

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JOHN A. RAPANOS, ET UX., :

4 Petitioners :

5 v. : No. 04-1034

6 UNITED STATES; :

7 and :

8 JUNE CARABELL, ET AL., :

9 Petitioners :

10 v. : No. 04-1384

11 UNITED STATES ARMY CORPS OF :

12 ENGINEERS, ET AL. :

13 - - - - -X

 Washington, D.C.

 Tuesday, February 21, 2006

16 The above-entitled matter came on for oral
17 argument before the Supreme Court of the United States
18 at 10:12 a.m.

19 APPEARANCES:

20 M. REED HOPPER, ESQ., Sacramento, California; on behalf
21 of the Petitioners in No. 04-1034.

22 TIMOTHY A. STOEPKER, ESQ., Detroit, Michigan; on behalf
23 of the Petitioners in No. 04-1384.

24 PAUL D. CLEMENT, ESQ., Solicitor General, Department of
25 Justice; on behalf of the Respondents.

2 (10:12 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Rapanos v. United States and
5 Carabell v. the United States Army Corps of Engineers.

6 Mr. Hopper.

7 ORAL ARGUMENT OF M. REED HOPPER

8 ON BEHALF OF THE PETITIONERS IN NO. 04-1034

9 MR. HOPPER: Mr. Chief Justice, may it please
10 the Court:

11 This is a case of agency overreaching. In
12 this case, the Corps and EPA pushed the very limits of
13 congressional authority, contrary to the plain text of
14 the act and without any clear indication Congress
15 intended that result. They claim 404(a) jurisdiction
16 over the entire tributary system, from the smallest
17 trickle to the largest watershed, swapping in --
18 sweeping in remote, non-navigable wetlands 20 miles
19 from the traditional navigable water.

20 This limitless claim of jurisdiction shifts
21 the Federal/State balance and raises significant
22 constitutional questions. We believe this boundless
23 interpretation is inconsistent with this Court's
24 reading of the act in Solid Waste Agency.

25 JUSTICE SCALIA: It goes somewhat beyond the

1 smallest trickle? Doesn't it? Doesn't it also include
2 ditches that currently don't have any trickle if they
3 obtain a trickle during a rainstorm?

4 MR. HOPPER: Yes, Your Honor. They actually
5 argued that it -- it makes no difference whether there
6 -- what the substantiality is or the directness of the
7 connection is. It's irrelevant to the jurisdictional
8 determination.

9 And as I said, they -- the -- the agencies
10 assert jurisdiction over even the entire watershed.
11 For example, the Mississippi watershed, the largest in
12 the Nation, covers 1 million square acre -- 1 million
13 square miles and reaches from the Rockies to the
14 Appalachians and drains 41 percent of the 48 lower
15 States.

16 JUSTICE GINSBURG: So where would you --
17 where would -- where would you put the line?

18 MR. HOPPER: I'd put the line where Congress
19 put the line, Your Honor. Congress declared in 404(a)
20 that it would prohibit the discharge of fill and
21 dredged material into the navigable waters. So the --
22 these agencies can permit or prohibit any discharge, no
23 matter where it occurs, so long as it reaches a
24 navigable water. That would be the --

25 JUSTICE GINSBURG: But then -- but you were

1 -- you are including at least wetlands that abut --

2 MR. HOPPER: Yes.

3 JUSTICE GINSBURG: -- navigable water.

4 MR. HOPPER: Yes. Traditional navigable
5 waters plus abutting wetlands inseparably bound up.

6 JUSTICE GINSBURG: What about major
7 tributaries?

8 MR. HOPPER: Congress cannot regulate all
9 tributaries. It could regulate some tributaries --

10 JUSTICE GINSBURG: Which ones?

11 MR. HOPPER: -- but would have to do so on a
12 case-by-case basis. The regulation of all tributaries
13 raises significant constitutional questions and
14 contrary to the regulation of -- of wetlands that are
15 inseparably bound up. And there's no clear indication
16 that Congress intended to regulate any tributaries, let
17 alone the entire tributary system.

18 JUSTICE GINSBURG: Well, is your position no
19 tributaries or some tributaries?

20 MR. HOPPER: The -- the act, by its terms,
21 does not recognize the -- the regulation of any
22 tributary. It does --

23 JUSTICE ALITO: Does it make sense to say
24 that any wetlands that it abuts a traditionally
25 navigable water is covered, but a tributary that leads

1 right into a traditionally navigable water is not
2 necessarily covered?

3 MR. HOPPER: I think -- I think it's fair to
4 say that under this Court's determination in Solid
5 Waste Agency that the only wetlands that are covered
6 are those that are abutting and inseparably bound up.
7 It makes sense to do so because by regulating those
8 types of wetlands, the Government is essentially
9 declaring them the equivalent of the navigable
10 waterway.

11 JUSTICE SOUTER: Yes, but they're doing it
12 for a functional reason. The functional reason is that
13 if you put the poison in the adjacent wetland, it's
14 going to get into the navigable water. Exactly the
15 same argument can be made as you go further and further
16 up the tributaries, and it seems to me that once you
17 concede, as I think you have to, that there can be a
18 regulation that goes beyond literally navigable water
19 at the point at which the -- the pollutant is added,
20 then you have to follow the same logic right up through
21 the watershed to -- to any point at which a pollutant,
22 once added, will eventually get into the navigable
23 water.

24 MR. HOPPER: The reason that logic does not
25 apply, Your Honor, is because the regulation of -- of

1 tributaries raises significant constitutional questions
2 that are not implicated by the regulation of a wetland
3 inseparably --

4 JUSTICE SOUTER: Then -- then you have to
5 accept the fact that -- that Congress cannot
6 effectively regulate the navigable -- the -- the
7 condition of the navigable water itself because if all
8 the -- the -- let's -- let's assume there's a class of
9 -- of evil polluters out there who just want to wreck
10 the -- the navigable waters of the United States. All
11 they have to do is get far enough upstream and they can
12 dump anything they want to. It will eventually get
13 into the navigable water, and Congress can't do
14 anything about it on your theory.

15 MR. HOPPER: That's incorrect, Your Honor.
16 We acknowledge that under the -- the act, the
17 Government can regulate any discharge that actually
18 reaches the navigable water.

19 JUSTICE SOUTER: So you're -- you're going to
20 -- you -- you then want to draw a distinction between
21 the dredge and fill addition and, let's say, a -- a
22 conventional synthetic poison.

23 MR. HOPPER: No. Either -- in either case,
24 if -- if the -- if the discharge of dredged material
25 actually enters into a navigable water, regardless of

1 where it's discharged, it would be covered. Same for a
2 conventional toxin.

3 JUSTICE SOUTER: You mean on -- on -- in
4 every -- in every case then, I mean, Congress would
5 have to -- I'm sorry -- a scientist would have to
6 analyze the molecules and -- and trace them up, and so
7 long as they could -- could trace it to a specific
8 discharge, they could get at it, but otherwise they
9 couldn't? I mean, that -- you know, you know what I'm
10 getting at. That obviously would -- would totally
11 thwart the regulation.

12 MR. HOPPER: I don't -- I don't believe it
13 would, Your Honor. The -- the -- certainly Congress
14 did not think so in section --

15 JUSTICE SCALIA: Couldn't you simply assume
16 that anything that is discharged into a tributary
17 ultimately goes where the tributary goes? Wouldn't it
18 be enough to prove the discharge?

19 MR. HOPPER: Well, it certainly wasn't true
20 in this case, Your Honor. The --

21 JUSTICE SCALIA: So you don't think it would
22 be enough for the -- for the Government to prove the
23 discharge into a tributary in order to prove that the
24 act has been violated.

25 MR. HOPPER: No, Your Honor, I do not.

1 JUSTICE SCALIA: You really think it has to
2 trace the molecules.

3 MR. HOPPER: Absolutely. That's -- that's
4 what the terms of the act require.

5 CHIEF JUSTICE ROBERTS: How do you -- how do
6 you define a tributary?

7 MR. HOPPER: Well, the -- that's one of the
8 problems here, Your Honor, is that -- is that the
9 agency has -- has established a moving target for --
10 for tributaries.

11 CHIEF JUSTICE ROBERTS: So what's your
12 definition?

13 MR. HOPPER: Well, the -- the definitions
14 we're working with here, to which we object, is that --
15 is that it includes anything in the hydrological
16 connection.

17 CHIEF JUSTICE ROBERTS: I know what you
18 object to, and I know that you think your client isn't
19 covered. But I don't know what test you would have us
20 adopt for what constitutes a tributary.

21 MR. HOPPER: Well, we're suggesting that --
22 that this Court need not define tributary because under
23 the act all tributaries are excluded. The only -- the
24 only prohibited act --

25 CHIEF JUSTICE ROBERTS: Okay, but we

1 still don't know what you're excluding. I mean, the
2 Missouri is a tributary of the Mississippi, but I
3 assume it's still covered.

4 MR. HOPPER: Those -- anything that is not of
5 a -- anything does not constitute the channel, the
6 traditional navigable water, and anything not abutting
7 as a -- as a inseparably bound up wetland would
8 constitute a tributary.

9 JUSTICE KENNEDY: Well, it -- it seems to me
10 that what works in your favor is -- is it SWANCC? I
11 don't -- I'm not quite sure how to pronounce the case.

12 MR. HOPPER: Yes.

13 JUSTICE KENNEDY: The Migratory Bird Rule
14 case where we said there had to be a significant nexus.
15 But I think what the Court is asking you is -- is how
16 to define significant nexus. We're -- if you want us
17 just to say, well, this case is too much, but then the
18 Corps of Engineers should use its expertise to come up
19 with a new regulation, that's rather an odd opinion for
20 us to write.

21 MR. HOPPER: Well, this Court did not --

22 JUSTICE KENNEDY: And it seems to me that
23 that's what you're asking us to do here.

24 MR. HOPPER: This Court did not suggest in --
25 in SWANCC that a significant nexus constitutes the

1 jurisdictional standard for all -- for all waters.

2 That standard only applies to wetlands that are
3 adjacent to traditional navigable waters.

4 The jurisdictional standard is determined by
5 the terms of the act. In -- in SWANCC, this Court
6 determined that the act was clear and should be read as
7 written to avoid the constitutional questions raised by
8 a broad interpretation of the act. As written --

9 JUSTICE GINSBURG: From everything -- from
10 everything you said, it sounds like you're -- you're
11 taking issue with Riverside Bayview because if a
12 wetland adjacent to the river counts, then why not a
13 stream that goes right into it? What sense does that
14 distinction make?

15 MR. HOPPER: It makes perfect sense, Your
16 Honor, because the regulation of those tributaries and
17 streams, all of them in the entire tributary system,
18 raise significant constitutional questions that are not
19 implicated by regulating wetlands that are inseparably
20 bound up with traditional navigable water.

