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The Wetlands Coverage of the Clean Water Act is Revisited by the Supreme Court: *Rapanos and Carabell*

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Summary

Twice in the past, the Supreme Court has grappled with issues as to the geographic scope of the wetlands permitting program in the federal Clean Water Act (CWA). On October 11, 2005, the Supreme Court agreed to hear two more cases (consolidated by the Court) addressing such questions — both from the Sixth Circuit. In *Rapanos v. United States*, the issue is whether the permitting program applies to wetlands that are only distantly connected to traditional navigable waters — i.e., or at least do not actually abut them. In *Carabell v. U.S. Army Corps of Engineers*, the issue is whether the program reaches wetlands that are not hydrologically connected to any “water of the United States,” the CWA term that defines the act’s geographic reach. Both cases also raise a constitutional question: assuming that the disputed CWA coverage exists, did Congress, in enacting the CWA, exceed its authority under the Commerce Clause of the Constitution? Implicating hot-button legal issues such as federal-state relations under the Commerce Clause and private property rights, and affecting the reach of several CWA provisions outside the permitting program, the Court’s decision is sure to be of great interest.

The policy question associated with these cases — what *should be* the outer geographic limit of CWA jurisdiction and what are the consequences of restricting the scope of regulatory protection under the act — has challenged regulators, landowners and developers, and policymakers for more than 30 years. The answer is important, because as noted it determines the extent of federal CWA regulatory authority not only for the wetlands permitting program but also for several other CWA programs; the CWA has one definition of “navigable waters” that applies to the entire law. Critics of the regulatory program want the federal government to give up jurisdiction over most non-navigable tributaries and wetlands adjacent thereto, and allow other federal and state programs to fill whatever gap such changes would create.

While regulators and the regulated community debate the legal dimensions of federal jurisdiction under the CWA, scientists contend that there are no discrete, scientifically supportable boundaries or criteria along the continuum of wetlands to separate them into meaningful ecological or hydrological compartments. Wetland scientists believe that all such waters are critical for protecting the integrity of waters, habitat, and wildlife downstream. Changes in the limits of federal jurisdiction highlight the role of states in protecting waters not addressed by federal law. From the states’ perspective, federal programs provide a baseline for consistent, minimum standards to regulate wetlands and other waters. Most states are either reluctant or unable to take steps to protect non-jurisdictional waters through legislative or administrative action.

A Supreme Court decision in *Rapanos* and *Carabell* is expected by June 2006. This report will be updated as developments warrant.

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The Wetlands Coverage of the Clean Water Act is Revisited by the Supreme Court: *Rapanos and Carabell*

On October 11, 2005, the Supreme Court agreed to review two Sixth Circuit decisions addressing the outer bounds of the geographic coverage of the federal Clean Water Act (CWA).¹ In *Rapanos v. United States*,² the issue is whether the CWA's wetlands permitting program applies to wetlands that are only distantly connected to traditional navigable waters — or at a minimum, do not abut them. In *Carabell v. U.S. Army Corps of Engineers*,³ the issue is whether that same program reaches wetlands that are not hydrologically connected to any “water of the United States,” the CWA phrase defining the geographic reach of the act. Both cases also raise a constitutional question: *if* the disputed CWA coverage exists, did Congress exceed its authority under the Commerce Clause of the Constitution?⁴

In taking these separate cases (consolidated by the Court for oral argument and decision), the Court revisits a CWA conundrum with which it and many other courts have wrestled for three decades: *which wetlands are to be regulated under the federal CWA and which fall solely within the jurisdiction of the states in which they are located.*

Wetlands, with a variety of physical characteristics, are found throughout the country. They are known in different regions as swamps, marshes, fens, potholes, playa lakes, or bogs. Although these places can differ greatly, they all have distinctive plant and animal assemblages because of the wetness of the soil. Some wetland areas may be continuously inundated by water, while other areas may not be flooded at all. In coastal areas, flooding may occur on a daily basis as tides rise and fall.

