No. 04-1384

In the Supreme Court of the United States

JUNE CARABELL, ET AL., PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the United States Army Corps of Engineers acted reasonably in interpreting the term "waters of the United States" as it appears in the Clean Water Act (CWA), 33 U.S.C. 1362(7), to encompass a wetland that is "adjacent" to, but separated by a narrow man-made berm from, a tributary that is covered by the CWA.

2. Whether the application of the CWA to the wetland at issue in this case is a permissible exercise of congressional authority under the Commerce Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 391 F.3d 704. The opinion of the district court (Pet. App. 15a-17a) and the report and recommendation of the magistrate judge (Pet. App. 20a-57a) are reported at 257 F. Supp. 2d 917.

JURISDICTION

The court of appeals entered its judgment on September 27, 2004. A petition for rehearing was denied on January 10, 2005 (Pet. App. 18a-19a). The petition for a writ of certiorari was filed on April 11, 2005 (a Monday), and was granted on October 10, 2005. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted 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) "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a).[1] One of the mechanisms adopted by Congress to achieve that purpose is a prohibition on the discharge of any pollutants, including dredged or fill material, into "navigable waters" except pursuant to a permit issued in accordance with the Act. 33 U.S.C. 1311(a), 1362(12)(A). The CWA defines the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). It defines the term "pollutant" to mean, *inter alia*, dredged spoil, rock, sand, and cellar dirt. 33 U.S.C. 1362(6). The CWA provides that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

The Clean Water Act establishes two complementary permitting programs through which appropriate federal or state officials may authorize discharges of pollutants from point sources into the waters of the United States. Section 404(a) of the CWA authorizes the Secretary of the Army, acting through the Army Corps of Engineers

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[1] The 1972 legislation extensively amended the Federal Water Pollution Control Act (FWPCA), which was originally enacted in 1948. Further amendments to the FWPCA enacted in 1977 changed the popular name of the statute to the Clean Water Act. See Pub. L. No. 95-217, 91 Stat. 1566; 33 U.S.C. 1251 note. This brief will refer to the statute in its current form as the Clean Water Act or CWA; the brief will refer to earlier amendments as the FWPCA Amendments.

(Corps), to issue a permit "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a). Under Section 404(g), the authority to permit certain discharges of dredged or fill material may be assumed by state officials. 33 U.S.C. 1344(g). The discharge of pollutants other than dredged or fill material may be authorized by the Environmental Protection Agency (EPA), or by a State with an approved program, under the National Pollutant Discharge Elimination System (NPDES) program, pursuant to Section 402 of the CWA. 33 U.S.C. 1342.

2. The instant case involves the construction of the statutory term "the waters of the United States."

a. For purposes of the Section 402 and 404 permitting programs, the current EPA and Corps regulations implementing the CWA include substantively equivalent definitions of the term "waters of the United States." The Corps defines that term to include:

> (1) All 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;
>
> (2) All interstate waters including interstate wetlands;
>
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce * * * ;

> (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
>
> (5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;
>
> (6) The territorial seas;
>
> (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

33 C.F.R. 328.3(a); see 40 C.F.R. 230.3(s)(1) (EPA).[2]

The Corps' regulations define the term "wetlands" to mean "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas." 33 C.F.R. 328.3(b). The term "adjacent" is defined to mean "bordering, contiguous, or neighboring." 33 C.F.R. 328.3(c). The regulations further specify 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.*

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[2] For simplicity, this brief will refer solely to 33 C.F.R. 328.3(a), the Corps' regulatory provisions implementing Section 404. 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(a), 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."

b. In *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (*Riverside Bayview*), and subsequently in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), this Court addressed the proper construction of the CWA terms "navigable waters" and "the waters of the United States." In *Riverside Bayview*, the Court framed the question before it as "whether the [CWA], together with certain regulations promulgated under its authority by the [Corps], authorizes the Corps to require landowners to obtain permits from the Corps before discharging fill material into wetlands adjacent to navigable bodies of water and their tributaries." *Id.* at 123. The Court sustained the Corps' regulatory approach as a reasonable exercise of the authority conferred by the CWA. See *id.* at 131-135.

The Court in *Riverside Bayview* observed that Congress, by defining the term "navigable waters" to mean "the waters of the United States," had expressed its intent "to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." 474 U.S. at 133. After noting the Corps' scientific judgment that "wetlands adjacent to navigable waters do as a general matter play a key role in protecting and enhancing water quality," *ibid.*; see *id.* at 133-134, the Court held that,

> [i]n 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 about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judg-

> ment that adjacent wetlands may be defined as waters under the Act.

Id. at 134.

The Court in *Riverside Bayview* acknowledged the possibility that "not every adjacent wetland is of great importance to the environment of adjoining bodies of water." 474 U.S. at 135 n.9. The Court found, however, that so long as the Corps' approach reflects a reasonable understanding of the *typical* relationship between wetlands and adjacent water bodies, the existence of unusual cases "does not seriously undermine the Corps' decision to define all adjacent wetlands as 'waters.'" *Ibid.* The Court explained that, "where it appears that a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment—or where its importance is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit." *Ibid.* The Court "conclude[d] that a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act." *Id.* at 135. The Court declined, however, "to address the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water." *Id.* at 131-132 n.8.

In *SWANCC*, this Court addressed an aspect of the question reserved in *Riverside Bayview* and rejected the Corps' construction of the term "waters of the United States" as encompassing "isolated," nonnavigable, intrastate ponds based solely on their use as habitat for migratory birds. 531 U.S. at 171-172. The Court quoted with apparent approval its prior holding that "Congress' concern for the protection of water qual-

ity and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the "waters" of the United States.'" *Id.* at 167 (quoting *Riverside Bayview*, 474 U.S. at 134). The Court explained, however, that, if the use of isolated ponds by migratory birds were found by itself to be a sufficient basis for federal regulatory jurisdiction under the CWA, the word "navigable" in the statute would be rendered superfluous. *Id.* at 172. While recognizing that the term "navigable waters" as used in the CWA includes "at least some waters that would not be deemed 'navigable' under the classical understanding of that term," *id.* at 171 (quoting *Riverside Bayview*, 474 U.S. at 133), the Court stressed that the word "navigable" must be given some content, see *id.* at 172 ("[I]t is one thing to give a word limited effect and quite another to give it no effect whatever."). The Court concluded that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Ibid.*

3. Petitioners own a tract of 19.61 acres in Chesterfield Township in Macomb County, Michigan. Pet. App. 2a. One of the last large forested wetlands in Macomb County covers 15.96 acres of the property. *Ibid.* That wetland is a remnant of prehistoric Lake St. Clair, which now lies about a mile to the southeast. *Ibid.*; J.A. 91a-92a.[3]

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[3] In prehistoric times, much of what is now Macomb County was submerged under the lake. Pet. App. 2a; J.A. 91a. As the lake receded, some areas remained covered by wetlands. Pet. App. 2a; J.A. 91a. Since the early 1800s, however, Macomb County has lost most of its wetlands. J.A. 67a. Forested wetlands, which provide unique ecological

The property is in the shape of a right triangle. Pet. App. 2a. An unnamed ditch runs along the hypotenuse, from the southwest to the northeast corner of the property. *Id.* at 2a-3a. The ditch appears to have been excavated from the wetland approximately 50-60 years ago, see *id.* at 62a, at which time the excavated material was "cast to either side of the ditch, creating upland berms approximately four feet wide along the banks of the ditch," *id.* at 3a. "The berm edging the [petitioners'] property serves to block immediate drainage of surface water out of the parcel into the ditch." *Ibid.* The berm may be overtopped when water levels are particularly high, however, and it contains drainage cuts that facilitate water flow from the wetland into the ditch. J.A. 186a-187a. The berm is the only separation between the wetland and the ditch. Pet. App. 9a.