21 JUSTICE SCALIA: More than that, Mr. Hopper.
22 I thought and I had expected you to -- to respond to
23 Justice Souter's question this way, his question about
24 how come putting poison in -- in the wetlands is bad,
25 but it's okay to put it in the tributary. But they --

1 as I understand it, the reason we held wetlands were
2 included within the waters of the United States was not
3 -- not that, that you could poison the waters by
4 poisoning the wetlands, but rather, it was that it's
5 very hard to tell where the navigable water ends and
6 the wetland begins. And -- and we said, you know,
7 we're not going to parse that. If it's -- if it's
8 adjacent to a navigable water and it's wet, we're going
9 to say it's part of a navigable water.

10 MR. HOPPER: That's right.

11 JUSTICE SCALIA: I thought that was our
12 basis.

13 MR. HOPPER: That's exactly right.

14 JUSTICE SCALIA: And, of course, that basis
15 doesn't apply to tributaries, does it? You -- you can
16 always tell where the tributary ends. It ends at the
17 point where it goes into the main river.

18 MR. HOPPER: I think that's correct, Your
19 Honor.

20 JUSTICE GINSBURG: You think that's correct
21 about what the Court said in Bayview when it phrased
22 the question as before discharging fill material into
23 wetlands adjacent to navigable bodies of water and
24 their tributaries. That's what the Court thought it
25 was deciding in Riverside Bayview.

1 MR. HOPPER: The Court did frame the question
2 that way, Your Honor. However, the Court's commentary
3 about tributaries was not germane to its -- to its
4 holding. Tributaries was not a question before the
5 Court.

6 JUSTICE GINSBURG: At any rate, they could
7 not have been making the distinction Justice Scalia
8 suggested if, at least in the Court's thinking, the
9 tributaries rolled right into the navigable body.

10 MR. HOPPER: Well, as I said, the -- the
11 Court's commentary in Riverside Bayview is not good law
12 because the -- the Court was not addressing the -- a
13 tributary's question in that case, and it was not faced
14 with a Commerce Clause challenge as it is in this case.

15 And at that time, the agency did not interpret
16 tributaries to include every hydrological reach of the
17 -- of the tributary system.

18 JUSTICE SOUTER: Yes, but doesn't the
19 reference to tributary make it relatively plain that
20 what the Court was getting at was the impossibility of
21 drawing a functional distinction between wetlands and
22 tributaries on the one hand, navigable waters on the
23 other, when the purpose of the regulation is to protect
24 the purity of the ultimate navigable water? And isn't
25 the inclusion of the reference to tributaries an

1 indication that it said if we want to attain the
2 objective, which is clearly constitutional, then we
3 have got to recognize these means, i.e., regulation of
4 -- of pollution in wetlands and tributaries, in order
5 to reach that objective? Isn't that the reasoning that
6 is apparent from what Justice Ginsburg just -- just
7 read to you?

8 MR. HOPPER: I don't believe so, Your Honor.
9 The -- the problem that -- that the agencies have in
10 this case, which was underscored in Solid Waste Agency,
11 is that the Government cannot show any clear indication
12 that Congress intended to regulate the entire tributary
13 system. In Solid Waste Agency, this Court did
14 recognize that because of congressional acquiescence,
15 Congress intended to regulate wetlands adjacent to
16 navigable waters, but as to other waters, this Court
17 could come to no conclusion because the Congress had
18 never defined other waters.

19 JUSTICE SOUTER: Well, it's -- except for the
20 -- it seems to me except for -- for your -- your
21 argument is -- is fine except for one problem. And
22 that is, if we -- if we assume that Congress was being
23 as -- as cautious as you suggest, then Congress'
24 caution, in effect, was -- was allowing an end run
25 around the regulation for the reasons we went into a

1 moment ago. All you've got to do is -- is dump the
2 pollutant further -- far enough upstream in the
3 watershed and you get away scot-free. And it's very
4 difficult to believe that Congress could have intended
5 that.

6 MR. HOPPER: I don't think it's difficult to
7 believe that at all, Your Honor. We simply look at --
8 at the goals and objectives that Congress itself
9 adopted in furtherance of this mission to protect the
10 waters. If we look at 1251(a), Congress declares that
11 its purpose is to protect the integrity of the Nation's
12 waters. It used that term, Nation's waters. And then
13 in -- in 1251(a)(1), it says it will accomplish this by
14 eliminating the discharge of pollutants into the
15 navigable waters, showing that it knows how to
16 distinguish between all waters and navigable waters.
17 And then in 1251(b), Congress says we will respect and
18 defer to the States' primary responsibility to address
19 local water pollution and to manage local land and
20 water use. So the way that Congress intended to
21 address this issue was to defer to the States to
22 regulate pollutants upstream while Congress -- or while
23 the Federal Government regulates downstream. That's a
24 perfectly rational approach to this national problem.

25 CHIEF JUSTICE ROBERTS: But if -- but your --

1 but your answer earlier to Justice Souter's earlier
2 question was that if you dump the pollutants anywhere
3 and they make their way to the navigable water, you're
4 covered. Right?

5 MR. HOPPER: Are covered if they make it --
6 their way all the way there. If they don't, then the
7 States have that responsibility. And every State in
8 the Nation has antipollution regulation.

9 If there are no further questions, I'd like
10 to reserve my time.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.
12 Mr. Stoepker.

13 ORAL ARGUMENT OF TIMOTHY A. STOEPKER

14 ON BEHALF OF THE PETITIONERS IN NO. 04-1384

15 MR. STOEPKER: Mr. Chief Justice, may it
16 please the Court:

17 After years of review by the State of
18 Michigan and the Respondent, the record is very clear.

19 Petitioners' wetland is hydrologically isolated from
20 any navigable water of the United States.

21 Further, the State of Michigan, exercising
22 the power specifically and traditionally reserved to
23 it, undertook responsibility to regulate the waters at
24 issue and pollution and, in doing so, issued Petitioner
25 a wetland permit.

1 It is clear from the record in this case that
2 there is no hydrological connection between the
3 Petitioners' wetland and navigable waters of the United
4 States. Referring to the appendix filed, the joint
5 appendix filed in this case, specifically beginning
6 with the EPA letters dating back to 1994, as this
7 property has been under years of review, do not
8 reference any such connection.

9 CHIEF JUSTICE ROBERTS: Did we talk about a
10 hydrological connection in Riverside Bayview?

11 MR. STOEPKER: The -- the connection there
12 was -- in essence, yes, Your Honor, based upon the
13 inseparable, bound-up nature of those wetlands which
14 were immediately adjacent to the navigable water.
15 There was nothing that separated those wetlands from
16 that specific body of water. They were immediately
17 adjacent and intersected with that body of water.

18 JUSTICE SCALIA: I'm not sure what you mean
19 by a hydrological connection. Do you mean a constant
20 -- a constant body of water between the two, or do you
21 mean simply a -- a drain that at some times might carry
22 off rainwater from -- from this land? And -- would
23 that -- would that suffice to be a hydrological
24 connection?

25 MR. STOEPKER: In -- in this case, Your

1 Honor, there was no connection at all. In this case,
2 there was no connection identified. It was speculated
3 that there might be a potential --

4 JUSTICE SCALIA: Water never ran off of this
5 -- of this land.

6 MR. STOEPKER: No. If you look -- that is
7 correct. If you look at the circuit court opinion, it
8 -- and even the district court opinion and the findings
9 made, there is no finding that any water has ever left
10 the Petitioners' wetland into the ditch.

11 JUSTICE SOUTER: Well, do they have to make
12 this on a plot-by-plot basis, or can they make a
13 categorical judgment that even in cases in which, you
14 know, there's a berm, as there is here, when the water
15 is high, it spills over? And if the categorical
16 judgment is sound, do you have an exception because
17 they haven't proven it with respect to your particular
18 lot?

19 MR. STOEPKER: Yes. Yes, Your Honor. In --
20 in this case --

21 JUSTICE SOUTER: Where do you get that
22 exception?

23 MR. STOEPKER: In the Respondents' brief on
24 page 18, they acknowledge that the traditional test has
25 been hydrological connection, that that's what they

1 have looked towards.

2 JUSTICE SOUTER: And the -- and the -- but I
3 mean, what I'm getting at is the traditional test is
4 the basis for a categorical judgment. Your land falls
5 within the general category. Your argument is I should
6 not be subject to it, to the statute, because of the
7 general category. I should be subject to it only if
8 they prove specifically that the water spills over in
9 rainy periods in my particular lot. In other words,
10 you're saying there's got to be a specific connection
11 as opposed to a categorical judgment. And my question
12 is what under the act supports that view.

13 MR. STOEPKER: Under the act, it talks about
14 the issue of discharge. That is the -- that is the
15 matter that is being regulated by the statute, an
16 actual discharge into the navigable body of water. If
17 you have an hydrologically isolated body of water, you
18 cannot physically have a discharge into the navigable
19 stream. It is an impossibility. And therefore, the
20 act does not allow the speculation that the Court is
21 referring to here.

22 JUSTICE SOUTER: So -- so your -- maybe what
23 you're saying is we have shown or the record shows that
24 this doesn't fit within the category because it never
25 spills over or whatever. Is that your argument?

1 MR. STOEPKER: That is correct. The record
2 in this case does not identify a connection between
3 this wetland and this non-navigable ditch.

4 JUSTICE STEVENS: Am I correct --

5 JUSTICE SCALIA: Mr. Stoepker, your
6 friend, Mr. Hopper, would certainly not agree with you
7 that -- that a -- a hydrological connection is the,
8 quote, traditional test. What -- what is your
9 definition of tradition?

10 MR. STOEPKER: Our definition --

11 JUSTICE SCALIA: How long has this test been
12 established?

13 MR. STOEPKER: If you look at Respondents'
14 brief in their arguments to this Court, they first
15 state, page 18, that in fact traditionally they've
16 looked at hydrological connection. Second, they --

17 JUSTICE SCALIA: Traditionally.

18 MR. STOEPKER: Traditionally.

19 JUSTICE SCALIA: Yes --

20 MR. STOEPKER: From the inception of the
21 rules.

22 JUSTICE SCALIA: From the inception of the
23 rules.

24 MR. STOEPKER: Inception of the rules, that
25 they have looked at hydrological connection.

1 JUSTICE SCALIA: That that alone has been
2 enough.

3 MR. STOEPKER: No. They state that that is
4 the -- the beginning point. The beginning point.

5 They then state that they have historically
6 undertook a interrelationship analysis of the wetland
7 to the tributary or body of water and that they then
8 defer that to the permit review.

9 JUSTICE SCALIA: I see. So you're -- you're
10 not conceding that -- that hydrologic -- hydrological
11 connection is adequate. You're just -- is sufficient.
12 You're just saying it's necessary.

