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U.S. Supreme Court Review of *Rapanos v. United States* and *Carabell v. United States Army Corps of Engineers*: Implications for Wetlands and Interstate Commerce

by William Want

Editors' Summary: The exact contours of wetlands jurisdiction has been in dispute ever since the U.S. Supreme Court's decision in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers. *Today, the Court has been given the chance to clarify this area of law as it faces two cases dealing with wetlands jurisdiction. In* Rapanos v. United States*, the Court must decide whether CWA jurisdiction extends to a series of wetlands that do not abut a navigable-in-fact water. And in* Carabell v. U.S. Army Corps of Engineers*, the issue is whether CWA jurisdiction can extend from a navigable-in-fact water over a man-made berm to an adjacent wetlands when there is no demonstrated hydrologic connection between the two waters. In both cases, if the answer is yes, the Court must also decide whether Congress has the authority to extend federal jurisdiction to such waters under the Commerce Clause. In this Article, Prof. William Want examines these two cases in light of the CWA and Court precedent, and expresses his view on how these cases should be resolved.*

I. Introduction

The U.S. Supreme Court has granted certiorari in two wetlands cases that are likely to profoundly affect this area of law and potentially much more.[1] The petitioners in the cases, both arising from the U.S. Court of Appeals of the Sixth Circuit, ask the Court to prohibit the U.S. Army Corps of Engineers (the Corps) from asserting Clean Water Act (CWA) jurisdiction over wetlands adjacent to non-navigable waters on the ground that it exceeds the bounds of the CWA or, alternatively, that it violates the Interstate Commerce Clause of the U.S. Constitution.

Much is at stake in these cases, first because wetlands are a dwindling resource that perform significant environmental functions.[2] A ruling that the CWA protects only those wetlands adjacent to navigable waters would lead to the loss of hundreds of thousands of acres of wetlands and perhaps millions. On the other hand, without such a ruling, landowners would continue to be substantially restricted in the use of wetlands on their private property. The most wide-ranging impact, however, would result from the Court ruling that the Corps' assertion of jurisdiction in the cases violates the Interstate Commerce Clause. This would restrict the U.S. Congress' authority to regulate the environment generally as well as in many other areas of social policy. Additionally, these cases are of importance because they offer the first substantial opportunity for the new Chief Justice John Roberts to express his views on the environment, a subject for which he was criticized during his confirmation process.[3]

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1. Rapanos v. United States, 376 F.3d 629, 34 ELR 20060 (6th Cir. 2004), *cert. granted*, 126 S. Ct. 414 (Oct. 11, 2005); and Carabell v. Corps of Eng'rs, 391 F.3d 704, 34 ELR 20147 (6th Cir. 2004), *cert. granted*, 126 S. Ct. 415 (Oct. 11, 2005).

2. WILLIAM WANT, LAW OF WETLANDS REGULATION ch. 2, §2.3 (West 2005). In addition to protecting wetlands, federal wetlands regulation has served the general environmental purpose of requiring federal permits for numerous development projects since there are often some wetlands or drainages large enough to invoke the Corps' CWA jurisdiction. Once the Corps' permit is required, other federal environmental laws come into play, including the National Environmental Policy Act, 42 U.S.C. §§4321-4370d, ELR STAT. NEPA §§2-209, and the Endangered Species Act (ESA), 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18, and the public plays a role through commenting and a possible public hearing. While environmentalists have praised this general environmental authority asserted through the Corps' permit process, landowners have criticized it. This general environmental authority, however, was substantially reduced as a result of the Court's ruling in *Solid Waste Agency of N. Cook County (SWANCC) v. Corps of Eng'rs*, 531 U.S. 159, 31 ELR 20382 (2001), that there is no federal jurisdiction over isolated wetlands.

3. While still on the U.S. Court of Appeals for the District of Columbia Circuit, now-Chief Justice John Roberts dissented from a request to rehear en banc an ESA case. Rancho Viejo v. Norton, 323 F.3d 1062 (D.C. Cir. 2003), *reh'g en banc denied*, 334 F.3d 1158 (D.C. Cir. 2003). During the confirmation process for Chief Justice, some commentators criticized him for wanting to rehear the case that had been decided favorably to the ESA. Chief Justice Roberts was also criticized for referring to the endangered species at issue as a "hap-

This is not the first time the question of wetlands jurisdiction has reached the Supreme Court. In *United States v. Riverside Bayview Homes, Inc.*,[4] the Supreme Court ruled that federal jurisdiction extends to wetlands adjacent to navigable waters where the wetlands drain into navigable waters even though the wetlands are not themselves flooded by navigable waters. Then, 16 years later, the Court significantly limited the reach of federal jurisdiction over wetlands in *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers*[5] by ruling that jurisdiction does not extend to isolated wetlands that have no actual connection to navigable waters.