¹ 33 U.S.C. §§ 1251-1387.

² *United States v. Rapanos*, 376 F.3d 629 (6th Cir. 2004), *cert. granted sub nom. Rapanos v. United States*, 74 U.S.L.W. 3228 (Oct. 11, 2005) (No. 04-1034).

³ *Carabell v. U.S. Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004), *cert. granted under same name*, 74 U.S.L.W. 3228 (Oct. 11, 2005) (No. 04-1384).

⁴ The Commerce Clause, U.S. Const. art. I, § 8, cl. 3, gives the Congress authority “To regulate Commerce ... among the several States”

Background

From the earliest days, Congress grappled with where to set the outer bound of federal authority over the nation's waterways, particularly with regard to uses of waterways that impaired navigation. The phrase Congress often used to define federal authority was "navigable waters of the United States."⁵ The concept proved an elastic one: in Supreme Court decisions from the early to mid-twentieth century, "navigability" underwent a substantial expansion "from waters in actual use to those which used to be navigable to those which by reasonable improvements could be made navigable to nonnavigable tributaries affecting navigable streams."⁶

Notwithstanding the Court's enlargement of "navigability," the Congress considering the legislation that became the CWA of 1972⁷ felt that the term was too constricted to define the reach of a law whose purpose was not maintaining navigability, but rather preventing pollution. Accordingly, Congress in the CWA retained the traditional term "navigable waters," but defined it to mean "waters of the United States"⁸ — seemingly minimizing, if not eliminating, the constraint of navigability. The conference report said that the new phrase was intended to be given "the broadest possible constitutional interpretation."⁹

Among the provisions in the 1972 clean water legislation was section 404,¹⁰ which together with section 301(a) requires persons wishing to discharge dredged or fill material into "navigable waters," as newly defined, to obtain a permit from the U.S. Army Corps of Engineers.¹¹ The Corps' initial response to section 404 was to apply it solely to waters traditionally deemed navigable (which included few wetland areas), despite the broadening "waters of the United States" definition and conference report language. Under a 1975 court order,¹² however, the Corps issued new regulations that swept up a range of wetlands.¹³ This broadening ushered in a debate, continuing today, as to *which* wetlands Congress meant to reach in the section 404

⁵ See in particular two precursors of the CWA: Rivers and Harbors Act of 1899 §§ 10 (33 U.S.C. § 403), and 13 (33 U.S.C. § 407). Section 13 covers tributaries of navigable waters as well.

⁶ William H. Rodgers, Jr., *Handbook on Environmental Law* 401 (1977) (footnotes omitted).

⁷ P.L. 92-500. To be precise, the 1972 enactment was titled the Federal Water Pollution Control Act Amendments of 1972. It was only after the 1977 amendments thereto that the act as a whole became known as the Clean Water Act.

⁸ CWA § 502(7), 33 U.S.C. § 1362(7).

⁹ Conference report S.Rept. 92-1236 at 144, *reprinted in* 1972 U.S. Code Cong. & Admin. News 3776, 3822.

¹⁰ 33 U.S.C. § 1344.

¹¹ Section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant, except in compliance with various CWA sections, including section 404.

¹² *NRDC v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975).

¹³ 40 Fed. Reg. 31320 (July 25, 1975), amending 33 C.F.R. part 209.

permit program. At one time or another, the debate has occupied all three branches of the federal government.

As the title of this report indicates, *Rapanos* and *Carabell* are not the Supreme Court's first foray into the section 404 jurisdictional quagmire. In 1985, in *Riverside Bayview Homes, Inc. v. United States*,¹⁴ the Court unanimously upheld as reasonable the Corps' extension of its section 404 jurisdiction to "adjacent wetlands" — as one component of its definition of "waters of the United States."¹⁵ Under the Corps regulations, adjacent wetlands are wetlands adjacent to navigable bodies of water or interstate waters, or their tributaries.¹⁶ The Court reasoned that the water-quality objectives of the CWA were broad and sensitive to the fact that water moves in hydrologic cycles. Due to the frequent difficulties in defining where water ends and land begins, the Court could not say that the Corps' conclusion that adjacent wetlands are inseparably bound up with "waters of the United States" was unreasonable, particularly given the deference owed to the Corps' and EPA's ecological expertise. Also persuasive was the fact that in considering the 1977 amendments to the CWA, Congress vigorously debated but ultimately rejected amendments that would have narrowed the Corps' asserted jurisdiction under section 404.