13 MR. STOEPKER: We're -- that is correct, Your
14 Honor.

15 JUSTICE SCALIA: Okay.

16 CHIEF JUSTICE ROBERTS: Can I get back to the
17 question earlier? What is a hydrological connection?
18 Is it enough if the water seeps through the ground and
19 underground is connected with the navigable water, or
20 does there have to be a ditch or -- or a culvert that
21 you can see the water flowing through?

22 MR. STOEPKER: Yes, Your Honor. The --

23 CHIEF JUSTICE ROBERTS: Yes?

24 MR. STOEPKER: Mr. Chief Justice, in -- in
25 response to that question, both potentially. In this

1 case, again, there was no surface water connection, and
2 due to the nature of the clay soils, it was found that
3 there was no groundwater connection --

4 JUSTICE KENNEDY: Was it -- was it also clear
5 that after the improvement, there would be no drainage?

6 MR. STOEPKER: After the improvement, there
7 could be drainage. Ironically the Respondent in this
8 case actually recommends that the barriers between this
9 site and the ditch be removed.

10 JUSTICE STEVENS: May I just ask one
11 clarifying question? Was it found that there was no
12 connection, or was it not found that there was a
13 connection?

14 MR. STOEPKER: It was found that there was
15 not a connection.

16 JUSTICE STEVENS: It was. I didn't read it
17 that way.

18 MR. STOEPKER: If you -- referring the Court
19 to the Respondents' report dated May 5th of 2000, it
20 specifically states --

21 JUSTICE SOUTER: Where are you reading from?

22 MR. STOEPKER: This is from appendix page 81
23 and 83. This is a report that starts with the term
24 jurisdictional at the top.

25 JUSTICE SOUTER: Right.

1 MR. STOEPKER: It notes a number of issues or
2 classifications there or points. First, that the
3 wetland is not adjacent to navigable water. It then
4 notes the wetland is not adjacent to headwater. And
5 then it makes a comment. It says, to a tributary to
6 navigable water, and it says, no.

7 The sole basis for jurisdiction in that
8 report is the Migratory Bird Rule. The Respondent took
9 out to the property who they believed to be the most
10 credible expert they had on migratory birds and then
11 state that the --

12 JUSTICE STEVENS: I'm sorry. I want to be
13 sure I follow you. You say that somewhere on page 82
14 there is a finding that there was no hydrological
15 connection?

16 MR. STOEPKER: They do not reference a -- I'm
17 -- this --

18 JUSTICE STEVENS: They don't find a --

19 MR. STOEPKER: Right. They do -- they do
20 not.

21 JUSTICE STEVENS: I agree with that. I'm
22 asking you if they found there was no hydrological
23 connection.

24 MR. STOEPKER: Yes, they make that in a
25 subsequent report.

1 JUSTICE STEVENS: But not on page 82.

2 MR. STOEPKER: Not -- not in this first
3 report.

4 JUSTICE SOUTER: Is the report in the -- is
5 the subsequent report in the record somewhere?

6 MR. STOEPKER: Yes. The next report is
7 issued September 11th of 2000. In that report --

8 JUSTICE SOUTER: And again, where --

9 JUSTICE STEVENS: What page are you on?

10 JUSTICE SOUTER: Where are you?

11 MR. STOEPKER: I'm going to refer you to the
12 specific pages.

13 They first referenced clay soils on page 93.

14 These are the same clay soils that the State
15 administrative law judge, after much hearing on the
16 record, found were impermeable to prevent groundwater
17 and surface water discharge.

18 Then at page 97 of the appendix, the
19 Respondent finds that due to site conditions -- I will
20 quote -- this wetland has been obstructed from
21 receiving runoff from surrounding area and from
22 circulation by flooding into the drain. End of quote.

23 Then referring to page 99 of the same
24 appendix, I quote. The parcel is not currently a part
25 of the S-O Drain watershed, being the Sutherland-Oemig

1 watershed.

2 Then referring to page 100 where they comment
3 on navigation, they state, no impact on navigation.

4 And then finally at page 106 of the appendix,
5 the features on this site -- and again I quote --
6 presently isolate the wetland from the S-O Drain and
7 receiving waters.

8 So it receives none and it gives none. They
9 used the term in their report isolated. There is no
10 finding anywhere to the contrary in any reports issued,
11 or thereafter at the public hearing that was conducted
12 by the Respondent, that there is any connection. In
13 fact, the Sixth Circuit noted there was no connection.

14 JUSTICE GINSBURG: Then what was the reason
15 they gave for rejecting the permit?

16 MR. STOEPKER: The -- the sole reason claimed
17 for jurisdiction at the agency hearing was adjacency to
18 this non-navigable, unnamed ditch, which was dug by the
19 county for a sewer system. That's the sole reason.
20 The same argument appeared at the district court level,
21 adjacency to the unnamed, unnavigable ditch.

22 JUSTICE KENNEDY: I'm --

23 JUSTICE GINSBURG: Suppose --

24 JUSTICE KENNEDY: -- I'm still not clear as
25 to what the findings were, if there were findings, as

1 to what the condition would be after the improvement.
2 Would there be an increased likelihood of drainage into
3 the ditch after the improvement?

4 MR. STOEPKER: The -- it -- it could occur in
5 two different ways.

6 JUSTICE KENNEDY: And -- and if that were so,
7 would that be sufficient for jurisdiction?

8 MR. STOEPKER: They -- that -- that was not
9 their finding because in this case they actually
10 recommended, whether or not anything occurred on the
11 property, that the berms or barriers be removed. They
12 actually recommend there be an interaction between the
13 wetland and the ditch. That's the irony of this.

14 JUSTICE KENNEDY: But, well -- suppose the
15 interaction were automatic. Would that suffice to make
16 this a wetlands after the improvement?

17 MR. STOEPKER: It -- it is our position in
18 this case no because the ditch next to the site has not
19 been regulated under the rules adopted by the
20 Respondent and -- nor under the statute adopted by
21 Congress. The ditch is -- has been historically
22 designated as a point source or a source point, as has
23 been the drain under the statute.

24 In 1975, after the district court ruled that
25 the Respondent's rules were too narrow from a

1 jurisdictional standpoint, the Respondent then expanded
2 its rules in 1975. In the preamble to those rules, it
3 specifically stated that ditches -- ditches of this
4 nature, drainage ditches, were specifically exempted as
5 waters of the United States. That is in the preamble.

6 We then go to 19 --

7 CHIEF JUSTICE ROBERTS: Counsel, what -- what
8 is the test that you would have us adopt for a
9 significant nexus?

10 MR. STOEPKER: Our -- our test for
11 significant nexus would start with the -- the basis
12 that there must be an established, existing
13 hydrological connection between the wetland and the
14 body of water adjacent --

15 CHIEF JUSTICE ROBERTS: By that, you mean
16 either a ditch or underground seepage?

17 MR. STOEPKER: Yes.

18 CHIEF JUSTICE ROBERTS: Okay. So there has
19 -- there has to be any -- and any hydrological
20 connection works.

21 MR. STOEPKER: Based --

22 CHIEF JUSTICE ROBERTS: Mr. Hopper won't like
23 that, but for --

24 MR. STOEPKER: No.

25 (Laughter.)

1 MR. STOEPKER: Using this Court's definition
2 in -- in SWANCC, it's -- it is our position that it
3 needs to be a substantial nexus or interrelationship.
4 We're saying --

5 JUSTICE SCALIA: You don't -- you don't
6 have to define what -- everything that's necessary.
7 All you have to define is one indispensable element.
8 And all you're arguing is that a hydrological
9 connection is an indispensable element, whatever
10 additional elements --

11 MR. STOEPKER: That is correct.

12 JUSTICE SCALIA: -- there may be. So you may
13 agree with your friend, Mr. Hopper.

14 MR. STOEPKER: We're --

15 JUSTICE SCALIA: You -- you just haven't
16 reached that point. Right?

17 MR. STOEPKER: We don't -- we do not believe
18 that this case needs to reach that --

19 JUSTICE STEVENS: But I'm still puzzled --

20 JUSTICE SCALIA: I don't want to set you two
21 to fighting with each other.

22 JUSTICE STEVENS: -- by your answer to
23 Justice --

24 (Laughter.)

25 JUSTICE STEVENS: -- Justice Kennedy. What

1 if there's no hydrological connection today, but there
2 would be after you -- after you built your project?

3 MR. STOEPKER: At that point, then maybe the
4 Respondent could determine there would be some form of
5 regulation if, in fact, the discharge was into a ditch
6 that was, in fact, regulated. And --

7 JUSTICE STEVENS: But it -- would it be a
8 sufficient reason to deny a permit based on the
9 judgment that after the project is completed, there
10 will be a -- a hydrological connection?

11 MR. STOEPKER: The test is from the outset,
12 Your Honor.

13 JUSTICE STEVENS: No. It seems to me you
14 could answer that yes or no.

15 MR. STOEPKER: Yes. No.

16 JUSTICE STEVENS: Perhaps you don't want to
17 but --

18 (Laughter.)

19 MR. STOEPKER: The -- the resulting impact --
20 I would say no. The resulting impact has not been
21 determined for jurisdiction.

22 JUSTICE STEVENS: But isn't it sort of
23 foolish to say that we're concerned about pollution,
24 but only if you -- only if you catch it in advance?
25 That doesn't make sense because if the problem would

1 arise when you did what you're seeking a permit to do,
2 why shouldn't you be denied the permit?

3 MR. STOEPKER: The application for the permit
4 does not automatically equate to a request to
5 discharge. The fill of a wetland does not
6 automatically discharge into the ditch.

7 JUSTICE STEVENS: No, but my hypothesis is
8 that we know it would happen, or they -- they would
9 find it would happen after the project is completed.
10 And it seems to me that -- that that's what you should
11 focus on rather than what's -- you know, rather than
12 what happens before.

13 MR. STOEPKER: This Court's test in SWANCC is
14 based upon the before, and also based upon Riverside,
15 it examined the before condition and the impact on that
16 navigable water. And what is to be prevented is the
17 discharge into that navigable water. And that is the
18 initial test that is conducted.

19 If the Court examines the Respondent's actual
20 test data, what they examined here was the
21 jurisdictional determination from the beginning. Is
22 there a connection? Is it isolated? Is it not
23 isolated? They didn't look at the after-effect. They
24 looked at the after-effect in relationship to issuing
25 or not issuing the permit.

1 JUSTICE SCALIA: What we're talking about
2 here is -- is at -- at most, whether this is a water of
3 the United States. The condition for requiring permits
4 is that it -- it be a water of the United States.
5 Isn't that right?

6 MR. STOEPKER: That is correct.

7 JUSTICE SCALIA: And it either is or it
8 isn't, not -- not that it will be. It either is or it
9 isn't. If it is, you -- you need a permit; if it
10 isn't, you don't need a permit.

11 MR. STOEPKER: That is correct.

12 JUSTICE SOUTER: And Justice Stevens'
13 question I think in -- in that framework is -- is this.
14 If it will result in discharge after the project, is
15 it a water of the United States now?