In *Riverside Bayview*, the Court noted it was difficult to draw the exact line between land and water and ruled that the Corps' determination of that line was entitled to deference.[6] But in *SWANCC*, the Court refused to grant deference to the Corps because its assertion of jurisdiction there raised concerns that the CWA exceeded Congress' authority to regulate under the Interstate Commerce Clause.[7]

Now it is the Supreme Court itself that is called upon to draw the line between its 1985 *Riverside Bayview* decision allowing adjacent wetlands regulation and its 2001 *SWANCC* decision prohibiting isolated wetlands regulation. The Corps claims the wetlands at issue are adjacent and, therefore, subject to regulation under *Riverside Bayview*, whereas the landowners claim the wetlands have such a tenuous connection to navigable waters that they should be considered isolated under *SWANCC*.

This Article begins with a discussion of the historical development of the Corps' jurisdiction over wetlands. It next describes the two cases on which certiorari has been granted, analyzes those cases in terms of *Riverside Bayview*, *SWANCC*, and the CWA, and then discusses the positions of the parties. The Article concludes by expressing a view as to how the Court should resolve the cases.

II. Historical Development of Corps' Wetlands Jurisdiction

The Corps' assertion of wetlands jurisdiction under the CWA has been controversial every step of the way since the Act's passage in 1972.[8] Until 1991, the Corps and the courts steadily increased the agency's jurisdictional reach under the CWA. Since then, however, they have reduced this jurisdiction. Now there is the possibility that in the two wetlands cases accepted for certiorari, the Supreme Court will return CWA jurisdiction to essentially where it started in 1972.

Prior to the enactment of the CWA, the Corps regulated wetlands under the Rivers and Harbors Act of 1899.[9] Under the Corps' administrative interpretations, federal jurisdiction extended to mean high water in tidal waters and ordinary high water in nontidal waters. Mean high water is the average of the high tides over an 18.6 year lunar cycle.[10] As an average of the high tides, the mean high water line does not extend to the full distance of the tidal waters themselves or the wetlands they create. The ordinary high water mark is the point on a river bank the water reaches so frequently that it leaves a visual mark.[11] It too does not extend to the full reach of the waters.

The CWA of 1972 continued to place federal authority for issuing wetland permits in the Corps, but appeared to change the jurisdictional coverage. Whereas jurisdiction under the Rivers and Harbors Act was clearly navigable waters, the CWA added a twist by first defining jurisdiction as navigable waters, then proceeding to define navigable waters as "waters of the United States." The legislative history included a statement that it was Congress' intention that the term be given the broadest possible interpretation unencumbered by agency determinations that had been made for administrative purposes.[12]

The Corps initially did not interpret the phrase "waters of the United States" to expand its wetlands jurisdiction beyond the mean high water and ordinary high water lines where it had exercised jurisdiction under the Rivers and Harbors Act. But in 1975, an environmental group challenged this limited assertion of jurisdiction in federal district court, and the court ordered the Corps to expand its jurisdiction.[13] The Corps proceeded to promulgate regulations expanding its jurisdiction in three phases, with the third phase extending to all waters of the United States.[14] Just what all waters of the United States meant became the subject of future Corps' guidance and court decisions, but at a minimum it included navigable waters, their tributaries, adjacent wetlands and, until *SWANCC*, isolated wetlands.[15]

less toad that, for reasons of its own, lives its entire life in California." 334 F.3d at 1160. The *New York Times* described the controversy surrounding Chief Justice Robert's dissent as follows:

> There could be a lot of talk about toads at the confirmation hearings for John Roberts Jr. In one of the few revealing opinions he has written in his brief time on the bench, Judge Roberts voted to reconsider a ruling that said the Endangered Species Act protected the arroyo Southwestern toad from being wiped out by a real estate development. He strongly suggested that Congress could protect only a species whose demise would affect "interstate commerce"—but that toad, he wrote, is a "hapless toad that, for reasons of its own, lives its entire life in California."

Adam Cohen, *Is John Roberts Too Much of a Judicial Activist?*, N.Y. Times, Aug. 27, 2005, at A12. A review of then-Judge Robert's dissent reveals, however, he may have been more concerned with shoring up the court's opinion by employing recent Court precedent than overturning it.

4. 474 U.S. 121 (1985).
5. 531 U.S. 159, 31 ELR 20382 (2001).
6. 474 U.S. at 131.
7. 531 U.S. at 172-73.
8. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607.
9. 33 U.S.C. §403.
10. 33 C.F.R. §329.12(a)(2).
11. *Id.* §329.11(a)(1).
12. S. Rep. No. 1236, 92d Cong. 144 (1942). *See also* S. Rep. No. 414, 92d Cong. 77 (1971); 118 Cong. Rec. 33756-57 (1972) (remarks of Rep. John Dingell (D-Mich.)).
13. Natural Resources Defense Council v. Callaway, 392 F. Supp. 685, 5 ELR 20285 (D.D.C. 1975).
14. 40 Fed. Reg. 31320 (July 25, 1975). The final phase covered almost all waters and became effective on July 1, 1977. The waters it did not cover were those above the headwaters of creeks and streams. Headwaters were defined as the point where the average annual flow was less than five cubic feet per second. *Id.* at 31321. While the final phase covered isolated wetlands, the Corps was required to make a discretionary determination to regulate the particular isolated wetlands in question and find that one of four possible connections to interstate commerce was present. *Id.* at 31324.
15. The Corps issued revised wetlands regulations in 1977 (42 Fed Reg. 37121 (July 19, 1977)). These regulations dropped the requirement imposed by the 1975 regulations that one of the four interstate commerce connectors be present. The Corps explained this action in the preamble to the regulation as follows: "We recognize, however, that this list was not all inclusive, as some waters may be involved as links to interstate commerce in a manner that is not readily estab-