In 2001, the Court returned to the geographic reach of section 404. The decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC)*¹⁷ directly involved the "isolated waters" component of the Corps' definition of "waters of the United States,"¹⁸ rather than the "adjacent wetlands" component at issue above. "Isolated waters," in CWA parlance, are waters that are not traditional navigable waters, are not interstate, are not tributaries of the foregoing, and are not hydrologically connected to navigable or interstate waters or their tributaries — but whose "use, degradation, or destruction [nonetheless] could affect interstate commerce."¹⁹ Illustrative examples include "intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, *wetlands*, sloughs, [or] prairie potholes"²⁰ with an interstate commerce nexus. The issue before the Court was whether "waters of the United States" is broad enough to embrace the Corps' assertion of jurisdiction over such "isolated waters" purely on the ground that they are or might be used by migratory birds that cross state lines — known as the Migratory Bird Rule.

In a 5-4 ruling, the majority opinion held that the Migratory Bird Rule was not authorized by the CWA. The decision's rationale was much broader, however, appearing to preclude federal assertion of 404 jurisdiction over isolated waters on *any*

¹⁴ 474 U.S. 121 (1985).

¹⁵ 33 C.F.R. § 328.3(a)(7). An identical EPA definition is at 40 C.F.R. § 230.3(s)(7).

¹⁶ See note 15, *supra*.

¹⁷ 531 U.S. 159 (2001).

¹⁸ 33 C.F.R. § 328.3(a)(3). An identical EPA definition is at 40 C.F.R. § 230.3(s)(3).

¹⁹ See note 18, *supra*.

²⁰ See note 18, *supra* (emphasis added).

basis — indeed, over wetlands not adjacent to “open water.”²¹ This disparity between the Court’s holding and its rationale has occasioned considerable litigation in the lower courts, the majority of which opts for a narrow reading of *SWANCC*, hence a broad reading of remaining Corps jurisdiction under section 404. Such uncertainties as to the Corps’ isolated waters jurisdiction after *SWANCC* has focused attention on the alternative bases in Corps regulations for asserting 404 jurisdiction — such as the existence of “adjacent wetlands.” Neither the Corps of Engineers nor EPA, however, has modified its section 404 regulations since *SWANCC*.

The new spotlight on the concept of adjacent wetlands is the backdrop for the Supreme Court’s consideration of *Rapanos* and *Carabell*, two “adjacent wetlands” cases.

***Rapanos v. United States:* Distant Hydrological Connection**

The *Rapanos* case arose as a civil enforcement action filed by the United States in 2000, seeking penalties for the filling of Michigan wetlands without a section 404 permit. (In a separate federal *criminal* action, John Rapanos was convicted in 1995 of illegally discharging fill material into protected wetlands.) As in *Riverside Bayview*, the issue was the Corps’ jurisdiction under the “adjacent wetlands” component of its regulations defining “waters of the United States.” In particular, plaintiffs argued that *SWANCC* did more than throw out the Migratory Bird Rule; it also barred section 404 regulation of wetlands that do not physically abut a traditional navigable water.

