



FREQUENTLY ASKED QUESTIONS ABOUT CLEAN WATER ACT JURISDICTION

Q1: What was the first United States Supreme Court case to examine Clean Water Act (CWA) jurisdiction?

A1: On December 4, 1985, the United States Supreme Court in a unanimous decision, *United States v. Riverside Bayview Homes Inc.*, 474 U.S. 121 (1985) (*Riverside Bayview*), upheld the United States Army Corps of Engineers' (Corps') rulemaking decision to include "wetlands adjacent to navigable waters or interstate waters and their tributaries" within the definition of "waters of the United States." *Id.* at 129. The Court found "Congress chose to define the waters covered by the Act broadly." *Id.* at 133. The Court deferred to the Corps' rulemaking conclusion determining adjacent wetlands that are "inseparably bound up with the 'waters of the United States'" are themselves jurisdictional. Specifically, the Court concluded:

In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment [in the rulemaking] about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.

Id. at 134.

Q2: What was the status of agency assertions of jurisdiction under the CWA prior to the United States Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, et al.*, 531 U.S. 159 (2001) (SWANCC)?

A2: In 1986, the Corps issued the "Migratory Bird Rule" extending federal CWA jurisdiction beyond "interstate waters" to all "intrastate waters" which "are or could be used as habitat" by migratory birds. In other words, CWA jurisdiction was based upon the potential presence of birds only. Moreover, under the "bird rule," the agencies did not need to identify whether a waterbody was an "adjacent" wetland or a tributary. The sole test was potential bird use. The "bird rule" was ultimately challenged and rejected by the United States Supreme Court in the SWANCC decision. Furthermore, the Court believed that the "bird rule" raised serious constitutional questions

under the Commerce Clause of the U.S. Constitution. Therefore, legislation that purports to “restore” jurisdiction to that which was in existence prior to *SWANCC* would likely authorize federal control as broad or broader than the “bird rule” -- and would likely be unconstitutional.

Q3: How did the United States Supreme Court in *SWANCC* describe Congress’s intent regarding jurisdiction under the CWA?

A3: On January 9, 2001, the United States Supreme Court issued the *SWANCC* decision rejecting the Corps’ assertion of jurisdiction over isolated ponds (former gravel pits that collected rainwater) based upon the Migratory Bird Rule. The Court noted that *Riverside Bayview* concerned “*adjacent*” *wetlands*; whereas the *SWANCC* case concerned “*isolated*” *ponds*. The Court distinguished the wetlands in *Riverside Bayview* from the isolated ponds in *SWANCC*, emphasizing that it was the “significant nexus between the wetlands and ‘navigable waters’ that informed our reading of the CWA in *Riverside Bayview*.” *Id.* at 167. While the *SWANCC* Court acknowledged that the word “navigable” was not to be construed in a traditional or literal sense, Chief Justice Rehnquist cautioned “it is one thing to give a word limited effect and quite another to give it no effect whatever.” *Id.* at 172.

The Court also noted there were “significant constitutional questions raised by” the Corps’ assertion of jurisdiction over *all intrastate waters* based upon the potential use for migratory birds. *Id.* at 174. Indeed, the *SWANCC* Court determined that claiming jurisdiction “over ponds and mudflats would result in a significant impingement of the States’ traditional and primary power over land and water use.” *Id.* Further, the Court cited the CWA’s own language as expressing a desire to “recognize, preserve, and protect the primary responsibilities of States . . . to plan the development and use . . . of land and water resources. . .” *Id.* (citing 33 U.S.C. § 1251(b) of the CWA).

Q4: Why was there confusion after the *SWANCC* decision?

A4: Prior to *SWANCC*, federal agencies had been regulating all waters, isolated, adjacent, or otherwise, based upon the *potential use* by migratory birds. Since birds land in almost all water in the United States, the agencies did not need to make detailed factual findings about whether a water was “isolated,” “adjacent,” or a “tributary.” Instead, if a bird could use the area, the area was subject to federal control. *SWANCC* invalidated reliance on the bird rule. Therefore, the agencies were forced to rely on their existing regulations to establish jurisdiction. These regulations broadly cover all “adjacent wetlands” and “tributaries.” However, the term “adjacent” was vaguely defined, and the term “tributary” had no regulatory definition. Without definitions, the agencies after *SWANCC* stretched the meaning of these vague or undefined terms to reach previously “isolated” waters.