With all waters of the United States subject to the Corps' jurisdiction, including adjacent and isolated wetlands, the critical wetlands jurisdictional issue became the criteria necessary to make an area a wetlands. The Corps tried to resolve this question by issuing a wetlands delineation manual in 1987 that essentially defined wetlands in terms of three indicators: soils, hydrology, and plants.[16] Then, the Corps and three other federal agencies jointly issued a new wetlands manual in 1989 that allowed for jurisdiction in a number of instances where only one wetlands indicator was present.[17] The 1989 manual represented the highpoint of wetlands jurisdiction. It was issued at a time when the Corps' regulations and court decisions allowed jurisdiction over all waters, including isolated wetlands, and it allowed just one of the three wetland indicators to be the basis of a wetlands determination.

Retraction of the geographic scope of wetlands jurisdiction started in earnest on August 17, 1991, when President George H. Bush signed the Energy and Water Development Appropriations Act of 1992,[18] which contained a provision prohibiting the Corps from expending any funds to perform wetlands delineations using the 1989 manual. As a consequence, the Corps began using the 1987 manual for delineations. The next major retraction of wetlands jurisdiction occurred when the Supreme Court issued its *SWANCC* ruling in 2001. Since then, five circuit courts have issued opinions interpreting *SWANCC*. Four have determined that wetlands jurisdiction still extends to wetlands adjacent to non-navigable tributaries of navigable waters,[19] while one has ruled that jurisdiction is limited to wetlands adjacent to navigable waters.[20] In the two cases accepted for certiorari, the Court is asked to resolve this split and also to determine whether adjacency is eliminated by a narrow berm between the wetlands and waters of the United States.

lished by the listing of a broad category." 42 Fed. Reg. at 37128. These regulations extended Corps' jurisdiction to areas above headwaters through a nationwide permit that allowed the fill of such areas if several conditions were met. The regulations allowed the Corps to require an individual permit in areas above headwaters where there were special concerns, and the regulations always required an individual permit in these areas for natural lakes, including adjacent wetlands, that were larger than 10 acres. *Id.* at 37130. Some additional changes were made in later revisions to the regulations: 42 Fed. Reg. 31794 (July 22, 1982); 49 Fed. Reg. 39478 (Oct. 5, 1984); and 51 Fed. Reg. 41206 (Nov. 13, 1986).

16. U.S. Army Corps of Engineers, Wetlands Delineation Manual (1987).

17. Federal Manual for Identifying and Delineating Jurisdictional Wetlands (1989). This was an interagency cooperative publication of the Corps, the Department of the Army, the U.S. Fish and Wildlife Service, and the Soil Conservation Service.

18. 16 U.S.C. §832m.

19. In addition to the Sixth Circuit, these courts are the U.S. Courts of Appeals for the Fourth Circuit, the U.S. Courts of Appeals for the Seventh Circuit, and the U.S. Courts of Appeals for the Ninth Circuit. The cases are *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004); *United States v. Rueth Dev. Co.*, 335 F.3d 598 (7th Cir. 2003), *cert. denied*, 540 U.S. 1040 (2003); and *Headwaters v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001).

20. The U.S. Court of Appeals for the Fifth Circuit. *See* In re Needham, 354 F.2d 340 (5th Cir. 2003) and Rice v. Harken Exploration Co. 250 F.3d 264 (5th Cir. 2001). The United States contends in its oppositions to certiorari that these Fifth Circuit cases do not in fact restrict wetlands jurisdiction to those adjacent to traditional navigable waters because they were decided under the Oil Pollution Act, 33 U.S.C. §§2701-2761, ELR Stat. OPA §§1001-7001, and did not involve wetlands.

III. The *Rapanos* and *Carabell* Decisions Below

The cases accepted for certiorari are *Rapanos v. United States*,[21] and *Carabell v. United States Army Corps of Engineers*.[22] The petitioners in *Rapanos* own three parcels of land in three separate Michigan counties. All three parcels are adjacent to non-navigable tributaries as far as 20 miles from navigable waters. The federal government successfully prosecuted Mr. Rapanos criminally, and he and his wife civilly, for filling 54 acres of wetlands at the sites without obtaining permits. The Rapanos argued in the district court and in the court of appeals that the wetlands were isolated and therefore not subject to federal jurisdiction under *SWANCC*.

