No. 06-619

In the Supreme Court of the United States

BACCARAT FREMONT DEVELOPERS, LLC, PETITIONER

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
SUE ELLEN WOOLDRIDGE
Assistant Attorney General
ELLEN DURKEE
KATHERINE W. HAZARD
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the wetlands at issue in this case are "waters of the United States" within the meaning of the Clean Water Act, 33 U.S.C. 1362(7).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

Regulations—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 06-619

BACCARAT FREMONT DEVELOPERS, LLC, PETITIONER

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 425 F.3d 1150. The opinion of the district court (Pet. App. 15a-24a) is reported at 327 F. Supp. 2d 1121.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 2005. A petition for rehearing was denied on August 3, 2006 (Pet. App. 51a-52a). The petition for a writ of certiorari was filed on November 1, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves the permitting requirements of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended, Pub. L. No. 95-217, 91 Stat. 1566, 33 U.S.C. 1251 *et seq.* (Clean Water Act or CWA). Pursuant to Section 404(a) of the CWA, 33 U.S.C. 1344(a), petitioner sought a permit from the United States Army Corps of Engineers (Corps) to place fill material into 2.36 acres of wetlands in Alameda County, California. Pet. App. 17a, 37a. After determining that the relevant wetlands are subject to its regulatory jurisdiction, the Corps issued a permit that allows petitioner to fill the 2.36 acres but requires certain mitigation conditions to offset the loss of those wetlands. *Id.* at 4a. Petitioner filed suit, contending that the wetlands on the site are not "waters of the United States" within the meaning of the CWA, 33 U.S.C. 1362(7), and that the Corps therefore acted arbitrarily or capriciously by requiring mitigation measures. Pet. App. 4a-5a. The district court granted summary judgment to the Corps, *id.* at 15a-24a, and the court of appeals affirmed. *Id.* at 1a-13a.

1. Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). Section 301(a) of the CWA prohibits the "discharge of any pollutant by any person" except in compliance with the Act. 33 U.S.C. 1311(a). The term "discharge of a pollutant" is defined to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). The CWA defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

The Corps and the United States Environmental Protection Agency (EPA) share responsibility for implementing and enforcing Section 404 of the CWA, 33 U.S.C. 1344, which authorizes the issuance of permits for the discharge of dredged or fill material into waters covered by the Act. See, *e.g.*, 33 U.S.C. 1344(a)-(c). The Corps and EPA have promulgated substantively equivalent regulatory definitions of the term "waters of the United States." See 33 C.F.R. 328.3(a) (Corps definition); 40 C.F.R. 230.3(s) (EPA definition). That definition encompasses, inter alia, waters susceptible to use in interstate commerce, including tidal waters, see 33 C.F.R. 328.3(a)(1), 40 C.F.R. 230.3(s)(1); "[t]ributaries" of such waters, see 33 C.F.R. 328.3(a)(5), 40 C.F.R. 230.3(s)(5); and wetlands that are "adjacent" to other covered waters, see 33 C.F.R. 328.3(a)(7), 40 C.F.R. 230.3(s)(7).[1] The regulations define the term "adjacent" to mean "bordering, contiguous, or neighboring," and they provide that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" 33 C.F.R. 328.3(c).

The Corps has also promulgated regulations governing the Section 404 permit-application process. 33 C.F.R. Pts. 320, 323, 325. Under those regulations, "[t]he Corps has authorized its district engineers to issue formal determinations concerning the applicability of the [CWA] * * * to activities or tracts of land." 33

---

[1] To avoid confusion between the term "navigable waters" as defined in the CWA and implementing regulations, see 33 U.S.C. 1362(7) and 33 C.F.R. 328.3, and the use of the term "navigable waters" to describe waters that are, have been, or could be used for interstate or foreign commerce, see 33 C.F.R. 328.3(a)(1), this brief will refer to the latter as "traditional navigable waters."

C.F.R. 320.1(a)(6); see 33 C.F.R. 325.9. Thus, before any discharge of dredged or fill material has occurred, a private landowner may request that the Corps issue a jurisdictional determination so that the landowner can ascertain whether activities at a particular site would require a federal permit.