16 MR. STOEPKER: Under the Court's definition
17 in SWANCC and Riverside, the answer again is no.

18 JUSTICE SOUTER: Then -- then Congress has
19 passed a statute that says we'll lock the barn after
20 the horse is stolen. I mean, that -- maybe that's what
21 it did, but that's -- that would be a very odd thing
22 for it to do, wouldn't it?

23 MR. STOEPKER: It did not do so, Your Honor,
24 because specifically under section 1251(b), it reserved
25 to the States the primary responsibility of regulating

1 pollution within its waters. The primary
2 responsibility. That primary responsibility is not
3 designated to the Respondent in this case. A shift
4 would -- in -- in that framework would shift the
5 primary responsibility to the Respondent and take that
6 primary responsibility away from the State.

7 JUSTICE SOUTER: Well, it -- it would do so
8 in -- in cases of -- I guess, of the -- the sorts of --
9 of new proposed actions that require the -- the Corps
10 to get into it in the first place. But I also assume
11 that it would leave lots of -- of water pollution
12 regulation to the States. I don't see that it would
13 displace the States.

14 MR. STOEPKER: In this case, it actually --
15 the decision of the Respondent did displace the State.
16 The State, after years of examination and
17 determination of impact, made a decision to issue a
18 wetland permit to this project and, in doing so, found
19 specifically that the issuance of the permit would be
20 better, effective method of dealing with pollution than
21 not issuing the permit. That was the specific finding
22 made by the administrative law judge in that appendix,
23 and those findings are the first part of the appendix
24 in this case, detailed findings after a 2-week
25 administrative trial where witnesses were cross-

1 examined and examined.

2 In this case, the Respondent has ignored
3 those State powers given to its traditional waters and
4 has said, we're going to ignore, number one, your claim
5 of jurisdiction, and number two, we're going to ignore
6 your finding of no impact and completely disregard
7 that.

8 So, in fact, the framework in this case did
9 shift. The State did what it was supposed to do under
10 1251(b) and the -- the Respondent in this case usurped
11 that responsibility and those traditional powers
12 granted to it traditionally and both by this statute,
13 and then determined that what the State of Michigan did
14 had no relevance. It was unwarranted. So the
15 framework in this case did specifically change.

16 And in doing so, we get back to those same
17 factual findings they've made. We are here only today
18 because they found that it is adjacent to a ditch which
19 they have said is not a waters of the United States.
20 So in this case, the --

21 JUSTICE SCALIA: And the only reason it's a
22 water of the United States is that there are some
23 puddles on this land. Right? And if there were no
24 puddles, it -- it wouldn't be a water of the United
25 States. It would just be land of the United States.

1 MR. STOEPKER: That's correct, because
2 there's some puddles on the land occasionally.

3 JUSTICE SCALIA: So it -- it becomes waters
4 of the United States because there are puddles on it,
5 and you assert because those puddles have some
6 hydrological connection or if it is -- if it is water
7 of the United States, those puddles have some
8 hydrological connections with the navigable waters.

9 MR. STOEPKER: To -- to be waters of the
10 United States, they would have to have a hydrological
11 connection as a minimum test to be a part of the waters
12 of the United States.

13 JUSTICE SCALIA: And -- and the -- the
14 statute only prohibits the discharge of dredged or fill
15 material, which is what is going on here, into the
16 navigable waters, right, at specified disposal sites.
17 I'm sorry. The -- the permits that -- that are
18 required here --

19 MR. STOEPKER: That is correct.

20 JUSTICE SCALIA: -- permit discharge into
21 waters, not -- not into lands that aren't waters.

22 MR. STOEPKER: No. The -- that is correct.
23 The permit permits the discharge into a navigable water
24 of the United States. That is the object of the
25 permit.

1 Again, the rules that the Respondent has
2 adopted since 1975 have specifically excluded the
3 Nundane ditch, as well as the drain next to that ditch,
4 as being defined as waters of the United States. So
5 therefore, even if they could show a connection, which
6 is a question that has been raised, would in fact the
7 wetland be regulated, by the -- by the Respondents' own
8 definitions and by the statutory definition which
9 excludes a ditch and a drain under section 1262(12) and
10 (14), neither the ditch or the Sutherland-Oemig drain
11 by definition is a water of the United States. It is a
12 point source and therefore not a water. So even if
13 they could --

14 JUSTICE GINSBURG: May I ask one question
15 about your -- your not -- no hydrological connection?
16 If this berm were next to a wetland that would
17 otherwise be adjacent to a river, the situation that
18 was presented in Riverside Bayview, is it the berm that
19 prevents there being a hydrological connection?

20 MR. STOEPKER: In this case, there are two
21 things. The first, the berm segregates the surface
22 water connection between the two, and then second, the
23 nature of the soils being clay, which are not permeable
24 soils, create the additional segregation between that
25 and the body of water.

1 JUSTICE GINSBURG: So it could -- there could
2 be a situation where the wetlands would be right next
3 to the river, but there's a berm in between, and that
4 would break the hydrological connection?

5 MR. STOEPKER: It would break the
6 hydrological connection. However, this Court has ruled
7 in the Riverside case that those wetlands which are
8 adjacent to navigable waters -- it did not reach the
9 issue whether they were not adjacent to non-navigable
10 waters. They only addressed the -- this Court only
11 addressed the issue of relationship to navigable
12 waters. In that case, this Court specifically found
13 that wetlands adjacent to navigable waters were
14 regulated.

15 The Court specifically reserved the --

16 JUSTICE SCALIA: Do you think it -- do you
17 think it mean adjacent with a berm in between? I -- I
18 thought the reason they -- they reached that conclusion
19 was you can't tell where the navigable water ends and
20 where the wetland begins. I -- I thought they assumed
21 a connection between the two.

22 MR. STOEPKER: In reading the opinion -- Your
23 Honor, my time is up.

24 CHIEF JUSTICE ROBERTS: You may respond
25 briefly.

1 MR. STOEPKER: Yes.

2 In reading the opinion, it -- it appears
3 that this Court found, because it actually went to the
4 water's edge, there was an inseparable, bound-up
5 attachment between the wetland and the navigable water.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 MR. STOEPKER: Thank you.

8 CHIEF JUSTICE ROBERTS: General Clement.

9 ORAL ARGUMENT OF PAUL D. CLEMENT

10 ON BEHALF OF THE RESPONDENTS

11 GENERAL CLEMENT: Mr. Chief Justice, and may it
12 please the Court:

13 In United States against Riverside Bayview
14 Homes, this Court unanimously upheld the Corps'
15 jurisdiction over wetlands that were not themselves
16 navigable, but were adjacent to waters otherwise within
17 the Corps' jurisdiction.

18 The principal difference between the Rapanos
19 wetlands and the wetlands at issue in Riverside Bayview
20 are that the Rapanos wetlands are adjacent to a non-
21 navigable tributary, while the wetlands at issue in
22 Riverside Bayview were adjacent to a navigable creek.

23 CHIEF JUSTICE ROBERTS: How do you define
24 tributary?

25 GENERAL CLEMENT: Mr. Chief --

1 CHIEF JUSTICE ROBERTS: The tributary -- you
2 say they're adjacent to a nonnavigable tributary.
3 That's a -- a culvert, a ditch. Right?

4 GENERAL CLEMENT: Well, not in all these cases,
5 Mr. Chief Justice.

6 CHIEF JUSTICE ROBERTS: But in Rapanos'
7 case.

8 GENERAL CLEMENT: No, not -- not -- that's
9 actually not true. There are three specific wetlands
10 that are at issue in the Rapanos case. One of those,
11 the Pine River site, as its name suggests, is adjacent
12 to the Pine River, which is a body of water that has
13 water flowing through it all year-round. It's a river.

14 I don't think anybody would look at that and say
15 that's not a tributary of the downstream navigable
16 rivers. And I think that's why, in fairness --

17 CHIEF JUSTICE ROBERTS: What about -- what
18 about the other -- the other sites?

19 GENERAL CLEMENT: The -- the other sites are --
20 are adjacent to man-made ditches that also drain in.

21 If I just -- can I just say, though, I think
22 the fact that the Pine River site is so obviously a
23 tributary under -- under any definition is one of the
24 reasons, along with the theory that you heard advanced
25 by Petitioners, that this case --

1 CHIEF JUSTICE ROBERTS: But your argument
2 assumes that the ditches that go to the other two sites
3 are also tributaries.

4 GENERAL CLEMENT: Absolutely, Mr. Chief Justice.

5 I just want to make the point that this case, because
6 of the theory Petitioners have advanced, has not really
7 unearthed or focused on the definition of a tributary,
8 but let me get to it because the Corps has defined the
9 definition of a tributary. And the definition of a
10 tributary is basically any channelized body of water
11 that takes water in a flow down to the traditional
12 navigable water --

13 JUSTICE SCALIA: Even when it's not a body of
14 water.

15 GENERAL CLEMENT: Even --

16 JUSTICE SCALIA: A storm drain, even -- even
17 when it's not filled with water, is a tributary.
18 Right?

19 GENERAL CLEMENT: Justice Scalia, absolutely.

20 JUSTICE SCALIA: Okay.

21 GENERAL CLEMENT: The Corps has not drawn a
22 distinction between man-made channels or ditches and
23 natural channels or ditches. And, of course, it would
24 be very absurd for the Corps to do that since the Erie
25 Canal is a ditch.

1 JUSTICE SCALIA: I suggest it's very absurd
2 to call that waters of the United States. It's a
3 drainage ditch dug -- you know, dug by the municipality
4 or -- you know, or a gutter in a street. To call that
5 waters of the United States seems to me extravagant.

6 GENERAL CLEMENT: Well, let me say two things,
7 Justice Scalia. First of all, this case has not been
8 litigated under the theory that the key difference is
9 whether it's man-made or natural, and that defines
10 somehow the scope of a tributary. And I think there's
11 a good reason for that, which is the second point,
12 which is as the Corps experts -- from the experts of the
13 Corps will tell you, the process of making the natural
14 rivers navigable has all been about the process of
15 channelizing them and creating man-made, artificial
16 channels in them to the point where the difference
17 between that which is a man-made channel and that which
18 is a natural channel is both difficult to discern and
19 utterly beside the point for purposes of this
20 regulatory scheme.

21 JUSTICE SCALIA: What -- what percentage of
22 the -- of the territory of the United States do you
23 believe is -- is subjected to permits from the Corps of
24 Engineers on your theory whenever you want to move
25 dirt, whenever you want to deposit sand? What -- what

1 percentage of the total land mass of the United States,
2 if you define tributary as broadly as you define it to
3 include? Every storm drain? I mean, it's the whole
4 country, isn't it?

5 GENERAL CLEMENT: Well --

6 JUSTICE SCALIA: All the water goes down to
7 the sea and there's some kind of a drain or -- or a bed
8 that takes the water down there.

