



The Water Report™

Water Rights. Water Quality & Water Solutions in the West

WETLANDS & THE CLEAN WATER ACT

US SUPREME COURT HEARING IMMINENT

RAPANOS, CARABELL, AND THE LIMITS OF FEDERAL JURISDICTION

In This Issue:

Wetlands Law	1
Water Quality & Temperature Trading	10
Water Quality Standards Litigation	17
Water Briefs	19
Calendar	27
Upcoming Stories:	
Perchlorate Update	
CWA/ESA Relationships	
Arizona NPDES Authority	
& More!	

by Howard Bleichfeld, Sam Collinson, and Christopher S. Mills of Van Ness Feldman, PC

INTRODUCTION

On Tuesday, February 21st, the United States Supreme Court is scheduled to hear oral argument on two cases concerning the scope of federal jurisdiction under the federal Clean Water Act (CWA). The two cases, *Rapanos v. United States*, 376 F.3d 629 (6th Cir. 2004), *cert. granted* (U.S. Oct 11, 2005) (No. 04-1034) and *Carabell v. U.S. Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004), *cert. granted* (U.S. Oct 11, 2005) (No. 04-1384), which have been consolidated for review by the Supreme Court, involve landowners who filled wetlands distant from “traditional” navigable waters. By “traditional” navigable waters we mean those waters that comprise the “highways of commerce,” and have been regulated for over 100 years by the US Army Corps of Engineers (Corps). They are defined in Corps regulations as “those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently used, or have been in the past, or may be susceptible for use to transport interstate or foreign commerce.” 33 C.F.R. § 329.4 (2005). In reviewing the decisions of the US Court of Appeals for the 6th Circuit in the *Rapanos* and *Carabell* cases, the Supreme Court may clarify the boundaries of federal CWA jurisdiction which have remained unclear since the Court’s 2001 decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (“SWANCC”—531 U.S. 159 (2001)).

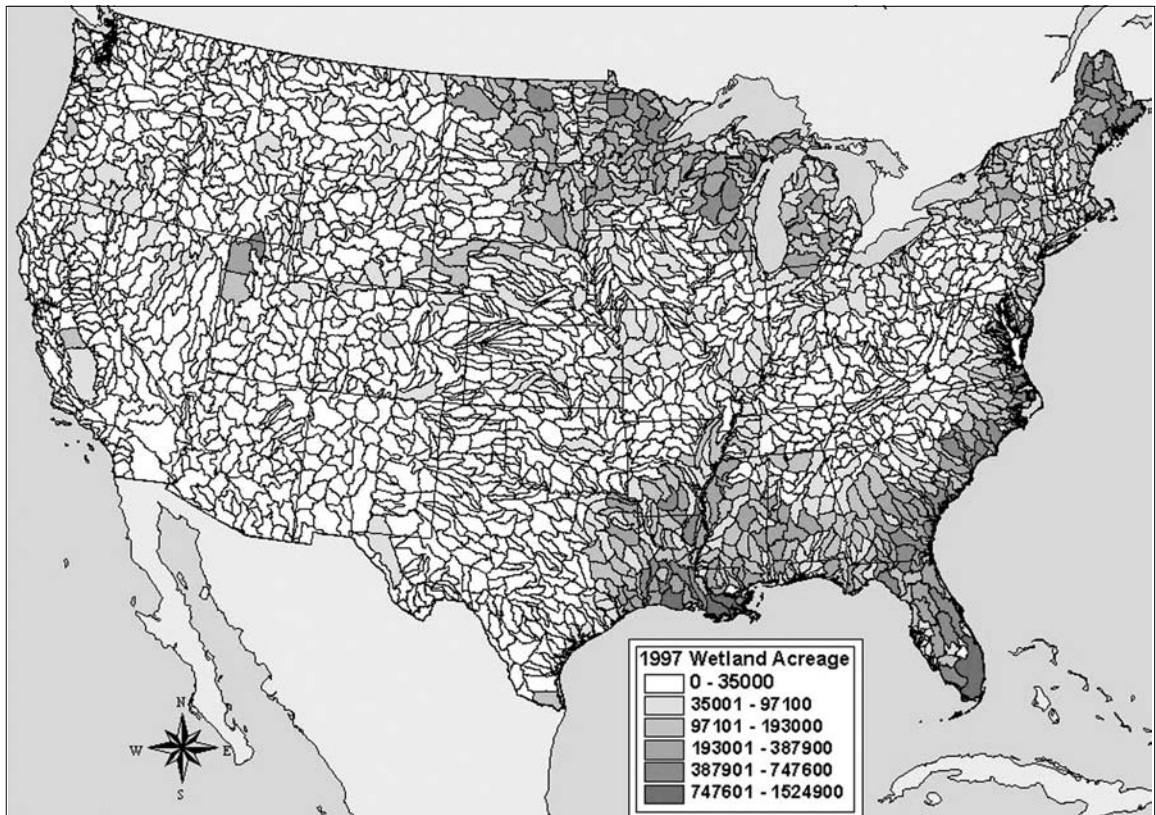
The limits of federal jurisdiction are important to developers, irrigation districts, state and local governments, utilities and any other entity seeking to plan and build a project affecting wetlands. The wetlands permitting process under section 404 of the CWA is time consuming, expensive, and controversial. Once jurisdiction under the program is claimed, it is all too easy for the sponsor of a project to lose control over its timing and design. Moreover, application for a CWA section 404 permit often triggers extensive consultation with the US Fish and Wildlife Service under section 7 of the federal Endangered Species Act. In addition, because the Court’s decision will apply to the entire CWA, the jurisdiction of other programs also could be affected, including the National Pollutant Discharge Elimination System (NPDES) Program under CWA section 402, and the Oil Pollution Act.