2. This Court has recognized that Congress, in enacting the CWA, "evidently intended 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." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (*Riverside Bayview*); see *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 486 n.6 (1987) ("While the Act purports to regulate only 'navigable waters,' this term has been construed expansively to cover waters that are not navigable in the traditional sense."). In *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Court held that use of "isolated" nonnavigable intrastate waters by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. *Id.* at 166-174. The Court noted, and did not cast doubt upon, its prior holding in *Riverside Bayview* that the CWA's coverage extends beyond waters that are "navigable" in the traditional sense. See *id.* at 172.

Most recently, the Court again construed the CWA term "waters of the United States" in *Rapanos* v. *United States*, 126 S. Ct. 2208 (2006). *Rapanos* involved two consolidated cases—*Rapanos* v. *United States*, No. 04-1034, and *Carabell* v. *United States Army Corps of*

Engineers, No. 04-1384—in which the CWA had been applied to pollutant discharges into wetlands adjacent to nonnavigable tributaries of traditional navigable waters. *Ibid.*; see *id.* at 2219 (plurality opinion). All Members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense. See *id.* at 2220 (plurality opinion); *id.* at 2241 (Kennedy, J., concurring in the judgment); *id.* at 2255 (Stevens, J., dissenting).

Four Justices in *Rapanos* interpreted the term "waters of the United States" as covering "relatively permanent, standing or continuously flowing bodies of water," 126 S. Ct. at 2225 (plurality opinion), that are connected to traditional navigable waters, *id.* at 2226-2227, as well as wetlands with a continuous surface connection to such water bodies, *id.* at 2227.[2] Justice Kennedy interpreted the term to encompass wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 2236 (Kennedy, J., concurring); see *id.* at 2248. In addition, Justice Kennedy concluded that the Corps' assertion of jurisdiction over "wetlands adjacent to navigable-in-fact waters" may be sustained "by showing adjacency alone." *Ibid.* The four dissenting Justices, who would have affirmed the court of appeals' application of the pertinent regulatory provisions, also concluded that the term "waters of the United States" encompasses, inter alia, all tributaries and wetlands that satisfy either the plural-

[2] The *Rapanos* plurality noted that its reference to "relatively permanent" waters "d[id] not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." 126 S. Ct. at 2221 n.5.

ity's standard or that of Justice Kennedy. See *id.* at 2265 & n.14 (Stevens, J., dissenting).

3. In 1997, petitioner purchased a 30.98-acre site in Fremont, California, near San Francisco Bay, on which it planned to develop an office complex. The site is roughly rectangular in shape and is bordered on the south and west by property owned by the Alameda County Flood Control District (ACFCD). Two ACFCD flood control channels, which rise and fall with the tide and connect to San Francisco Bay, run parallel to the southern and western boundaries of the site. Pet. App. 2a-4a, 16a-17a, 24a, 28a.

The relevant site contains 7.66 acres of wetlands. Pet. App. 2a. Petitioners acknowledge that 0.48 acres of the site are tidally inundated through a leaking flap gate in a culvert and therefore are "waters of the United States" within the meaning of the CWA. See Pet. 7 n.3; Pet. App. 15a n.1, 16a. Between the wetlands and the flood control channels is a man-made berm topped by a maintenance road, which parallels the southern and western boundaries of the site. *Id.* at 2a-3a, 16a. At the closest point, the edge of the wetlands is approximately 65-70 feet from the tidal waters. *Id.* at 3a, 40a. Two culverts that pass through the berm connect the wetlands hydrologically to the western channel. *Id.* at 43a-44a.

4. At petitioner's request, the Corps' San Francisco District conducted a jurisdictional determination pursuant to 33 C.F.R. 320.1(a)(6) and 325.9.[3] On January 28,

[3] In February 1998, the San Francisco District initially determined that 7.66 acres of wetlands on the site were covered by the CWA as wetlands adjacent to traditional navigable waters, see 33 C.F.R. 328.3(a)(1), (7) and (c). See Pet. App. 3a. After this Court issued its decision in *SWANCC*, petitioner requested that the Corps reconsider

2002, the San Francisco District issued a jurisdictional determination, concluding that 7.66 acres of wetlands on the site are adjacent to tidal waters and thus subject to the Corps' jurisdiction under the CWA. Pet. App. 3a-4a, 37a-44a. The District determined that the wetlands located on the site occur in approximately six delineated areas that together form "a complex or continuum" connected by hydrology and hydric soils. *Id.* at 43a-44a.[4]