Several decisions were handed down in the *Rapanos* criminal and civil cases, but ultimately the Rapanos lost both in the Sixth Circuit. In the criminal case, the Supreme Court denied certiorari,[23] but in the civil case it granted it.[24] The questions accepted for review are whether the CWA applies to wetlands that do not abut navigable waters and whether the extension of CWA jurisdiction to every intrastate wetland with any sort of hydrological connection to navigable waters exceeds Congress' constitutional power to regulate interstate commerce.[25]

In *Carabell*, the petitioners sought to construct a 130-unit condominium development on their property in Chesterfield, Michigan. Approximately 16 acres of the 20-acre property are forested wetlands adjacent to an unnamed ditch that connected with a navigable lake about one mile away. Between the ditch and the wetlands is a four-foot berm, which was created by the deposit of spoils from the ditch when it was dug. The Carabells' condominium development would have filled or disrupted essentially all of the wetlands on the property. The questions accepted for review in *Carabell* are whether the CWA extends to wetlands that are hydrologically isolated from waters of the United States and whether the limits on Congress' authority under the Interstate Commerce Clause preclude it from regulating wetlands hydrologically isolated from waters of the United States.[26]

The two cases offer the Supreme Court both a modest and a radical alternative to paring down wetlands jurisdiction if it decides to rule against the Corps. The modest alternative would be to rule in favor of the Carabells and require the Corps to specifically determine whether there is a hydrological connection to navigable waters. This would not likely alter the ultimate result in the case because there is likely a hydrological connection. The Corps and the court simply did not explicitly make that determination. The radical approach would be to rule in favor of the Rapanos and return wetlands jurisdiction to those wetlands immediately adjacent to traditional navigable waters. The Court could reach

21. 376 F.3d 629 (6th Cir. 2004).

22. 391 F.3d 704 (6th Cir. 2004).

23. United States v. Rapanos, 339 F.3d 447 (6th Cir. 2003), *cert. denied*, 541 U.S. 972 (Apr. 5, 2004), *cert. rehearing denied*, 541 U.S. 1070 (May 24, 2004).

24. 376 F.3d at 629, *cert. granted*, 126 S. Ct. at 414.

25. Brief of Petitioner at i, United States v. Rapanos, No. 04-1034 (U.S. Dec. 2005) [hereinafter Rapanos Brief].

26. Brief of Petitioner at i, United States Army Corps of Eng'rs v. Carabell, No. 04-1384 (U.S. Dec. 2005) [hereinafter Carabell Brief].

this result based on its interpretation of the CWA and thereby limit the impact of its decision to wetlands and water pollution. Alternatively, it could reach this same result based on the Interstate Commerce Clause, and thereby cause widespread impacts.

IV. Arguments of the Parties Before the Supreme Court

The *Rapanos* brief first contends that the Corps' wetlands jurisdiction under the CWA is limited to wetlands that physically abut traditional navigable waters.[27] In support, it cites language from *Riverside Bayview* and *SWANCC* requiring a significant nexus between adjacent wetlands and traditional navigable waters in order for the Corps to have jurisdiction.[28] The *Rapanos* brief also cites a statement from *SWANCC* that because the CWA regulates "navigable waters," some meaning must be given to the word "navigable."[29] According to the *Rapanos* brief, to assert jurisdiction one cannot simply argue that wetlands adjacent to non-navigable waters would have some effect on the water quality of traditional navigable waters because this argument would extend CWA jurisdiction to activities occurring on land.[30] Similarly, the brief argues that the Corps' assertion of jurisdiction over wetlands like those here would impose on the primary responsibilities of the states over land and water resources.

The *Rapanos* brief next argues that the government's expansive interpretation of the CWA raises significant Interstate Commerce Clause issues.[31] For this argument, the brief draws support from the Supreme Court's decisions in *United States v. Lopez*,[32] striking down the law prohibiting the possession of firearms in a school zone, and *United States v. Morrison*,[33] striking down a law prohibiting violence against women.[34] The brief does not call for reversal on the basis of a lack of congressional authority under the Interstate Commerce Clause as did the petition for certiorari, but rather for the Court to withhold deference to the Corps' interpretation of its authority.[35] While the *Rapanos* brief toned down the interstate commerce argument that had been made so emphatically in the petition for certiorari, the Supreme Court accepted as one of the two questions for review whether Congress has exceeded its authority under the Interstate Commerce Clause.[36] The issue, therefore, is still very much in play in the case.

Finally, the *Rapanos* brief argues that the government's interpretation of its jurisdiction raises significant due process issues.[37] It cites a recent report of the U.S. General Accounting Office (GAO) that documents inconsistent jurisdictional determinations on the adjacency question by Corps' district offices throughout the country.[38] The *Rapanos* brief states: "the GAO report concludes that even Corps staff working in the same office cannot agree on the scope of the CWA and that 'three different district staff' would likely make 'three different assessments' as to whether a particular water feature is subject to the Clean Water Act."[39] The confusion, the brief argues, is particularly problematic because the Corps' wetlands jurisdictional determination provides the basis for imposing multimillion dollar penalties and seeking criminal prosecution against those who violate the Act as a result of that determination.[40]

In its opposition brief, the United States contends that *Riverside Bayview* held that the Corps has CWA jurisdiction over wetlands adjacent to non-navigable tributaries of navigable waters, and that *SWANCC* did not cast doubt on this. According to the United States, *SWANCC* simply required for wetlands jurisdiction that there be a "significant nexus" between the wetlands and the adjacent waters.[41] This significant nexus clearly exists here, the United States claims, because water moves in hydrological cycles and effective regulation of traditional navigable waters would not be possible if pollution of tributaries fell outside CWA jurisdiction.[42] Further emphasizing this point, the United States contends that if non-navigable tributaries were excluded from federal jurisdiction, "then discharges of such materials as sewage, toxic chemicals and medical waste into those tributaries would not be subject to the CWA's permitting requirements, no matter how clear the link between the non-navigable tributary and the traditional navigable water. . . ."[43]

