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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
KELLY A. JOHNSON
Acting Assistant Attorney General
GREER S. GOLDMAN
TODD S. KIM
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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 area that is separated from a tributary of a traditional navigable water by a narrow man-made berm, where evidence in the record reflected the presence of at least an occasional hydrologic connection between the wetland and the adjacent tributary.

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.

TABLE OF CONTENTS

Page

Opinions below ... 1
Jurisdiction ... 1
Statement ... 2
Argument ... 9
Conclusion ... 19

TABLE OF AUTHORITIES

Cases:

Deaton v. *United States*, 541 U.S. 972 (2004) ... 10
Hodel v. *Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264 (1981) ... 16
International Paper Co. v. *Ouellette*, 479 U.S. 481 (1987) ... 2
Kosak v. *United States*, 465 U.S. 848 (1984) ... 10
NCAA v. *Smith*, 525 U.S. 459 (1999) ... 15
Needham, In re, 354 F.3d 340 (5th Cir. 2003) ... 14, 15
Newdunn Assocs., LLP v. *United States Army Corps of Eng'rs*, 541 U.S. 972 (2004) ... 10
Rapanos v. *United States*, 541 U.S. 972 (2004) ... 10
Rice v. *Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001) ... 12, 13
Solid Waste Agency of N. Cook County v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) ... 3, 10, 11
United States v. *Ashland Oil & Transp. Co.*, 504 F.2d 1317 (6th Cir. 1974) ... 16, 17
United States v. *Byrd*, 609 F.2d 1204 (7th Cir. 1979) ... 16

Cases—Continued: Page

United States v. *Deaton*, 332 F.3d 698 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004) 14, 16, 17, 18, 19

United States v. *Hartsell*, 127 F.3d 343 (4th Cir. 1997) 16

United States v. *Lopez*, 514 U.S. 549 (1995) . . 16, 17, 18

United States v. *Lovasco*, 431 U.S. 783 (1977) 10

United States v. *Pozsgai*, 999 F.2d 719 (3d Cir. 1993), cert. denied, 510 U.S. 1110 (1994) 16

United States v. *Rapanos*, 339 F.3d 447 (6th Cir. 2003), cert. denied, 541 U.S. 972 (2004) 10

United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) 2, 3, 11, 12, 17, 18, 19

United States v. *Tull*, 769 F.2d 182 (4th Cir. 1985), rev'd on other grounds, 481 U.S. 412 (1987) 16

Zobrest v. *Catalina Foothills School Dist.*, 509 U.S. 1 (1993) 15

Constitution, statutes and regulations:

U.S. Const. Art. I, § 8, Cl. 3 (Commerce Clause) 15, 16, 17

Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1251 *et seq.* 2

33 U.S.C. 1311(a) (§ 301(a)) 2

33 U.S.C. 1342 (§ 402) 4

33 U.S.C. 1344 (§ 404) 4

33 U.S.C. 1344(a) (§ 404(a)) 3, 4

Statutes and regulations—Continued: Page

33 U.S.C. 1344(b) 4
33 U.S.C. 1344(c) 4
33 U.S.C. 1344(g)-(h) 5
33 U.S.C. 1344(j) 6
33 U.S.C. 1362 3
33 U.S.C. 1362(7) 2
33 U.S.C. 1362(12)(A) 2
Oil Pollution Act of 1990, 33 U.S.C. 2701 *et seq* 12
33 U.S.C. 2701(21) 12
33 U.S.C. 2702(a) 12
5 U.S.C. 706(2)(E) 9
33 C.F.R.:
Section 323.2(a)(2) (1985) 11
Section 323.2(a)(3) (1985) 11
Section 323.2(a)(5) (1985) 11
Section 323.2(a)(7) (1985) 11
Section 328.3 3
Section 328.3(a) 4
Section 328.3(a)(1) 3, 4
Section 328.3(a)(2) 11
Section 328.3(a)(3) 11
Section 328.3(a)(5) 4, 15
Section 328.3(a)(7) 4, 8, 15
Section 328.3(c) 4, 7

Regulations—Continued: Page

40 C.F.R.:
Section 230.3(b) 4
Section 230.3(s) 4
Section 230.3(s)(1) 4
Section 230.3(s)(5) 4, 15
Section 230.3(s)(7) 4, 15
Section 233.50(j) 6
Section 233.70 5

In the Supreme Court of the United States

No. 04-1384

JUNE CARABELL, ET AL., PETITIONERS

v.