At the northeastern corner of petitioners' property, the ditch connects with the Sutherland-Oemig Drain, through which water flows throughout the year. Pet. App. 3a; J.A. 95a. The Sutherland-Oemig Drain flows into Auvase Creek, which in turn flows into Lake St. Clair. Pet. App. 3a. Lake St. Clair "is part of the Great Lakes drainage system," *ibid.*, and is a traditional navigable water, *id.* at 56a-57a.

4. In 1993, petitioners applied to the Michigan Department of Environmental Quality (MDEQ), which administers an EPA-approved CWA program (40 C.F.R. 233.70; see 33 U.S.C. 1344(g)-(h)), for a permit to fill the wetland to facilitate construction of a 130-unit condominium complex. Pet. App. 3a. Both EPA and the United States Fish and Wildlife Service (FWS) filed

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benefits and take decades to regenerate once lost, are particularly scarce. J.A. 67a, 79a, 102a-104a; Pet. App. 74a.

comments opposing the application. *Ibid.* MDEQ initially denied the application, but a state administrative law judge directed it to issue a permit allowing a 112-unit complex. *Id.* at 3a-4a. Under the CWA and implementing regulations, however, EPA's continuing objection required petitioners to seek the Corps' approval as well. *Id.* at 4a; see 33 U.S.C. 1344(j); 40 C.F.R. 233.50(j).

In August 1999, petitioners applied to the Corps for a permit to fill the wetland in order to build the condominium complex. Pet. App. 4a; C.A. App. 32-40. The application indicated that petitioners would fill 15.87 acres of wetland while dredging and replanting 3.74 acres to create new wetlands. Pet. App. 4a. Petitioners also proposed to connect two of the areas of replanted wetlands directly to the ditch to allow the exchange of water. C.A. App. 38-40; J.A. 95a. Various parties, including EPA, FWS, the Lake St. Clair Advisory Committee, and the Water Quality Unit of the Macomb County Prosecutor's Office, objected to the permit application. J.A. 60a-80a.

In September 2000, after three site inspections, the Corps issued its permit evaluation. Pet. App. 4a; J.A. 84a-126a. That evaluation explained, *inter alia*, that

> [w]etlands located on the parcel likely provide floodwater storage due to the fact that the site contains clay soils and the parcel appears to be a depressional area. Spoils from the ditch were sidecast, creating a dike which serves to block immediate drainage out of the parcel and holding water until [it] is quite high. By holding the water which falls onto the approximately 20 acre site and preventing it from immediately entering the surface water

> system, flood peaks to downstream areas are reduced.

J.A. 93a. The Corps concluded that petitioners' proposed development activities would have substantial negative impacts on water quality, terrestrial wildlife, and the overall ecology, as well as lesser effects regarding downstream erosion and sedimentation, flood hazards and floodplain values, and aquatic wildlife. J.A. 96a-115a; Pet. App. 4a.

In October 2000, the Corps officially notified petitioners that it had denied their permit application. Pet. App. 4a-5a. The Corps found that petitioners' proposed filling activities were subject to the CWA because, *inter alia*, the relevant wetland is "adjacent to a drain which empties directly into a [traditional navigable] water." *Id.* at 69a.[4] In summarizing the reasons for its denial of the permit application, the Corps stated: "Cumulatively, this and similar projects are resulting in increases in flood duration and frequency and a contribution to the degradation of water quality in the Lake St. Clair watershed." *Id.* at 70a; see *id.* at 73a-74a. In light of the anticipated negative effects of the proposed discharges on

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[4] The Corps' initial denial of petitioners' permit application was issued before this Court's decision in *SWANCC*. In finding that petitioners' proposed discharge was subject to the CWA, the Corps relied in part on record evidence "establish[ing] the site as being used for interstate commerce (neo-tropical migratory bird stopping point)." Pet. App. 69a. In its subsequent decision denying petitioners' administrative appeal, the Corps recognized that this Court's intervening decision in *SWANCC* "negated use of the Migratory Bird Rule to establish an interstate commerce connection on isolated, intrastate waters." *Id.* at 63a. The Corps concluded, however, that "[t]he SWANCC decision is not relevant to [petitioners'] proposal because the subject wetlands are not isolated." *Ibid.*

"water quality, flood hazards, aquatic and terrestrial biota, recreation, and conservation and overall ecology," the Corps concluded that "the detriments greatly outweigh the benefits to the overall public interest." *Id.* at 70a-71a; see *id.* at 5a.

In December 2000, petitioners filed an administrative appeal from the denial of their permit application. Pet. App. 5a, 59a. Petitioners argued "that the Corps lacked regulatory jurisdiction over the property because the wetlands were purportedly isolated from all outside waters by [the] spoil berm." *Id.* at 5a. Petitioners further contended that the MDEQ's issuance of a state permit foreclosed the Corps from reaching a contrary decision, and that "the Corps should have issued [petitioners] a permit because their proposed activities met all statutory and regulatory requirements." *Ibid.*

In March 2001, the Corps denied the administrative appeal. Pet. App. 58a-68a. The Corps found that petitioners' proposed filling activities were subject to the CWA because the wetland on their property is "adjacent to a surface tributary system of a navigable waterway, Lake St. Clair." *Id.* at 61a; see *id.* at 60a-64a. The Corps explained that "the man-made spoil berm that separates the wetland from the ditch does not exclude adjacency [under 33 C.F.R. 328.3(c)]." *Id.* at 62a. In rejecting petitioners' challenge to the merits of the permit denial, the Corps referred with apparent approval to the prior administrative findings that, "[b]esides the effects on wildlife habitat and water quality, * * * the project would have a major, long-term detrimental effect on wetlands, flood retention, recreation and conservation and overall ecology." *Id.* at 66a.

5. In July 2001, petitioners filed suit in the United States District Court for the Eastern District of Michi-

gan, challenging the Corps' denial of their permit application. Pet. App. 6a; C.A. App. 6. Petitioners alleged, *inter alia*, that the Corps and EPA lacked regulatory jurisdiction over their proposed filling activities because the wetland on their property was not part of "the waters of the United States" within the meaning of the CWA. *Id.* at 15-16. The case was referred to a magistrate judge, and the parties submitted cross-motions for summary judgment. Pet. App. 6a.

The magistrate judge entered a report and recommendation that the district court grant summary judgment to the Corps and EPA. Pet. App. 20a-57a. With respect to the applicability of the Clean Water Act, the magistrate judge concluded that, "because [petitioners'] property is adjacent to neighboring tributaries of navigable waters and has a significant nexus to 'waters of the United States,' it is in fact not isolated, and is subject to the jurisdiction of the CWA." *Id.* at 49a. The magistrate judge further recommended that petitioners' challenge to the merits of the Corps' permitting decision be rejected. *Id.* at 50a-55a. The magistrate judge explained, *inter alia*, that "[t]he cumulative impacts of numerous such projects would be major and negative as fewer and fewer wetlands remain in [the local area] to function as sediment basins resulting in greater flooding events of local drains and streams thereby increasing erosion and/or accretion problems." *Id.* at 51a. The district court adopted the magistrate judge's report and recommendation and entered judgment in favor of the Corps and EPA. *Id.* at 15a-17a.