CASE OVERVIEWS

In the *Rapanos* case, contractors were hired to prepare three sites in Bay County, Michigan, including 54 acres of wetlands, for development. The wetlands on one of the sites were 20 miles from the Kawkawlin River, a traditional navigable water. The wetlands on the site were connected intermittently to the Kawkawlin by a manmade ditch and a non-navigable creek. On another site, surface runoff from wetlands flowed into similar non-navigable tributaries and eventually to traditionally navigable waters. The US

Wetlands

US Wetlands (1997)



Wetland Acreage. Shaded areas indicate 1997 acreage of wetlands within 8-digit hydrologic boundaries. Source: National Resource Inventory, revised December 2000.

Environmental Protection Agency (EPA) asserted that the work on the site involved the unauthorized filling of jurisdictional wetlands in violation of section 404 of the CWA. EPA ordered Rapanos to stop all work and restore the sites to their original condition. Rapanos refused, believing that the CWA does not apply to non-navigable, intrastate wetlands far removed from traditional navigable waters. In 1994 the EPA brought criminal charges against John Rapanos. Mr. Rapanos was convicted in 1995 and fined \$185,000. The trial judge refused to sentence Mr. Rapanos to prison for “mov[ing] some sand from one end [of his property] to the other.” *U.S. v. Rapanos*, 235 F.3d 256, 259-260 (6th Cir. 2000). Simultaneously in 1994, the civil suit that is now before the Supreme Court was filed.

The property at issue in *Carabell* is a 19.6 acre site in Macomb County, Michigan lying about a mile from Lake St. Clair. The property, which contains wetlands, is separated from a ditch by manmade berms. The ditch connects to a drain, which in turn empties into a creek, which empties into Lake St. Clair. According to the petitioners, the berms prevent any surface or ground water connection between Carabell’s property and the ditch or any other water. Nevertheless, the EPA asserted jurisdiction over the property on grounds that the wetland was adjacent to a navigable water of the United States. The Corps subsequently denied a permit submitted by Carabell to develop the property. In both the *Rapanos* and *Carabell* cases, the US Court of Appeals for the 6th Circuit held that federal jurisdiction attached to the wetlands.

BACKGROUND

The CWA prohibits discharges of pollution into “navigable waters” except in accordance with the various provisions of the Act. “Navigable waters” are defined in the CWA as the “waters of the United States, including the territorial seas.” The CWA does not further define the term “waters of the United States.” The two agencies that share responsibility for implementing the CWA — EPA and the Corps — have defined the term broadly to include not only traditional navigable waters, but all other waters, including intrastate lakes, rivers, streams and wetlands if their use, degradation, or destruction could affect interstate commerce, as well as tributaries of such waters. In addition, the regulations assert federal jurisdiction over wetlands that are “adjacent” to any of these waters (see 33 C.F.R. 328.3(a) and (c); and 40 C.F.R. 230.3(s)(1) (EPA).

The Water Report

(ISSN pending) is published monthly by Envirotech Publications, Inc.

260 North Polk Street,
Eugene, OR 97402

Editors: David Light &
David Moon

Phone: 541/ 343-8504

Cellular: 541/ 517-5608

Fax: 541/ 683-8279

email:

thewaterreport@hotmail.com

website:

www.thewaterreport.com

Subscription Rates:

\$249 per year; Multiple
subscription rates
available.

Postmaster: Please send
address corrections to:

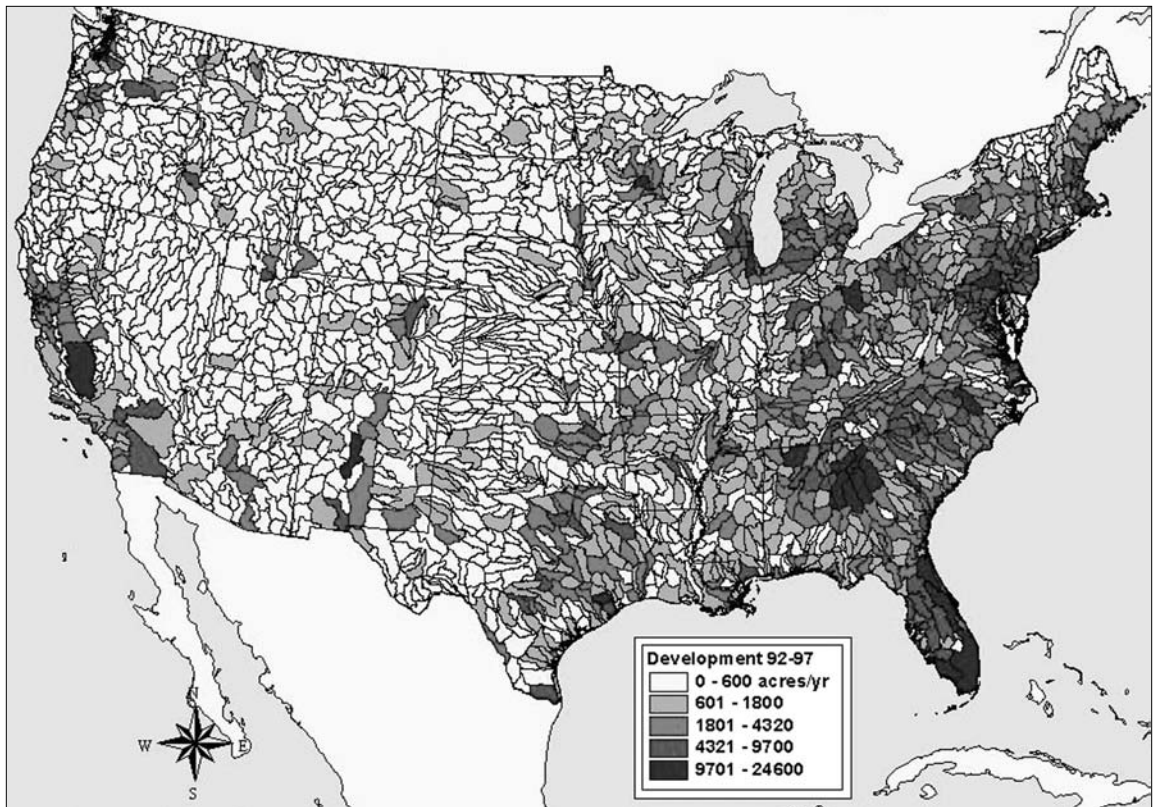
The Water Report,
260 North Polk Street,
Eugene, OR 97402

Copyright© 2006

Envirotech Publications,
Incorporated

Wetlands

**US
Development
Rate**



Annual Development Rate. Shaded areas indicate annual rate of development 1992-97 within 8-digit hydrologic boundaries. Source: National Resource Inventory, revised December 2000.

**Federal
Jurisdiction**

**“Adjacent”
Wetlands**

Riverside Bayview Homes

The *Rapanos* and *Carabell* cases mark the third time the Supreme Court has addressed the extent of federal jurisdiction over wetlands and other waters under the section 404 wetlands permitting program. In its 1985 opinion in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), the Court addressed whether the assertion of jurisdiction over “adjacent” wetlands was a valid exercise of agency authority under the CWA. There, Riverside Bayview Homes owned 80 acres of wetlands abutting Black Creek, a traditional navigable waterway near Lake St. Clair in Macomb County, Michigan. When the company placed fill material on the property without a federal permit, the Corps asserted jurisdiction over the property as an “adjacent” wetland and obtained an injunction from the district court. The Supreme Court upheld federal jurisdiction, reasoning that Congress intended the term “navigable waters” to include at least some waters that would not be deemed “navigable” under the traditional understanding of that term (474 U.S. at 133). The Court found that because the wetland in question “actually abuts on a navigable waterway,” the Corps’ judgment that it was “inseparably bound up” with the “waters of the United States” and therefore subject to federal regulation was reasonable (*Id.* at 134-135).

SWANCC

Six years later the Supreme Court addressed the question of federal jurisdiction over waters and wetlands not adjacent to any navigable waterway. The Solid Waste Agency of Northern Cook County (SWANCC) sought to fill several small ponds in two counties in Illinois for use as a municipal solid waste disposal site. The ponds, which had formed on a site formally used for sand and gravel mining, were non-navigable and hydrologically isolated from other waters. The Corps asserted jurisdiction over the ponds on the basis of the so-called “Migratory Bird Rule,” which authorized federal CWA jurisdiction over any waters that could be used by migratory birds.

**“Migratory Bird
Rule”**

In the *SWANCC* decision, the Supreme Court held that isolated, non-navigable, intrastate waters and wetlands are not jurisdictional “waters of the United States” under section 404 of the CWA where the sole basis for asserting jurisdiction is the use of such waters by migratory birds (*SWANCC v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001)). Corps regulations define “isolated waters” as those non-tidal waters of the United States, including wetlands, that are (1) not part of a surface tributary system to interstate or navigable waters; and (2) not adjacent to such tributary waterbodies (33 C.F.R. § 330.2(e) (2005)). The Court found that there is a difference between giving the term “navigable” limited effect, as