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

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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 judgment of the court of appeals (Pet. App. 14a) was entered on September 27, 2004. A petition for rehearing was denied on January 10, 2005 (Pet. App. 18a). The petition for a writ of certiorari was filed on April 11, 2005 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners sought permission to fill a wetland in Macomb County, Michigan, in order to build a condominium complex. The United States Army Corps of Engineers (Corps) denied petitioners' permit application under the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act or CWA), 33 U.S.C. 1251 *et seq*., and petitioners filed suit to challenge that determination. The district court granted summary judgment to the Corps and the Environmental Protection Agency (EPA). Pet. App. 15a-17a. The court of appeals affirmed. *Id*. at 1a-13a.

1. Section 301(a) of the Clean Water Act prohibits the "discharge of any pollutant by any person," unless in compliance with the Act. 33 U.S.C. 1311(a). "Discharge of a pollutant" is defined to include "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).

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); 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 naviga-

ble in the traditional sense.").[1] In *Riverside Bayview*, the Court upheld the Corps' assertion of regulatory authority, under the CWA, over "all wetlands adjacent to other bodies of water over which the Corps has jurisdiction." 474 U.S. at 135.

In *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), this Court again construed the CWA term "waters of the United States." The Court in *SWANCC* 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 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. The Court stated, however, that "it is one thing to give a word limited effect and quite another to give it no effect whatever. The 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.*

2. The CWA sets up two complementary permitting schemes. Section 404(a) authorizes the Secretary of the Army, acting through the Corps, or a State with an approved program, to issue a permit "for the discharge of dredged or fill material into the navigable waters at

---

[1] To avoid confusion between the term "navigable waters" as defined in the CWA and implementing regulations, see 33 U.S.C. 1362; 33 C.F.R. 328.3, and the traditional 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."

specified disposal sites." 33 U.S.C. 1344(a). Under Section 402, any discharge of pollutants other than dredged or fill material must be authorized by a permit issued by the EPA (or a State with an approved program) under the National Pollutant Discharge Elimination System (NPDES). See 33 U.S.C. 1342. The Corps and EPA share responsibility for implementing and enforcing Section 404 of the CWA. See, *e.g.*, 33 U.S.C. 1344(b) and (c).

The Corps and EPA have promulgated identical 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). As it relates to this case, the definition encompasses traditional navigable waters, which include tidal waters and waters susceptible to use in interstate commerce, see 33 C.F.R. 328.3(a)(1); 40 C.F.R. 230.3(s)(1); "tributaries" to traditional navigable waters, see 33 C.F.R. 328.3(a)(5); 40 C.F.R. 230.3(s)(5); and wetlands that are "adjacent" to traditional navigable waters or their tributaries, see 33 C.F.R. 328.3(a)(7); 40 C.F.R. 230.3(s)(7). 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); 40 C.F.R. 230.3(b).

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.*; C.A. App. 106-107.

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. When the ditch was excavated from the wetland, the excavated material created a small berm running along both sides of the ditch. *Id.* at 3a. Portions of the berm obstruct surface water flow to the ditch, but the berm may be overtopped when water levels are high. *Ibid.*; C.A. App. 108, 639. The berm also contains drainage cuts that facilitate water flow from the wetland into the ditch. *Id.* at 639.

The ditch connects with the Sutherland-Oemig Drain at the northeastern corner of the property. Pet. App. 3a. The Sutherland-Oemig Drain flows into Auvase Creek, which flows into Lake St. Clair. *Ibid.* Lake St. Clair, which connects Lake Huron and Lake Erie and lies between Michigan and Canada, is a traditional navigable water. *Ibid.* At the southwestern corner of the property, the ditch connects with other ditches that in turn drain into Auvase Creek and, eventually, into Lake St. Clair. *Ibi*d.

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 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. 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. Pet. App. 4a. Various parties objected to the permit application, including EPA, FWS, the Lake St. Clair Advisory Committee, and the Water Quality Unit of the Macomb County Prosecutor's Office. C.A. App. 79-90.

In September 2000, after three site inspections, the Corps issued its permit evaluation. Pet. App. 4a. The Corps concluded that petitioners' proposed development activities would have substantial negative impacts on water quality, terrestrial wildlife, and the overall ecology, plus lesser effects regarding downstream erosion and sedimentation, flood hazards and floodplain values, and aquatic wildlife. *Ibid.*

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 [covered] water." *Id.* at 69a.[2]

[2] 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

Given the anticipated negative effects of the proposed discharges on "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, arguing, *inter alia*, that the Corps lacks regulatory jurisdiction over the wetland. Pet. App. 5a. In March 2001, the Corps denied the administrative appeal. *Id*. at 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.