Additionally, the United States argues that CWA §404(g)(1) clearly reflects Congress' understanding that the Act's coverage extends at least to some waters beyond traditional navigable waters and their adjacent wetlands.[44] According to the United States, of all other waters to which §404(g)(1) might refer, tributaries have the closest nexus to traditional navigable waters.[45] The United States further claims that petitioners offer no basis, and there is none, for distinguishing among different non-navigable tributaries for purposes of CWA jurisdiction.[46]

The United States contends that the effects of the individual instances of discharge may be aggregated for purposes of demonstrating substantial impacts on interstate commerce.[47] Also, on the question of interstate commerce authority, the United States contends that Congress' authority to prevent pollutant discharges that will actually degrade the quality of traditional navigable waters necessarily includes

27. Rapanos Brief, *supra* note 25, at 5, 6, 11, and 12.
28. *Id*. at 4, 16, 22, and 31.
29. *Id*. at 15.
30. *Id.* at 21 and 22.
31. *Id.* at 23 and 24.
32. 514 U.S. 549 (1995).
33. 529 U.S. 598 (2000).
34. Rapanos Brief, *supra* note 25, at 13, 20-22.
35. *Id*. at 15 and 22.
36. *Id*. at i.
37. *Id.* at 24.
38. *Id*. at 27 (citing U.S. General Accounting Office, Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction (GAO-04-297) (Feb. 27, 2004) [hereinafter GAO Report]).
39. Rapanos Brief, *supra* note 25, at 27.
40. *Id*.
41. Brief of Respondents, Rapanos v. United States, No. 04-1034, at 19 (U.S. Jan. 2006) [hereinafter U.S. Rapanos Brief].
42. *Id.* at 19 and 20.
43. *Id*.
44. *Id*. at 23.
45. *Id*. at 24.
46. *Id*. at 32, 33, and 36.
47. *Id*. at 44. The majority in *United States v. Morrison*, 529 U.S. 598, 617 (2000), allowed aggregation of impacts only for activities determined to be economic in nature.

the power to devise reasonable procedures for dealing with discharges that are likely to have that effect.[48]

Further, the United States cites in support of Congress' interstate commerce authority the Supreme Court's recent ruling in *Gonzales v. Raich*.[49] In that case, the Court rejected the plaintiffs' claim that the federal prohibition on the manufacture and possession of marijuana for medical purposes pursuant to California law exceeded Congress' authority.[50] According to the United States, it was critical to the result in *Raich* that the Court was asked to invalidate an individual application of a concededly valid general statutory scheme.[51] The United States claims that similarly the Court is asked here to invalidate an aspect of Congress' clear general authority to regulate waters of the United States. According to the United States, the Supreme Court cases *Lopez*[52] and *Morrison*,[53] rejecting Congress' assertion of authority, are distinguishable because there the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety.[54]

Finally, the United States contends that a requirement for a CWA wetlands permit will not unduly intrude upon state authority over water resources and land use because the only activities that require a CWA permit are discharges of pollutants from a point source into waters.[55] Other functions and activities relating to land use remain in the hands of the state.[56]

The *Carabell* brief, like the *Rapanos* brief, notes the requirement in *SWANCC* that there must be a significant nexus between the wetlands and waters of the United States in order for the Corps to have adjacent wetlands jurisdiction.[57] It contends that the nexus cannot be established where, as here, there is no hydrological connection to the alleged adjacent waters.[58] Without the hydrological connection, the brief argues, the wetlands are essentially isolated and, under *SWANCC*, they are not subject to CWA jurisdiction.[59] The brief further contends that the overwhelming majority of courts have held that there is no significant nexus in the absence of a hydrological connection.[60] *SWANCC*, the brief argues, specifically ruled that an ecological connection is not sufficient for CWA jurisdiction.[61]

The *Carabell* brief next argues that states, not the federal government, have authority over intrastate waters unless there is a clear directive from Congress to the contrary.[62] "[G]iving the Corps authority to regulate land on the basis of *potential* hydrological connections would, in effect, give the federal government police power over land use . . . ."[63] As with the *Rapanos* brief, the *Carabell* brief argues that deference to the agency's interpretation is not warranted because it would raise serious constitutional questions.[64]

Further, the *Carabell* brief contends that the Corps' assertion of adjacent wetlands jurisdiction in this case exceeds Congress' authority under the Interstate Commerce Clause.[65] The brief claims that the activities taking place in the wetlands, allegedly not hydrologically connected to waters of the United States, do not have substantial impacts on interstate commerce.[66] According to the brief, the impacts of the activities may not be aggregated for purposes of determining the question of substantial impacts because they are not inherently economic in nature.[67]

In its opposition to the *Carabell* brief, the United States relies on Corps' regulations that specifically define jurisdiction as including adjacent wetlands separated from waters by a berm.[68] Those regulations are valid, according to the United States, because as a class adjacent wetlands generally have a hydrologic connection to, and affect the water quality of, waters to which they are adjacent.[69] This generally remains true as to adjacent wetlands separated by a berm, the brief contends, because berms generally do not block the passage of water altogether, but rather allow some surface or subsurface flow.[70]