6. The court of appeals affirmed. Pet. App. 1a-13a. The court held that, under the CWA and implementing regulations, the Corps has regulatory authority over petitioners' proposed discharges because the wetland on

their parcel is adjacent to tributaries of a traditional navigable water. *Id.* at 9a-10a. The court recognized in particular that, under 33 C.F.R. 328.3(a)(7), a wetland separated from a tributary only by a berm or other man-made barrier remains "adjacent" to that tributary. Pet. App. 9a-10a. The court of appeals also concluded that this Court's decision in *SWANCC* did not cast doubt on the validity of the Corps and EPA regulations governing "adjacent wetlands," which this Court had upheld in *Riverside Bayview*. *Id.* at 10a-12a. The court of appeals upheld the district court's determination that "there is a 'significant nexus' between the wetland on the [petitioners'] property and the adjacent nonnavigable ditch abutting their property, a ditch that flows one way or another into other tributaries of navigable waters of the United States." *Id.* at 12a.

Petitioners also contended that, even if their proposed discharges were subject to the permitting requirements of the CWA, the district court had erred by failing to set aside the Corps' adverse ruling on the merits of their permit application. Pet. App. 13a. The court of appeals agreed with the district court "that the Corps' decision was neither arbitrary nor capricious," and it therefore found "no basis for disturbing the district court's determination." *Ibid.*

SUMMARY OF ARGUMENT

A. The Corps' assertion of permitting authority over wetlands that are physically adjacent—*i.e.*, "bordering, contiguous, or neighboring"—to a covered water body, even when a berm or similar feature lies between the wetland and the adjacent waters, reflects a reasonable interpretation of the CWA. This Court has already upheld the assertion by the Corps and EPA of jurisdiction

over wetlands adjacent to regulable bodies of water. And the pertinent regulations have long looked to whether waters are physically adjacent without regard to berms or similar features.

The terms of the CWA leave the Corps and EPA with substantial discretion to define the precise connection to traditional navigable waters that is necessary to bring particular wetlands within the Act's coverage. Congress's use of the term "adjacent" in later amendments to the Act suggests acquiescence not only in the general proposition that pollution discharges into "adjacent wetlands" require a CWA permit, but also in the regulatory definition of the term "adjacent wetlands" that the Corps had recently adopted when those amendments were enacted. Deference to the agencies' judgment is also appropriate because defining the class of wetlands that are likely to be important to the larger aquatic environment implicates the technical expertise of the Corps and EPA.

The hypothetical prospect that a berm or similar feature might occasionally sever all hydrologic connection between a wetland and adjacent waters does not render the Corps' approach invalid. This Court has recognized that the Corps and EPA, in identifying "the waters of the United States" for purposes of the CWA, may rely on categorical judgments about the classes of waters that are potentially important to the larger aquatic environment. The regulatory definition of "adjacent wetlands" reflects the expert agencies' determination that pollution of wetlands "bordering, contiguous, or neighboring" to other covered waters will typically threaten the quality of those adjacent waters, even when a berm or dike runs between them. That generalization is supported by substantial scientific evidence and fully

supports a decision about the proper scope of federal *jurisdiction* to consider whether (and under what conditions) a permit should be granted.

Although cases may occasionally arise in which the effect of a berm or similar feature is to negate a wetland's importance to adjacent waters, evidence that a particular feature has that effect is properly treated as a justification for granting a CWA permit allowing the discharge to occur, rather than as a ground for excluding the wetland from CWA jurisdiction. That approach provides clear guidance to regulated parties and ensures that the threshold jurisdictional question can be resolved through a clear and easily administrable standard. It also avoids the significant enforcement difficulties that might otherwise exist if an unpermitted discharge obscured or destroyed physical evidence concerning whether there was, in fact, a hydrologic connection between wetlands and adjacent waters.

B. Petitioners' constitutional challenge was neither pressed nor passed upon below, and it therefore is not properly before this Court. In any event, application of the CWA to petitioners' wetlands is a permissible exercise of congressional power under the Commerce Clause. Federal protection of wetlands adjacent to tributaries may be sustained both as regulation of the "channels" of interstate commerce, and as regulation of a class of activities having a substantial aggregate effect on interstate commerce. Congress's authority does not turn on either the existence or the permeability of the berm running between petitioners' wetlands and the adjacent tributary. The Corps and EPA have determined that such features generally do not negate a wetland's importance to the larger aquatic environment,

and petitioners have identified no basis on which that determination could be deemed irrational.

ARGUMENT

THE CORPS HAS ACTED LAWFULLY IN DEFINING THE TERM "ADJACENT WETLANDS" TO INCLUDE WETLANDS THAT ARE PHYSICALLY ADJACENT TO OTHER WATERS COVERED BY THE CWA BUT ARE SEPARATED FROM THOSE WATERS BY A BERM OR SIMILAR FEATURE

This case has been consolidated with *Rapanos* v. *United States*, cert. granted, No. 04-1034 (Oct. 11, 2005), and the two cases share significant issues in common. Each case presents the question whether the Corps may lawfully exercise permitting authority under the CWA with respect to point-source pollutant discharges into wetlands that are "adjacent," generally defined by the Corps' regulations to mean "bordering, contiguous, or neighboring" (33 C.F.R. 328.3(c)), to tributaries of traditional navigable waters. Our brief in *Rapanos* explains (at 17-37) that the regulatory provisions defining the term "waters of the United States" to include tributaries and their adjacent wetlands are consistent with the text, history, and purposes of the CWA, and with this Court's decisions construing the Act. Our brief in *Rapanos* further explains (at 38-49) that the CWA, as applied to the wetlands at issue in that case, is a permissible exercise of congressional authority under the Commerce Clause.

This case implicates one aspect of the Corps' regulations that *Rapanos* does not. The regulatory definition of "adjacent" states 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). Although no such feature was present in *Rapanos*, an earthen

berm approximately four feet wide runs between petitioners' wetlands and the neighboring tributary. Thus, the instant case presents an additional question concerning the validity of the Corps' assertion of regulatory authority over wetlands adjacent to a regulable waterway (here a tributary) but separated from it by a berm or similar feature.[5] For the reasons that follow, the Corps' regulatory approach is consistent with the CWA, and the Act's application to petitioners' wetlands is a permissible exercise of Commerce Clause authority.

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[5] Petitioners suggest in passing that a Corps site-inspection report indicated that the unnamed ditch to which the wetland is adjacent is not a "tributary." See Pet. Br. 8, 39 (citing J.A. 82a, 97a). The cited pages do not support petitioners' characterization of the Corps' report. J.A. 82a-83a. Moreover, the Corps in later decision documents found that the ditch is part of Lake St. Clair's tributary system. Pet. App. 59a, 61a-62a, 69a. The courts of appeals have consistently held that, for purposes of the regulatory definition of "waters of the United States," a man-made ditch can be a "tributary" of the downstream waters to which the ditch ultimately contributes flow. See, *e.g.*, *United States* v. *Gerke Excavating, Inc.*, 412 F.3d 804, 805-806 (7th Cir. 2005), petition for cert. pending, No. 05-623 (filed Nov. 11, 2005); *Parker* v. *Scrap Metal Processors, Inc.*, 386 F.3d 993, 1009 (11th Cir. 2004); *Treacy* v. *Newdunn Assocs.*, 344 F.3d 407, 417 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004); *United States* v. *Rapanos*, 339 F.3d 447, 449, 451-452 (6th Cir. 2003), cert. denied, 541 U.S. 972 (2004); *United States* v. *Deaton*, 332 F.3d 698, 710-712 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004); *Headwaters, Inc.* v. *Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001); *United States* v. *Eidson*, 108 F.3d 1336, 1341-1342 (11th Cir.), cert. denied, 522 U.S. 899 and 1004 (1997); *United States* v. *Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1325 (6th Cir. 1974). But cf. *In re Needham*, 354 F.3d 340, 347 (5th Cir. 2003) ("[T]he term 'adjacent' cannot include every possible source of water that eventually flows into a navigable-in-fact waterway.").