**Isolated
Wetlands**

<p>Wetlands</p>	<p>in <i>Riverside Bayview Homes</i>, and giving the term no effect at all. The Court in <i>SWANCC</i> held that the agencies' expansive definition of the term "waters of the United States" was so broad that the word "navigable" was effectively eliminated from the statutory term "navigable waters." The term "navigable," according to the Court, demonstrates that in enacting the CWA, Congress had in mind "its traditional jurisdiction over waters that were or had been navigable in fact, or which could reasonably be so made." The Court explained that its decision in <i>Riverside Bayview Homes</i> was based on Congress' clear intent to regulate wetlands that "actually abutted on a navigable waterway" (531 U.S. at 167). The Court stated in <i>SWANCC</i> that it was the "significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in <i>Riverside Bayview Homes</i>." (<i>Id.</i>) In contrast, the CWA does not allow jurisdiction over "ponds that are <i>not</i> adjacent to open water" (531 U.S. at 168; emphasis in original).</p>
<p>Significant Nexus</p>	<p>The Court grounded its decision in <i>SWANCC</i> in its analysis of the CWA, but stated that the Corps' assertion of jurisdiction over isolated waters raised "significant constitutional questions." The Court noted that twice since 1995 it has "reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited," and stated further that allowing the Corps and EPA to claim jurisdiction over isolated waters would result in a "significant impingement of the State's traditional and primary power over land and water use." <i>Id.</i> at 173 and 174.</p>
<p>Commerce Clause</p>	<p>Post-SWANCC Inconsistency</p> <p>Unfortunately, the Court's opinion in <i>SWANCC</i> did not result in clearer jurisdictional boundaries under the federal wetlands permitting program. Instead, administrative actions and lower court decisions following <i>SWANCC</i> have created further inconsistency in the operation of the program. A report issued in March, 2004 by the General Accounting Office concluded that jurisdictional decisions made by the Corps are made inconsistently across the country by Corps district offices. The report found that the inconsistency was greatest when the Corps considered jurisdiction over: 1) adjacent wetlands; 2) tributaries; and 3) ditches and other man-made conveyances. That same year, the Administration canceled a rulemaking drafted to provide specific guidelines to field personnel who make the day-to-day determinations of federal jurisdiction over wetlands and other waters. Meanwhile, the federal courts have adopted differing interpretations of the <i>SWANCC</i> decision. Some courts have interpreted <i>SWANCC</i> to exclude from CWA jurisdiction not only all isolated waters, but all waters except traditionally navigable waters and their adjacent wetlands. The majority of federal courts have interpreted <i>SWANCC</i> more narrowly, thereby retaining expansive federal CWA jurisdiction. The Court now has the opportunity to clarify federal jurisdiction in this area.</p>
<p>Inconsistent Application</p>	<p>THE RAPANOS & CARABELL CASES</p> <p>In adjudicating the <i>Rapanos</i> and <i>Carabell</i> cases, the US Court of Appeals for the 6th Circuit interpreted <i>SWANCC</i> to mean that isolated, intrastate wetlands are not subject to jurisdiction under the CWA. However, the court held in <i>Rapanos</i> and <i>Carabell</i> that the subject wetlands were not "isolated." The court found a connection between the wetlands and the ditches and, ultimately, traditional navigable waters, sufficient to establish federal jurisdiction. In contrast, the court noted, the seasonal ponds at issue in <i>SWANCC</i> had "no hydrological connection to other waterways." <i>U.S. v. Rapanos</i>, 339 F.3d 447, 452 (6th Cir. 2003).</p> <p>In <i>Rapanos</i>, the court of appeals found that contamination of the wetlands could affect the drain, which could affect the creek, which in turn could affect traditional navigable waters. The court stated that <i>SWANCC</i> "requires a 'significant nexus' between the wetlands and 'navigable waters' for there to be jurisdiction" under the CWA. "Because the wetlands are adjacent to the Drain and there exists a hydrological connection among the wetlands, the Drain, and the Kawkawlin River, we find ample nexus to establish jurisdiction." According to the panel, the protection of the wetlands on Rapanos' land is a "fair extension of the Clean Water Act." <i>United States v. Rapanos</i>, 339 F.3d 447, 453 (6th Cir. 2003).</p> <p>The court in <i>Carabell</i> deferred to the Corps' interpretation of its regulation that defined "adjacent" wetlands to include wetlands separated from a tributary of navigable waters by a berm or man-made barriers. Corps regulations provide that the term "adjacent" means "bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands'" (33 C.F.R. § 328.4(c) (2005)). The court then reasoned that the adjacent wetlands contained a "significant nexus" with traditional navigable waters sufficient to establish federal jurisdiction under the CWA. According to the court, such a nexus was established between the "wetlands on the Carabell's property and the adjacent non-navigable ditch abutting their property, a ditch that flows one way or another into other tributaries of navigable waters of the United States." 391 F.3d at 710.</p>
<p>6th Circuit Findings</p>	<p>Hydrological Connection (Rapanos)</p>
<p>Adjacency (Carabell)</p>	

ISSUES BEFORE THE SUPREME COURT

In addition to the extent of the agencies' statutory authority under the CWA, these two cases present important constitutional questions that were raised, but not ruled on, in *SWANCC*.

First, with respect to the agencies' authority under the CWA, the *Rapanos* case presents the question of whether the statutory term "navigable waters" extends to wetlands that "do not even abut" a traditional navigable water (see Petition for Writ of Certiorari). In *Carabell*, the statutory question presented is whether the CWA extends to wetlands that are "hydrologically isolated" from any of the navigable waters of the United States.

Second, the *Rapanos* case presents the constitutional question of whether "extension of Clean Water Act jurisdiction to every intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote the connection, exceeds Congress' constitutional power to regulate commerce among the states?" (see Petition for Writ of Certiorari). *Carabell* questions similarly whether Congress has the power under the Commerce Clause of the Constitution to regulate wetlands that are "hydrologically isolated" from any of the navigable waters of the United States.