9 GENERAL CLEMENT: Well, I think the precise
10 answer to your question being none of the land mass --
11 none of the land itself would be regulated. But in
12 terms of -- you want to talk about the --

13 JUSTICE SCALIA: You're calling empty ditches
14 -- not unless you call empty ditches land, which I do.

15 GENERAL CLEMENT: Well, the -- the Corps doesn't.
16 They treat those as water bodies.

17 JUSTICE SCALIA: I understand that.

18 GENERAL CLEMENT: And that's not the gravamen of
19 the complaint here.

20 But just to be responsive to your question, I
21 think it's important to understand that the Corps and
22 the EPA's view of wetlands would cover about 80 percent
23 of the wetlands in the country. And that shows that
24 the impact of this Court's decision in SWANCC was real
25 and substantial because about 20 percent of the

1 Nation's wetlands are isolated.

2 JUSTICE SCALIA: But -- but you -- that's
3 just because this statute happens to refer to wetlands.

4 But under your theory, the Corps of Engineers would
5 have jurisdiction over any land that is part of that
6 tributary system as well. If any of that land has a
7 deposit of -- of some materials that could leach into
8 or -- or drain into the -- the tributary system, which
9 is to say any gutter, in theory, the -- the Federal
10 Government can regulate it all. No?

11 GENERAL CLEMENT: I don't think that's right,
12 Justice Scalia. The Corps has regulated this
13 channelized tributary system. It has done it without
14 regard to whether those channels are seasonally dry in
15 some areas, and I think that's a rational judgment.
16 It's not been the gravamen of this case, though. And
17 what's important is while the Corps and the Federal
18 Government regulate that channelized system of
19 tributaries, non-point source pollution is still
20 something that's in the primary providence of the
21 States. And so it's not true that the Corps is
22 asserting an authority to regulate land as such.

23 But to also get it on the table, if the
24 Federal Government wanted to -- if Congress changed its
25 mind and said that, say, the banks of the navigable

1 rivers or their tributaries are within the scope of
2 this program, as it did in 1899 in section 13 of the
3 Rivers and Harbors Act, we'd be here defending that as
4 a valid exercise of Congress' authority not just under
5 the Commerce Clause, but under the navigation power of
6 the --

7 JUSTICE SCALIA: But in 1899, it just said
8 navigable rivers, not -- not every -- every tributary
9 defined to include even storm drains.

10 GENERAL CLEMENT: No. With respect, Justice
11 Scalia, in 1899 in section 13 of the Rivers and Harbors
12 Act, the so-called Refuse Act, Congress regulated the
13 navigable waters and their tributaries. Now, in
14 fairness, the focus there was this idea that they only
15 regulated the tributaries if they could show that it
16 flowed into the navigable waters themselves, but they
17 asserted right in the text of the statute in 1899 the
18 authority to regulate the tributaries and the banks.

19 And that shows what I think is a very
20 important difference between this case and SWANCC.

21 JUSTICE KENNEDY: But your -- your theory is
22 there is regulatory authority because there's an
23 interaction between the wetlands or the lands in
24 question and the navigable waters.

25 GENERAL CLEMENT: Justice Kennedy, that's not

1 precisely accurate. The way it would describe it is
2 this.

3 As to the first question you have to ask,
4 which is are the tributaries covered, we think an
5 important component of describing the reach of the
6 tributary system is whether there's a hydrological
7 connection. On the second -- and that's subsection (5)
8 of the regulatory definition that brings within the
9 scope of waters of the United States tributaries.

10 Then you get to the second question which
11 actually implicates another subsection of the
12 definition, subsection (7), which is the adjacent
13 wetlands. And as to the adjacent wetlands, as the
14 Carabell case illustrates, the definition does not turn
15 on hydrological connection for purposes of asserting
16 the Corps' jurisdiction.

17 JUSTICE KENNEDY: Well, but -- but wasn't --
18 wasn't the reason for including the adjacent wetlands
19 because of -- of the likelihood of an interaction?

20 GENERAL CLEMENT: I think they -- they were
21 included for the likelihood of an interaction both
22 hydrologically and otherwise.

23 I would say two important things, though.

24 JUSTICE KENNEDY: Well, let -- well, please
25 finish.

1 GENERAL CLEMENT: The two points I would make is,
2 first of all, I think the Corps' regulations, which for
3 30 years have ignored the premise -- the -- the
4 presence of a berm, are rational because in the vast,
5 vast majority of cases, that berm is not going to
6 prevent a hydrological connection, so to speak. And so
7 a test that focuses, first and foremost, on physical
8 proximity is a very rational jurisdictional test.

9 The second thing I would say, though, is it's
10 simply not true that even in the rare case where a berm
11 or a dike prevents all hydrological connection, that an
12 adjacent wetland will not perform an important function
13 for the adjacent water body. And the most obvious one
14 is the flood control possibility of the wetland.

15 CHIEF JUSTICE ROBERTS: Well -- well, as you
16 mention that, you cited subsection (7), and there's a
17 -- what struck me anyway as a very interesting
18 provision in there. It covers wetlands adjacent to
19 waters other than waters that are themselves wetlands.

20 Now, everything that you've said today and in your
21 brief would lead me to think you would contend that
22 wetlands that are adjacent to wetlands ought to be
23 covered as well, and yet, the regulation leaves them
24 out. And I want to know why do you think the
25 regulation leaves those wetlands out.

1 GENERAL CLEMENT: I -- I think, Mr. Chief
2 Justice, my own view is the reason that that caveat is
3 in subsection (7) is actually a vestige of the pre-
4 SWANCC scope of the regulation. And specifically, if
5 you look at subsection (3) of the definition which is
6 the isolated waters provision that was at issue, I
7 think, through the Migratory Bird Rule in SWANCC, that
8 includes wetlands in the available isolated waters.
9 And I think --

10 CHIEF JUSTICE ROBERTS: To me it -- it
11 suggests that even the Corps recognized that at some
12 point you've got to say stop because logically any drop
13 of water anywhere is going to have some sort of
14 connection through drainage. And they're -- they're
15 stopping there, and I wonder if we ought to take that
16 same instinct that -- that you see in subsection (7)
17 and apply it to your definition of tributary and say,
18 at some point, the definition of tributary has to have
19 an end. Otherwise, you're going to go and reach too
20 far, beyond what Congress reasonably intended.

21 GENERAL CLEMENT: Well, several thoughts on that,
22 Mr. Chief Justice. I think the problem with that
23 approach is that the reason why it makes sense to
24 regulate that very first tributary that flows into the
25 Mississippi is the reason that it makes sense to

1 regulate the entire tributary system. All of that
2 water is going to flow down into the navigable waters,
3 and if there's going to be --

4 CHIEF JUSTICE ROBERTS: But that's true of
5 the wetland that is adjacent to the wetland that is
6 adjacent to the tributary, and yet, the Corps says
7 we're not going to reach the wetland that is adjacent
8 to another wetland.

9 GENERAL CLEMENT: Well, with respect, Mr. Chief
10 Justice, the way that I would read that and the way I
11 understand the Corps reads that is that was really just
12 trying to exclude a wetland adjacent to a wetland that
13 was a water of the United States only because of the
14 application of subsection (3).

15 JUSTICE KENNEDY: Your assumption --

16 GENERAL CLEMENT: And I think that's -- that's
17 supported by the --

18 JUSTICE KENNEDY: -- but this -- this is
19 preliminary to my question. In SWANCC, we said there
20 has to be a significant nexus. It seems to me that you
21 have to show that there's some significant relation
22 between the wetlands you're regulating or seeking to
23 regulate and the navigable water.

24 GENERAL CLEMENT: I agree with that, Justice
25 Kennedy.

1 JUSTICE KENNEDY: And I -- and that's just,
2 it seemed to me, so far been missing from the
3 discussion.

4 GENERAL CLEMENT: Well, and I -- I guess there
5 is two ways to look at this. You can start with the
6 significant nexus test and see if it's met. I guess
7 the way that the Corps would naturally proceed is to
8 start with their definitions, and they would say
9 section -- subsection (5) covers tributaries. And you
10 can ask the question, is there a significant nexus
11 between the tributaries and the navigable waters in
12 which they flow into? And I think the answer to that
13 is yes.

14 And then there's the secondary question, as
15 to subsection (7) of the regulatory definition. Is
16 there a significant nexus between wetlands that are
17 adjacent to waters otherwise within the Corps'
18 jurisdiction, be they the traditional navigable waters
19 or their tributaries? And I think Riverside Bayview
20 answered that question and said, yes, there is a
21 significant nexus between adjacent wetlands and any
22 otherwise regulable water body to which they are
23 adjacent.

24 So that's the way we would ultimately satisfy
25 what this Court required, which is a significant nexus.

1 I wouldn't have understood this Court's
2 decision to transplant the significant nexus test and
3 say, that's what the Corps should administer, because
4 whatever ambiguity there is in waters of the United
5 States, I think significant nexus is precisely the kind
6 of test you'd want the Corps --

7 JUSTICE KENNEDY: What -- what about the
8 Chief Justice's question, wetlands next to wetlands?

9 GENERAL CLEMENT: Well, I -- I think that -- as I
10 said, I think what -- what the definition meant to get
11 at was to exclude wetlands adjacent to isolated
12 wetlands under subsection (3).

13 I think if you ask the question more broadly,
14 what about wetlands next to wetlands, I guess it
15 depends on what you mean by that because the one thing
16 we know from Riverside Bayview is that it's not a
17 requirement that the parcel and its wetlands be
18 immediately adjacent.

19 CHIEF JUSTICE ROBERTS: Well, but we didn't
20 come up with the idea of wetlands next to wetlands.
21 The Corps of Engineers has it in their regulations.

22 GENERAL CLEMENT: And --

23 CHIEF JUSTICE ROBERTS: So what do they mean
24 by it?

25 GENERAL CLEMENT: They meant wetlands adjacent to

1 waters that would otherwise not be in the statute which
2 are isolated wetlands under subsection (3). It's the
3 only application it has in -- in the regulatory
4 structure, as they understand it.

5 CHIEF JUSTICE ROBERTS: What -- what is an
6 example of an insignificant nexus under the SWANCC
7 test?

8 GENERAL CLEMENT: Under insignificant nexus?
9 Well, I think it's the waters at issue in SWANCC, and I
10 think it's --

11 CHIEF JUSTICE ROBERTS: No. There's no nexus
12 there.

13 GENERAL CLEMENT: Well, no --

14 CHIEF JUSTICE ROBERTS: They're isolated.
15 There's no nexus. The -- the notion in SWANCC of a
16 significant nexus suggests that there are some bodies
17 of water or puddles that are going to have a nexus, but
18 it's not going to be significant enough. We didn't
19 just say any nexus. It said significant nexus. So
20 what are you leaving out to give meaning to the test
21 that we articulated in SWANCC?