A. The Corps' Assertion Of CWA Permitting Authority Over Petitioners' Wetlands Is Reasonable And Consistent With The Act

Petitioners' fundamental submission is that the CWA does not extend to wetlands that lack a hydrologic connection to traditional navigable waters or their tributaries, and that the wetland at issue here, notwithstanding its geographic adjacency to a tributary, lacks such a hydrologic connection because it is separated from that tributary by a berm. Petitioners' submission is without merit. As an initial matter, petitioners' wetland has not been found to lack a hydrologic connection to the adjacent tributary, and the record evidence is to the contrary.

In any event, while the Corps and EPA might have focused on hydrologic connection as the key to defining the scope of the CWA, the agencies have permissibly adopted a different approach. The Corps and EPA regulations that assert jurisdiction over wetlands that are "adjacent" to other jurisdictional waters, without regard to the presence of hydrologic connections or the absence of features such as berms, reflect a reasonable and valid interpretation of the Act. As a class, "adjacent wetlands" generally have hydrologic connections with, and contribute to the quality of, the waters to which they are adjacent. Those generalizations remain true even when the wetlands are separated from the adjacent waters by man-made features like the berm on petitioners' property. The regulations embody the agencies' expert judgment that such features generally do not block the passage of water altogether, but rather allow either surface or subsurface flow (or both). And, of course, when that generalization proves inapplicable to a particular

adjacent wetland, the Corps and EPA can take that fact into account in the permitting process.

Thus, the question here is not whether the Corps may regulate the discharge of fill into a wetland solely because of its proximity to another water with which it demonstrably lacks any hydrologic connection. Rather, the question is whether the Corps and EPA may rely on the concept of "adjacency," which serves as a reasonable proxy for the presence of a hydrologic connection and for the importance of the wetland to the surrounding aquatic environment, to assert regulatory jurisdiction and thereby require those who wish to discharge pollutants into adjacent wetlands to seek permits.

1. The Record Does Not Support Petitioners' Claim That No Hydrologic Connection Exists Between Their Wetland And The Adjacent Tributary

Petitioners repeatedly assert (*e.g.*, Br. 4-5 & n.1, 12, 39-40) that the absence of any hydrologic connection between their wetlands and the adjacent ditch is either undisputed or at least clearly established. That is incorrect. Although the presence or absence of such a link was not a principal point of contention during the administrative or judicial proceedings below, the pertinent record evidence indicates that the wetland on petitioners' tract has at least an occasional hydrologic connection to the unnamed ditch and thus to Lake St. Clair, a traditional navigable water.

The Corps concluded that the small berm lying between the wetland and the adjacent ditch "serves to block *immediate* drainage out of the parcel and hold[s] water *until it is quite high*." J.A. 93a (emphasis added). The court of appeals likewise stated that the berm "serves to block *immediate* drainage of surface water out of the parcel into the ditch." Pet. App. 3a (emphasis

added). Neither the Corps nor the courts below described the berm as blocking *all* water movement from the wetland to the ditch, and the evidence in the record supports the opposite conclusion. In particular, petitioners' expert stated in the administrative record that "I think you would start seeing some overflow" of water from the wetland to the ditch in some circumstances, and petitioners' attorney conceded that "drainage cuts that run through that berm" would facilitate such flow. J.A. 186a-187a.[6]

With respect to the purported absence of a hydrologic connection between the wetland and the ditch, therefore, petitioners can demonstrate no more than the following: First, under the applicable regulations, a CWA permit is required for a discharge of pollutants into wetlands that are "bordering, contiguous, or neighboring" to any other covered waters. Where that close physical proximity exists, the regulations do not require proof of a hydrologic connection between the wetlands and adjacent waters in order for the wetlands to be treated as part of "the waters of the United States." Second, neither the Corps nor the courts below made any explicit finding as to whether petitioners' wetlands are hydrologically connected to other covered

[6] Petitioners rely (Br. 5) on the Corps' statements in its permit evaluation that "the parcel is not currently part of the [Sutherland-Oemig] Drain watershed" and that the wetland is "isolate[d]" from downstream waters. J.A. 99a, 106a. But given the statement earlier in the same document that the berm serves to hold water only "until it is quite high," those statements are most naturally read to indicate only that there is no surface water connection between the wetland and the ditch under typical conditions. Similarly, a Corps official's statement during an administrative appeal hearing that the parcel is "[e]ssentially * * * off-line" (J.A. 187a) does not imply that water never moves between the wetland and the ditch.

waters (although the record suggests the existence of such a connection). This case therefore involves the application of the CWA permitting requirement to pollutant discharges into wetlands "bordering, contiguous, or neighboring" to a covered tributary when the presence *or* absence of a hydrologic connection between the wetlands and the tributary has not been definitively established.

2. The Conclusion That The CWA Encompasses "Adjacent Wetlands" As Defined In The Agencies' Regulations Is Consistent With The Statutory Text And With This Court's Construction Of The CWA

The term "the waters of the United States" appears in the CWA as the definition of the phrase "navigable waters." 33 U.S.C. 1362(7). In *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (*Riverside Bayview*), the Court observed that "the Act's definition of 'navigable waters' as 'the waters of the United States' makes it clear that the term 'navigable' as used in the Act is of limited import." *Id.* at 133. In *Solid Waste Agency of Northern Cook County* v. *Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), however, the Court subsequently made clear that the word "navigable" cannot be treated as pure surplusage. See *id.* at 172 ("[I]t is one thing to give a word limited effect and quite another to give it no effect whatever."). Rather, the Court explained, "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Ibid.*

The Court in *SWANCC*, however, did not state precisely *what* connection to traditional navigable waters must exist before discharges into nonnavigable water

bodies may be regulated under the CWA. One approach might have been to tie the scope of the CWA to traditional navigable waters and all waters with a hydrologic connection to those waters. That is the approach petitioners favor. But that approach could raise serious difficulties, both because it would be difficult to administer (hydrologic connections often are neither readily apparent nor easy to prove, see pp. 33-36, *infra*) and because it would ignore other ways in which adjacent wetlands can impact traditional navigable waters, see pp. 28-29, *infra*. The Corps and EPA adopted a different approach that focuses on readily identifiable measures of physical proximity to regulable waters.

That approach was well within the agencies' discretion. Even when construed in light of Congress's general focus upon traditional navigable waters, "[t]he statutory term 'waters of the United States' is sufficiently ambiguous to constitute an implied delegation of authority to the Corps; this authority permits the Corps to determine which waters are to be covered within the range suggested by *SWANCC*." *United States* v. *Deaton*, 332 F.3d 698, 709-710 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004). The fact that a particular wetland is "bordering, contiguous, or neighboring" (33 C.F.R. 328.3(c)) to a covered water body is itself a significant connection between the two. Because the text of the CWA does not explicitly state whether that connection is a sufficient basis for the Corps' exercise of regulatory authority over pollutant discharges into adjacent wetlands, or whether some additional link is required, the Corps' resolution of that question is entitled to deference from a reviewing court.