In ruling that section 404 reached the Rapanos’ wetlands, the Sixth Circuit held that immediate adjacency of the wetland to a traditional navigable water is not required. Rather, what is needed is a “significant nexus” — a ubiquitous phrase in section 404 litigation lifted from *SWANCC*’s explanation of *Riverside Bayview*²² — between the wetlands and traditional navigable waters. “Significant nexus,” in turn, can be satisfied by the presence of a “hydrological connection.” Thus, the fact that the Rapanos’ wetlands had surface water connections to nearby tributaries of traditional navigable waters was sufficient for section 404 jurisdiction. Nor did it seem to matter to the court that the hydrological connection to traditional navigable waters was, for at least one of the Rapanos wetlands, distant — surface waters from this wetland flow into a man-made drain immediately north of the site, which empties into a creek, which flows into a navigable river. According to the record, this wetland is between eleven and twenty miles from the nearest navigable-in-fact water. In ruling that surface water connection to a tributary of a navigable water was

²¹ In *SWANCC* dictum, the Court stated: “In order to rule for the [Corps of Engineers], we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this.” 531 U.S. at 168 (emphasis in original).

²² *SWANCC*, 531 U.S. at 167.

enough, the circuit aligned itself with the large majority of appellate courts to rule on this issue since *SWANCC*.

In its petition for certiorari to the Supreme Court, the Rapanoses ask whether the CWA's reach extends to nonnavigable wetlands "that do not even abut a navigable water." If a hydrological connection, "no matter how tenuous or remote," is all that is required, the Rapanos' petition also asks whether such CWA jurisdiction would exceed Congress' power under the Commerce Clause.

Carabell v. U.S. Army Corps of Engineers: No Hydrological Connection

Like the Rapanoses, the Carabells owned a wetland tract in Michigan. They wished to develop it for a condominium project. Unlike the Rapanoses, the Carabells pursued the required wetlands permitting process — state, then federal. The *Carabell* case arose as their challenge to the Corps' denial of the section 404 permit, and raised, among other things, the issue of whether the Corps had jurisdiction over the wetland.

The Sixth Circuit held that "adjacent wetlands" jurisdiction existed under the Corps regulations, even though the wetland was separated from a tributary of "waters of the United States" by a four-foot-wide manmade berm that blocked immediate drainage of surface water from the parcel to the tributary.²³ The existence of the berm meant, critically, that unlike the wetlands in *Rapanos*, the wetlands here lacked any hydrological connection to navigable waters *at all*. Parenthetically, the fact that the "tributary" was merely a man-made ditch (which emptied into a creek, which flowed into a navigable lake) did not appear to be an issue in the case, as it was in *Rapanos*. Finally, the court endorsed the view of the majority of courts addressing the question that *SWANCC* spoke only to the Corps' "isolated waters" jurisdiction; it did not narrow the agency's "adjacent wetlands" authority involved here and broadly construed in *Riverside Bayview*.

In its petition for certiorari, the Carabells ask whether section 404 extends to "wetlands that are hydrologically isolated from any of the 'waters of the United States'." If so, the petition asks the same follow-up question as in *Rapanos*: Would such CWA jurisdiction exceed Congress' power under the Commerce Clause?

²³ Corps of Engineers regulations define the word "adjacent" in "adjacent wetlands" to mean "bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers ... are 'adjacent wetlands.'" 33 C.F.R. § 328.3(c).

Legal Analysis

The jurisdictional questions raised by *Rapanos* and *Carabell* present the Supreme Court with a “perfect storm” of hot-button issues. First, there is the federalism matter: where do CWA section 404 and the Constitution’s Commerce Clause draw the line between federal and state authority over wetlands? The Supreme Court has been newly active in the Commerce Clause area since 1995 — part of a willingness on the part of certain justices, particularly during this period, to limit federal power under several constitutional provisions.²⁴ The Court’s Commerce Clause views are of linch-pin importance to several federal environmental laws, among others, resting as those laws do on Congress’ power under the Clause. What makes the section 404 program particularly vulnerable to any future judicial narrowing of the commerce power is the program’s frequent application to wetlands where the constitutionally required nexus to interstate commerce is not obvious. The same holds true of applications of the Endangered Species Act to protect species, subspecies, and vertebrate populations that do not cross state lines.²⁵ Challenges to the more intrastate applications of both statutes, and likely others, may proliferate should the Court pare down the commerce power in *Rapanos* or *Carabell*.