22 GENERAL CLEMENT: I'm leaving out everything that
23 this Court excluded in SWANCC, and I wouldn't have
24 thought that the -- that the Court necessarily
25 suggested there was going to be some subset that had a

1 further insignificant nexus because it wasn't -- the
2 argument of the Government in those cases was obviously
3 -- we didn't just concede that those bodies of water
4 were utterly isolated. We said they did have important
5 ecological connections with the water. And I think the
6 way I read SWANCC is that we can't make that --

7 CHIEF JUSTICE ROBERTS: So if you have a
8 wetland, you would say a wetland with a hydrological
9 connection to a tributary of navigable waters through
10 one drop a year is a significant nexus to the waters of
11 the United States?

12 GENERAL CLEMENT: What I would say, Mr. Chief
13 Justice, is that if the tributary flows in. I would
14 start with the tributary, and I'd say, now, there's
15 clearly a significant nexus between the tributary and
16 the navigable waters to which it flows. I would then
17 look at the wetland, and I would say for purposes of
18 the regulation of adjacent wetlands --

19 CHIEF JUSTICE ROBERTS: One drop.

20 GENERAL CLEMENT: For purposes of the adjacent
21 wetlands, it doesn't look to hydrological connection
22 per se. The way I would resolve that is I would
23 resolve it with reference to footnote 9 in this Court's
24 opinion in Riverside Bayview, and I would say, all
25 right, one drop? Fair enough. It's in the regulatory

1 jurisdiction because it's adjacent and that's what the
2 Corps looks to. And I think that's a rational
3 judgment. But if there's one drop, grant the permit.
4 That solves the --

5 JUSTICE SCALIA: Adjacent to what? Adjacent
6 to a tributary. Right?

7 GENERAL CLEMENT: Adjacent to a tributary,
8 absolutely.

9 JUSTICE SCALIA: But -- but here's -- here's
10 the fly in the ointment. You -- you interpret
11 tributary to include storm drains and ditches that only
12 carry off rainwater. I mean, it makes an immense
13 difference to the scope of jurisdiction of the Corps of
14 Engineers. I mean, when you talk about adjacent to a
15 tributary, I think, you know, maybe adjacent to the
16 Missouri River or something like that. No. You're
17 talking about adjacent to a storm drain.

18 GENERAL CLEMENT: Well, Justice Scalia, I think
19 if you had in mind a tributary, you'd probably have in
20 mind the Pine River which is at issue in one of these
21 sites. And I think that's why that's not the way
22 Petitioners have presented this case.

23 JUSTICE SCALIA: Only because I don't know
24 how a storm drain is a water of the United States.
25 That's all. I mean, all of these terms that you're

1 throwing around somehow have to come within a
2 reasonable usage of the term, waters of the United
3 States, and I do not see how a storm drain under
4 anybody's concept is a water of the United States.

5 GENERAL CLEMENT: With respect, Justice Scalia,
6 some things that you might classify as a storm drain
7 are actually very deep channels that have a continuous
8 flow of water that were --

9 JUSTICE SCALIA: No. I was referring to a
10 real storm drain.

11 (Laughter.)

12 GENERAL CLEMENT: Well --

13 (Laughter.)

14 JUSTICE SCALIA: Okay?

15 GENERAL CLEMENT: But therein is the problem,
16 which is some things that are part of the storm water
17 drainage system of a city are actually things that were
18 previous navigable natural waters. I mean, so --

19 JUSTICE SCALIA: And some aren't. But -- but
20 you would sweep them all into the jurisdiction of the
21 Corps of Engineers.

22 GENERAL CLEMENT: We would, Justice Scalia, but I
23 guess if we can start with the proposition that
24 tributaries are covered and then some things that the
25 Corps thinks are tributaries you disagree with, that

1 would be fine. But that would be a different case.
2 That hasn't been the theory that this case has been
3 presented.

4 As I understand, these drains here are
5 actually, you know, substantial channels that do have
6 water in them. I have no doubt that the Pine River
7 meets the test that it sounds like you would have for a
8 tributary, and the difficulty I'm having is I'd be
9 happy to defend what the Corps did if this Court, in
10 the -- in the litigation of this case, had focused the
11 court's and the Corps' attention on that issue.

12 CHIEF JUSTICE ROBERTS: Am I right that a
13 tributary is not a defined term in the regulations?
14 Right?

15 GENERAL CLEMENT: That's right. It's an
16 undefined term. The Corps has interpreted it in the
17 2000 preamble. The best place to find the Corps'
18 teaching on this is 65 Fed.Reg. 12,823-4. And they go
19 through -- it was part of a comment and they deal with
20 comments about their treatment of ditches and the like
21 and many of these issues.

22 And I guess what I would say is I think that
23 for purposes of this case, I mean, you heard the
24 Petitioners' argument. They have obviously, based on
25 the legal position they've advanced, not focused this

1 Court or any other court's attention on subdividing
2 which tributaries count because their view is nothing
3 counts. Even the first tributary doesn't count. And I
4 think in this case what I would urge you to do, if --
5 if you have some concern with, you know, the extent of
6 the definition of tributaries, is to not make that a
7 basis for invalidating this -- the judgment of the
8 Sixth Circuit here. And that's an issue that could be
9 developed in other cases if -- if the parties want to
10 really focus the attention on that.

11 I think I would be comfortable defending the
12 Corps' judgment, even in those more finely focused
13 challenges, because I get back to the point, which is
14 that the same logic that has you regulate that first
15 tributary also suggests that you want to regulate
16 anything that's a channel that brings large quantities
17 of water into the navigable waterways.

18 JUSTICE SCALIA: Well, but that -- but that
19 doesn't follow. I mean, it is not a principle of law
20 that so long as the object is -- is lawful and within
21 the power of the United States, all means to which even
22 that object are lawful. That is simply not true.
23 There are various means of stopping that pollution, and
24 it may well be that one of the means, which intrudes
25 too deeply into the State's power to regulate land

1 within their jurisdiction, is not a permissible one.

2 That -- that's not an extraordinary proposition.

3 GENERAL CLEMENT: I absolutely agree with you,
4 Justice Scalia, and that's why I'm not up here asking
5 for Federal regulation over non-point source pollution,
6 although that obviously contributes to the -- to the
7 problem.

8 What I'm up here asking for is a recognition
9 that the tributary system is something that Congress
10 can validly regulate and did regulate in its broader
11 definition of waters of the United States in the Clean
12 Water Act. And I think that's something -- the
13 authority to regulate tributaries is something Congress
14 regulated starting in 1899 and, importantly, this Court
15 expressly upheld in 1941 in Oklahoma against Atkinson.

16 JUSTICE SCALIA: I don't see how non-point
17 source pollution is -- is any more remote from what the
18 Federal Government should be able to do to achieve its
19 ends than is a point source pollution that -- that
20 consists of -- of dumping sand on land that has some
21 puddles on it. I -- that seems to me just as remote.

22 GENERAL CLEMENT: Well, I think one important
23 thing to focus on, Justice Scalia, is this case is not
24 just about the Corps' 404 program because the 404
25 program by its terms does not permit anything. As --

1 as the permit word suggests, it's a -- it's a process
2 of granting permission. The relevant provision here is
3 section 301 of the statute which prohibits a discharge
4 into the navigable waters without a permit. And so
5 whatever this Court decides for purposes of the 404
6 jurisdiction, it's necessarily deciding for purposes of
7 the 402 jurisdiction of the EPA.

8 And so what you'd be suggesting is that if
9 some tributaries aren't covered, then it's perfectly
10 okay to dump toxins in those tributaries even though
11 you know that because they are a channelized system
12 that directly connects with the navigable water --

13 CHIEF JUSTICE ROBERTS: Well, that's not
14 really fair. The Petitioners, as I understand it, both
15 concede the discharges that make their way into the
16 navigable waters would be covered.

17 GENERAL CLEMENT: That's right, Mr. Chief
18 Justice, but there's only two ways to do that. One way
19 of doing that and the one that I hear them advocating
20 would be this impossible sort of process of trying to
21 fingerprint or DNA test oil spills in a tributary to
22 figure out, yes, that's the guy that got it to the
23 navigable waters. And the one thing we know is that
24 there were some efforts to try to regulate pollution
25 that way before 1972 and they were a dismal failure.

1 The only other way to do it, as suggested by
2 one or two amici, is to treat the last -- treat the
3 tributary as if it were a point source. But I'd sure
4 hate to be the guy who owns the -- the land next to
5 that tributary that's dumping into the Mississippi
6 who's going to be responsible for the pollution of
7 everybody upstream. And what Congress recognized in
8 1972 is that they had to regulate beyond traditional
9 navigable waters.

10 JUSTICE KENNEDY: But the Congress in 1972
11 also, in its statement of policy, said it's a statement
12 of policy to reserve to the States the power and the
13 responsibility to plan land use and water resources.
14 And under your definition, I -- I just see that we're
15 giving no scope at all to that clear statement of a
16 congressional policy.

17 GENERAL CLEMENT: With respect, Justice Kennedy,
18 the States still have plenary control over the non-
19 point source pollution. They still have an important
20 cooperative role in -- in the overall program, as
21 you'll hear more about in the second case today. And I
22 would actually ask you to focus on one particular
23 provision that deals with the relationship between the
24 Federal Government and the States under 404 in
25 particular, and that's section 404, subsection (g) of

1 the statute. And that was added to the statute in
2 1977.

3 Unless Congress is going to be construed to
4 have given the States a virtual empty set, that
5 provision makes crystal clear that the waters of the
6 United States, for purposes of the Clean Water Act,
7 extend beyond traditional navigable waters and their
8 adjacent wetlands.

9 JUSTICE SCALIA: Though not necessarily as
10 far as storm drains. It would be enough to -- to say
11 navigable -- you know, non-navigable tributaries that
12 are real -- real tributaries.

13 GENERAL CLEMENT: Absolutely, Justice Scalia. I
14 concede that. But then you get to the question of
15 defining real tributaries, and that's neither been teed
16 up in this litigation, nor is it something that I
17 think, at the end of the day, you'd want to differ from
18 the Corps' judgment, which although you find it
19 striking that some things that are ditches are actually
20 included in the system, that is a product of the way
21 that the tributary systems have worked, the way that
22 certain cities have taken over a natural stream and
23 channelized it and make it look like a ditch, but it's
24 part of the system that carries water down from the
25 headwaters. And again, maybe that's an issue that we

1 can try to divine the limits to in a subsequent case.

2 But I think what's important, as -- as your
3 very comments suggest, is that trying to give meaning
4 to that textual indication that Congress had clearly
5 wanted to capture something beyond traditional
6 navigable waterways and their adjacent wetlands.