5. In July 2001, petitioners filed suit in the United States District Court for the Eastern District of Michigan, 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 issued a report and recommendation that the district court grant summary judgment

---

SWANCC decision is not relevant to [petitioners'] proposal because the subject wetlands are not isolated." *Ibid.*

to the Corps and EPA. Pet. App. 20a-57a. 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 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 jurisdiction over petitioners' proposed discharges because the wetland on their parcel is adjacent to tributaries of a traditional navigable water. *Id.* at 9a-10a. In particular, the court recognized that a wetland separated only by a berm or other man-made barrier from a tributary remains "adjacent" to that tributary under 33 C.F.R. 328.3(a)(7). 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.

ARGUMENT

The decision of the court of appeals is correct and does not squarely conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. Petitioners contend (Pet. 4, 6, 8-23) that the assertion of federal regulatory authority in this case was impermissible under the Clean Water Act and conflicts with decisions of this Court and other courts of appeals because the wetland at issue here lacks any hydrologic connection with a traditional navigable water. That contention rests on a mistaken understanding of the factual record, and it does not merit review.

Petitioners repeatedly assert (Pet. 4, 6, 8, 19, 21) that the wetland at issue in this case is not hydrologically connected to other waters. The record does not support that characterization of the relevant wetland. Rather, 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, whose factual findings are entitled to substantial deference, see 5 U.S.C. 706(2)(E), 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*." C.A. App. 108 (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. Petitioners' expert and attorney conceded in the administrative record that water would sometimes move from

the wetland to the ditch and that "drainage cuts that run through that berm" would facilitate such flow. C.A. App. 639. The question whether the CWA encompasses wetlands that lack any hydrologic connection to other covered waters therefore is not properly presented in this case.

2. Petitioners contend (Pet. 14-15) that review by this Court is warranted to resolve the question whether the CWA covers wetlands that are adjacent to non-navigable tributaries of traditional navigable waters, or only wetlands that are adjacent to the traditional navigable waters themselves. Petitioners did not argue in the court of appeals that wetlands adjacent to non-navigable tributaries are excluded from the CWA's coverage. And while the court of appeals referred briefly (see Pet. App. 10a) to its prior rejection of a similar argument in *United States* v. *Rapanos*, 339 F.3d 447 (6th Cir. 2003), cert. denied, 541 U.S. 972 (2004) (*Rapanos I*), the court did not otherwise address the question. This Court should therefore decline to address petitioners' claim. See, *e.g.*, *Kosak* v. *United States*, 465 U.S. 848, 850 n.3 (1984); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, that claim lacks merit.[3]

a. Petitioners refer in passing (Pet. 15) to this Court's statement in *SWANCC* that CWA coverage does not "extend[] to ponds that are *not* adjacent to open water." *SWANCC*, 531 U.S. at 168. The Court was allud-

[3] During the 2003 Term, this Court denied three petitions for writs of certiorari that raised substantially similar claims. See *Newdunn Assocs., LLP* v. *United States Army Corps of Eng'rs*, 541 U.S. 972 (2004) (No. 03-637); *Deaton* v. *United States*, 541 U.S. 972 (2004) (No. 03-701); *Rapanos* v. *United States*, 541 U.S. 972 (2004) (No. 03-929). There is no reason for a different result in this case.

ing to a footnote in *Riverside Bayview* in which the Court had reserved 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, see 33 C.F.R. §§ 323.2(a)(2) and (3) (1985)." 474 U.S. at 131-132 n.8 (quoted in *SWANCC*, 531 U.S. at 167-168). When that footnote is read in context, it is clear that the Court in *Riverside Bayview* was reserving the question of jurisdiction over wetlands that are isolated from, rather than adjacent to, any other regulated waters, without regard to those waters' navigability.[4]

