty verdict. After granting Rapanos' motion for a new trial, the district court found that the court committed plain error. The United States Court of Appeals for the Sixth Circuit reversed this holding, remanding the case to the district court for sentencing. The district court sentenced Rapanos to three years probation and a fine of \$185,000. After appealing the conviction, the United States Supreme Court granted *certiorari* and remanded the case to the Sixth Circuit, which remanded back to the

district court. The district court then dismissed the case for lack of jurisdiction under the CWA. The United States appealed, claiming CWA jurisdiction existed.

On appeal, the Sixth Circuit first examined whether the district court correctly interpreted *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers* (“SWANCC”), where the Supreme Court held that non-navigable wetlands, if adjacent to navigable water, are under the jurisdiction of the CWA. Because Rapanos’ land was proximate but not connected to wetlands, the Sixth Circuit also relied on a Fourth Circuit decision in *United States v. Deaton*. The *Deaton* court determined that a small area between wetlands and navigable waters constituted a “significant nexus” and therefore was within CWA jurisdiction. The Sixth Circuit used this holding to show that Rapanos’ land similarly had a “significant nexus” to wetlands, thus establishing CWA jurisdiction.

Next, the court turned to a disputed jury instruction defining the term “waters.” Since Rapanos did not object to the instruction, the court reviewed the instruction for plain error. The Sixth Circuit determined that SWANCC’s interpretation of the CWA jurisdiction clause did not invalidate the agency’s regulation upon which the instruction was based, concluded that the district court jury could not have based its decision on impermissible grounds, and held that Rapanos’ rights could not have been affected by the jury instruction. Concluding the CWA applied to Rapanos’ land and that the jury instructions were sufficient, the court reversed the decision of the district court, reinstated the conviction, and remanded the case to the district court for sentencing.

*Becky Bye*

## SEVENTH CIRCUIT

**Home Builders Ass’n of Greater Chicago v. United States Army Corps of Eng’rs, 335 F.3d 607 (7th Cir. 2003)** (holding a government agency can enter into a coordination agreement with other regulatory agencies for the purpose of correlating federal regulations under the permit requirements of the Clean Water Act so long as the coordination agreement does not increase the agencies’ regulatory authority beyond that granted by Congress).

The Home Builders Association of Greater Chicago (“Home Builders”) filed three successive complaints in the United States District Court for the Northern District of Illinois seeking injunctive and declaratory relief against the United States Army Corps of Engineers (“Corps”). The catalyst for the suits was an Interagency Coordination Agreement (“ICA”) between the Corps and various local water-regulating agencies. Home Builders claimed adoption of the