Q5: What did the Bush Administration do in response to the SWANCC decision?

A5: On January 15, 2003, the Environmental Protection Agency (EPA) and the Corps issued an "Advance Notice of Proposed Rulemaking (ANPRM) on the Clean Water Act Regulatory Definition of 'Waters of the United States.'" 68 Fed. Reg. 1991 (January 15, 2003). The ANPRM *was not a proposed rule*. Rather, it did nothing more than solicit public comment on whether a rulemaking was necessary. In this regard, the ANPRM noted "SWANCC eliminates CWA jurisdiction over isolated, intrastate, non-navigable waters where the sole basis for asserting jurisdiction is the actual or potential use of the waters as habitat for migratory birds . . ." *Id.* at 1994. Indeed, this is the same statement of the holding of the case made by the Clinton Administration in their guidance memorandum on SWANCC dated January 30, 2001. The agencies' next step was to seek comments on whether there were other factors that could be used in asserting jurisdiction over these waters. In so doing, the agencies asked if there should be a definition of "isolated waters" and, if so, what factors should be used in determining whether a water is isolated or not.

Attached to the ANPRM was a "Joint Memorandum" providing guidance on SWANCC. The agencies noted because SWANCC limited use of the migratory bird rule, "it has focused greater attention on CWA jurisdiction generally, and specifically over tributaries to jurisdictional waters and over wetlands that are 'adjacent wetlands.'" *Id.* at 1996. In other words, a water was not considered "isolated" if it was "adjacent" to a "tributary." Therefore, such an analysis raised the question what do "adjacent" and "tributary" mean?

Q6: Did the ANPRM or Joint Memorandum limit the agencies' jurisdiction to traditional navigable waters?

A6: No. The Joint Memorandum unequivocally stated that "[f]ield staff should continue to assert jurisdiction over traditional navigable waters and adjacent wetlands and, generally speaking, their tributary systems and adjacent wetlands." *Id.* at 1998. Any statistics based upon the assumption that the Joint Memorandum limited jurisdiction to traditional navigable waters are similarly false. In short, the Joint Memorandum did NOT itself find SWANCC as holding that CWA jurisdiction is limited to traditional navigable waters, nor did the Joint Memorandum limit jurisdiction to traditional navigable waters as a matter of policy. Instead, the Joint Memorandum merely surveyed cases that had interpreted SWANCC, some of which found broad jurisdiction and others of which found narrow jurisdiction. The Joint Memorandum ultimately concluded that field staff should not assert jurisdiction "over isolated waters that are both intrastate and non-navigable, where the sole basis available for asserting CWA jurisdiction rests on any of the factors listed in the Migratory Bird Rule." *Id.* at 1997. In addition, the Joint Memorandum stated that field staff should seek formal project-specific headquarters approval prior to

asserting jurisdiction over waters based on other factors listed in the regulations.

The agencies ultimately withdrew the ANPRM and decided not to propose a rule to amend their regulations to address key terms.

Q7: How did the Bush Administration interpret the SWANCC decision in litigation?

A7: The Bush Administration asserted the broadest possible view of jurisdiction following *SWANCC*. It argued, as did the Clinton Administration before it, that the *SWANCC* case was limited to invalidating the assertion of jurisdiction over *isolated waters* based upon the migratory bird rule. In turn, the Bush Administration argued that if a wetland was “hydrologically connected” to navigable waters, no matter how tenuous, remote, or speculative the connection, it was considered an “adjacent” wetland and therefore covered by the CWA. Similarly, most non-wetland features connected hydrologically in some form over some distance to traditional navigable waters were deemed tributaries and therefore not isolated. Indeed, ditches which were previously non-jurisdictional were now deemed “tributaries,” and wetlands “adjacent” to the ditches were “adjacent wetlands.”

