

Nos. 04-1034 and 04-1384

IN THE
Supreme Court of the United States

JOHN A. RAPANOS, *et al.*
Petitioners,

v.

UNITED STATES,
Respondent.

JUNE CARABELL, *et al.*
Petitioners,

v.

U.S. ARMY CORPS OF ENGINEERS
Respondent.

**On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit**

**BRIEF OF *AMICUS CURIAE* JOHN J. DUNCAN, JR.
IN SUPPORT OF THE PETITIONERS**

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QUESTIONS PRESENTED

1. Does the Clean Water Act extend to wetlands that are hydrologically isolated from any of the “waters of the United States?”

2. Do the limits on Congress’ authority to regulate interstate commerce preclude an interpretation of the Clean Water Act that would extend federal authority to wetlands that are hydrologically isolated from any of the “waters of the United States?”

3. Does the Clean Water Act prohibition on unpermitted discharges to “navigable waters” extend to nonnavigable wetlands that do not even abut a navigable water?

4. Does 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, exceed Congress’ constitutional power to regulate commerce among the states?

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STATEMENT OF INTEREST

With the written consent of the parties, reflected in letters on file with the Clerk, this brief is submitted on behalf of the Honorable John J. Duncan, Jr., as *amicus*

curiae, pursuant to Rule 37 of the Rules of this Court. The Honorable John J. Duncan, Jr. is the Chairman of the Subcommittee on Water Resources and Environment of the Committee on Transportation and Infrastructure of the U.S. House of Representatives, which has jurisdiction over the Clean Water Act and responsibility for oversight over the implementation of that Act. As a result, *amicus* has a strong interest in the proper construction and enforcement of the Clean Water Act.¹

SUMMARY OF ARGUMENT

This case is about continuing efforts of the U.S. Army Corps of Engineers to extend the boundaries of its jurisdiction under the Clean Water Act beyond the limits on such jurisdiction recognized by this Court in *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (“SWANCC”), and about judicial acquiescence in these overly expansive assertions of jurisdiction. In *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2003), cert. granted, 126 S. Ct. 414 (2005) (Pet. App. A1), and *Carabell v. U.S. Army Corps of Eng'rs*, 391 F.3d 704 (6th Cir. 2004), cert. granted, 126 S. Ct. 415 (2005) (Pet. App. 1a), the U.S. Court of Appeals for the Sixth Circuit recognized that under SWANCC, the Corps’ jurisdiction over wetlands or water bodies must be premised on a “significant nexus” between the wetlands or waters at issue and waters that are navigable-in-fact. However, the Sixth Circuit’s interpretation of the “significant nexus” requirement is inconsistent with SWANCC. In essence, the Sixth Circuit gave the Corps broad authority to control the use of any piece of land that exhibits the soils, vegetation, and hydrology that are characteristic of wetlands as long as that

¹ No counsel for a party authored this brief in whole or in part and no person or entity, other than the *amicus curiae* or his counsel, made any monetary contribution to the preparation or submission of this brief.

land “neighbors” any natural or man-made means of conveying surface water that the Corps considers to be a “tributary” of waters that are navigable-in-fact. Under that standard, the Corps may assert jurisdiction over land, *as a matter of law*, even if the land is hydrologically isolated from all water that is navigable-in-fact,² and regardless of whether dredged or fill material that an owner proposes to place on his or her land will ever have any discernable impact on any water that is navigable-in-fact.³ Thus, the issue before the Court is whether the Sixth Circuit’s interpretation of the “significant nexus” requirement – upholding jurisdiction over wetlands that are hydrologically isolated from navigable waters or that have a hydrological connection that is so attenuated that pollutants discharged into the wetlands would in fact never affect the navigable waters – can be sustained in light of this Court’s decision in *SWANCC*.

That question must be answered in the negative. In authorizing these assertions of jurisdiction, the Sixth Circuit misinterpreted the scope and structure of the Clean Water Act, 33 U.S.C. §§ 1251-1387 (2000). The Act regulates “navigable waters,” which are defined as “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7) (2000). As this Court observed in

² *Carabell*, 391 F.3d at 705 (Pet. App. 3a) (upholding grant of summary judgment for Corps despite finding that “[t]he berm edging the Carabells’ property serves to block immediate drainage of surface water out of the parcel into the ditch.”).

³ Thus, in *Rapanos*, 376 F.3d at 639 (Pet. App. A16), the court of appeals required only a hydrological connection to navigable waters to establish jurisdiction over a wetland, even though the district court in a related case had found that the closest navigable waters are *20 miles away* and that the activities of Mr. Rapanos had no direct impact on those waters. *United States v. Rapanos*, 190 F. Supp. 2d 1011, 1015-16 (E.D. Mich. 2002), rev’d, 339 F.3d 447 (6th Cir. 2003).