7 JUSTICE SCALIA: It's a very vague
8 indication. I mean, I -- I agree with you that your
9 argument based on 404(g) is a strong one, but it -- it
10 perhaps is weakened if you believe that in order to
11 stretch to the -- to the limit of Federal jurisdiction,
12 you need a clear statement. I certainly wouldn't
13 consider 404(g) -- if -- if the act did not previously
14 include the kind of authority you're arguing for, I
15 would not -- I would not consider 404(g) a clear
16 statement of that -- of that new -- new authority.

17 GENERAL CLEMENT: Well, I think even you would
18 concede it's a clear statement that something else must
19 be covered. Otherwise, other than is completely
20 meaningless in the statute. And so -- and -- and I --
21 I grant you that it might not be a clear statement as
22 to the nth tributary, and maybe that's a case on which
23 we can litigate in the future.

24 But I think what I would say is, for those of
25 your colleagues that want to look at the legislative

1 history, it provides some additional context for 404(g)
2 and makes it very clear that Congress, as this Court
3 found in both Riverside Bayview and in SWANCC, was
4 specifically focused on the coverage of adjacent
5 wetlands. And it's very clear that they understood
6 that whatever scope of jurisdiction was given to the
7 Corps, that it would bring along with it the adjacent
8 wetlands. And so there was this long debate.

9 As I say, the legislative history I think
10 makes quite clear that they were meant to include
11 the non-navigable tributaries and a substantial amount
12 of the non-navigable tributaries. And so, I mean, I
13 would invite others to look at that.

14 I also think that, to get back to a point I
15 made earlier, one thing that's exceedingly clear from
16 that legislative history is nobody in 1977, including
17 those that were advocating restricting the scope of the
18 404(g) program, wanted to restrict the EPA's
19 jurisdiction under 402. And so in the legislation that
20 they proposed that eventually found form in 404(g),
21 they expressly decoupled the 404 permitting process and
22 its jurisdiction from the 402 process.

23 Petitioners' argument, by contrast,
24 necessarily restricts the scope of both of those
25 programs because they are joined in the hip through

1 301. And so if they're right that they can dredge and
2 fill in these wetlands, then it is equally true that
3 they can dump toxic materials into those wetlands.

4 If I --

5 JUSTICE BREYER: Could you just say a word
6 about the -- the ditch -- sorry -- the word about the
7 wetland next to a tributary that's separated by a man-
8 made object like a ditch? Are there many such
9 instances? It sounds to me like a scientific question.
10 Are there many such instances where there is no
11 transfer of water? And in those instances, is the
12 presence of water in the wetland anything more than a
13 coincidence?

14 GENERAL CLEMENT: Well --

15 JUSTICE BREYER: Insofar as it seeks to serve
16 a purpose of the statute to regulate this.

17 GENERAL CLEMENT: What I would say, Justice
18 Breyer -- I -- I think I can answer the whole question
19 -- is in the vast majority of cases, as I understand
20 it, a berm will not have the effect of actually
21 preventing all hydrological connection.

22 JUSTICE BREYER: And where do I look to
23 verify that scientific matter?

24 GENERAL CLEMENT: I think a number of the amicus
25 briefs have addressed that. I wish I could point to

1 you a specific one.

2 JUSTICE BREYER: No. I can't find any
3 quantitative assessment.

4 GENERAL CLEMENT: Oh, again, I didn't mean to
5 suggest a percentage. I just think that -- that -- let
6 me put it to you this way, and this is the argument we
7 obviously make in the brief. The best reason to think
8 that a man-made -- that a man-made berm or a natural
9 berm is unlikely to prevent all hydrological flow is
10 even those man-made structures that have as their
11 express design to prevent water flow, like dikes and
12 levees and dams, have seepage and leakage from them.
13 So --

14 JUSTICE BREYER: Fine.

15 Now suppose we take a set, which you think
16 exists as not the null set, of instances where there is
17 no such transfer, which your opponents say is this
18 case. Now what's the justification for regulating
19 those? If it's simply flood control because water
20 flows over the top and sits there, I guess you could
21 say the same thing is true of any low depression, and
22 therefore, the presence of water would be just a
23 coincidence. Now, what's your -- the fact that they're
24 wet doesn't have anything to do with it. It's the fact
25 that they're next to a place that floods that has to do

1 with it.

2 Now, what's wrong with what I just said?

3 GENERAL CLEMENT: What's wrong with what you
4 just said is that wetlands have unique characteristics
5 that are different just from low-lying areas. And I think
6 this Court started to recognize that in the Riverside
7 Bayview case. And the image I would leave you with is
8 the image that wetlands actually act something like a
9 sponge, and because of that characteristic, they play
10 two important roles in helping to regulate the flow of
11 the adjacent water body.

12 JUSTICE BREYER: Okay, I understand that.

13 Now, what specifically, since I think this is
14 scientific, do I look at to verify what you just said,
15 namely that a wet depression, even if there's no
16 interchange, has a lot to do with flood control that a
17 dry depression wouldn't have? That's a scientific
18 statement. Where do I verify it?

19 GENERAL CLEMENT: And, again, I mean, I would
20 direct you to the amicus briefs that discuss in length
21 the benefits of wetlands, but I understand you won't
22 find those --

23 JUSTICE BREYER: I read them, and I -- I just
24 perhaps wasn't reading them closely enough, but I just
25 can't find the verification directly there.

1 GENERAL CLEMENT: And -- and I sense that you
2 found them lacking in that sense. I guess what I would
3 say is there's certainly anecdotal evidence in those
4 amicus briefs that I think is quite striking.

5 JUSTICE BREYER: Well, what am I supposed to
6 do with the case? I read them quickly. I don't
7 necessarily pick up everything. I'll read them again.

8 But if I don't find empirical verification for that
9 statement, what am I supposed to do with this case?

10 GENERAL CLEMENT: Well, not surprisingly, I would
11 suggest that you defer to the agency in its exercise of
12 expertise.

13 JUSTICE BREYER: Fine. And where did the
14 agency, in its many, many proceedings over the course
15 of 35 years, say what you just said, namely that a
16 wetland acts as a sponge? It's very plausible to me.
17 It's just that there may be a need to drop a citation
18 somewhere.

19 (Laughter.)

20 GENERAL CLEMENT: Well, you -- and you could
21 cite to the proceedings in this very case in the joint
22 appendix because although they didn't use the sponge
23 word, there was a specific finding in this case that
24 these wetlands played an important role in flood
25 control and pollution control for the adjacent streams.

1 CHIEF JUSTICE ROBERTS: And if you wanted a
2 cite for the opposite proposition, you could cite subsection
3 (7) of the Corps' regulations where they have no
4 interest in wetlands that happen to be adjacent to
5 other wetlands that are adjacent to the waters of the
6 United States. If they act in the way that you've been
7 postulating, presumably they'd want to cover those
8 adjacent wetlands just as much as they want to cover
9 the wetlands that are next to the tributary, but they
10 don't.

11 GENERAL CLEMENT: With respect, I don't think
12 that follows because if you read subsection (7), as I
13 do, as only excluding those wetlands that are adjacent
14 to other isolated wetlands, then regulating those
15 wetlands --

16 CHIEF JUSTICE ROBERTS: It doesn't -- it
17 doesn't say that. It says other than waters that are
18 themselves wetlands. It excludes all wetlands that are
19 adjacent to wetlands that are adjacent to waters of the
20 United States.

21 GENERAL CLEMENT: Well, and as I said, I think
22 you have to read that in the context not just of the
23 rest of the regulations but of this Court's decision in
24 Riverside Bayview. The one thing we know from
25 Riverside Bayview is that it's not enough to simply say

1 that your parcel of wetlands is not adjacent to the
2 navigable waterway because in that case, as the Court
3 remarked, it -- the parcel ended before it got to the
4 adjacent navigable body of water and there was another
5 wetland. There was a continuation of the same wetland.

6 Now, I don't know whether you'd call that two adjacent
7 wetlands. I might as a common locution. There might
8 be some different way of referring to that. But we
9 know that the one wetland was covered because that was
10 the holding of this Court in Riverside Bayview.

11 So I don't think I would give undue weight to
12 that reading of it especially when, if you read it as I
13 do, it makes perfect sense because a wetland adjacent
14 to an otherwise isolated wetland is not going to have
15 the same role to play in flood control in terms of
16 monitoring the stream volume as a wetland adjacent to
17 an otherwise regulable water body as you have at issue
18 here. And so I think that that regulatory decision
19 that the Corps has made is one that's perfectly
20 defensible and makes sense.

21 And I think that -- again, I think one other
22 point that I want to note that's kind of specific to
23 this case is part of the reason why it makes sense to
24 regulate a wetland adjacent to an otherwise regulable
25 water body, even if there is a berm present, is

1 illustrated by this case because, as was alluded to,
2 the specific development plan at issue here -- and this
3 is clear at joint appendix pages 95 and 160 -- would
4 sever the berm and create the hydrological link between
5 a smaller, deeper wetland and the adjacent navigable
6 wetland -- waterway system. And so, I mean, it doesn't
7 make a lot of sense, as Justice Stevens suggested, to
8 have a regulatory regime where you have a regulable
9 wetland after but not before a construction project
10 that has the effect of vastly reducing the size of the
11 wetland.

12 JUSTICE SCALIA: So you say that the
13 authority of -- I don't -- I don't even think the Corps
14 has ever suggested this. The authority of the Corps
15 extends not only to all that you've -- we've been
16 talking about and that you've asserted, but also to
17 lands that, if altered, could have some hydrological
18 connection.

19 GENERAL CLEMENT: No, that's not it, Justice
20 Scalia. What I'm saying is what the Corps has always
21 done for 30 years is said they are going to regulate a
22 physically proximate, adjacent wetland without regard
23 to whether or not there's a berm there. I'm just
24 making the subsidiary point that that makes sense
25 because the very construction project that might be at

1 issue might have the effect of changing the degree of
2 the hydrological connection.

3 I want to be very clear, though. The
4 hydrological connection has never been the sine qua non
5 of the assertion of regulation authority over the
6 adjacent wetlands.

7 JUSTICE SCALIA: What is -- what is the basis
8 for their doing it? If there is currently no
9 hydrological connection, there is a berm, there is no
10 -- there is no connection to the navigable waters of
11 the United -- what could possibly be the basis for
12 their asserting jurisdiction?

13 GENERAL CLEMENT: The short answer is flood
14 control. If there is that berm that -- that allows the
15 sponge to soak up water, either rainwater or waters
16 from adjacent parcels, although I think in this case,
17 it would largely be rainwater, that -- the fact that
18 there's a berm actually helps in the flood control.
19 When you sever it, it changes the dynamic quite a bit
20 because then it's somewhat less helpful for flood
21 control --

22 JUSTICE SCALIA: Yes, I --

23 GENERAL CLEMENT: -- but actually is earlier in
24 term -- plays a better role --

25 JUSTICE SCALIA: A statute could do that. A

1 statute could do that. But this statute requires that
2 it be a water of the United States.

