No. 05-623

In the Supreme Court of the United States

GERKE EXCAVATING, INC., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether wetlands that drain into a tributary of traditional navigable waters are part of "the waters of the United States" within the meaning of the Clean Water Act (CWA), 33 U.S.C. 1362(7).

2. Whether application of the CWA to the wetlands 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. A1-A7) is reported at 412 F.3d 804. The opinion of the district court (Pet. App. B1-B35) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 2005. A petition for rehearing was denied on August 17, 2005 (Pet. App. C1). The petition for a writ of certiorari was filed on November 11, 2005. The jurisdiction of this Court is invoked under 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). 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 (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). Pursuant to Section 402 of the CWA, 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. 33 U.S.C. 1342.

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).[*]

[*] To avoid confusion between the term "navigable waters" as defined in the CWA and implementing regulations, see 33 U.S.C. 1362 and 33 C.F.R. 328.3, and the use of the term "navigable waters" to describe

2. This case arises out of a civil enforcement action brought by the United States under the CWA. The government alleged that petitioner and others had violated the CWA by discharging fill material into "the waters of the United States" without a permit. With respect to the government's claim against petitioner, the district court entered summary judgment for the United States. Pet. App. B1-B35.

As the district court explained (see Pet. App. B12), the principal contested issue in the case was whether the area into which petitioner had discharged fill material was part of "the waters of the United States" for purposes of the CWA. The district court first examined the physical characteristics of the area where the discharge had occurred and concluded that it fell within the regulatory definition of "wetlands." *Id.* at B12-B18; see 33 C.F.R. 328.3(b). The court further determined that the wetlands were "adjacent"—defined by the regulations to mean "bordering, contiguous, or neighboring," see 33 C.F.R. 328.3(c)—to tributaries of traditional navigable waters. Pet. App. B18-B26. The court based that conclusion on the government's uncontested allegation that the relevant wetlands "are adjacent to a drainage ditch running to Deer Creek, a tributary flowing into the south fork of the Lemonweir River, which is a tributary of the Wisconsin River, which is navigable in fact and is used in interstate commerce." *Id.* at B19. In light of the hydrologic connection between the wetlands and traditional navigable waters, the district court agreed with the government that petitioner's discharge was covered by the CWA. See *id.* at B19, B24, B25.

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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."

The district court also held that the application of the CWA to the facts of this case represents a valid exercise of Congress's power under the Commerce Clause (U.S. Const. Art. I, § 8, Cl. 3). Pet. App. B26-B31. The court explained that "Congress's authority to regulate the channels of interstate commerce extends to this regulation subjecting waters to jurisdiction because of their relationship to traditionally navigable waters." *Id.* at B28. The court rejected petitioner's contention (*id.* at B26, B29) that Congress's authority in this sphere is limited to the prevention and removal of impediments to navigation. The court noted that Congress has well-established authority "to keep the channels of interstate commerce free from immoral and injurious uses." *Id.* at B29 (quoting *Caminetti* v. *United States*, 242 U.S. 470, 491 (1917)). The court stated that, "[j]ust as Congress may regulate the flow of drugs and guns in interstate commerce, it may regulate the flow of pollutants through the channels of interstate commerce, even if the pollutants do not threaten the capacity of the channel to serve as a conduit in interstate commerce." *Ibid.*

3. The court of appeals affirmed. Pet. App. A1-A7. The court explained that Congress's power under the Commerce Clause includes the authority to prevent the degradation of traditional navigable waters. *Id.* at A4-A6. The court concluded that, "[w]hether the wetlands are 100 miles from a navigable waterway or 6 feet, if water from the wetlands enters a stream that flows into the navigable waterway, the wetlands are 'waters of the United States' within the meaning of the [Clean Water] Act." *Id.* at A6.

DISCUSSION

Pursuant to authority conferred by the CWA, the Corps has issued regulations that define the term "waters of the United States" to include, *inter alia*, "[t]ributaries" of traditional navigable waters (33 C.F.R. 328.3(a)(5)) and "[w]etlands adjacent to" such tributaries (33 C.F.R. 328.3(a)(7)). The court of appeals held that those regulations reflect a permissible interpretation of the CWA, and that the application of the Act to the wetlands into which petitioner discharged fill is a valid exercise of congressional power under the Commerce Clause. The court's decision is correct and is consistent with the weight of appellate precedent.

On October 11, 2005, this Court granted petitions for writs of certiorari in *Rapanos* v. *United States*, No. 04-1034, and *Carabell* v. *U.S. Army Corps of Engineers*, No. 04-1384. Those cases, which have been consolidated and set for oral argument on February 21, 2006, also present statutory and constitutional questions concerning the application of the CWA to wetlands adjacent to nonnavigable tributaries of traditional navigable waters. Because the Court's decisions in *Rapanos* and *Carabell* are likely to shed light on the proper disposition of petitioner's challenge to the assertion of federal regulatory jurisdiction here, the petition for a writ of certiorari should be held pending the resolution of those cases. See Pet. 4 n.1.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decisions in *Rapanos* v. *United States*, No. 04-1034, and *Carabell* v. *U.S. Army Corps of Engineers*, No. 04-1384, and then disposed of as appropriate in light of those decisions.

Respectfully submitted.

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JANUARY 2006