Of course, this Court does not write on a blank slate in considering the reasonableness of a decision to in-

clude wetlands adjacent to regulable waters within the scope of the CWA. Although *Riverside Bayview* did not involve a berm, the Court upheld the basic regulatory approach of including adjacent wetlands within the scope of the CWA. And while *Riverside Bayview* involved a "navigable waterway" (474 U.S. at 131), the logic of petitioners' argument is not limited to wetlands adjacent to nonnavigable tributaries, but would suggest that even wetlands adjacent to traditional navigable waters fall outside the CWA if a berm severs the hydrologic connection between the two. That argument is difficult to square with the Court's reasoning in *Riverside Bayview*. See pp. 29-30, *infra*.

Other language in the CWA, moreover, suggests that Congress acquiesced in the concept of adjacency that is reflected in the Corps and EPA regulations. Under Section 404(g), States are authorized to assume responsibility for administration of the Section 404 permitting program with respect to "navigable waters (other than [traditional navigable waters], *including wetlands adjacent thereto*)." 33 U.S.C. 1344(g)(1) (emphasis added). That provision was enacted in 1977, some months after the Corps' issuance of final regulations that specified that "adjacent wetlands" include wetlands that border neighboring waters but are separated from them by a berm or similar feature.[7]

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[7] Final regulations published by the Corps on July 19, 1977, defined the term "adjacent wetlands" to include "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like." See 42 Fed. Reg. 37,144. The debates that culminated in the 1977 FWPCA Amendments reflected Congress's awareness of the 1977 regulations. See, *e.g.*, 123 Cong. Rec. 38,968 (1977) (House debate); *id.* at 26,718 (Senate debate).

In both the Senate and the House of Representatives, debates on the legislative proposals that culminated in the 1977 FWPCA Amendments (which included Section 404(g)) "centered largely on the issue of wetlands preservation." *SWANCC*, 531 U.S. at 170 (quoting *Riverside Bayview*, 474 U.S. at 136). The text and history of those Amendments indicate that "Congress in 1977 acquiesced in the Corps' definition of waters as including adjacent wetlands." *Riverside Bayview*, 474 U.S. at 138. It is unlikely that Congress, in generally acceding to the Corps' inclusion of adjacent wetlands within the regulatory definition of "waters of the United States," intended to disapprove the precise definition of "adjacent wetlands" set forth in the text of the regulations. See, *e.g.*, *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 342 (1991) ("In the absence of contrary indication, we assume that when a statute uses [a term of art], Congress intended it to have its established meaning.").[8]

Judicial deference to the regulatory definition is appropriate not only because of the relative imprecision of the statutory language and Congress's apparent acqui-

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[8] Other CWA provisions employ the word "adjacent" in its usual sense of neighboring or proximate. See, *e.g.*, 33 U.S.C. 1272(a) (EPA may remove "contaminated sediments outside the boundaries of and adjacent to the navigation channel"), 1281(n)(2), 1285(*l*)(2) ("adjacent urban complexes"), 1311(h)(9) ("waters surrounding or adjacent to the point at which such effluent is discharged"), 1329(b)(1) ("adjacent States"), 1346(a)(1)(A), (b)(1), (c)(1), (d), (g)(1) ("coastal recreation waters adjacent to beaches or similar points of access"). Congress has used different terminology in CWA provisions that require a hydrologic connection. See, *e.g.*, 33 U.S.C. 1254(n)(4) (Supp. II 2002) (defining "estuary" with reference to "natural connection with open sea"), 1362(21)(B)(ii) ("waters upstream of the mouth of a river or stream having an unimpaired natural connection with the open sea").

escence in the regulatory coverage of "adjacent wetlands," but also because the question presented here implicates the "Corps' and EPA's technical expertise." *Riverside Bayview*, 474 U.S. at 134. As a general matter, inclusion of adjacent wetlands within the regulatory definition of "waters of the United States" reflects the agencies' expert judgment that "adjacent wetlands are inseparably bound up with the 'waters' of the United States," in the sense that "wetlands may affect the water quality of adjacent lakes, rivers, and streams." *Ibid.* *Inter alia*, "wetlands may serve to filter and purify water draining into adjacent bodies of water, and to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion." *Ibid.* (citations omitted). Defining the class of wetlands that are likely to perform those functions—and, in particular, determining whether pollution of wetlands separated from neighboring tributaries by berms or similar features is generally likely to affect the quality of the neighboring waters—are tasks far better suited for administrative than for judicial resolution.

3. CWA Coverage Of Wetlands Separated From "Adjacent" Waters By Berms Or Dikes Is Supported By Scientific Evidence and Agency Experience Demonstrating The Interrelated Nature of Such Adjacent Waters

The expert judgment of the agencies charged with administering the CWA is that pollution of wetlands "bordering, contiguous, or neighboring" to other covered waters will typically threaten the quality of those adjacent waters, even when the two are separated "by man-made dikes or barriers, natural river berms, beach dunes and the like." 33 C.F.R. 328.3(c); see 42 Fed. Reg. 37,128 (1977) (explaining that "Federal jurisdiction un-

der Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system."). That judgment is supported by substantial scientific evidence.

a. Berms and similar features typically do not block *all* water flow. Indeed, even dams, which are specifically designed and constructed to impound large amounts of water effectively and safely, do not prevent all water flow, but rather allow seepage under the foundation of the dam and through the dam itself.[9] As an agency with expertise and responsibilities in engineering and public works, the Corps extensively studies water retention structures like berms, levees, and earth and rock-fill dams. The agency has found that all water retention structures are subject to seepage through their foundations and abutments.[10] The inevitability of

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[9] See, *e.g.*, International Atomic Energy Agency, *Fact Sheet on Investigating Leaks in Dams & Reservoirs* (visited Jan. 11, 2006) ("All dams are designed to lose some water through seepage.") <http://www-tc.iaea. org/tcweb/publications/factsheets/sheet20dr.pdf>; U.S. Bureau of Reclamation, Provo Office, *Safety of Dams* (visited Jan. 11, 2006)("All dams seep, but the key is to control the seepage through properly designed and constructed filters and drains.") <http://www.usbr.gov/uc/provo/progact/damsafety.html>; Federal Energy Regulatory Comm'n (FERC), *Engineering Guidelines for the Evaluation of Hydropower Projects* 14-36 to 14-39 (2005) ("Seepage through a dam or through the foundations or abutments of dams is a normal condition.") <http://www.ferc.gov/industries/hydropower/safety/eng-guide/chap14.pdf>.

[10] See, *e.g.*, U.S. Army Corps of Eng'rs, *Seepage Analysis and Control for Dams* 1-1 (1986) <http://www.usace.army.mil/inet/usace-docs/eng-manuals/em1110-2-1901/entire.pdf>; U.S. Army Corps of Eng'rs, *General Design and Construction Considerations for Earth and Rock-Fill Dams* 6-1 (2004) <http://www.usace.army.mil/inet/usace-docs/eng-manuals/em1110-2-2300/entire.pdf>; U.S. Army Corps of

seepage is a consequence not of poor design, but of physics: water will flow downward where it can and thus will seep through small spaces in the structure and in the ground beneath it.[11] Thus, good engineering practices do not entail the prevention of all seepage; rather, they assume seepage and entail steps to manage it so that it will not compromise the integrity of berms, levees, and dams.[12]

b. Even in the unlikely event that a particular wetland lacks any surface connection to a "bordering, contiguous, or neighboring" water body, a subsurface connection between the two is highly likely to exist. Below ground level, water tends to flow into a wetland from uphill areas and from a wetland to downhill areas, and

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Eng'rs, *Design, Construction, and Maintenance of Relief Wells* 1-1 (1992) <http://www.usace.army.mil/inet/usace-docs/eng-manuals/em1110-2-1914/entire.pdf>. This Court recently recognized that a canal and an impoundment area separated by levees were hydrologically connected (and might even be considered a single water body) because, *inter alia*, the "levees continually leak." *South Florida Water Mgmt. District* v. *Miccosukee Tribe of Indians*, 541 U.S. 95, 110 (2004).