The United States also disputes what it calls the repeated assertion in the *Carabell* brief that the wetlands at issue are not hydrologically connected to the adjacent waters.[71] In this regard, the United States cites a number of statements in the record, including the Corps' finding that the berm "serves to block *immediate* drainage out of the parcel and hold[s] water *until it is quite high*" and the alleged concessions by the Carabells' expert that there was an overflow in some circumstances and by their attorney that "drainage cuts that run through that berm" would facilitate the flow of water from the wetland to the ditch.[72] The United States also claims that the Corps did a site-specific evaluation of the wetlands in this case and determined that Carabells' proposed activity in the wetlands would have a major long-term impact on water quality.[73]

The United States disputes the Carabells' Interstate Commerce Clause claim on grounds similar to those included in its *Rapanos* brief.[74]

V. Proposed Resolution of the Cases

Carabell is the easier of the two cases to resolve because it is based on what could be called a technical argument—the lack of an explicit finding by the Corps that there is a hydrological connection between the wetlands and navigable wa-

48. *Id*. at 48.
49. 125 S. Ct. 2195 (2005).
50. U.S. Rapanos Brief, *supra* note 41, at 45.
51. *Id*. at 46.
52. 514 U.S. at 567.
53. 529 U.S. at 598.
54. Brief of Respondents, Carabell v. U.S. Army Corps of Eng'rs, No. 04-1384, at 46 (U.S. Jan. 2006) [hereinafter U.S. Carabell Brief].
55. *Id*. at 48.
56. *Id*. at 49.
57. Carabell Brief, *supra* note 26, at 28 and 29.
58. *Id*. at 29 and 39.
59. *Id*.
60. *Id*. at 33.
61. *Id*. at 27, 28.
62. *Id*. at 31.
63. *Id*. at 45 (emphasis in original).
64. *Id*. at 31-33.
65. *Id*. at 40, 42, and 43.
66. *Id.*
67. *Id.*
68. U.S. Carabell Brief, *supra* note 54, at 18.
69. *Id*.
70. *Id*.
71. *Id*. at 19.
72. *Id*. (emphasis in original).
73. *Id*. at 37.
74. *Id*. at 39.

ters at issue. As the United States points out, however, various statements in the record indicate there is a connection. Such a connection is in fact likely due to the proximity of the wetlands to navigable waters. The Supreme Court, therefore, could uphold the decision in *Carabell* based on the statements in the record or the proximity of the wetlands to the waters.

An alternative basis for upholding the decision would be for the Court to rely on the Corps' regulation defining adjacent wetlands as including wetlands separated from navigable waters by a berm. When the Corps adopted this regulation on July 19, 1977,[75] it stated in the preamble to the regulation, "[t]he terms would include wetlands that directly connect to other waters of the United States, or that are in reasonable proximity to these waters but physically separated from them by man-made dikes or barriers, natural river berms, beach dunes, and similar obstructions."[76] On the basis of deference to the Corps' regulation and the reasonableness of making proximity a key factor for determining adjacency, the Court could decide to uphold the decision in *Carabell*.

If the Court decides the CWA allows the Corps' assertion of jurisdiction in *Carabell*, it must then decide the other question accepted for certiorari of whether this assertion is allowed by the Interstate Commerce Clause. The Court should decide that it is. While the Court in *SWANCC* found that the regulation of isolated wetlands would present a serious constitutional question because of the lack of a hydrological connection to navigable waters, there is likely such a connection in *Carabell*. If the Court determines there is some question on this point, it could remand the case for the Corps to explicitly determine whether there is an actual hydrological connection in this case. In the alternative, the Court could determine that it was sufficient that the proximity criteria would normally assure such a connection.

The challenge in *Rapanos* is more substantial, but it too should ultimately fail. There should be no question that in enacting the CWA, Congress intended to expand the jurisdictional coverage asserted by the Corps under the Rivers and Harbors Act. The goal of the Rivers and Harbors Act is to protect navigation, whereas the goal of the CWA is to protect water quality. This goal cannot be accomplished without extending federal jurisdiction beyond traditional navigable waters. The Supreme Court endorsed this view by upholding the Corps' jurisdiction beyond mean high water in *Riverside Bayview.* Thus, the only question should be how far beyond traditional navigable waters does jurisdiction reach under the CWA. To accomplish the purpose of the CWA, it must extend to wetlands adjacent to non-navigable tributaries.

Both the *Rapanos* and the *Carabell* briefs argue that a potential hydrological connection to navigable waters does not provide a valid basis for federal jurisdiction because this would extend federal authority all the way to land, which is the primary responsibility of the states and surely not covered by the CWA.[77] However, the Supreme Court ruled in *Riverside Bayview* that while it is difficult to determine the exact demarcation between land and water, the Corps' determination of the question is entitled to deference.[78] The Corps should therefore be able to determine where land begins and exclude it from jurisdiction even where its regulation would assist in accomplishing the goals of the CWA.