Elsewhere in the *Riverside Bayview* opinion, moreover, the Court used the phrase "open water" as a shorthand for "rivers, streams, and other hydrographic features more conventionally identifiable as 'waters,'" in order to distinguish those types of water bodies from wetland areas, such as "shallows, marshes, mudflats, swamps [and] bogs." 474 U.S. at 131-132. The Court did not use the phrase "open water" to distinguish navigable from nonnavigable streams. See, *e.g.*, *id*. at 134 (using the phrase "adjacent bodies of open water" interchangeably with "adjacent lakes, rivers, and streams," without reference to navigability). Finally, under a contrary interpretation of the term "open water," the CWA would not encompass wetlands adjacent to nonnavigable tribu-

---

[4] The pertinent footnote in *Riverside Bayview* cited 33 C.F.R. 323.2(a)(2) and (3) (1985), which have since been re-codified at 33 C.F.R. 328.3(a)(2) and (3). Those are the subsections of the regulatory definition of "waters of the United States" that cover interstate and isolated intrastate wetlands, respectively. If, by referring to "wetlands that are not adjacent to bodies of open water," the Court had meant to include wetlands adjacent to nonnavigable tributaries, it would presumably have cited as well 33 C.F.R. 323.2(a)(5) and (7) (1985), which encompass nonnavigable tributaries and wetlands adjacent to those tributaries.

taries that are themselves part of "the waters of the United States." That view cannot be reconciled with *Riverside Bayview*, which held 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.

b. Petitioners fail to identify a square conflict among the courts of appeals on the question whether wetlands adjacent to nonnavigable tributaries of traditional navigable waters fall within the CWA's coverage. Petitioners' reliance (Pet. 14-15, 20-21) on *Rice* v. *Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), is misplaced. *Rice* addressed the question whether the Oil Pollution Act of 1990 (OPA), 33 U.S.C. 2701 *et seq.*, imposed liability on parties who discharged oil onto dry ground, when that oil was alleged to have migrated into various types of waters. See *Rice*, 250 F.3d at 265-266. Like the CWA, the OPA regulates discharges into "navigable waters," defined as "the waters of the United States." 33 U.S.C. 2701(21); see 33 U.S.C. 2702(a). The term is generally understood to have the same meaning under both statutes. See *Rice*, 250 F.3d at 267-268.

The court in *Rice* rejected each of three suggested bases for the imposition of OPA liability. First, the Fifth Circuit addressed the question whether the OPA regulated "discharges of oil that contaminate the groundwater," and it held that "subsurface waters are not 'waters of the United States' under the OPA." 250 F.3d at 270. Second, the court in *Rice* addressed the plaintiffs' contention that "surface waters on the [property] are directly threatened by [the defendant's] discharges into the groundwater." *Ibid.* The court found that all discharges were onto dry land and that there

was no evidence of any discharge directly into surface water. *Ibid.* The court further concluded that, even if the discharges could be shown to have seeped into the surface waters on the ranch, the record was insufficient to support a determination that those waters were part of "the waters of the United States." The court explained that the record in the case contained "no detailed information about how often the creek runs, about how much water flows through it when it runs, *or about whether the creek ever flows directly (above ground) into the Canadian River*." *Id.* at 270-271 (emphasis added). Absent proof of a surface connection between the creek in question and any traditional navigable water, the court was unable to conclude that the creek was "sufficiently linked to an open body of navigable water as to qualify for protection under the OPA." *Id.* at 271. Third, the court in *Rice* addressed the question whether "discharges into groundwater that migrate into protected surface waters" are covered by the OPA. *Ibid.* The court held that the OPA does not apply to "discharges onto land, with seepage into groundwater, that have only an indirect, remote, and attenuated connection with an identifiable body of 'navigable waters.'" *Id.* at 272.

Thus, the Fifth Circuit's decision in *Rice* was premised on the absence of any demonstrated surface water connection between the allegedly contaminated seasonal creek and any traditional navigable water. Because the case did not involve a discharge into wetlands, the Fifth Circuit had no occasion to define the circumstances in which wetland areas can properly be treated as part of the "waters of the United States." In particular, the court in *Rice* did not discuss either (i) whether the CWA encompasses wetlands adjacent to a nonnavigable tribu-

tary of a traditional navigable water, or (ii) whether the presence of a berm or similar barrier precludes treatment of a wetland as "adjacent" to a neighboring water body. The decision in *Rice* therefore is not inconsistent with the Sixth Circuit's ruling here.