Q8: What did the *Rapanos* Court decide?

A8: The consolidated cases of *Rapanos v. United States (Rapanos)* and *Carabell v. U.S. Army Corps of Engineers (Carabell)*, *Rapanos v. United States*, 126 S.Ct. 2208 (2006), once again examined the extent of federal jurisdiction under the CWA. *Rapanos* rejected the agencies’ “any hydrological connection” theory of jurisdiction. The case involved three wetland parcels (two adjacent to a ditch, one adjacent to a river) located twenty miles away from the nearest navigable-in-fact water. *Carabell* involved a wetland about a mile away from traditional navigable water. The wetland was near an upland ditch that is part of the municipal storm drainage system, and a berm separated the wetland from the ditch. In both cases, the Bush Administration argued that the wetlands at issue were not “isolated” but rather “adjacent” jurisdictional waters because some “hydrological connection” to traditional navigable waters could be discerned.

All nine Justices rejected arguments that the CWA regulated only traditional navigable waters. Therefore, it is clear that, even under the most conservative Justices’ view, CWA jurisdiction extends well beyond traditional navigable waters.

Importantly, a majority of the Justices rejected the Corps’ “any hydrological connection” theory of jurisdiction. Those five Justices, however, did not agree on what the proper scope for determining jurisdiction is. Although there is much debate on how to determine the precise holding of the case, it is clear that Justice Kennedy’s opinion (which cast the necessary fifth vote to

reject the Government's theory) is critical to determine the extent of "navigable waters" covered by the CWA.

Justice Kennedy found the Government's "any connection" theory raised significant constitutional concerns. He found instead the "significant nexus" standard used in *Riverside Bayview* and *SWANCC* is the operative standard for determining whether a non-navigable water or wetland should be regulated under the CWA. "Absent more specific regulations . . . the Corps must establish a significant nexus on a case-by-case basis. . . ."

Kennedy was not the only Justice to call for new agency regulations. Chief Justice Roberts noted rulemaking:

would have [given the agencies] plenty of room to operate in developing some notion of the outer bound to the reach of their authority. . . . Rather than providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot is another defeat for the agency.

Moreover, as Justice Breyer of the dissent also observed, the agencies should "write new regulations, and speedily so."

Q9: Must Congress amend the CWA in response to the United States Supreme Court cases?

A9: No. One of the few similarities among all sides of the *Rapanos* decision is the call for further regulation, not an alteration of the CWA itself. The CWA provides sufficiently broad authority to define jurisdictional waters and to control pollution in those waters. In this regard, the aforementioned Supreme Court cases uphold federal authority over "adjacent" wetlands (*Riverside Bayview*); reject authority to regulate "isolated" ponds (*SWANCC*); and reject limiting the CWA to traditional, navigable-in-fact waters (*Rapanos*). The Court also rejected the agencies' attempt to reach all intrastate waters with a hydrological connection, the position they asserted in *Rapanos*. Accordingly, the problem is not with the statute and its use of the term "navigable," but with the agencies' regulations which fail to clearly define the key terms under these cases: "isolated," "adjacent," "significant nexus," and "tributary." These terms, like the agencies' technical decision to regulate adjacent wetlands upheld in *Riverside Bayview*, should be defined by the agency through the notice and comment process of a rulemaking.

Q10: Does removing the term "navigable" from the statute clarify the intent of Congress in passing the CWA in 1972?

A10: No. It is clear that Congress intended to use the term "navigable waters" when it passed the CWA in 1972. The conference report specifically states that "Congress intends the term 'navigable waters' be given its broadest

possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. REP. NO. 92-1236, at 144 (1972), *reprinted in* 1 CONGRESSIONAL RESEARCH SERVICE, LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 327 (1973). Taking the term "navigable" out of the statute would be the exact opposite of what Congress intended, as their emphasis in 1972 was specifically on using the term "*navigable waters*." *Deleting the term from the statute does not clarify the original intent; it changes it.*

Q11: What happens if the term "navigable" is removed from the CWA?