3 GENERAL CLEMENT: Absolutely.

4 JUSTICE SCALIA: And -- and when -- when
5 there is nothing but puddles that are isolated by a
6 berm, even from the storm drain which goes to
7 tributaries, I can't conceive of -- of how you could
8 consider that that's -- you know, at least where it
9 leaks sometimes into the storm drain and went down to a
10 tributary, I think it's an exaggeration, but maybe you
11 could call it a water of the United States. But where
12 there's a berm that prevents any water from going even
13 into the storm drain which then goes into a tributary,
14 how can you possibly consider that a water of the
15 United States?

16 GENERAL CLEMENT: Well, I think the way I would
17 do it is you start with the tributary. And if you'll
18 concede for purposes of the illustration or the
19 argument that that's a water of the United States, then
20 what the Corps does as a jurisdictional regulation is
21 treat the adjacent wetland as a water of the United
22 States as well. That makes sense for two principal
23 reasons.

24 One, in the overwhelming majority of cases,
25 there is going to be a hydrological connection.

1 Actually tracing out exactly what it is and how it
2 works is very difficult and not the kind of thing you'd
3 want to get into at the jurisdictional stage, and
4 that's why the Court said that was fine in footnote 9
5 of Riverside Bayview.

6 JUSTICE SCALIA: That's not the argument I
7 was addressing. I'm addressing the argument that in
8 changing the land, you may cause it to --

9 GENERAL CLEMENT: And that's not an independent
10 basis for jurisdiction. It's simply an illustration of
11 why disregarding the berm makes sense.

12 JUSTICE SCALIA: I'm happy to hear that.
13 That's all I was trying to establish. You -- you don't
14 assert that that's an independent basis.

15 GENERAL CLEMENT: It is not an independent basis.
16 It is part of the reason why, though, in the context
17 of wetlands in particular, a focus on physical
18 proximity and adjacency makes sense and a fixation on
19 hydrological connection does not make sense.

20 Part of the reason you can look at the record
21 here and find differing information about the extent of
22 the hydrological connection is that is not a term that
23 is relevant for the regulatory scheme. And the same
24 thing was equally true in Riverside Bayview itself. In
25 fact, in Riverside Bayview, the district court made a

1 finding that the wetland there was hydrologically
2 isolated from the adjacent streams. Now, as the
3 Solicitor General pointed out in the petition at
4 footnote 7 in Riverside Bayview, we think the best
5 understanding of what was meant there was that there
6 was no overtopping and that there was some drainage.
7 But that just illustrates the point that hydrological
8 connection is not a statutory term. It's not a
9 regulatory term. It's a very loose term and it's not a
10 term the Corps has ever used in regulating adjacent
11 wetlands.

12 It's important to stress that the regulation
13 for adjacent wetlands that is at issue here, subsection
14 (7), is exactly the same regulation that was at issue
15 in Riverside Bayview. As Justice Ginsburg pointed out,
16 the Court, when it framed the question presented,
17 framed it in terms of whether or not the Corps could
18 rationally regulate wetlands that were adjacent to
19 navigable waters and their tributaries. And when they
20 got to the holding, this Court approved the regulation
21 and approved the fact that it asserted jurisdiction
22 over wetlands adjacent to otherwise regulable waters.
23 So if the tributaries are otherwise regulable because
24 they are waters of the United States, it follows
25 directly from Riverside Bayview that the adjacent

1 wetlands are covered as well.

2 CHIEF JUSTICE ROBERTS: You -- you put a lot
3 of weight on the tributary question in your approach by
4 giving up the hydrological connection. Your response
5 is you don't need a hydrological connection because
6 it's right next to a tributary. But for those of us
7 who are having a little trouble with the concept of
8 tributary, you don't leave us much to fall back on.

9 GENERAL CLEMENT: Well, and -- and I'm -- I wish
10 that weren't the case, Mr. Chief Justice.

11 What I would say, though, is that this case
12 has just not framed up the question of tributaries, and
13 that's because -- I mean, to put it more favorably to
14 my client, the other side has never taken issue with
15 the fact that their wetlands are adjacent to
16 tributaries. And I think that's -- that's obvious for
17 a couple of reasons. I mean, first of all, if you look
18 at the property in Carabell, it's just a mile from Lake
19 St. Clair. It's right next to a substantial drainage
20 ditch which connects to a navigable water, Auvase
21 Creek, and then into Lake St. Clair. In fact, it's
22 kind of ironic, but the property in Riverside Bayview
23 was also a mile away from Lake St. Clair. So it's very
24 similar.

25 If you look at the three sites at issue in

1 Rapanos, one is right next to the Pine River. One of
2 the others -- the whole point of the dredge and fill
3 operation was to drain the wetland through the adjacent
4 tributary systems so the water would go away. And in
5 the third one, there also isn't an issue about whether
6 or not those are tributaries. In a different case,
7 that might be an appropriate focus for inquiry.

8 The last thing, I would say a couple of
9 points before I sit down. I do think, first, that
10 section 404(g) of the statute is very important because
11 it is the clearest textual indication that Congress
12 intended to regulate something beyond traditional
13 navigable waterways and their adjacent wetlands. And
14 as this Court itself remarked in SWANCC, the single
15 most likely candidate are the non-navigable
16 tributaries.

17 The second point to emphasize is that the
18 scope of the Corps' 404 jurisdiction is the same as the
19 EPA's 402 jurisdiction. They are joined at the hip
20 through the basic prohibition under section 301. So a
21 conclusion that somehow certain tributaries are excised
22 from the tributary system for purposes of 404 is
23 likewise excising those tributaries and creating a
24 situation where you can have a -- a free dump zone at
25 some point above the -- above what somebody might put

1 as the limits of the navigable waterway system or the
2 tributary system. And I think that is something that
3 even the proponents of narrowing the Corps'
4 jurisdiction in 1977 could not countenance.

5 The last point I would make is that there are
6 going to be real-world consequences to contracting the
7 jurisdiction of the Corps and the EPA to pre-1972 or,
8 really, pre-1899 levels, especially for the downstream
9 States. I think it's a bit much to ask a legislator in
10 Wisconsin or in Minnesota to stop local development in
11 order to protect the water quality and flood control
12 propensities of the Mississippi River in Mississippi.
13 That's why it was manifest in 1972 that there was a
14 need for a Federal solution to this problem. That
15 Federal solution includes as two of its most important
16 components first getting at water pollution at its
17 source, at the point source, and secondly, covering the
18 tributary system without which the navigable waters
19 will continue to be polluted.

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you, General.

22 Mr. Hopper, you have 4 minutes remaining.

23 REBUTTAL ARGUMENT OF M. REED HOPPER

24 ON BEHALF OF THE PETITIONERS IN NO. 04-1034

25 MR. HOPPER: Thank you, Mr. Chief Justice.

1 JUSTICE SCALIA: Mr. Hopper, I hope you're
2 going to tell us what you make of section 404(g).

3 MR. HOPPER: I'd be happy to. In -- in Solid
4 Waste Agency, this Court looked at 404(g) and
5 determined that it had -- it was not enlightening as to
6 the meaning of navigable waters under 404(a) because
7 Congress did not define other waters in any way. And
8 this Court likewise concluded that 404(g) was simply
9 not before it and would not draw any conclusion from
10 it. So I submit that it is really irrelevant.

11 I note -- I want to draw this Court's
12 attention to our footnote 1 in our reply where we point
13 out that -- that in every formal rulemaking, the Corps
14 and the EPA have excluded drainage ditches from the
15 definition of tributary. It is here and now that these
16 agencies are redefining the term tributary to include
17 anything in the hydrological chain. The Sixth Circuit
18 decision says that any hydrological connection suffices
19 as a significant nexus to bring in wetlands under
20 Federal jurisdiction.

21 Of course, in -- in page 31 of the
22 opposition, the Government argues that neither the
23 directness -- excuse me -- nor the substantiality of a
24 tributary's connection to traditional navigable waters
25 is relevant to the jurisdictional inquiry. It's simply

1 not true that the Government is only identifying
2 channelized conduits as tributaries. Anywhere water
3 flows is a tributary in their book.

4 Let me also address something that this Court
5 did in SWANCC. It was not the lack of a hydrological
6 connection in that case that informed this Court's
7 decision to exclude those isolated ponds from Federal
8 jurisdiction. It was the fact that those -- that the
9 regulation of those isolated ponds did not meet the
10 terms of the act and there was no clear indication
11 Congress intended to regulate isolated ponds. I submit
12 that's this case. In this case, there is no clear
13 indication that Congress intended to regulate wetlands
14 20 miles from the nearest navigable water.

15 The --

16 JUSTICE GINSBURG: We're told that one of
17 them was much closer.

18 MR. HOPPER: The -- the record is silent as
19 to the distance between --

20 JUSTICE GINSBURG: What about the Pine River?
21 Are you -- that's not 20 miles away, is it?

22 MR. HOPPER: We don't know how far that is
23 because the record is silent as to the distance between
24 those water bodies.

25 JUSTICE GINSBURG: Do you know? The -- the

1 Solicitor General represented to us that it was very
2 close. Are you disputing that as a matter of fact?

3 MR. HOPPER: I don't know what he means by
4 very close. The -- the Solicitor General would agree
5 with me that -- that there's nothing in the record to
6 indicate what those distances are.

7 And it's irrelevant in -- in our opinion
8 whether it's -- whether it's a mile or 20 miles or 50
9 miles or 100 miles, and that's the point. There does
10 -- under the -- under the Federal regulations a true,
11 significant nexus is not required, just any
12 hydrological connection. This is a presumption on
13 congressional authority.

14 This expansive interpretation destroys any
15 distinction between what is national and what is local
16 under -- as -- as has already been pointed out. Under
17 the Federal regulations, you can't dig a ditch in this
18 country without Federal approval. You can't fill it
19 in. You can't clean it out without Federal approval.
20 This reads the term navigable right out of the statute.

21 We -- we ask this Court not to allow these
22 agencies --

23 JUSTICE STEVENS: Of course, when we're
24 talking about the scope of -- of Federal power, we're
25 not merely concerned with dumping refuse in the creek,

1 but also deliberate attempts to poison the water
2 system.

3 MR. HOPPER: Congress -- Congress considered
4 all this when it made its policy decision to defer to
5 the States to address this. The States have the
6 ability and the will to -- to protect their own waters
7 from pollutants of any kind. And as I indicated
8 earlier, all the States have antipollution regulations.

9 JUSTICE STEVENS: No. The fact that the
10 States have the power and the interest does not
11 necessarily mean that the Federal Government does not
12 also have the power.

13 MR. HOPPER: My time is --

14 CHIEF JUSTICE ROBERTS: You may respond
15 briefly.

16 MR. HOPPER: Congress determined that it
17 would defer to the States instead of exercising any
18 further power beyond its channels authority.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 The case is submitted.

21 (Whereupon, at 11:33 a.m., the case in the
22 above-entitled matter was submitted.)

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