For similar reasons, the Fifth Circuit's decision in *In re Needham*, 354 F.3d 340 (2003), see Pet. 14-15, 20-21, does not squarely conflict with the Sixth Circuit's decision in this case. *Needham*, like *Rice*, involved a suit under the OPA. 354 F.3d at 342. The oil at issue in *Needham* "was originally discharged into [a] drainage ditch at Thibodeaux Well," and from there "spilled into Bayou Cutoff, and then into Bayou Folse. Bayou Folse flows directly into the Company Canal, an industrial waterway that eventually flows into the Gulf of Mexico." *Id.* at 343. The Fifth Circuit held that the defendants' conduct was covered by the OPA. *Id.* at 346-347. The court stated that "the proper inquiry is whether Bayou Folse, the site of the farthest traverse of the spill, is navigable-in-fact or adjacent to an open body of navigable water." *Id.* at 346. The Fifth Circuit found that "Bayou Folse is adjacent to an open body of navigable water, namely the Company Canal," *ibid.*; and it concluded on that basis that "the Thibodeaux Well oil spill implicated navigable waters and triggered federal regulatory jurisdiction pursuant to the OPA," *id.* at 347.

In the course of its analysis, the Fifth Circuit appeared to disapprove the results reached by the Sixth and Fourth Circuits in *Rapanos I* and *United States* v. *Deaton*, 332 F.3d 698 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004), and it stated that "[t]he CWA and the OPA are not so broad as to permit the federal government to impose regulations over 'tributaries' that are neither themselves navigable nor truly adjacent to navi-

gable waters." 354 F.3d at 345. That statement was dictum, however, in light of the *Needham* court's determination that the oil spill actually involved in that case was covered by the OPA. And while the *Needham* court stated that "both the regulatory and plain meaning of 'adjacent' mandate a significant measure of proximity," *id.* at 347 n.12, and that "the term 'adjacent' cannot include every possible source of water that eventually flows into a navigable-in-fact waterway," *id.* at 347, the court did not offer a precise rule for determining when a nonnavigable tributary is "adjacent" to a traditional navigable water.[5] Nor did the court in *Needham* consider the application of the CWA to wetlands of any sort. Thus, even assuming that the Fifth Circuit follows the *Needham* dictum in a future case in which the issue is actually presented, it is unclear to what extent the approaches taken by the Sixth and Fifth Circuits would lead to different results in concrete factual settings.

3. Petitioners contend (Pet. 5, 24-28) that Congress lacks authority under the Commerce Clause to regulate discharges of pollutants into the wetland at issue in this case. Petitioners did not raise that claim in the court of appeals, nor did the court address any constitutional question. Petitioners' Commerce Clause challenge therefore is not properly preserved for review by this Court. See *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993).

In any event, every court of appeals that has addressed the question has held that the CWA may constitutionally be applied to nonnavigable tributaries and

[5] Under the regulations, "adjacency" is relevant only to wetlands, not to tributaries. 33 C.F.R. 328.3(a)(5) and (7); 40 C.F.R. 230.3(s)(5) and (7).

their adjacent wetlands.[6] This Court and others have long recognized Congress's power to regulate pollutant discharges into waters that are not themselves navigable where such regulation is reasonably necessary to maintaining the quality of traditional navigable waters. Petitioners' constitutional claim lacks merit and does not warrant this Court's review.

a. Because the Corps' exercise of regulatory authority over adjacent wetlands and discharges serves the federal goals of protecting navigability and enhancing water quality in traditional navigable waters, this case implicates core federal interests that were not present in *SWANCC*. Congress's "power over navigable waters is an aspect of the authority to regulate the channels of interstate commerce," *Deaton*, 332 F.3d at 706—the first of the three categories of permissible Commerce Clause legislation identified by this Court in *United States* v. *Lopez*, 514 U.S. 549, 558 (1995)—and that power "carries with it the authority to regulate non-navigable waters when that regulation is necessary to achieve Congressional goals in protecting navigable waters," *Deaton*, 332 F.3d at 707.