ARGUMENTS BEFORE THE SUPREME COURT

Collectively, the petitioners in *Rapanos* and *Carabell* challenge the Corps' assertion of jurisdiction over the wetlands on their properties on several grounds. They argue initially that assertion of jurisdiction under the CWA violates the "significant nexus" test that the Supreme Court articulated in *SWANCC*. Petitioners in *Carabell* argue that a wetland that is hydrologically distinct from a navigable waterway lacks a "significant nexus," even if it geographically abuts a non-navigable tributary of that waterway. Petitioners in the *Rapanos* case argue that the "significant nexus" between a navigable waterway and a wetland must involve more than the mere presence of a hydrologic connection. The nexus must at least involve a direct physical abutment of a traditional navigable water. Petitioners also argue that the language and legislative history of the CWA suggest that the Corps' broad interpretation of the CWA is not entitled to deference. Finally, they argue that the Corps' interpretation presents serious constitutional concerns, necessitating that the Court interpret the CWA narrowly.

The Government, on behalf of the Corps and EPA, argues that neither direct physical abutment nor a demonstrated hydrologic connection is necessary to assert CWA jurisdiction over wetlands. Rather, all wetlands that might, as a class, potentially affect traditional navigable waters possess a "significant nexus" with the navigable water sufficient to trigger federal jurisdiction. The Government also argues that the Corps' interpretation of the CWA is consistent with the language, history, and purpose of the Act. Finally, the Government argues that the Corps' interpretation of the CWA is consistent with Congress' constitutional authorities.

The "Significant Nexus" Test

Carabell asserts that a fundamental premise behind the finding of jurisdiction in *Riverside Bayview* was the existence of a hydrologic connection between the wetland and navigable waterway. *Carabell* maintained that on his property the berm prevented any hydrologic connection between the wetland and the water — hence, there is no "significant nexus" and the wetland cannot be said to be "inseparably bound up" with the navigable water.

Rapanos contends that a mere hydrologic connection is insufficient to meet the "significant nexus" test. Beyond a simple hydrologic connection, a wetland must physically abut a traditional navigable water as in *Riverside Bayview*, and as clarified in *SWANCC*, in order to be "inseparably bound up" with the water and create the required "significant nexus." Otherwise, any water source that might eventually make its way into a traditional navigable waterway will be subject to federal jurisdiction, including water flowing over a public street into a storm drain, or a lawn that drains to the street.

The Government's view of what constitutes a "significant nexus" is far more broad. The Government argues that such a nexus exists whenever the water or wetland in question could effect traditional navigable waters. A "significant nexus" clearly exists between navigable waters and their non-navigable tributaries because "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source" [*Riverside Bayview*, 474 U.S. at 133 (quoting S. Rep. No. 414, 92d Cong., 1st Sess. 77 (1971))]. If CWA jurisdiction did not extend to tributaries, then many sources of pollution, including discharges of toxic waste and sewage, would be beyond federal regulation, no matter their impact on downstream navigable waters, even if the impact of such pollution is felt in another state. According to the Government, the Court in *Riverside Bayview* based its holding not on an understanding of "adjacency" that is limited solely to geographic proximity, but on the acknowledgement of a broader notion of the potential impact that filling wetlands has on downstream waters, consistent with the goals of the CWA.

Wetlands

Constitutional Questions

Remote Connections

Petitioner's Positions

Federal Position

Hydrologic Connection

Too Broad?

Tributary Regulation

The Language and Legislative History of the Clean Water Act

Carabell and Rapanos argue that the CWA defines “navigable waters” as “waters of the United States, including the territorial seas” (33 U.S.C. § 1362(7)). The plain meaning of this definition is clear because the term “navigable waters” has a specific meaning that has previously been judicially defined to denote those rivers, lakes, streams, and other bodies of water that were used for navigation in interstate commerce, or could reasonably be made navigable (*see, e.g., United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-08 (1940)). “When Congress codifies a judicially defined concept, it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the courts” (*Davis v. Michigan Dep’t of Treasury*, 489 U.S. 803, 813 (1989)). Because the meaning of “navigable water” and “waters of the United States” are clear, and because the Corps’ interpretation is contrary to this clear meaning, the Corps interpretation is not entitled to deference.

In response, the Government argues that, although earlier versions of the CWA included the word “navigable” within the definition of “waters of the United States,” the version enacted by Congress deleted the word, thereby expressing the intent of Congress to broaden the scope of federal water protection legislation. The Court in *Riverside Bayview* noted that, by defining “navigable waters” to mean “the waters of the United States,” “Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes” (*Riverside Bayview* at 133).

Moreover, the Government argues, section 404(g)(1) of the CWA provides that a state may administer its own permit program to cover the discharge of material into navigable waters “other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce” (33 U.S.C. 1344(g)(1) (emphasis added)). If the term “navigable waters” means nothing more than waters that are now, or are susceptible to being used for commerce, the clause “other than” would be rendered meaningless. Given that Congress intended at least some additional waters to be subject to the CWA, non-navigable tributaries are the most obvious candidates. The Government asserts that if tributaries of navigable waters are covered by the CWA, then the wetlands adjacent to them are as well, as the Court held in *Riverside Bayview*.

However, the Court in *SWANCC* appeared to reject the expansive notion of “navigable waters” asserted by the Corps. According to the Court, section 404(g) does not determine the meaning of “waters,” particularly when the term “navigable waters” is defined specifically in section 502(7). The Court in *SWANCC* also stated that nothing in the legislative history of the CWA “signifies that Congress intended to exert anything more than its commerce power over navigation” (*SWANCC*, 531 U.S. at 168 n.3. (internal citation omitted)).