[11] See, *e.g.*, U.S. Army Corps of Eng'rs, *Seepage Analysis and Control of Dams*, *supra*, at 4-1 to 4-26; U.S. Army Corps of Eng'rs, *Design and Construction of Levees* app. B (2000) <http:// www.usace.army.mil/inet/usace-docs/eng-manuals/em1110-2-1913/entire.pdf>.

[12] See, *e.g.*, U.S. Army Corps of Eng'rs, *Seepage Analysis and Control for Dams*, *supra*, at 7-1 to 14-3; U.S. Army Corps of Eng'rs, *General Design and Construction Considerations for Earth and Rock-Fill Dams*, *supra*, at 2-1, 6-1 to 6-7; U.S. Army Corps of Eng'rs, *Design and Construction of Levees*, *supra*, at 5-1 to 5-11, app. C; U.S. Army Corps of Eng'rs, *Design, Construction, and Maintenance of Relief Wells*, *supra*, at 1-1; U.S. Army Corps of Eng'rs, *Engineering and Design: Design Guidance for Levee Underseepage* 1-9 (2005) <http://www.usace.army.mil/usace-docs/eng-tech-ltrs/etl1110-2-569/entire.pdf>; FERC, *Engineering Guidelines for the Evaluation of Hydropower Projects*, *supra*, at 14-36 to 14-39.

such flow will typically connect wetlands with nearby waters.[13] Such subsurface connections can have significant practical effects. For instance, wetlands that have subsurface connections with downstream waters may serve as nutrient sinks that protect the quality of those waters even in the absence of a surface connection.[14] Indeed, petitioners concede (Br. 12-13, 19, 29) that either a surface or a subsurface hydrologic connection to a covered water may support inclusion of a wetland within "the waters of the United States" under the CWA.

c. When a berm or dike separates a wetland from a traditional navigable water or a tributary, the wetland's capacity to absorb water may be all that prevents unusually high waters from overtopping the barrier. The wetland may thus deter flooding and trap pollutants and sediment that would otherwise reach the adjacent waters. See *Riverside Bayview*, 474 U.S. at 134-135 (adjacent wetlands serve, *inter alia*, "to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion"); 33 C.F.R. 320.4(b)(2)(v). Along the Mississippi River and near San Francisco, for instance, vast areas of wetlands behind dikes and levees serve functions including flood protection.[15] In such cir-

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[13] See, *e.g.*, National Research Council, *Riparian Areas: Functions and Strategies for Management* 33-34 & fig. 1-4, 58-68 & fig. 2-11 (2002) <http://www.nap.edu/books/0309082951/html>.

[14] See, *e.g.*, National Research Council, *Compensating for Wetland Losses under the Clean Water Act* 50 (2001) <http://www.nap.edu/books/0309074320/html>; National Research Council, *Riparian Areas: Functions and Strategies for Management*, *supra*, at 70-75.

[15] R. Daniel Smith & Charles V. Klimas, *A Regional Guidebook for Applying the Hydrogeomorphic Approach to Assessing Wetland Functions of Selected Regional Wetland Subclasses, Yazoo Basin,*

cumstances, a wetland may substantially benefit adjacent waters by *minimizing* harmful water flow.

4. The Corps And EPA Have Permissibly Adopted A Classwide, Categorical Approach In Defining The Categories Of Waters Encompassed By The CWA

The validity of the Corps' approach does not depend on the proposition that wetlands separated by a berm or similar feature from a covered tributary (or other water) will *always* function as integral parts of a larger aquatic system, such that pollution of the wetlands will *necessarily* impair the quality of the adjacent waters. The consequence of treating particular wetlands as part of "the waters of the United States" is not to impose an absolute prohibition on pollutant discharges into such wetlands. Rather, inclusion of such wetlands within the jurisdictional definition simply means that the permitting agency will scrutinize and attempt to mitigate the likely impacts of a proposed discharge on the public interest (including the protection of traditional navigable waters) before deciding whether the project may go forward.

While not addressing the specific issue of berms or similar features, the Court in *Riverside Bayview* recognized that the Corps' treatment of adjacent wetlands as part of "the waters of the United States" is not rendered unreasonable or unlawful simply because *some* such wetlands will have insubstantial functional connections with the larger aquatic environment. The Court explained:

Lower Mississippi River Alluvial Valley 14-67 (2005) <http://el.erdc.usace.army.mil/wetlands/pdfs/trel02-4.pdf>; San Francisco Bay Area Wetlands Ecosystem Goals Project, *Baylands Ecosystem Habitat Goals* 1, 31, 81-83 (1999) <http://www.abag.ca.gov/ bayarea/sfep/reports.htmlCalif>.

> [I]t may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps' decision to define all adjacent wetlands as "waters." * * * That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment—or where its importance is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit.

474 U.S. at 135 n.9.

While the presence of a berm between a wetland and an adjacent body of water may make it marginally less likely that the wetland and waterway will be significantly intertwined, the basic regulatory approach adopted by the Corps and EPA and upheld in *Riverside Bayview* still makes sense in this context. So long as the Corps and EPA have reasonably concluded that such features *generally* do not obviate the concerns at which the CWA is directed, there is no basis for setting aside the expert agencies' determination—reflected in published regulations adopted after formal notice-and-comment rulemaking—that wetlands separated by such features from other covered waters should be treated as "adjacent wetlands."

Nothing in *SWANCC* casts doubt on the commonsense proposition that the Corps and EPA may define the term "waters of the United States" to include *classes* of waters whose degradation is generally likely to cause

the sorts of environmental harm that the CWA is intended to prevent, and may consider during the permitting process whether the class-wide judgment holds true in a particular instance. In holding that the CWA does not authorize the Corps to regulate pollutant discharges into "isolated" ponds, based on the ponds' value as habitat for migratory birds, the Court in *SWANCC* explained that "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in [*Riverside Bayview*]." 531 U.S. at 167. As explained above (see pp. 29-30, *supra*), however, the nexus on which the *Riverside Bayview* Court relied was the valid generalization that adjacent wetlands *as a class* will typically affect the quality of neighboring waters. The Court in *Riverside Bayview* found that nexus to be present notwithstanding the Court's express recognition that the regulatory definition of "waters of the United States" "may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways." 474 U.S. at 135 n.9. The Court expressed the expectation that the Corps would deal with such unusual circumstances not by exempting particular discharges from the CWA permitting requirements, but "simply by issuing a permit." *Ibid.*

The Court in *SWANCC* disapproved the Corps' assertion of CWA regulatory authority over a class of waters (*i.e.*, isolated waters used as habitat for migratory birds) that was defined, *qua* class, wholly without reference to traditional navigable waters. See 531 U.S. at 171-172. The Court found the "Migratory Bird Rule" to be inconsistent with the CWA because the Rule gave "no effect whatever" to Congress's use of the word "navigable." *Id.* at 172. The Court in *SWANCC*, however, did not question the authority of the Corps and EPA, in

identifying "the waters of the United States" for which pollutant discharges are subject to the CWA permitting requirements, to rely on reasonable categorical judgments about the classes of waters that bear a sufficient relationship to traditional navigable waters so as to warrant coverage under the Act. And, more specifically, the Court in *SWANCC* did not question the Court's unanimous decision in *Riverside Bayview* that the agencies' judgment about the class of adjacent wetlands covered by the Act is reasonable.

