THE CLEAN WATER ACT AFTER RAPANOS & CARABELL:
THE PERFECT LEGAL STORM

Each level of government – federal, state and local - has a regulatory interest in development activities occurring at or near wetlands. Because wetlands occupy the transition zone between land and water, they often have contested factual and regulatory boundaries. They also provide many occasions to test the limits of federal regulatory authority, the most recent of which was addressed by the United States Supreme Court on June 19, 2006. The Court handed down a decision that restricts the reach of the Clean Water Act, Rapanos v. United States, and Carabell v. U.S. Army Corps of Engineers. 547 U.S. ___(2006), available online at http://www.eswr.com/1105/rapanos/rapanos-fullopinionscotus.pdf The Supreme Court has clarified and narrowed the scope of federal power over wetlands under the CWA.

Before now the federal circuits had been divided on the correct test for determining when a non-navigable feature, such as a wetland, should be treated as "navigable" for regulatory purposes. Some thought the key was whether the proximity of the wetland to the navigable water was enough to justify federal regulation. Some felt there must be some hydrological connection to the navigable water, and others thought that being within the watershed of the navigable waters was sufficient. Still others pondered how close the "nexus" must be to justify the use of federal regulatory power.

These cases have drawn intense interest at the federal, state and local level, and have been closely watched by the regulatory community, environmental organizations, property owners and state and local water agencies. It is important to understand that in general, Commerce Clause jurisprudence attempts to strike a balance between the authority of the federal government over matters of national interest and the exercise of state authority over matters of state and local interest preserved to the states by the Tenth Amendment. In the area of wetlands regulation, the tension between these constitutional provisions came to a head in a collision of national, state, and local interests that some have called the perfect "legal storm."

In Carabell and Rapanos, the Court took the opportunity to rein in the power of Congress to enact federal environmental laws. The Court's decision turned on the meaning of "navigable waters" and its application to federal wetlands regulation under the CWA. The CWA, as well as many other environmental laws, is based on the Commerce Clause, which is Congress' constitutional authority to "regulate commerce . . . among the several states." Over 180 years ago, the Supreme Court held that "commerce" includes "navigation." The question begging for resolution was whether the application of the CWA to some non-navigable wetlands, based on the potential effect to interstate commerce and de-linked from the traditional connection to "navigable waters," exceeded Congress' constitutional authority. In a plurality opinion by Justice Scalia, with a concurring opinion by Justice Kennedy, the Court sidestepped the constitutional question and found that the Corps had overstepped its authority under the CWA, basing its decision on statutory interpretation.
By way of background, Section 404 of the Clean Water Act (CWA) was enacted in 1972 and gave federal regulators the power to control the discharge of pollutants into “navigable waters.” The term “navigable waters” is a jurisdictional prerequisite to the application of the CWA. It is statutorily defined by Congress to mean “waters of the United States.” It is important for state and local governments to know when and under what conditions they can face a challenge through an enforcement action based on not having a Section 404 permit or for failing to comply with the terms of a 404 permit that has been granted. The U.S. Army Corps of Engineers is the lead federal agency on wetlands regulation, and it has broadly construed the grant of jurisdiction from Congress over “waters of the United States” to include marshland that was not directly adjacent to lakes and navigable rivers and streams, including situations where the linkage was through a network of ditches and drainage canals. At the core of these decisions was whether “navigable waters” could rationally include wetlands whose only connection to a body of water on which a boat can float is that the wetlands drained into creeks or ditches that in turn drained into small streams that eventually flowed into navigable waters.

I. Overview of Section 404 of the Clean Water Act

Section 404 of the CWA establishes a permit system, administered by the Corps of Engineers for the discharge of dredged or fill material into “waters of the United States.” The Corps’ definition of the term “waters of the United States” is tied to interstate commerce. Discharges to such waters without a Section 404 permit are prohibited, and even with a permit, the use and development of land may be significantly curtailed by conditions imposed by the Corps’ Section 404 permit.

The permitting system has teeth. Failure to have a required Section 404 permit or the failure to comply with its terms, exposes the property owner to civil as well as criminal liability. In Carabell, landowners owned 19 acres of land about a mile from Lake St. Clair in Michigan, connected to the lake by a network of manmade ditches. Many critics of the Corps’ seemingly overarching regulatory authority in this field, including at least four of the Justices, confronted what appeared to be an unending effort by the Corps to federalize every drop of water in the country. The Court’s decision marks a line of demarcation beyond which the judicial branch was unwilling to allow a massive federal regulatory agency in Washington, D.C. to be in charge of development miles away from any recognizably navigable waters.