Riverside Bayview squarely held that the Corps and EPA may assert regulatory authority over at least *some* wetlands and other waters that do not themselves meet traditional tests of navigability, based on their connec-

[6] See, *e.g.*, *United States* v. *Pozsgai*, 999 F.2d 719, 733-734 (3d Cir. 1993), cert. denied, 510 U.S. 1110 (1994); *United States* v. *Hartsell*, 127 F.3d 343, 348-349 (4th Cir. 1997); *United States* v. *Tull*, 769 F.2d 182, 185 (4th Cir. 1985), rev'd on other grounds, 481 U.S. 412 (1987); *United States* v. *Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1325-1329 (6th Cir. 1974); *United States* v. *Byrd*, 609 F.2d 1204, 1209-1210 (7th Cir. 1979). See also *Hodel* v. *Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264, 282 n.21 (1981) (citing favorably to *Ashland Oil* and *Byrd*).

tions to traditional navigable waters. See 474 U.S. at 133.[7] And while *Riverside Bayview* did not involve a Commerce Clause challenge to the Corps' regulations, petitioners do not question Congress's constitutional authority to regulate pollutant discharges into wetlands that have hydrologic connections to traditional navigable waters and their tributaries. Instead, petitioners' constitutional argument is based on the contention that the wetland at issue here lacks a hydrologic connection to any other water. See Pet. 24-28. As explained above, however (see pp. 9-10, *supra*), petitioners' characterization of the facts is unfounded. Accordingly, review is not warranted.

b. Petitioners' reliance (Pet. 25-26) on this Court's decision in *Lopez* is misplaced. *Lopez* considered the validity of a federal statute under the third of three categories of permissible Commerce Clause legislation identified by the Court, *i.e.*, the regulation of activities that "substantially affect" interstate commerce. 514 U.S. at 558-559. Contrary to petitioners' contention (Pet. 26), the present case involves legislation falling within the first category of permissible Commerce Clause legislation identified by the Court, *i.e.*, regulation of the use of the channels of interstate commerce. *Id.* at 558. As the court in *Deaton* correctly concluded, Congress's "power over navigable waters is an aspect of the authority to regulate the channels of interstate commerce," 332 F.3d at 706, and that power "carries with it the authority to regulate nonnavigable waters when that regulation is necessary to achieve Congressional goals

---

[7] The courts have long recognized that pollution and environmental degradation in the nonnavigable portion of a tributary system may have an adverse effect on water quality in the traditional navigable waters to which those tributaries lead. See, *e.g.*, *Ashland Oil*, 504 F.2d at 1326.

in protecting navigable waters," *id.* at 707. *Lopez* does not undermine that conclusion.

Moreover, even with respect to legislation falling within the third *Lopez* category, a reviewing court need only find that a "rational basis exist[s] for concluding" that a regulated activity substantially affects interstate commerce. 514 U.S. at 557. Here, there is considerably more than a "rational basis" for concluding that discharges of pollutants into wetlands that are adjacent to nonnavigable tributaries of traditional navigable waters have a substantial effect, in the aggregate, on the downstream navigable waters. See *id.* at 558. As a general matter, the harm caused by discharges of dredged or fill material into wetlands includes, but is not limited to, the release of sediment downstream. An even greater harm arises from the *filling* of wetlands, which, as a general matter, reduces or destroys their capacity to perform a variety of essential hydrological and ecological functions, such as filtering and absorbing pollutants from runoff and storing flood waters. See *Riverside Bayview*, 474 U.S. at 134-135. And the Corps found that petitioners' filling of the wetland at issue here would result in just such harm. Pet. App. 70a-71a; see *id.* at 5a.

c. Petitioners contend that, if the CWA is construed to cover the wetland at issue in this case, the Act would "intrude upon the states' primary power to regulate land and water use." Pet. 27. That contention lacks merit. Even with respect to those waters that are encompassed by the regulatory definition of "waters of the United States," the only activity that requires a CWA permit is the discharge of a pollutant (including dredged spoil, sand, and rock) from a point source. Other functions and activities relating to land use remain in the hands of local authorities.

In any event, the federal government possesses longstanding and well-established power to protect the quality of traditional navigable waters by regulating upstream pollutant discharges. See p.16, *supra*. As cases like *Riverside Bayview* make clear, the exercise of that authority may as a practical matter affect activities (*e.g.*, residential housing development, see *Riverside Bayview*, 474 U.S. at 124) that are also subject to extensive state regulation. See *Deaton*, 332 F.3d at 707 ("The power to protect navigable waters is part of the commerce power given to Congress by the Constitution, and this power exists alongside the states' traditional police powers."). So long as the assertion of federal regulatory authority in this case was an otherwise permissible use of the power to protect traditional navigable waters, the requirement that petitioners seek a CWA permit for their fill activities does not impermissibly encroach on state and local land-use planning. See *id.* at 707-708.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
KELLY A. JOHNSON
Acting Assistant Attorney General
GREER S. GOLDMAN
TODD S. KIM
Attorneys

JUNE 2005