Second, there are property rights concerns. Some 75% of jurisdictional wetlands in the lower 48 are on private property, with the result that protests from property owners denied section 404 permits (or subjected to unacceptable conditions on same) are often heard — sometimes in the courts through Fifth Amendment

²⁴ Two justices closely associated with the Court’s recent reexaminations of the boundary between federal and state power under the Constitution, Chief Justice Rehnquist and Justice O’Connor, have now left the Court. The federal-state views of their replacements, Chief Justice John Roberts and Justice Samuel Alito respectively, were a recurring theme during their confirmation hearings. The limited Commerce Clause writings of these new justices suggest views similar to those of their predecessors. Then-Judge Roberts was one of two dissenters from the denial of rehearing en banc in *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158, 1160 (D.C. Cir. 2003), an Endangered Species Act decision rejecting a Commerce Clause challenge to the act. Perhaps coincidentally, the Supreme Court’s decision to hear *Rapanos* and *Carabell*, following several denials of certiorari in cases raising similar issues, was made in the first conference of the justices presided over by Chief Justice Roberts.

Then-Judge Alito dissented from the Third Circuit’s decision upholding as within the Commerce Power a federal law banning the possession and transfer of machine guns. *United States v. Rybar*, 103 F.3d 273 (3d Cir. 1996). Previously, several federal circuits had determined, under various rationales, that the machine gun ban was *not* a violation of the Commerce Clause.

²⁵ 16 U.S.C. §§ 1531-1544. Though all Commerce Clause challenges to applications of the Endangered Species Act have failed thus far, several vigorous dissents have been registered. Both *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), cert. denied, 531 U.S. 1145 (2001), and *National Ass’n of Homebuilders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), cert. denied, 524 U.S. 937 (1998), were decided on 2-1 votes. In two other Endangered Species Act cases, circuit court decisions to deny rehearing en banc after rejecting a Commerce Clause challenge caused more than one judge of the court to object: *GDF Realty Investments, Ltd. v. Norton*, 362 F.3d 286 (5th Cir. 2004) (six judges in dissent), cert. denied, 125 S. Ct. 2898 (2005), and *Rancho Viejo, LLC v. Norton*, 334 F.3d 1158 (D.C. Cir. 2003) (two judges in dissent), cert. denied, 540 U.S. 1218 (2004).

takings suits. The public visibility of such grievances is often heightened by property rights organizations and their allies in Congress. And third, there is the legal tension stemming from the hybrid land/water nature of wetlands. In American law, the rights of landowners generally are multifold and relatively unqualified; rights in water, by contrast, tend to be limited and highly qualified. Wetlands law, standing at the intersection of these two bodies of law, reflects the tension between them.

Aside from these broad jurisprudential concerns, *Rapanos* and *Carabell* have pervasive significance within the CWA itself. The CWA jurisdictional phrase “waters of the United States” that the Court likely will construe in those cases governs not only the section 404 wetlands permitting program, but also multiple other provisions and requirements of that law (see discussion below under Policy Implications). In addition, the Oil Pollution Act of 1990 uses “waters of the United States” to define its scope.²⁶

As to how the Supreme Court decision might come out, one can only say that the petitioners’ argument in *Rapanos* seems a harder sell than that in *Carabell*. The Rapanos’ ask the Court to deny CWA and constitutional coverage of waters that are, albeit tenuously, connected to navigable-in-fact waters. In light of the broad purposes of the CWA and the broad reach of the Commerce Clause, this argument may prove a tough one.²⁷ The Carabells, however, ask only that waters not connected *at all* to navigable waters be ruled off limits.

The two cases are to be argued on February 21, 2006, with a decision likely by June. Reflecting their importance, numerous amicus briefs have been filed on both sides, including a few by organizations that claim never to have filed amicus briefs before. Some current and former Members of Congress also are among the amici.²⁸

Policy Implications

The policy question associated with these cases — what *should be* the outer limit of CWA regulatory jurisdiction and what are the consequences of restricting the geographic scope of regulatory protection under the act — has challenged regulators, landowners and developers, and policymakers since passage of the act in 1972.