The *Rapanos* brief points out that the Supreme Court in *SWANCC* stated that Congress' retention of the word "navigable" must mean something and argues that this supports restricting jurisdiction to traditional navigable waters. Such an interpretation, however, would make "navigable waters" mean everything and the further definition of that term as "waters of the United States" mean nothing. It would also be contrary to legislative history indicating that Congress intended to expand jurisdiction.

Deference to the Corps' wetlands decision and adjacency regulation is another reason for upholding the Sixth Circuit's decision in *Rapanos*. The *Rapanos* brief argues it is not due here because, just as in *SWANCC*, the Corps' assertion of jurisdiction raises a substantial constitutional question. The wetlands in *Rapanos*, however, are more similar to those in *Riverside Bayview* because in both these cases water flowed from the wetlands to surface waters. So just as the Court granted deference to the Corps' interpretation of its jurisdiction in *Riverside Bayview*, it should grant deference in these cases.

The final question in *Rapanos* is whether the Corps' assertion of jurisdiction over wetlands as far as 20 miles from navigable waters exceeds Congress' interstate commerce authority. This authority has become a murky area of law since the Supreme Court began restricting it in 1995 in *Lopez*.[79] The Justices have divided on the issue in dissents and concurrences, and circuit court judges have similarly disagreed on the issue. The connection of adjacent wetlands to navigable waters and the fact that wetlands destruction is done principally for economic gain should assure, however, that these cases thread the needle of the interstate commerce requirement.

In *Raich*,[80] the Supreme Court's most recent interstate commerce decision, the Court ruled that Congress has authority to ban the use and growth of marijuana for medical purposes in California despite a state law to the contrary. The Court recited three broad categories of activities Congress may regulate under the Interstate Commerce Clause, namely: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce or persons and things in interstate commerce; and (3) activities having a substantial effect on interstate commerce.[81] The Court then proceeded to discuss various factors in that case that lead it to the conclusion that Congress had acted within its interstate commerce authority. According to the Court:

> When Congress decides that the total incidence of a practice poses a threat to a national market, it may regulate the entire class. When it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so.[82]

The Court gave weight to findings in the introductory sections of the federal drug control statute explaining why Con-

75. 42 Fed. Reg. 37128 (July 19, 1977).

76. *Id*. at 37129.

77. Rapanos Brief, *supra* note 25, at 21, 22; Carabell Brief, *supra* note 26, at 45.

78. *Riverside Bayview Homes, Inc.*, 474 U.S. at 131.

79. 514 U.S. at 549.

80. 125 S. Ct. at 2195.

81. *Id*. at 2205.

82. *Id*. at 2207.

gress deemed it appropriate to encompass local activities within the scope of the federal law.[83] The Court distinguished the case from *Lopez* and *Morrison*, where it found no interstate commerce authority, on the basis that the parties in those cases asserted that a particular statute or provision fell outside Congress' commerce power in its entirety.[84] Further, the Court noted that a comprehensive regulatory statute may validly be applied to local conduct that does not, when viewed in isolation, have a significant impact on interstate commerce.[85] According to the Court, it was not appropriate to carve out as an exemption from Congress' interstate commerce a local or intrastate aspect.[86]

Applying these factors to the instant cases demonstrates that Congress has the authority under the Interstate Commerce Clause to regulate wetlands adjacent to non-navigable waters. Under the CWA, Congress regulates the "entire class" of discharges into waters, embracing more than traditional navigable waters. Although the regulation encompasses what might be called intrastate activities, the regulation was enacted for the purpose of preventing a threat to navigable waters. Congress noted in an introductory clause of the CWA the objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[87] Further, unlike *Lopez* and *Morrison*, the CWA does not assert an authority that falls entirely outside Congress' commerce power. Rather, petitioners claim that Congress' authority under the CWA is constitutional as to traditional navigable waters and wetlands adjacent to them, but unconstitutional as to wetlands adjacent to non-navigable waters. Thus, petitioners seek to carve out as an exemption from Congress' interstate commerce authority the non-navigable or intrastate component of the problem.

Not only do the factors named in *Raich* support the assertion of CWA jurisdiction as not violating the Interstate Commerce Clause, but also that assertion is supported as falling within the third broad category of what Congress may regulate under the Interstate Commerce Clause, namely activities having a substantial effect on interstate commerce. The key to fulfilling this category is for the activity to be considered economic in nature because, as such, the effects of the activities may be aggregated rather than considered individually.[88]

Whether an activity is economic in nature for purposes of interstate commerce authority has been a subject of substantial dispute among Supreme Court Justices and courts of appeal judges. In *Morrison*, the majority determined that a federal criminal law on domestic violence was not economic in nature. A four-Justice dissent, however, concluded that domestic violence qualified as an economic activity based on medical and other social costs and diminished national productivity associated with it. Interpreting *Morrison*, the majority of a three-judge panel of the U.S. Court of Appeals for the Fourth Circuit decided that the regulation of the endangered red fox constituted an economic activity because, among other reasons, it affected interstate commerce through tourism, scientific research, the possibility of a renewed trade in fur pelts, and the threat posed by red wolves to livestock and other animals.[89]

Justice Antonin Scalia has consistently found the activities under review in the recent Interstate Commerce Clause cases are not economic in nature, voting with the majority in *Morrison* and dissenting in *Raich*. Explaining his reasoning in *Raich*, Justice Scalia stated that he objected to piling inference upon inference in order to establish that a noneconomic activity has a substantial effect on interstate commerce.[90] It is not necessary, however, to pile on inferences to find that the destruction of wetlands affects navigable waters, which in turn affects interstate commerce. Wetlands directly affect navigable waters by reducing both pollution and flooding. This flood control function was highlighted recently by Hurricane Katrina's disastrous flooding of New Orleans, Louisiana, believed to be caused in part by the destruction of wetlands in the Gulf of Mexico.[91] No one can deny the enormous economic impact of this tragedy.