In 1998, shortly after its initial request for a jurisdictional determination, petitioner applied for a permit to fill 2.36 of the 7.66 acres of wetlands on the site. Pet. App. 3a, 17a. On February 6, 2002, the Corps offered to issue a permit that would authorize petitioner to discharge fill material into those 2.36 acres. *Id.* at 4a. As a condition of the permit, however, the Corps required

---

its jurisdictional determination. *Ibid.* The San Francisco District concluded that *SWANCC* did not affect its authority over "wetlands adjacent to a tidal waterway." *Ibid.* On appeal, the Corps' South Pacific Division remanded the matter to the San Francisco District for further consideration of the question whether the wetlands are adjacent to other covered waters. *Id.* at 36a; see *id.* at 25a-36a. On January 28, 2002, in its decision on remand, the District again determined that 7.66 acres of wetlands on the site form one wetlands complex adjacent to the tidal flood control channels and therefore are within the Corps' jurisdiction under the CWA. *Id.* at 37a-44a.

[4] The District set forth six reasons for its determination that the wetlands are adjacent to tidal waters: (1) barriers such as berms and culvert flaps do not defeat adjacency pursuant to 33 C.F.R. 328.3(c); (2) the wetlands are in reasonable proximity to the flood control channels; (3) the wetlands serve important functions that contribute to the aquatic environment in general and to the nearby tidal waters; (4) the wetlands' functions are particularly important given the reduction of wetlands in the San Francisco Bay area; (5) the wetlands are within the 100-year flood plain of tidal waters; and (6) the wetlands are part of a hydric soil unit that is contiguous with adjacent tidal waters. Pet. App. 4a, 39a-43a.

petitioner to "create on-site a minimum of 2.36 acres of seasonal freshwater wetlands" and to "enhance the remaining 5.3 acres of existing brackish wetlands." *Ibid.* Petitioner signed the permit but reserved the right to seek judicial review of the Corps' jurisdictional determination. *Ibid.*

5. Petitioner filed suit, seeking (1) a declaration that the Corps does not have regulatory jurisdiction over the disputed wetlands and (2) an injunction prohibiting the Corps from enforcing the mitigation conditions of the permit. See Pet. App. 18a. The district court granted the Corps' motion for summary judgment. *Id.* at 15a-24a. The court explained that it was "undisputed that the flood control channels to the west and south of the site are waters of the United States subject to Clean Water Act § 404 jurisdiction." *Id.* at 22a. The court concluded that "the contested wetlands are separated from the channels by the berms, which are man-made barriers, and the contested wetlands are therefore 'adjacent wetlands,' under the meaning of 33 C.F.R. § 328.3(c), over which the Corps has regulatory jurisdiction." *Ibid.*

6. The court of appeals affirmed. Pet. App. 1a-13a.

a. The court of appeals observed that the ACFCD flood control channels were acknowledged by both parties to "contain waters of the United States." Pet. App. 7a. The court further explained that the Corps had found the relevant wetlands to be "adjacent to the flood control channels" for purposes of 33 C.F.R. 328.3(a)(7). The court rejected petitioner's contention that "adjacency alone is insufficient to support the Corps' jurisdiction." Pet. App. 7a. The court stated that "[t]he text of the CWA and the implementing regulations promulgated by the Corps give no indication that a significant hydrological or ecological connection is a condition of

Corps jurisdiction over adjacent wetlands." *Ibid.*; see *id.* at 7a-12a.

In the alternative, the court of appeals held that, "even if the CWA did require demonstration of a significant nexus on a case-by-case basis * * *, there is no question that one exists here." Pet. App. 13a. The court relied on the Corps' findings as to the relationship between the wetlands and the ACFCD flood control channels, including the findings that "the wetlands serve important functions that contribute to the aquatic environment in general and to the nearby tidal waters in particular," and that "the wetlands' functions are particularly important given the reduction of wetlands in the San Francisco Bay area." *Ibid.* The court stated that, "[e]ven viewing the evidence in the light most favorable to [petitioner]," the agency's findings could not be set aside as arbitrary or capricious. *Ibid.* The court concluded that, "[t]aken together, the Corps' findings would be more than sufficient to establish a significant nexus between the wetlands on the site and the flood control channels, were such a showing required." *Ibid.*

c. The court of appeals issued its decision on October 14, 2005. See Pet. App. 1a. Petitioner filed a petition for rehearing and rehearing en banc. The court of appeals deferred ruling on that petition pending this Court's resolution of *Carabell*. See *id.* at 49a-50a. After this Court issued its decision in *Rapanos* and *Carabell*, the court of appeals denied the petition for rehearing and rehearing en banc. *Id.* at 51a-52a.