It should be noted that CWA section 404(g)(1) does provide for transfer to the states of certain “other” traditional navigable waters regulated under section 10 of the Rivers and Harbors Act and section 404 of the CWA. Known as “historic only waters,” such waters often extend far upstream beyond those waters that cannot be transferred under section 404(g)(1). Moreover, the Corps has issued a streamlined nationwide permit (NWP 24) to provide CWA section 10 authorization for such transferred section 404 waters. Accordingly, the clause “other than” is not rendered meaningless in section 404(g)(1) under the construction of the statute advocated by Rapanos.

The Question of Deferring to the Federal Agencies’ Interpretation of the CWA

According to the Government, although Rapanos argues that the CWA cannot extend to all non-navigable tributaries of a navigable waterway (including remote ditches and drains), the text of the CWA does not distinguish among different non-navigable tributaries; therefore that task fell to the EPA and the Corps. Making the determination of what classes of water bodies are likely to affect downstream water quality is a task best suited to the administrative expertise of the agencies, rather than judicial resolution. For example, the agencies’ judgment that “adjacent” wetlands, as a class, are likely to affect water quality in navigable waters, is based on substantial evidence because extensive studies indicate that berms, even concrete dams, do not stop all water flow. Thus, even if a wetland lacks a surface connection to another adjacent water body, a subsurface connection is likely to exist. Geographical adjacency serves as a reasonable, readily identifiable proxy for the existence of a hydrologic connection. The Government therefore contends that the agencies’ determination is entitled to deference.

Carabell and Rapanos argue that judicial deference is unwarranted. They point to *SWANCC*, in which the Court refused to defer to the agencies, reasoning that “[w]here an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result” (531 U.S. at 172). The Court noted its “assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority” (*Id.* at 172-173). Moreover, this “concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power” (*Id.* at 173).

Wetlands

“Navigable Waters”

Deference?

Intent

Tributaries Included

SWANCC Interpretation

“Historic Only Waters”

Agency Expertise

Deference Findings

<p>Wetlands</p>	<p>According to Rapanos and Carabell, there is no clear statement of congressional intent to warrant judicial deference. The Court should refuse to defer to the agencies in this case because their interpretation of the CWA encroaches significantly on the states' traditional authority to regulate local development.</p>
<p>State/Local Authority</p>	<p style="text-align: center;">Federal and State Power Sharing: Federalism Concerns</p> <p>Rapanos and Carabell assert that regulation of the entire tributary system of any navigable waterway, as well as adjacent wetlands, impinges on the State's traditional power over land and water use. The expansive jurisdiction claimed by the Corps gives the federal government veto power over tens of thousands of land use projects annually. This usurps the traditional power of state and local governments to regulate land and water use (e.g., <i>Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.</i>, 429 U.S. 363, 375-376 (1977)). This is particularly troubling because the CWA clearly acknowledges and gives precedence to the states' traditional control over water regulation — "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to . . . plan the development and use . . . of land and water resources." (33 U.S.C. § 1251(b)). Congress intended that under the CWA, water pollution downstream would be addressed at the federal level, but regulation of upstream areas would be reserved to the states, a balance of federal and state power sharing recognized in <i>SWANCC</i> (531 U.S. at 166-167).</p>
<p>CWA Intent</p>	<p>Carabell cites the permitting process involving its property as a prime example of federal usurpation of state power over land use. Before the federal government became involved, the Michigan Department of Environmental Quality (MDEQ) evaluated how filling of the wetlands on Carabell's property might affect the Lake St. Clair watershed. The MDEQ recommended issuing a permit, concluding that the filling would have no effect on flood control, or any other state interests; indeed, MDEQ stated that the nearly four acres of wetlands that were to be enhanced as mitigation under the development plan were likely to provide more water filtration than the current wetlands. In contrast, the Corps focused more on whether the proposed condominium development was necessary for the local economy than on any potential adverse environmental effects. The result was a kind of regulatory reversal, in which the federal agency served a role normally reserved for the states – zoning, in effect – and the state agency functioned more like a body concerned with pollution protection. Such regulatory behavior illustrates the concerns over the appropriate balance of federal and state power. According to Carabell, the Constitution simply does not give federal agencies the authority to engage in such local decision-making.</p>
<p>Regulatory Reversal?</p>	<p style="text-align: center;">Commerce Clause Concerns</p> <p>Another important issue before the Court is whether the agencies' assertion of federal jurisdiction over the wetlands at issue exceeds the limits of federal authority under the United States Constitution. The federal government may exercise only that power granted to it in the Constitution; all other power is reserved to the states. All federal statutes and regulatory activities pursuant thereto must be grounded in one of the powers granted to the federal government by the Constitution. Most federal environmental laws, including the CWA, are enacted pursuant to Congress' power to regulate interstate commerce. Article I, Section 8, Clause 3 of the Constitution, the "Commerce Clause," reserves to the Congress the power to regulate commerce among foreign nations, the states and the Indian tribes.</p>
<p>Constitutional Issues</p>	<p>In the case of <i>United States v. Lopez</i>, 514 U.S. 549 (1995), the Supreme Court held that authority to regulate under the Commerce Clause encompasses three categories of activities. First, Congress may regulate the <i>channels</i> of interstate commerce. Second, Congress may regulate the <i>instrumentalities</i> of interstate commerce, including persons and things in interstate commerce. Third, Congress may regulate activities that <i>substantially affect</i> interstate commerce (<i>Id.</i> at 558-559). The third category of Commerce Clause power is the broadest. The parties in <i>Rapanos</i> and <i>Carabell</i> disagree both with respect to the appropriate category of Commerce Clause power, and the extent of that power.</p>
<p>Regulation Categories</p>	<p>Rapanos contends that the Commerce Clause power over the channels of interstate commerce is inapplicable, because wetlands are not now navigable, and are not reasonably capable of being made navigable. As such, the Government can only claim in this case that federal jurisdiction extends to the filling of wetlands under the third <i>Lopez</i> category. Yet Rapanos argues that the mere presence of a hydrologic connection does not satisfy the "substantial effects" test articulated in <i>Lopez</i> because a hydrologic connection that is tenuous and remote, as is the case with the wetlands on the Rapanos property, may have little or no effect. Rapanos cites the Court's statement in <i>SWANCC</i> that "twice in the past six years we have reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not unlimited." <i>SWANCC</i>, 531 U.S. at 173 According to Rapanos, the agencies' assertion of authority over any wetland with a hydrological connection to a traditional navigable water contains no logical stopping point, and converts the commerce power into a general police power like that retained by the states. The same limitless commerce power was claimed under the Migratory Bird Rule and was rejected by the Court in <i>SWANCC</i>. For its part, Carabell points out that the</p>
<p>Logical Extension?</p>	