The act prohibits the discharge of dredged or fill material into navigable waters without a permit, and it also prohibits discharges of pollutants from any point source to navigable waters without a permit. Disputes have centered on whether wetlands

²⁶ 33 U.S.C. § 2701(21).

²⁷ CWA and constitutional coverage of remotely connected waters were upheld in *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004). Joining the court’s unanimous opinion were two generally conservative judges, Judge Wilkinson and Judge Luttig.

²⁸ Rep. John Duncan (R-Tenn.) filed on the side of petitioners Rapanos and Carabell. Reps. John Dingell (D-Mich.), John Conyers (D-Mich.), and Charles Rangel (D-N.Y.), plus several former Members of Congress, filed on the side of respondent United States.

and other waters are navigable waters. The answer to this question is important, because it determines the extent of federal CWA regulatory authority not only for the section 404 program, but also for purposes of implementing other CWA programs. Critics of the section 404 regulatory program, such as land developers and agriculture interests, argue that the Corps' wetlands program has gradually and illegally expanded its asserted jurisdiction since 1972. They want the Corps and EPA to give up jurisdiction over most non-navigable tributaries and allow other federal and state programs to fill whatever gap is created.

Waters that are jurisdictional are subject to the multiple regulatory requirements of the CWA: standards, discharge limitations, permits, and enforcement. Non-jurisdictional waters, in contrast, do not have the federal legal protection of those requirements. The act has one definition of "navigable waters" that applies to the entire law. The definition applies to: federal prohibition on discharges of pollutants (section 301), requirements to obtain a permit prior to discharge (sections 402 and 404), water quality standards and measures to attain them (section 303), oil spill liability and oil spill prevention and control measures (section 311), certification that federally permitted activities comply with state water quality standards (section 401), and enforcement (section 309). As noted above, it impacts the Oil Pollution Act and other environmental laws as well. For example, the reach of the Endangered Species Act (ESA) is affected, because that act's requirement for consultation by federal agencies over impacts on threatened or endangered species is triggered through the issuance of federal permits.²⁹ Thus, by removing the need for a CWA permit, a non-jurisdictional determination would eliminate ESA consultation, as well.

SWANCC challenged and found invalid the assertion of CWA jurisdiction over isolated, non-navigable intrastate waters solely on the basis of their use (or potential use) as habitat by migratory birds. Most of the post-*SWANCC* cases have, instead, addressed tributaries and adjacent wetlands, asking which of these have the "significant nexus" to navigable waters that the Supreme Court has said is necessary to establish federal jurisdiction.

Wetlands are an important part of the total aquatic ecosystem, with many recognized functions and values, including water storage (mitigating the effects of floods and droughts), water purification and filtering, recreation, habitat for plants and animals, food production, and open space and aesthetic values. Functional values, both ecological and economic, at each wetland depend on its location, size, and relationship to adjacent land and water areas. To the layman, many of these values are more obvious for wetlands adjacent to large rivers and streams than they are for wetlands and small streams that are isolated in the landscape from other waters. Many of the functions and values of wetlands have been recognized only recently. Historically, many federal programs encouraged wetlands to be drained or altered because they were seen as having little value. Even today, while more federal laws either encourage wetland protection or regulate their modification, pressure exists to modify, drain, or develop wetlands for uses that some see as more economically beneficial.

²⁹ 16 U.S.C. § 1536.

While regulators and the regulated community debate the legal dimensions of federal jurisdiction, scientists contend that there are no discrete, scientifically supportable boundaries or criteria along the continuum of wetlands to separate them into meaningful ecological or hydrological compartments. Numerous scientific studies define and describe the importance of the functions and values of wetlands, in support of their significant nexus to navigable waters.³⁰ In all but some very narrow instances, scientists say, terms such as “isolated waters” and “adjacent wetlands” are artificial legal or regulatory constructs, not valid scientific classifications. From this perspective, even waters that lack a direct surface connection to navigable waters or that only flow intermittently are connected to the larger aquatic ecosystem via subsurface or overflow hydrologic connections. Wetland scientists believe that all such waters are critical for protecting the integrity of waters, habitat, and wildlife downstream.