SWANCC, the use of the term “navigable waters” to define the scope of jurisdiction under the Clean Water Act demonstrates that in passing the Act, Congress intended to assert its traditional authority over navigation. 531 U.S. at 172. The Court further held that the Corps’ assertion of jurisdiction over waters that had no connection to traditionally navigable waters invoked the outer limits of congressional authority and encroached on traditional state authority over land and water use. *Id.* at 174.⁴ Given these concerns, the Court concluded that wetlands or other water bodies must have a significant nexus with navigable waters in order to qualify as waters of the United States. *Id.* at 167.

The Sixth Circuit acknowledged the “significant nexus” requirement, but applied it in a way that ignores the concerns underlying the decision in *SWANCC* and that conflicts with the text of the Act in fundamental ways. First, the Sixth Circuit authorized the assertion of jurisdiction over wetlands that were hydrologically isolated from any navigable waters or tributaries thereof simply because the Corps determined those wetlands to be “adjacent” to a “tributary” of a navigable water. However, that assertion of jurisdiction over wetlands “neighboring” waters that are not even themselves navigable is flatly inconsistent with the Court’s decision in *SWANCC*, which rejected an attempt by the Corps to regulate waters that had no hydrological connection with navigable waters. The Corps cannot be allowed to evade *SWANCC*’s jurisdictional limitation through the simple expedient of deeming wetlands to be “adjacent” to tributaries of navigable waters and assuming that the adjacency label is sufficient to establish a significant nexus.

⁴ Hereinafter such traditionally navigable waters will be referred to simply as “navigable waters.”

Second, the Sixth Circuit erroneously determined that whenever there is a hydrological connection between a wetland and a navigable water, that fact alone can be considered dispositive of the existence of a significant nexus that is sufficient to establish Clean Water Act jurisdiction. While a mere hydrological connection – particularly one that is highly attenuated – may serve as a nexus with navigable waters, such a nexus may or may not be significant. A determination of significance must take other factors into account. In particular, the extent to which wetlands may be considered “waters of the United States” depends in part on whether material placed in the wetlands can reasonably be expected to reach navigable waters. In addition, because the Clean Water Act regulates point source discharges of pollutants and not pollution from nonpoint sources, the courts must be careful not to allow the Corps and the U.S. Environmental Protection Agency to use the regulation of wetlands as a backdoor method of regulating nonpoint sources and land use.

Finally, the Sixth Circuit failed to consider that, in both of the decisions under review, it was authorizing the assertion of jurisdiction over wetlands based on the purported hydrological connection between the wetlands and conveyances that qualify as point sources under section 402 of the Clean Water Act, 33 U.S.C. § 1342 (2000). The Clean Water Act does not require a permit to discharge pollutants into a point source. It regulates the discharge of pollutants from a point source. The point source itself is not a water of the United States and wetlands may not be considered waters of the United States by virtue of being adjacent to the point source.

ARGUMENT**I. There Is No Clean Water Act Jurisdiction Over Wetlands That Are Hydrologically Isolated From Navigable Waters.**

In *Carabell*, the Sixth Circuit held that the significant nexus with navigable waters that is required for Clean Water Act jurisdiction could be satisfied by a determination that the wetlands in question are “adjacent” to a tributary of navigable waters within the meaning of the Corps’ regulations. 391 F.3d at 709-10 (Pet. App. 10a-12a). However, the loose label of “adjacency” cannot substitute for a critical case-by-case appraisal of whether a significant nexus with navigable waters in fact exists.

Notwithstanding the court’s finding of “adjacency,” the facts demonstrate that the wetlands at issue in *Carabell* are hydrologically isolated from navigable waters. The Sixth Circuit stated that “[t]he berm edging the Carabells’ property serves to block immediate drainage of surface water out of the parcel into the ditch” running parallel to the berm along the edge of the property. 391 F.3d at 705 (Pet. App. 3a). The Sixth Circuit recognized that “the SWANCC Court made clear that isolated intrastate waters cannot be subject to the Corps’ jurisdiction under the CWA.” *Id.* at 709 (Pet. App. 10a). Despite this recognition, the Sixth Circuit upheld summary judgment for the Corps by relying on Corps regulations that assert Clean Water Act jurisdiction over wetlands that are adjacent to tributaries of waters of the United States.⁵

⁵ Regulations issued by the Corps define “waters of the United States” to include waters that are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide (*i.e.*, traditional navigable waters) (33 C.F.R. § 328(a)(1) (2005)); interstate waters including interstate wetlands (*id.* § 328(a)(2)); all other waters the use, degradation or destruction of which would

This result ignores the basis of this Court's opinion in *SWANCC*. In *SWANCC*, the Court found that when Congress enacted the Clean Water Act in 1972, it intended to regulate wetlands and other water bodies that are inseparably bound up with navigable waters. 531 U.S. at 167. However, it is difficult to see how a wetland that does not have a surface water connection with navigable waters could have a significant nexus with those waters.⁶ Pollutants discharged into such a wetland cannot reach navigable waters and therefore cannot impact such waters in any way that could be considered significant. The fact that the Corps determined that filling in the wetlands at

affect interstate or foreign commerce (*id.* § 328(a)(3)); all impoundments of waters otherwise defined as waters of the United States (*id.* § 328(a)(4)); *tributaries of waters identified in paragraphs (1) through (4)* (*id.* § 328(a)(5)); the territorial seas (*id.* § 328(a)(6)); and *wetlands that are adjacent to any of the waters identified in paragraphs (1) through (6)* (*id.* § 328(a)(7)). EPA's regulations include the same definition for the purpose of implementing other sections of the Act. 40 C.F.R. § 230.3(s) (2005).