As to the due process claim of inconsistent assertions of jurisdiction by the Corps' district offices, it first should be noted that due process is not a question on which the Court granted certiorari. Perhaps recognizing this problem, the *Rapanos* brief only states that the inconsistent jurisdictional determinations found by the GAO report raise the due process issue, not that they violate due process. In *SWANCC*, the Court tempered its interpretation of the CWA to avoid a serious constitutional question, and apparently this is what the *Rapanos* brief seeks to accomplish with the due process argument.

The due process argument should fail, however, because it is much more clear in *Rapanos* than in *SWANCC* that the CWA in fact regulates the wetlands in question. The wetlands at issue are not isolated with no hydrological connections to surface waters. Secondly, the facts the *Rapanos* brief cites in support of the due process argument ultimately do not make the case for it. The brief points to inconsistent determinations of jurisdiction by the different Corps' offices and the enormous consequences for landowners running afoul of this amorphous jurisdiction. This predicament developed, however, as a result of *SWANCC*, which dramatically reduced the scope of the Corps' wetlands jurisdiction. Moreover, if landowners are uncertain as to whether an activity they contemplate is subject to the Corps' jurisdiction, they can simply obtain a determination from the Corps. Additionally, it is clear that many Corps' district offices assert adjacent wetlands jurisdiction with respect to non-navigable waters. Otherwise, how could there be four circuit courts

83. *Id*. at 2208.

84. *Id*. at 2209.

85. *Id*. at 2209, 2211.

86. *Id*. at 2212-13.

87. 33 U.S.C. §1251(a).

88. *See Morrison*, 529 U.S. at 617.

89. Gibbs v. Babbitt, 214 F.3d 483, 492, 494-97 (4th Cir. 2000). The dissent argued it was not an economic activity.

90. 125 S. Ct. at 2217. The majority made a similar point in *United States v. Lopez*, 514 U.S. 549, 567 (1995), stating that to uphold the government's contention that firearms possession in a local school zone would "substantially affect interstate commerce would require this Court to pile inference upon inference . . . ."

91. Tim Hirsch, BBC News, *Katrina Damage Blamed on Wetlands Loss* (Nov. 1, 2005), *at* http://news.bbc.co.uk/2/hi/americas/4393852.stm (last visited Feb. 1, 2006); Matthew Waite & Craig Puttman, *Katrina Offers Lesson on Wetlands Protection*, St. Petersburg Times (Sept. 5, 2005), *at* http://www.sptimes.com/2005/09/05/Worldandnation/Katrina_offers_lesson.shtml (last visited Feb. 1, 2006) ("Wetlands could have protected New Orleans, experts say, if so many acres hadn't been destroyed by years of alterations to the Mississippi River.").

affirming this jurisdiction and one rejecting it? For some Corps' district officials not to assert such jurisdiction in particular cases is therefore more akin to an agency exercising its enforcement authority than simply disclaiming the authority altogether.

Also, the executive and legislative branches of government seem capable of dealing with the problem of inconsistent applications of adjacent wetlands jurisdiction by different Corps' district offices. Congress requested a report on this subject from the GAO, which recommended that the Corps survey its district offices as to this question and make appropriate changes.[92] The Corps may proceed with these recommendations or, in the alternative, Congress may impose changes itself. In any case, the Corps' current application of its adjacent wetlands jurisdiction does not violate due process.

VI. Conclusion

In the *Riverside Bayview* case decided in 1985, the Supreme Court specifically left open the question of whether the Corps has jurisdiction over isolated wetlands.[93] Subsequent to that decision, environmentalists and real estate interests anxiously awaited the determination of this question, which came in the *SWANCC* decision in 2001. Since the Court's ruling in *SWANCC* rejecting isolated wetlands jurisdiction, environmentalists and real estate interests have argued over the precise meaning of the ruling. In elaborating on this issue now, the Court should recognize that the wetlands at issue in *Rapanos* and *Carabell* are more analogous to those in *Riverside Bayview* than those in *SWANCC* and uphold CWA jurisdiction. Further, the Court should not interpret the Interstate Commerce Clause as preventing Congress from regulating waters and wetlands so intimately connected with navigable waters because this would seriously thwart the stated purpose of the CWA. Rather, the Court should recognize that Congress expanded the definition of navigable waters in the CWA to include waters that carry pollutants to traditional navigable waters. Finally, the Court should recognize that the assertion of this authority does not violate Congress' interstate commerce authority because the factors of *Raich* are satisfied and because activities in wetlands adjacent to non-navigable waters substantially affect navigable waters.

92. GAO Report, *supra* note 38, at 28.

93. 474 U.S. at 131, n.8.