ARGUMENT

Petitioner contends (Pet. 13-21) that the judgment of the court of appeals should be vacated and the case should be remanded for reconsideration in light of

Rapanos. That disposition is unwarranted. The Ninth Circuit's opinion makes clear that application of the standards endorsed by a majority of this Court in *Rapanos* would not alter the outcome here. Indeed, because the court of appeals explicitly deferred ruling on petitioner's request for rehearing pending this Court's resolution of *Carabell*, the court has already considered whether the decision in *Rapanos* affects the appropriate disposition of this case. The petition for a writ of certiorari therefore should be denied.

1. Under the Corps' regulations implementing the CWA, the term "waters of the United States" is defined to include all wetlands "adjacent to" other covered waters. 33 C.F.R. 328.3(a)(7). The term "adjacent" is defined to mean "bordering, contiguous, or neighboring." 33 C.F.R. 328.3(c). The regulations specifically provide that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands,'" *ibid.*, and a finding of adjacency does not depend under the regulations on a showing of a hydrological connection between a wetland and another covered water.

In a ruling issued before this Court's decision in *Rapanos*, the court of appeals in this case sustained the categorical approach to adjacent wetlands reflected in the Corps' regulations. See Pet. App. 6a-12a. In *Rapanos*, however, five Members of this Court concluded that the pertinent regulatory provisions are overbroad insofar as they define the term "waters of the United States" to encompass *all* wetlands adjacent to other covered waters. See 126 S. Ct. at 2227 (plurality opinion) (concluding that a wetland is covered by the CWA only if it has a "continuous surface connection with" another

covered water); *id.* at 2248-2249 (Kennedy, J., concurring in the judgment) (concluding that a wetland adjacent to a non-navigable tributary is covered only if it has a "significant nexus" to navigable-in-fact waters). When a particular wetland satisfies neither the plurality's standard nor that of Justice Kennedy, it falls outside the CWA's coverage under the approaches taken by a majority of this Court, even if it is encompassed by the regulatory definition of "waters of the United States." To the extent that the court of appeals found the regulatory provisions governing adjacent wetlands to be valid in *all* their applications, its ruling has been superseded by this Court's decision in *Rapanos*.

2. Under a proper understanding of *Rapanos*, the Corps may continue to exercise regulatory jurisdiction over any wetland that satisfies *either* the standard for CWA coverage adopted by the *Rapanos* plurality *or* the standard set forth in Justice Kennedy's concurrence. That is so because the four dissenting Justices in *Rapanos* stated explicitly that they would sustain the exercise of federal regulatory jurisdiction under the CWA whenever either of those standards is satisfied. See 126 S. Ct. at 2265 & n.14 (Stevens, J., dissenting). Thus, in all such cases, the Corps' exercise of regulatory jurisdiction would be consistent with the views of a majority of this Court's Members.

In *Marks* v. *United States*, 430 U.S. 188 (1977), this Court stated that, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.* at 193 (citation and internal quotation marks omitted). Taken in isolation, the *Marks*

Court's reference to "those Members who concurred in the judgments" might suggest that lower courts, in determining the precedential effect of a fractured decision of this Court, should ignore the views of dissenting Justices. This Court has subsequently recognized, however, that in some cases the *Marks* test is "more easily stated than applied to the various opinions supporting the result," *Grutter* v. *Bollinger*, 539 U.S. 306, 325 (2003) (quoting *Nichols* v. *United States*, 511 U.S. 738, 745 (1994)), and has acknowledged that "[i]t does not seem 'useful to pursue the *Marks* inquiry to the utmost logical possibility'" in every case, *ibid.* (quoting *Nichols*, 511 U.S. at 745-746).