⁶ While a wetland that has no surface water connection with navigable waters could have an indirect connection to such waters through groundwater, the courts have generally recognized that groundwater is a state-regulated resource that is not covered under the Clean Water Act. See, e.g., *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001); *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965 (7th Cir. 1994). As such, groundwater cannot serve as a basis for a hydrological connection sufficient to establish jurisdiction under the Act. See *Oconomowoc Lake*, 24 F.3d at 962. Contamination of groundwater, which can result from releases of contaminants onto dry ground as readily as through releases to wetlands, is generally addressed through other federal and state authorities such as the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (2000) ("CERCLA").

issue in *Carabell* would reduce habitat for wildlife⁷ cannot be used to establish a significant nexus, as this Court clearly stated in *SWANCC*. *Id.* at 171-72.

The only potential pollution of navigable waters emanating from the property at issue that was identified in *Carabell* is ordinary nonpoint source runoff that may occur as a result of the development of *any* piece of property, regardless of whether it is a wetland. *Carabell*, 257 F. Supp. 2d at 932 (Pet. App. 50a-51a). However, the Clean Water Act is not a land preservation statute. Changes in land use are not regulated under the Clean Water Act but are instead left to the states. See 33 U.S.C. § 1251(b) (2000). Thus, even if development of the wetlands would increase impervious surfaces, potentially causing runoff and erosion affecting water quality, such impacts cannot be used to establish a significant nexus without upsetting the federal-state balance inherent in the Act.⁸ Accordingly, in *Carabell*, as in *SWANCC*, there is no federal jurisdiction under the Clean Water Act.

The Sixth Circuit attempted to justify the Corps' jurisdictional determination in *Carabell* by relying on this Court's statement in *United States v. Riverside Bayview Homes*, 474 U.S. 121, 135 (1985), that "[i]f it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand." See *Carabell*, 391 F.3d at 709 (Pet. App. 11a). However, the

⁷ *Carabell v. U.S. Army Corps of Eng'rs*, 257 F. Supp. 2d 917, 924 (E.D. Mich. 2003), aff'd 391 F.3d 704 (6th Cir. 2004), cert. granted, 126 S. Ct. 414 (2005) (Pet. App. 33a-34a).

⁸ Increased runoff caused by the creation of impervious surfaces is not a discharge of a pollutant from a point source. If collected in a conveyance, such runoff may be regulated under section 402(p) of the Clean Water Act as a stormwater discharge. 33 U.S.C. § 1342(p) (2000). Otherwise, it is nonpoint source pollution, the regulation of which is left to the states.

Court in *Riverside Bayview* was focused on the question of jurisdiction over wetlands that directly abut open water and whether frequent flooding of the wetland by the open water is necessary to establish jurisdiction. 474 U.S. at 131. Therefore, the Court's affirmation of the Corps' determination to regulate adjacent wetlands must be read in that context, *i.e.*, as affirming the Corps' definition of adjacent wetlands as it applies to wetlands that "actually abut[]" navigable waters, *id.* at 135.

The fact that the Corps may presume a significant nexus where wetlands directly abut open waters does not mean that it is reasonable to presume such a nexus where wetlands are, as here, geographically removed from open water. Indeed, the Corps' application of the adjacency concept demonstrates the highly elastic nature of this concept in practice and undercuts any suggestion that adjacent wetlands by their very nature have a significant nexus with navigable waters. For example, some Corps districts routinely assert jurisdiction over wetlands that are 200 feet away from any tributary of a navigable water, while other districts may consider wetlands to be adjacent to waters of the United States – and therefore consider the wetlands themselves to be waters of the U.S. – if the wetlands are 500 feet from a navigable water or a tributary. See U.S. General Accounting Office, GAO-04-297, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction* 19 (2004) (hereinafter "*GAO Report*"). Some Corps districts consider wetlands to be adjacent to navigable waters or their tributaries if the wetlands are within the 100-year floodplain of the navigable water or tributary in question, an area that can extend several miles from the navigable water or tributary. *Id.* at 17-18.

Thus, the notion of adjacency can be very expansive and can serve as a license to the Corps to regulate broad areas of the landscape regardless of the presence of any