A11: Removing the term "navigable waters" from the statute would change the original intent of Congress in enacting the CWA. Such an amendment would also raise serious questions about its constitutionality, impair ordinary permitting decisions made by Corps personnel in the field, and definitely lead to more litigation raising Commerce Clause issues. Since 1824, it has been well-settled law that the federal regulatory authority over "navigable waters" is based on Congress's power to regulate navigation under the Commerce Clause. In making the statement in the conference report about regulating navigable waters, Congress was exercising its authority under the Commerce Clause. Maintaining the term "navigable waters" makes it clear that, while Congress has asserted its broad authority under the Commerce Clause, this jurisdiction is not limitless.

Moreover, deleting the term "navigable" from the statute would call into question section 101(b) of the CWA declaring Congress's intent for States to have the primary responsibility for land and water decisions. If all waters are subject to federal control, then few if any waters would be controlled by the State. The term "navigable" preserves a balance with the States.

Q12: Does the CWA recognize the States' primary rights and responsibilities over land and water resources?

A12: Yes. CWA section 101(b) states that "[i]t is the policy of the Congress to recognize, preserve, and protect the *primary responsibilities and rights* of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." CWA § 101(b). In *SWANCC*, the Court declined to extend federal jurisdiction over ponds and mudflats falling within the "Migratory Bird Rule" because to do so would result in a significant impingement of the States' traditional and primary power over land and water use. The Court noted that regulation of land use is a function traditionally performed by local governments, and Congress chose to preserve and protect the primary responsibilities of the States in the CWA. Proposals that would grant federal control over all "intrastate waters" would

readjust the federal-state balance of the CWA and suffer from the same legal infirmities as the “bird rule.”

Q13: What does it mean to enact legislation that “restores CWA authority” to that which existed prior to the decision in *SWANCC*?

A13: Prior to *SWANCC*, the agencies asserted jurisdiction based upon a waterbody’s potential use for migratory birds. Accordingly, all water everywhere that could be used by birds was subject to federal jurisdiction. The Supreme Court found that there were significant constitutional questions raised by the breadth of jurisdiction under this standard, in addition to ruling that this standard went far beyond the jurisdiction established by Congress in the CWA. Any legislation similar to the “migratory bird rule” would face similar constitutional challenges and protracted, costly litigation, resulting in future regulatory uncertainty hindering the Corps from making permitting decisions.

Q14: Is the CWA sufficient to protect aquatic resources?

A14: Yes. The CWA is arguably the most comprehensive environmental law in the nation. It regulates pollution at its source, whether it is a discharge of a pollutant from an industrial pipe, a wastewater treatment plant, or a concentrated animal feeding operation (CAFO). Congress devised a comprehensive regulatory system at both the federal and state levels for issuance of permits and state water quality standards. In addition, the permit process has teeth, and can result in substantial fines or even jail for those who violate the Act's no discharge mandate. Moreover, individual parts of the CWA protect specific aquatic resources, such as estuaries, the Great Lakes, and beaches. Congress never envisioned that every conveyance that could possibly carry water had to be regulated as a water of the United States for the CWA to be protective. On the contrary, the existing CWA broadly regulates pollution without federalizing all areas that are wet.

About the Waters Advocacy Coalition

The Waters Advocacy Coalition is active in working to protect our nation’s wetlands resources as members of the regulated community and/or co-regulators and is comprised of both public and private organizations. Members include: American Farm Bureau Federation; American Forest & Paper Association; American Road & Transportation Builders Association; Associated General Contractors of America; CropLife America; Edison Electric Institute; The Fertilizer Institute; Foundation for Environmental and Economic Progress; International Council of Shopping Centers; National Association of Counties; National Association of Flood & Stormwater Management Agencies; National Association of Home Builders; National Association of Industrial and Office Properties; National Association of Manufacturers; National Association of State Departments of Agriculture; National Cattlemen’s Beef Association; National Corn Growers Association; National Mining Association; National Multi Housing Council; National Pork Producers Council; National Stone, Sand & Gravel Association; and RISE – Responsible Industry for a Sound Environment.

For more information, contact Virginia Albrecht or Deidre Duncan at Hunton & Williams LLP at (202) 955-1919.