In *SWANCC*, the Supreme Court did not draw a bright line for regulatory purposes of determining the limits of federal jurisdiction (and wetland scientists do not believe that a bright line is possible, in any case). While the ruling reduced federal jurisdiction over some previously regulated wetlands, even nearly five years later, it remains difficult to determine the precise effect of that decision. Many affected interests (states and the regulated community) contend that guidance from the Corps and EPA has not adequately defined the scope of regulated areas and wetlands affected by *SWANCC* and subsequent court rulings.³¹ In addition, the Government Accountability Office found that uncertainties are amplified by variability in jurisdictional determinations made by the 38 Corps District offices that administer the CWA section 404 permit program.³² The Rapanoses and the Carabells hope that the Supreme Court will clarify the jurisdiction issue and that the Court will further narrow the program’s geographic reach.

Estimates of the types of wetlands and amounts of affected acreage depend on interpretation of *SWANCC* and subsequent court rulings and on assumptions about defining key terms such as “adjacent,” “tributary,” and “significant nexus.” Because in its regulations before *SWANCC* the Corps had broadly defined “waters of the United States,” including those encompassed by the Migratory Bird Rule, nearly all U.S. wetlands and waters were subject to CWA jurisdiction, since practically all are used to a greater or lesser extent by migratory birds.³³ Depending on how key terms are now defined, reduced federal jurisdiction could affect very small or very large

³⁰ Leibowitz, Scott G. “Isolated Wetlands and Their Functions: An Ecological Perspective.” *Wetlands*. Vol. 23, no. 3, September 2003. pp. 517-531.

³¹ See, for example: U.S. Congress. House of Representatives. Committee on Transportation and Infrastructure. Subcommittee on Water Resources and Environment. “Inconsistent Regulation of Wetlands and Other Waters.” Hearing, 108th Congress, 2d Session, March 30, 2004. (H.Hrg. 108-58) 200 p.

³² U.S. Government Accountability Office. “Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction.” GAO-04-297. February 2004.

³³ Kusler, Jon. The Association of State Wetland Managers. “‘Waters of the U.S.’ After *SWANCC*.” August 12, 2005 (draft), p. 6.

categories of waters and wetlands. The possible changes in jurisdiction could range from 20% to 80% of the Nation's total estimated 100 million acres of wetlands.³⁴

- Under a narrow interpretation of *SWANCC* allowing the Corps to regulate traditionally navigable waters, tributaries, adjacent wetlands, and other wetlands with a significant nexus (even if they are not tributary or adjacent), 80-90% of wetlands would be regulated under federal law. Documentation of such nexus would likely need to be made on a case-by-case basis.
- If the Corps regulates traditionally navigable waters and their adjacent wetlands, plus tributaries and wetlands adjacent to all tributaries, 40-60% or more of all wetlands are likely to be regulated. Much depends on how the Corps, EPA, and the courts define “tributary” and “adjacent” — key terms at issue in the *Rapanos* and *Carabell* cases. For example, if “tributary” were narrowly construed to include only perennial streams, some prairie potholes, vernal pools, forested wetlands, wet meadows, tundra, and bogs would be unregulated.
- Under a broad reading of *SWANCC*, limiting the Corps to only regulating traditionally navigable waters and adjacent wetlands, perhaps 20% of the Nation's wetlands would be subject to federal regulation. Under this scenario, CWA-regulated wetlands would primarily include fringe wetlands on large rivers, streams, and lakes, and coastal and estuarine fringing wetlands.