In some fractured decisions, the narrowest rationale adopted by one or more Justices who concur in the judgment may be the only controlling principle on which a majority of the Court's Members agree. In that situation, application of the rule announced in *Marks* provides a sensible approach to determining the controlling legal principles of the case. But in *Rapanos*, as in some other instances, no opinion for the Court exists and neither the plurality nor the concurring opinion is in any sense a "lesser-included" version of the other.[5]

---

[5] Five Justices agreed that the judgments of the Sixth Circuit in *Rapanos* and *Carabell* should be vacated and the cases remanded for further proceedings. See 126 S. Ct. at 2235 (plurality opinion); *id.* at 2252 (Kennedy, J., concurring in the judgment). The plurality concluded that a remand was necessary because the court of appeals had not determined, and the existing record provided an inadequate basis for deciding, whether the tributaries at issue "contain[ed] a relatively permanent flow" or whether the pertinent wetlands "possess[ed] a continuous surface connection" to those tributaries. *Id.* at 2235. Justice Kennedy found a remand to be appropriate because neither the Corps nor the lower courts in the consolidated cases had addressed the question "whether the specific wetlands at issue possess a significant

In that instance, the principles on which a majority of the Court agreed may be illuminated only by consideration of the dissenting Justices' views. The dissenting opinions, by emphasizing controlling legal principles on which a majority of the Court agrees, may thereby contribute to an understanding of the law created by the case. And once those principles have been identified, sound legal and practical reasons justify a rule that a lower federal court should adhere to the view of the law that a majority of this Court has unambiguously embraced. See *Waters* v. *Churchill*, 511 U.S. 661, 685 (1994) (Souter, J., concurring) (analyzing the points of agreement between plurality, concurring, and dissenting opinions to identify the legal "test * * * that lower courts should apply," under *Marks*, as the holding of the Court); cf. *League of United Latin Am. Citizens* v. *Perry*, 126 S. Ct. 2594, 2607 (2006) (analyzing concurring and dissenting opinions in a prior case to identify a legal conclusion of a majority of the Court); *Alexander* v. *Sandoval*, 532 U.S. 275, 281-282 (2001) (same); *Wilton* v. *Seven Falls Co.*, 515 U.S. 277, 285 (1995) (same); *United States* v. *Johnson*, 467 F.3d 56, 66 (1st Cir. 2006) (concluding that the federal government can establish jurisdiction over waters that "meet either the plurality's or Justice Kennedy's standard as laid out in *Rapanos*").

---

nexus with [traditional] navigable waters." *Id.* at 2252; see *id.* at 2250-2252. Neither of those grounds for decision is inherently narrower than the other, thus making it logically impossible to identify a consensus narrowest position among the views of the Justices who concurred in the judgment. Both the standard articulated in the plurality opinion and that articulated in Justice Kennedy's concurrence are subsets of the dissent's standard, which would recognize as within the scope of the Corps' CWA jurisdiction all wetlands adjacent to tributaries of traditional navigable waters.

Consideration of the dissenting Justices' views is consistent with the underlying purpose of the specific rule announced in *Marks*, because it enables lower courts to discern the governing rule of law that emerges from a fractured decision of the Court. Cf. *Rapanos*, 126 S. Ct. at 2236 (Roberts, C.J., concurring) (noting the need to look to *Marks* in view of the absence of an opinion commanding a majority of the Court). And the application of that approach here clearly supports finding the existence of federal regulatory jurisdiction whenever the legal standard of the plurality or of Justice Kennedy's concurrence is satisfied, since a majority of the Court's Members would find jurisdiction in either of those instances. See *id.* at 2265 (Stevens, J., dissenting).

3. In the instant case, the Corps and the court of appeals recognized, and petitioner has not disputed, that the ACFCD flood control channels are "tidal waters"—*i.e.*, waters subject to the ebb and flow of the tide. See, *e.g.*, Pet. App. 3a, 4a, 40a; 33 C.F.R. 328.3(f). The water in the flood control channels therefore is *part of* the traditional navigable waters that extend to and include San Francisco Bay, the limit of which is defined by the high tide line. See 33 C.F.R. 328.3(a)(1) (defining the term "waters of the United States" to include "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, *including all waters which are subject to the ebb and flow of the tide*") (emphasis added); see also 33 C.F.R. 328.2, 328.3(d), 328.4(b)(1); 61 Fed. Reg. 65,898 (1996). The Corps' regulatory approach is consistent with the text of the CWA, see 33 U.S.C. 1344(g)(1), and with established understandings of the scope of federal regulatory authority under Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403;

see 33 C.F.R. 329.4, and of the federal navigation servitude. See, *e.g.*, *Willink* v. *United States*, 240 U.S. 572, 580 (1916); see also, *e.g.*, *In re Paradise Holdings, Inc.*, 795 F.2d 756, 759 (9th Cir.) (explaining that "[t]hroughout the nation's history, tidal waters have been held to be within the definition of 'navigable waters'"), cert. denied, 479 U.S. 1008 (1986).[6]