Wetlands**Corps' Position****Substantial Effects****SWANCC & Ecological Connection****Aggregate Effects****Rational Basis****Broad "Wetlands" Definition****Expansive Jurisdiction**

effect on interstate commerce is even more obscure when there is no hydrologic connection to a navigable waterway. With no hydrologic connection between the wetland and the navigable water, whether there is a physical abutment or not, it is difficult to discern how any navigable waterway involved in interstate commerce might be affected.

The Government responds that the Corps' exercise of jurisdiction over wetlands, even those that do not have a hydrologic connection or directly abut a tributary of a navigable waterway, is justified under both the first and third categories under *Lopez*. The Corps' interpretation is justified under the first prong of *Lopez* because harm to wetlands can have an effect on the channels of interstate commerce – the traditional navigable waters. In the aggregate, pollutant discharges into wetlands adjacent to tributaries can have substantial effects on navigable waters downstream. Pollution from non-navigable tributaries and waters adjacent to them not only can impede navigation, but also can impact fish, plants, wildlife, and recreation in the navigable water. Jurisdiction under the CWA stems from the fact that adjacent wetlands *as a class* have a significant impact on navigable waters. That an individual wetland may have no effect on navigable waters does not affect jurisdiction because the Corps may simply grant a permit to allow the wetland to be developed.

In the *SWANCC* litigation, however, the Government advanced a similar argument. In that case the Corps contended that migratory birds created an ecological connection between an isolated wetland and a navigable waterway sufficient to support commerce clause jurisdiction. The Court rejected this interpretation and held that such an ecological connection was insufficient to establish a "significant nexus" (*SWANCC*, 531 U.S. at 171-172).

The Government argues that the exercise of jurisdiction over wetlands with a hydrologic connection to tributaries of navigable waters also is a permissible exercise of Congress' authority to regulate classes of activities that substantially affect commerce, thus satisfying the third prong in *Lopez*. Rapanos' argument that there is no actual proof that a discharge into their wetlands reaches traditional waterways is irrelevant to the issue of jurisdiction because it has already been established that Congress may decide that the aggregate effect of all of the individual instances of discharge justifies regulating each of them, and such a decision will be upheld in court so long as there is a rational basis for concluding that the regulated activity substantially affects interstate commerce (*Lopez*, 514 U.S. at 557). According to the Government, if the Corps were required to prove that any particular discharge will impact a navigable waterway before asserting federal jurisdiction, the entire regulatory scheme would be stymied.

Due Process Concerns

Rapanos argues that, given the civil and criminal penalties associated with violations of the CWA, the agencies' broad interpretation of federal jurisdiction raises constitutional "due process" issues. The definition of "wetlands" is broad, covering any area "inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(b) (2005). Under this definition and implementing guidance, areas that are wet for only one or two weeks per year are often subject to federal jurisdiction. Individuals have been subject to criminal penalties, including time in prison, for placing clean fill on dry land (see e.g. *United States v. Mills*, 816 F. Supp. 1546 (N.D. Fla. 1993)). The Corps' shifting and expanding definitions of "adjacent," "tributary," and "navigable waters," are also problematic. Not only do the Agency's definitions constantly change, but Corps districts, and even individual staff members within a single Corps district, differ in how they interpret and implement the regulatory program. When these vague, shifting, and overly broad definitions are used to impose severe civil and criminal penalties on landowners, due process concerns are implicated. In order to avoid such problems, the expansive jurisdictional claims of the agencies should be rejected.

POSSIBLE IMPLICATIONS

In *Rapanos* and *Carabell*, the Government claims that the *potential* effect on traditional navigable waters of filling the wetlands on Rapanos' and Carabell's property creates a "significant nexus" between the wetlands and those traditional navigable waters that justifies federal jurisdiction over the wetlands. The Government's claim of jurisdiction based on its interpretation of the "significant nexus" test is sweeping. If the Court were to uphold the Government's view of its jurisdiction, the implications for property owners and project sponsors would be significant indeed.