Today, wetlands are appreciated as a vital link between water and land, aid flood control by absorbing excess rainwater, reducing soil erosion, and filtering pollutants from the water supply. Wetlands provide the habitat for waterfowl, fish, plants and many endangered species, as well as spawning and nursery areas for fisheries.

Section 404 of the CWA was intended by Congress to be a pollution control statute designed to protect and preserve the “waters of the United States.” Over the years the CWA has shifted the focus of federal regulation from protecting navigability to preserving and protecting.
the nation’s waters from environmental degradation. This shift has rendered problematic the significance of the connection to navigability. From a pragmatic standpoint, “waters of the United States” may or may not be navigable in fact. Indeed, the CWA does not require that a wetland be navigable in fact or susceptible of navigation through modification. As a consequence, the federal courts have been left with the task of determining the theoretical connection between “navigable waters” and “waters of the United States” and their application to wetlands. Carabell and Rapanos go a long way toward clarifying when wetlands are covered by the CWA, and how strong the connection to navigable waters must be for the CWA to apply.

II. U. S. v. Riverside Bayview Homes, Inc.

The Court’s wetlands jurisprudence got a jump-start in 1985 when the Supreme Court decided U. S. v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985). There the Court upheld the Corps’ assertion of regulatory authority over an 80-acre parcel of non-navigable, low-lying marshy wetlands on the basis that there was a “significant nexus” between the “adjacent” wetlands and navigable waters. It expansively construed the meaning of the term "navigable" to align it with what it considered Congress' stated purpose. “Adjacent” wetlands, the Court reasoned, were waters that together with navigable waters “form the entire aquatic system,” and “affect the water quality of the other waters within the aquatic system.”

The Court emphasized that it was not the intent of Congress for “navigable waters” to be solely limited by the traditional test of navigability in fact. Its view was that the authority of the federal government to protect the water quality of navigable waterways included sufficient regulatory authority over “some waters” that would not be considered navigable under the traditional concept of navigability. Congress’ intent was “to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed ‘navigable’ under the classical understanding of that term.”

The Court declined to decide, however, whether federal authority might extend to isolated “waters” that were not “adjacent” to navigable waters. It did not resolve the scope of Congress’ constitutional authority over “some waters that would not be deemed ‘navigable’ under the classical understanding of that term.” That resolution came in 2001 with SWANCC.

III. Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers

In Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001), the Corps denied a Section 404 permit to plaintiffs who wanted to develop a solid waste disposal site on an abandoned sand and gravel pit that contained ponds used by migratory birds.

The Corps sought to exercise its regulatory authority over the intrastate, isolated ponds based on the theory that migratory birds, which fly across state lines, could potentially use the
pond waters habitat. The Supreme Court in a 5-4 decision held the Corps had exceeded its regulatory authority under Section 404(a) and that its actions were held inconsistent with Congress’ intent. The Court declined to consider the constitutional question whether Congress had the power to assert jurisdiction, concluding that Congress did not intend the Corps to exercise regulatory authority over such “waters.”

IV. Carabell v. U.S. Army Corps of Engineers

In Carabell, the plaintiffs applied to the Corps to place approximately 57,000 cubic yards of fill on about 15 acres of wooded wetlands located next to a ditch which in turn connected to the Sutherland-Oemig Drain, which emptied into a creek, which eventually emptied into Lake St. Clair. When the ditch was excavated, spoils were placed on each side of the ditch, creating a berm that blocked surface water drainage from the plaintiffs’ property into the ditch. The berm severed the surface hydrological connection between the plaintiffs’ property and the ditch.

Even though the plaintiffs contested the Corps’ assertion of jurisdiction over their project because of the absence of either a hydrological connection or a physical connection to navigable waters, they still applied for a Section 404 permit. The Corps denied the permit on the ground that the project would have “major long term, negative impacts on water quality, on terrestrial wildlife, on the wetlands, on conservation, and on the overall ecology of the area” as well as “minor negative impacts on downstream erosion and sedimentation, on flood hazards and floodplain values, and aquatic wildlife.”

Following an unsuccessful administrative appeal and a loss by the plaintiffs at the district court level, the Sixth Circuit affirmed the district based on SWANCC’s adjacency requirement. It upheld the Corps’s definition of “adjacent,” as “bordering, contiguous, or neighboring,” and including “wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like.” Applying the Corps’ definition of “adjacent wetlands,” which included wetlands separated from waters of the United States by man-made dikes or barriers, the Sixth Circuit concluded that the absence of a present hydrological connection to the non-navigable ditch did not foreclose the finding that the Corps had jurisdiction.