5. Proof Of A Hydrologic Connection Between Wetlands And Adjacent Waters Is Not A Prerequisite To The Exercise Of Regulatory Authority Under The CWA

For the foregoing reasons, proof of a hydrologic connection to an adjacent water body is not a prerequisite to the Corps' exercise of regulatory jurisdiction over pollutant discharges into wetlands. The demonstrated absence of any significant interrelationship with adjacent waters, however, would be highly relevant to the Corps' disposition of any permit application for the discharge. Proof that no such relationship exists would likely lead the Corps to conclude that the wetland is "not significantly intertwined with the ecosystem of adjacent waterways" and is therefore "lacking in importance to the aquatic environment." *Riverside Bayview*, 474 U.S. at 135 n.9.[16] And if the Corps' analysis indicated that the

[16] Denial of a permit in the absence of a hydrologic connection to adjacent waters might be appropriate if a particular wetland lacked hydrologic connections with adjacent waters only because individuals had previously taken unauthorized steps to sever any such connection in an attempt to render the CWA inapplicable, see pp. 35-36 & note 23, *infra*; or if the wetland nonetheless played a significant role in preserving water quality by, for example, restraining flood waters that would otherwise flow into adjacent tributaries.

proposed discharge would have no deleterious effect on the quality of adjacent waters, its ordinary course of action would be to grant the requested permit, typically with only minimal conditions.[17]

Thus, consistent with *Riverside Bayview*, the Corps and EPA have adopted a regulatory framework under which neither the presence of a berm nor the absence of a proven hydrologic connection between wetlands and adjacent waters forecloses the agencies from asserting regulatory jurisdiction, but evidence confirming or disproving the existence of a significant interrelationship with adjacent waters is carefully considered within the permitting process. That approach provides clear guidance to regulated parties and ensures that the threshold jurisdictional question can be resolved in an expeditious manner. Although the expert view of the Corps and EPA is that covered waters and their adjacent wetlands virtually always have some sort of hydrologic connection, verifying the existence of such a connection is not always an easy endeavor.[18] Surface connections can be irregular, while subsurface hydrological connections can

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[17] The regulations governing the permit application process indicate that the Corps engages in a "general balancing process" that considers "the full public interest." 33 C.F.R. 320.1(a)(1), 320.4(a); see also 33 U.S.C. 1344(b)(1) (requiring the Corps to follow additional EPA guidelines); 40 C.F.R. pts. 230-233. The character of a wetland's hydrologic connection with adjacent waters and the effects of the proposed discharge on those waters are significant factors in that "public interest" review. See, *e.g.*, 33 C.F.R. 320.4(d) (emphasizing importance of water quality concerns); (*l*) (floodplain management), (o) (navigation).

[18] See, *e.g.*, Lewis M. Cowardin et al., *Classification of Wetlands and Deepwater Habitats of the United States* 21 (1979) (technical data describing hydrologic characteristics of water regimes, including wetlands, are seldom available).

be slow, hard to detect, and difficult to document.[19] Requiring the Corps to establish the existence of such a connection in every case at the jurisdictional threshold would be administratively impracticable and, in light of the scientific evidence documenting the general interrelationship between wetlands and adjacent waters, wholly unnecessary.[20]

With respect to the distinct questions raised by wetlands separated from adjacent waters by berms and similar features, the physical characteristics of such features, and their practical effect on the aquatic environment, will vary widely from case to case.[21] It would be difficult for the Corps and EPA to articulate a succinct regulatory test for distinguishing between features that are and are not likely to sever the practical connections between wetlands and adjacent waters. The regulatory

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[19] See, *e.g.*, Mark M. Brinson et al., *A Guidebook for Application of Hydrogeomorphic Assessments to Riverine Wetlands* 62-64 (1995) <http://el.erdc.usace.army.mil/wetlands/pdfs/wrpde11.pdf>; *Environmental Hydrology* 268-270 (1995) (Andy D. Ward & William J. Elliot eds. 1995).

[20] The Corps typically authorizes more than 80,000 projects annually under all its permitting programs, see, *e.g.*, U.S. Army Corps of Engineers, *Regulatory Program: All Permit Decisions*, *FY 2003* (visited Jan. 11, 2006) <http://www.usace.army. mil/inet/functions/cw/cecwo/reg/2003webcharts.pdf>, and informs us that approximately three-quarters of those authorizations are under Section 404.

[21] Unlike (for example) the levees lining significant stretches of the Mississippi River, the berm on petitioners' property was not engineered through a formal construction process but rather is the result of spoils sidecast during excavation of the ditch more than 50 years ago. See Pet. App. 62a. The berm is simply a low pile of dirt with drainage cuts running across it. There is no evidence that it was created for the purpose of blocking water, let alone that it is perfectly effective in achieving that result.

definition of "adjacent" as "bordering, contiguous, or neighboring" (33 C.F.R. 328.3(c)) provides a readily administrable standard, focused on physical proximity, that gives clear guidance to the regulated community regarding the scope of the CWA. The agencies' decision to cast the *jurisdictional* net in clear terms, capturing wetlands with a potential effect on traditional navigable waters, while leaving context-specific inquiries about the practical significance of individual berms for the next step of the analysis, is an eminently reasonable regulatory choice.[22]

The agencies' definition of "adjacent wetlands" facilitates expeditious resolution of jurisdictional issues not only "before the fact"—*i.e.*, when the Corps and regulated parties seek to determine whether a proposed discharge would be covered by the CWA (see note 22, *supra*)—but also in civil or criminal enforcement actions brought *after* unpermitted discharges have occurred. See 33 U.S.C. 1311, 1319. In such proceedings, the government bears the burden of proving that a pollutant was discharged into waters covered by the CWA. If the "adjacent wetlands" included within "the waters of the United States" were limited to wetlands having a

[22] The Corps' regulations provide a mechanism by which a party who wishes to know whether a discharge of dredged or fill material at a particular site would require a CWA permit may seek a "jurisdictional determination" from the agency. See 33 C.F.R. 320.1(a)(6), 325.9, 331.2. Such a jurisdictional determination may address whether a particular site contains wetlands and, if so, whether those wetlands are adjacent to a traditional navigable water or its tributary. In making a jurisdictional determination, however, the Corps considers *only* whether the site of the proposed discharge falls within the regulatory definition of "waters of the United States"; it does not consider the numerous other factors that would be relevant to the ultimate permitting decision.

hydrologic connection to neighboring waters, the government would be required to establish that a hydrologic connection had existed at the time of the discharge. The government's effort to satisfy that burden could be rendered substantially more difficult if the discharge itself obscured or destroyed physical evidence of the prior hydrologic connection. Cf. 42 Fed. Reg. 37,128 (1977) (noting that the Corps altered its definition of the term "wetlands" to require the presence of aquatic vegetation "under normal circumstances" because some individuals had attempted "to eliminate the permit review requirements of Section 404 by destroying the aquatic vegetation"). The regulatory definition of "adjacent wetlands" avoids that enforcement difficulty by articulating a standard (*i.e.*, whether the wetlands are or were "bordering, contiguous, or neighboring" to the covered waters) that can easily and accurately be applied even after a discharge has occurred.[23]

