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REVIEW & OUTLOOK

Wetlands Desperado

A mere land owner does not present as attractive a cause for civil libertarians these days as some al Qaeda operative getting his three squares a day down in Gitmo. But when an American citizen faces prison time for moving dirt on his own property, we say it's time to break out the editorial torches and pitchforks—especially when even the judge doesn't want to sentence the man.

The developer is John Rapanos, a 68-year-old Michigan man found guilty of violating the Clean Water Act. Though this probably conjures up images of a factory belching toxic chemical waste into a nearby stream, what we have here is a wetlands case. To put it another way, Mr. Rapanos's "crime" is to have moved sand on his own property without a federal permit. Last Wednesday, just when jail looked inevitable, federal Judge Lawrence Zatkoff put off sentencing Mr. Rapanos until October, by which time he hopes the U.S. Supreme Court will have offered some clearer guidelines for how U.S. law should treat such dastardly criminals.

Good luck. As Judge Zatkoff knows all too well, the reason Mr. Rapanos finds himself in this preposterous position is that our wetlands law is a hopeless swamp. The blame extends all around, from the politicians responsible for the Clean Water Act, and the federal bureaucrats who have used it to define almost any puddle as a wetland, to a Supreme Court apparently happy to leave everyone in the murk.

Let's be clear about what Mr. Rapanos did. He ignored cease-and-desist orders to stop filling in what the feds and state environmental authorities claim are wetlands on his property. Mr. Rapanos admits he went ahead and moved sand around. But he maintains that what the government is calling a wetlands is really a cornfield filled with drainage ditches.

The words of the 1972 Clean Water Act give the federal government authority over the "navigable waters of the United States." What's at issue, notes the Pacific Legal Foundation, which is defending Mr. Rapanos, is whether this control extends to farmland more than 10 miles away from the nearest such body of water, in this case the Kawkawlin River. That argument was given a boost in 2001 when the Supreme Court ruled that the government lacked authority over an Illinois wetland because it was not abutting a larger waterway. Unfortu-

nately, several appellate courts have since issued conflicting rulings in other cases, rendering the intent of the Supreme Court's ruling, well, muddy.

Then there's the definition of "wetlands."

*How the Clean Water Act
can make anyone
a 'criminal.'*

In the early 1900s the county's drain commission dug ditches on Mr. Rapanos's property to make it suitable for farming. The

Mackinac Center's Russ Harding, a former director of Michigan's environmental agency who's actually been on the property, says that it is not a wetlands because the drains do what they were meant to do: keep the land dry by draining the water.

Over the past 20 years or so, we've written about other American citizens who've gone to jail for running afoul of wetland regulators. These include John Pozsgai of Pennsylvania, whose crime spree consisted of improving a lot he bought that was filled with 7,000 old tires. Bill Ellen was another hardened wetlands criminal, a maritime engineer who actually ran afoul of the wetlands federalistas while trying to create a wildlife sanctuary in Maryland.

Now it's Mr. Rapanos's turn. At his original sentencing hearing in 1998, the same Judge Zatkoff highlighted the absurdity of the situation when he pointed to a drug dealer he'd sentenced that day in the same courtroom. "Here we have a person," Judge Zatkoff said, "who commits crimes of selling dope and the government asks me to put him in prison for 10 months. And then we have an American citizen, who buys land, pays for it with his own money, and he moves some sand from one end to the other and [the] government wants me to give him 63 months in prison. Now, if that isn't our system gone crazy, I don't know what is. And I am not going to do it. I don't believe he got a fair trial."

Thus far Judge Zatkoff's is the only sane voice we can find in all officialdom. Congress has shirked its job by failing to spell out whether it really meant to give regulators all the powers they've assumed under the Clean Water Act, the Supreme Court punts on cases that would clarify its earlier decision, and the Bush Administration has backed down on its own plans for wetlands regulatory reform because of pushback from environmentalists. The result is that law-abiding citizens such as John Rapanos can go to jail for moving sand on their own land.