Because the ACFCD flood control channels are traditional navigable waters, the adjacent wetlands are subject to federal regulatory jurisdiction under the analysis set forth in Justice Kennedy's *Rapanos* concurrence. That is so for two independent reasons.

a. In his concurring opinion in *Rapanos*, Justice Kennedy stated that, "[a]s applied to wetlands adjacent to navigable-in-fact waters, the Corps' conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone." 126 S. Ct. at 2248; see *id.* at 2249 ("When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction."). Justice Kennedy would have required the Corps to "establish a significant nexus on a case-by-case basis" only when the agency "seeks to regulate wetlands based on adjacency to nonnavigable tributaries." *Ibid.* Justice Kennedy further explained that, with respect to "wetlands separated from another water by a berm," the "Corps' definition of

[6] The status of the ACFCD flood control channels as traditional navigable waters does not depend on whether the channels themselves will support navigation. Like any other navigable-in-fact waterbody, tidal waters may contain shallow portions near the edges on which navigation is infeasible. Those portions nevertheless remain part of, and are not legally distinct from, the larger navigable-in-fact waterbody.

adjacency is a reasonable one, for it may be the absence of an interchange of waters prior to the dredge and fill activity that makes protection of the wetlands critical to the statutory scheme." *Id.* at 2245-2246. Because the ACFCD flood control channels to which petitioner's wetlands are adjacent are part of traditional navigable waters, the Corps could properly assert regulatory jurisdiction over those wetlands based on "adjacency alone." *Id.* at 2248.

b. As an alternative ground for its decision in this case, the court of appeals stated that, "even if the CWA did require demonstration of a significant nexus on a case-by-case basis * * *, there is no question that one exists here." Pet. App. 13a. The court relied on various findings made by the Corps concerning the relevant wetlands' relationship to the ACFCD flood control channels and to the larger aquatic environment. *Ibid.* The court stated that, "[e]ven viewing the evidence in the light most favorable to [petitioner]," the Corps' findings could not appropriately be set aside as arbitrary or capricious. *Ibid.* The agency findings that were reviewed and sustained by the court of appeals reinforce the conclusion that the wetlands at issue here "are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood," 126 S. Ct. at 2249 (Kennedy, J., concurring in the judgment), and that the wetlands therefore fall within the CWA's coverage under the analysis set forth in Justice Kennedy's *Rapanos* concurrence.[7]

---

[7] The Corps' administrative decision explained that, "[d]ue to their location," the wetlands at issue in this case "contribute or have the potential to contribute to important water quality renovative functions." Pet. App. 41a. The Corps identified the important functions that the wetlands help perform, including floodflow alteration, nutrient removal/

4. Vacatur of the court of appeals' judgment is particularly unwarranted because that court has already had the opportunity to consider the question whether the relevant wetlands are subject to federal regulatory authority under the standards set forth in the various opinions in *Rapanos*. In December 2005, after this Court had granted the petitions for certiorari in *Rapanos* and *Carabell*, the court of appeals ordered that its ruling on petitioner's request for rehearing and rehearing en banc would be deferred pending this Court's decision in *Carabell*. Pet. App. 49a-50a. *Carabell* was decided (along with *Rapanos*) on June 19, 2006, see 126 S. Ct. at 2208, and the court of appeals denied rehearing and rehearing en banc in this case on August 3, 2006, see Pet. App. 51a-52a. Although the court of appeals did not issue an opinion explaining its denial of rehearing, it is appropriate to assume that the court, having deferred its ruling on the rehearing petition pending this Court's decision in *Carabell*, took account of that decision before allowing the Corps' jurisdictional determination to stand.

---

transformation, sediment stabilization, and sediment/toxicant retention. *Ibid.* The Corps explained that "[b]y performing these functions the subject wetlands contribute to the improved quality of the aquatic environment in general and the tidal waters in the immediate vicinity in particular." *Ibid.* The Corps further explained that, in light of the wetlands' location along the historic bay margins, the "intersection of marine, estuarine and palustrine systems greatly increase[s] the probability of the occurrence or potential for wetland functions." *Id.* at 40a. The Corps noted as well that the functions performed by these wetlands are particularly important given the large reduction in the number of wetlands in the San Francisco Bay area. See *id.* at 41a-42a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

SUE ELLEN WOOLDRIDGE
Assistant Attorney General

ELLEN DURKEE
KATHERINE W. HAZARD
Attorneys

JANUARY 2007