Carabell presented the Supreme Court with a question of statutory construction as well as a question of constitutional law. The question of statutory construction was whether the Corps’ regulatory authority under the CWA extended to wetlands that are hydrologically disconnected from “waters of the United States,” but may impact them ecologically or environmentally. The constitutional question focused on Congress’ constitutional power: Does the Commerce Clause empower Congress to exercise federal authority over wetlands that are hydrologically disconnected from “waters of the United States,” but may impact them ecologically or environmentally?

V. Rapanos v. United States
In a companion case, *Rapanos v. United States*, John and Judith Rapanos were frustrated in their efforts to plan and construct a shopping center on their property which contained wetlands. After both state regulators and their own consultant reported that part of the site contained wetlands, the owner bulldozed the site to remove the wetlands. After an EPA order to cease the filling of the wetlands was ignored by the owners, they were charged and convicted of illegally discharging fill material into over 50 acres of protected wetlands in violation of the CWA. The district court found that defendants had violated the CWA, and the Sixth Circuit affirmed, on the basis that there was a hydrological connection between the wetlands and navigable waters, and that federal regulation under the CWA was proper.

The owners in *Rapanos* argued before the Supreme Court that the wetlands did not abut a navigable water, and Congress has no Commerce Clause power over their property.

Both cases were consolidated on appeal and argued February 21, 2006. The United States Supreme Court vacated and remanded both cases to the Sixth Circuit. Justice Scalia, joined by Chief Justice Roberts, and Justices Thomas and Alito, characterized the central problem as “the immense expansion of federal regulation of land use that has occurred under the Clean Water Act.” The plurality also agreed that the only way to cut back on that expanded regulatory authority was to restore a common-sense definition of “navigable waters” as “relatively permanent standing or flowing bodies of water.” The fifth Justice who sided with the plurality’s result was Justice Kennedy, but he took a more expansive view of the reach of the CWA, stating that the proper definition of “navigable waters” could include temporary channels of water, as long as they had a “significant nexus” to larger bodies of water. In Justice Kennedy’s view, they must “significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as “navigable.” He noted that those wetlands with only a “speculative or insubstantial” connection would not qualify.

The four-Justice dissent consisting of Justices Stevens, Souter, Ginsberg, and Breyer said that the Corps’ view of its own authority was right, and that the Executive branch and Congress had acquiesced in it for years.

**Conclusion**

While the Supreme Court has continued in its refusal to accept the invitation to decide the extent of Congress’ constitutional power under the Clean Water Act (CWA), it has provided a somewhat restricted interpretation that many see as a pull-back on the Corps of Engineers’ broad authority to regulated wetlands under Section 404 of the Clean Water Act. In its fractured four-plus-one plurality and concurring opinion in *Carabell v. U.S. Army Corps of Engineers* and *United States v. Rapanos*, the Court has assured us that this decision will not end the legal battle over federal regulation of wetlands, a battle that is likely continue until the Court clarifies the precise scope of Congress’ power.

This decision is based on the more measured approach of clarifying the Corps’ regulatory definition of the term “navigable waters” based on Congress’ intent. The impact of *Carabell* and
Rapanos is important to federal and state regulators as well as the property owners of wetlands and state and local governments that often find themselves in the middle of section 404 enforcement controversies. The Corps is currently the primary regulator of wetlands under the CWA, and not the states. Now that the Corps’ authority over “wetlands” has been narrowed, this will shift additional regulatory responsibility to the states. In an article soon to be published in The Urban Lawyer, Professor Jack Minan has made it clear in his analysis of these two cases that it is unlikely that states will embrace this “added” responsibility without enhanced federal financial aid to support their efforts. Most state budgets are already severely pinched, and no states are asking for more unfunded federal mandates. In the end, it may well be that while the Court has cut back on the Corps’ power under the CWA, the failure of a state to have a regulatory system to protect “isolated” wetlands will likely result in the loss of those wetlands not protected by federal law.

This summary of Rapanos and Carabell was prepared by IMLA Member Benjamin E. Griffith, Board Attorney for the YMD Joint Water Management District in Mississippi, based upon material contributed by Professor John H. Minan, Professor of Law, University of San Diego School of Law, for an upcoming issue of The Urban Lawyer.