Filling the Gaps

Whatever gaps in wetland regulation result from reduced federal jurisdiction arguably could be filled, at least in part, by other federal or state and local programs and actions. For example, some assert that wetland restoration and creation programs, such as the Wetlands Reserve Program and the Coastal Wetlands Restoration Program, or private conservation efforts can provide protection, even if the wetland is no longer jurisdictional.³⁵ However, others respond that such programs are likely to be incomplete in filling gaps, since they apply primarily to rural areas and do not apply to the one-third of the Nation's lands in federal ownership. Moreover, they were never intended to be a seamless group that would fill all possible gaps.

SWANCC and subsequent legal decisions also highlight the role of states in protecting waters not addressed by federal law. From the states' perspective, the federal section 404 program provides the basis for a consistent national approach to wetlands protection. But if a larger portion of wetlands are no longer jurisdictional, they say, it can be argued that the section 404 program no longer provides a baseline

³⁴ Kusler, Jon. The Association of State Wetland Managers. “The *SWANCC* Decision: State Regulation of Wetlands to Fill the Gap.” March 2004. pp. 6-8. Hereafter, Kusler.

³⁵ U.S. Environmental Protection Agency. “Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of ‘Waters of the United States.’” 68 Federal Register 1994-95. January 15, 2003.

for consistent, minimum standards to regulate wetlands. *SWANCC* and other court rulings do not prevent states from protecting non-jurisdictional waters through legislative or administrative action, but few states have done so. Prior to *SWANCC*, 15 states had programs that regulate isolated freshwater wetlands to some degree, but state officials acknowledge that these programs vary substantially from some that are comprehensive in scope to others that are limited by wetland size or have exemptions for agriculture and other activities.³⁶ Since 2001, a few states have passed new legislation or updated water quality regulations; the issue remains under consideration in several states, where competing proposals that are viewed by some as strengthening and by others as weakening wetland protection are being debated.³⁷

Although some states have authorities to regulate waters of their state, their ability to regulate effectively may be compromised, because state rules often are tied to federal definitions. The gap produced by reduced federal jurisdiction is most evident in the 32 states that have no independent wetlands programs and that typically have relied on CWA section 401 water quality certification procedures to protect wetlands. Pursuant to section 401, applicants for a federal permit must obtain a state certification that the project will comply with state water quality standards. Consequently, by conditioning certification, states have the ability to affect the federal permit and to exercise some regulatory control over wetlands without the expense of establishing independent state programs. However, as described previously, diminished CWA jurisdiction which affects the section 404 program also limits the reach of other CWA programs, including section 401.

Analysts familiar with the political and fiscal environments of states believe that most states are either reluctant or unable “to step boldly into the breach in federal wetlands protection....The Corps and the U.S. Environmental Protection Agency, not to mention Congress, have little cause to rely on the notion that states will effectively backstop federal protection for isolated wetlands.”³⁸ Many states are barred from enacting laws or rules more stringent than federal rules, or are reluctant to take action, due to budgetary and resource concerns, as well as apprehension that regulation will be judged to involve “taking” of private property and require compensation.

In Congress, legislation has been introduced that would address the CWA jurisdictional issues discussed here. One proposal, H.R. 1356, the Clean Water Authority Restoration Act of 2005, would provide a broad statutory definition of “waters of the United States;” clarify that the CWA is intended to protect U.S. waters from pollution, not just maintain their navigability; and include a set of findings to assert constitutional authority over waters and wetlands. Other legislation to restrict regulatory jurisdiction also has been introduced in the 109th Congress (H.R. 2658, the Federal Wetlands Jurisdiction Act of 2005). It would narrow the statutory definition

³⁶ Kusler, p. 15.

³⁷ Goldman-Carter, Jan. “Isolated Wetland Legislation: Running the Rapids at the State Capitol.” *National Wetlands Newsletter*. May-June 2005. pp. 27-29.

³⁸ Odell, Turner. “On Soggy Ground — State Protection for Isolated Wetlands.” *National Wetlands Newsletter*. September-October 2003. p. 10.

of “navigable waters” and define certain isolated wetlands and other areas as not being subject to federal regulatory jurisdiction. Neither bill has received congressional action.