For example, in addition to man-made ditches, the following might provide the connection to tributaries or traditional navigable waters necessary to create federal jurisdiction:

- *Ephemeral areas*, which are those erosion features and areas that drain only rainwater
- *Sheet flow*, which is the simple (un-channeled) flow of water over upland
- *Groundwater*;
- *Underground stormwater drainage systems*

Wetlands**Biological
Connection****Ecological
Connection****Congressional
Fix?**

Moreover, *biological* connections between a wetland and a tributary of a traditional navigable water or the navigable water itself could also be used to satisfy the “significant nexus” test. Such a biological connection might involve salamanders that migrate from a wetland to a tributary or traditional navigable water, for example. Unless modified or overturned in *Rapanos* or *Carabell*, however, the *SWANCC* decision would prevent the potential use of a wetland or water by migratory birds from being used to establish the requisite “significant nexus” with a navigable water to establish federal jurisdiction.

Ecological connections between wetlands and waters have also been suggested by the Government as a means for establishing federal jurisdiction under the “significant nexus” test. Should the Government prevail before the Court, the requisite “significant nexus” could be established not just between wetlands that are contiguous, or actually abut, a tributary or a traditional navigable water, but also between such waters and any wetland.

Such changes would actually trigger an expansion of jurisdiction over pre-*SWANCC* limits. It is questionable whether the Court, just four years after its decision in *SWANCC*, which curbed CWA jurisdiction, will approve the sweeping jurisdictional claims advanced by the Government. After all, the Court in *SWANCC* stated that “[t]he term ‘navigable’ has at least the import of showing us what Congress had in mind as its authority for enacting the [CWA]: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be made so.” *SWANCC*, 531 U.S. at 174.

RENEWED DEBATE IN CONGRESS ANTICIPATED

The Court’s decision, which is expected early this summer, may reinvigorate the debate in Congress on the limits of the federal wetlands regulatory program. Whatever the ruling, those who disagree may well turn to Congress to enact legislation to “correct” the Court’s decision. In particular, a ruling for more limited federal jurisdiction may trigger an aggressive effort by those who seek the broadest possible federal regulatory role to force a vote to overturn the Court’s ruling before the November elections.

FOR ADDITIONAL INFORMATION: HOWARD BLEICHFELD, Van Ness Feldman, PC (Washington DC), 202/298-1945 or email: HSB@vnf.com

Howard Bleichfeld is a member of the law firm of Van Ness Feldman, PC in Washington, DC. He focuses his practice on environmental, land and water use, and natural resources law.

Sam Collinson is a Senior Environmental Advisor to Van Ness Feldman. Previously, Mr. Collinson served for over 20 years as Chief of the Policy Development Branch at headquarters, US Army Corps of Engineers.

Christopher S. Mills is an associate attorney at Van Ness Feldman, where he practices primarily in the areas of environmental, land use, and natural resources law.

Adjacency — Jurisdiction**NINTH CIRCUIT: BACCARAT FREMONT DEVELOPERS, LLC v. US CORPS OF ENGINEERS**

Editor’s Note: Another case that undoubtedly will be raised before the Court is *Baccarat Fremont Developers, LLC v. United States Army Corps of Engineers*, Case No. CV-02-03317-CW (Oct. 14, 2005). Decided just three days after the Court agreed to hear *Rapanos* and *Carabell*, the *Baccarat* case dealt with many of the same issues. The Ninth Circuit held that the Corps had jurisdiction to regulate “adjacent wetlands” regardless of whether such wetlands have a “significant hydrological or ecological connection” to navigable waters. Like *Carabell*, the case involved wetlands that were separated from surface water by a man-made berm. In *Baccarat*, the site at issue contained 7.66 acres of wetlands which were 65-70 feet from flood control channels flowing to San Francisco Bay, at their closest point. *Baccarat* argued that after the Supreme Court’s decision in *Solid Waste Agency of N. Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (“*SWANCC*”), adjacency is no longer sufficient to establish the Corps’ jurisdiction under the CWA.

The Ninth Circuit explained its ruling upholding the Corps’ jurisdiction, clearly differentiating between the initial jurisdiction issue and the later (potential) permitting issue. “The text of the CWA and the implementing regulations promulgated by the Corps give no indication that a significant hydrological or ecological connection is a condition of Corps jurisdiction over adjacent wetlands. *Baccarat* relies on the Supreme Court’s decision in *SWANCC* to support its contention that adjacent wetlands must be hydrologically or ecologically connected to waters of the United States. *SWANCC*, however, did not address the Corps’ adjacency jurisdiction. Rather, it invalidated the Corps’ Migratory Bird Rule.” Slip Op. at 14104. The Ninth Circuit explained in the opinion that the issue of “adjacency” concerned *jurisdiction* for Corps regulation, as opposed to whether a permit to allow development should be granted. “According to the Supreme Court, when the Corps is confronted with adjacent wetlands that are not ‘significantly intertwined’ with the ecosystem of adjacent waterways, it ‘may . . . allow development. . . simply by issuing a permit.’” Slip Op. at 14106, citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 n.9 (1985).

FOR ADDITIONAL INFORMATION: The complete case is available at <http://caselaw.lp.findlaw.com/data2/circs/9th/0316586p.pdf>