In the instant case, the Corps' denial of petitioners' permit application rested substantially on the agency's view that petitioners' proposed activities would impair

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[23] The regulatory definition also ensures that individuals do not perceive an incentive to attempt to sever wetlands' hydrologic connections to adjacent water bodies and downstream waters by constructing physical barriers—for instance, installing walls of sheet piling or welding covers onto culverts—in order to remove the wetlands from the coverage of the CWA. Although the construction of some such barriers might be separately prohibited by the CWA (because the construction process itself could involve the discharge of pollutants into "the waters of the United States"), the applicability of the discharge prohibition to that process could be disputed in individual cases. In any event, regardless of whether such a barrier can lawfully be constructed without a permit, the purposes of the CWA are served by discouraging individuals from taking unilateral steps to remove waters from the Act's coverage.

the quality of surrounding waters. The Corps' permit evaluation concluded that petitioners' proposed activities "would have major, long term, negative impacts on," *inter alia*, "water quality," as well as "minor negative impacts on downstream erosion and sedimentation, on flood hazards and floodplain values, and on aquatic wildlife." Pet. App. 4a. In its subsequent decision denying the permit application, the Corps stated that, "[c]umulatively, this and similar projects are resulting in increases in flood duration and frequency and a contribution to the degradation of water quality in the Lake St. Clair watershed." *Id.* at 70a; see *id.* at 73a-74a. And in denying petitioners' administrative appeal of the earlier permit denial, the Corps referred with apparent approval to the prior agency findings that, "[b]esides the effects on wildlife habitat and water quality, * * * the project would have a major, long-term detrimental effect on wetlands, flood retention, recreation and conservation and overall ecology." *Id.* at 66a.

Thus, the Corps' site-specific analysis indicates that the generalization on which the agency's definition of "adjacent wetlands" is premised—*i.e.*, that pollution of wetlands separated from other waters only by a berm or similar feature will typically affect the quality of the larger aquatic system—holds true in this case. Although petitioners argued in the courts below that the Corps' rejection of their permit application was arbitrary and capricious, they raise no such claim in this Court, but argue solely that their proposed discharges were not subject to the CWA permitting requirements to begin with. Particularly given the Corps' currently-unchallenged assessment of the likely effects of petitioners' proposed activities on the surrounding aquatic environment, there is no basis for petitioners' contention

(Br. 29) that the wetland on their property "has precisely the same relationship to the waters of the United States as the man-made ponds in *SWANCC*."

B. Application Of The CWA To Wetlands Separated By A Berm Or Similar Feature From Other Waters Covered By The Act Is A Permissible Exercise Of Congressional Power Under The Commerce Clause

Petitioners contend (Br. 40-46) that application of the CWA to their own proposed discharges would exceed Congress's powers under the Commerce Clause. Because that claim was neither pressed nor passed upon below, it is not properly before this Court. In any event, petitioners' constitutional challenge lacks merit.

1. In their brief in the court of appeals (at 28-31), petitioners discussed recent Commerce Clause jurisprudence in order to explain the decision in *SWANCC*, but they did not contend that application of the CWA to their proposed discharges would be unconstitutional. Nor did the court of appeals address any constitutional question. Petitioners' Commerce Clause challenge therefore is not properly preserved for review by this Court. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993).

Indeed, petitioners' constitutional claim would have been untimely even if it had been asserted in the court of appeals. In the district court, petitioners' objections to the magistrate judge's report and recommendation (C.A. App. 856-863) did not include any Commerce Clause argument. Under longstanding Sixth Circuit precedent, issues not raised in a party's objections to the magistrate judge's report are generally treated as waived. See, *e.g.*, *United States* v. *Campbell*, 261 F.3d 628, 631-632 (6th Cir. 2001). In *Thomas* v. *Arn*, 474 U.S. 140 (1985), this Court upheld that waiver rule as a per-

missible exercise of the court of appeals' supervisory powers, explaining that "[t]he Sixth Circuit's rule, by precluding appellate review of any issue not contained in objections [to the magistrate judge's report], prevents a litigant from 'sandbagging' the district judge by failing to object and then appealing." *Id.* at 147-148. Petitioners should not be permitted to circumvent the Sixth Circuit's sound rule of judicial administration by raising in this Court a constitutional claim that was not properly advanced in *either* of the courts below.

2. As our brief in *Rapanos* explains (at 38-49), regulation of pollutant discharges into wetlands adjacent to tributaries is a permissible exercise of congressional power under the Commerce Clause. Because such discharges can have the ultimate effect of impairing the quality of traditional navigable waters downstream, application of the CWA to adjacent wetlands serves to protect the "channels" of interstate commerce. See 04-1034 U.S. Br. 39-44. In the aggregate, moreover, pollutant discharges into tributaries and their adjacent wetlands will have substantial commercial effects. See *id.* at 44-49.

The presence of a berm between petitioners' wetlands and the adjacent tributary does not meaningfully affect the constitutional analysis. The expert judgment of the Corps and EPA is that, when wetlands are "bordering, contiguous, or neighboring" to a covered water body, the wetlands and adjacent waters are likely to function as a single aquatic system, notwithstanding the existence of a berm or similar feature between them. Under established constitutional principles, that judgment should be sustained so long as it is rational. Compare, *e.g.*, *Gonzales* v. *Raich*, 125 S. Ct. 2195, 2211 (2005) (holding that "Congress acted rationally" in declining to

adopt a medical-marijuana exception to the generally applicable federal ban on manufacture, possession, and sale); *id.* at 2213 ("The notion that California law has surgically excised a discrete activity that is hermetically sealed off from the larger interstate marijuana market is a dubious proposition, and, more importantly, one that Congress could have rationally rejected."). Petitioners have offered neither argument nor scientific evidence casting doubt on the rationality of the agencies' determination that berms, dikes, and similar features generally do not sever the practical connection between wetlands and adjacent waters.

This Court in *Raich* reaffirmed that, "where the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." 125 S. Ct. at 2209 (brackets and internal quotation marks omitted). In rejecting the as-applied constitutional challenge in that case, the Court in *Raich* attached particular significance to the fact that the plaintiffs had "ask[ed] [the Court] to excise individual applications of a concededly valid statutory scheme." *Ibid.* If federal regulation of pollutant discharges into wetlands adjacent to tributaries is otherwise valid, a holding that the CWA is unconstitutional as applied to wetlands separated from adjacent tributaries by berms or dikes would be just the sort of judicial fine-tuning that the Court in *Raich* specifically disapproved.

The Court in *Raich* also recognized that exceptions to a statutory ban may sometimes be exploited to circumvent the overall enforcement scheme, and that Congress's decision to address that danger through the adoption of a categorical rule "is entitled to a strong presumption of validity." 125 S. Ct. at 2212; see *id.* at

2213-2214. That concern is implicated here as well. A definition of "adjacent wetlands" that turned on the demonstrated presence of a hydrologic connection could encourage landowners to attempt to evade the CWA permitting requirements by altering the physical characteristics of their property. The Corps' definition, by contrast, avoids creation of such incentives and can readily be applied even after a discharge has occurred. See pp. 35-36 & note 23, *supra*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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