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Army Corps of Engineers Jurisdiction Over Wetlands Under Section 404 of the Clean Water Act: *United States v. Riverside Bayview Homes, Inc.*

106 S. Ct. 455 (1985)

INTRODUCTION

The Clean Water Act[1] prohibits the discharge of "any pollutant" into the "navigable waters" of the United States, except as provided by the Act.[2] The Act defines "navigable waters" as the "waters of the United States, including the territorial seas."[3] Section 404 of the Act provides that the Secretary of the Army, through the Corps of Engineers, may issue permits for the discharge of dredged or fill material into the "navigable waters" covered by the Act.[4]

In 1972, when the relevant provisions of the Clean Water Act were enacted by the extensive amendment and reorganization of the Federal Water Pollution Control Act, the Corps' regulations for the administration of its permit program pursuant to section 404 of the Clean Water Act asserted jurisdiction only over those "waters of the United States" which were navigable in fact.[5] In 1975, the Corps expanded its interpre-

1. 33 U.S.C. § 1251 (1982).

2. *Id.* § 1311(a).

3. *Id.* § 1362(7). The territorial seas generally comprise the waters landward of a line three miles from shore in the Atlantic and Pacific Oceans and nine miles from shore in the Gulf of Mexico. This Note, however, does not discuss issues related to the territorial seas; it treats only the Clean Water Act's jurisdiction over other "waters of the United States," particularly wetlands.

4. Clean Water Act (CWA) § 404, 33 U.S.C. § 1344 (1982). The Clean Water Act also provides that the states may administer their own permit programs for discharge of dredged or fill material within their jurisdictions. CWA § 404(g)(1), 33 U.S.C. § 1344(g)(1). These state programs must first be approved by the Administrator of the Corps permit program. Section 402 of the Act, 33 U.S.C. § 1342, gives the United States Environmental Protection Agency much of the responsibility for the implementation of the Act through the National Pollution Discharge Elimination System (NPDES).

5. 33 C.F.R. §§ 209.120(b)(1)(b), 209.260 (1972). The Federal Water Pollution Control Act (FWPCA) was originally enacted in 1948. Ch. 758, 62 Stat. 1155. The FWPCA was amended periodically between 1948 and 1972, when it was extensively amended, reorganized, and expanded to basically its present form. Pub. L. No. 92-500, 86 Stat. 816 (1972). In 1977,

tation of "waters of the United States" to include waters navigable in fact and their tributaries, interstate waters and their tributaries, and nonnavigable intrastate waters whose use or misuse could affect interstate commerce.[6] In this latter category, the Corps asserted jurisdiction over "freshwater wetlands" adjacent to navigable waters.[7] Until recently, the question of the proper definition of wetlands subject to the Corps' section 404 permit authority had not been presented to the United States Supreme Court. On December 4, 1985, however, the Court decided the issue in *United States v. Riverside Bayview Homes, Inc.*[8]

I

FACTUAL AND PROCEDURAL BACKGROUND

Riverside Bayview Homes, Inc. (Riverside) wanted to develop eighty acres of low-lying, marshy land near Detroit. The land was located just south of the Clinton River, just north of Black Creek, and about a mile west of Lake St. Clair—all navigable waters over which the Corps had undisputed jurisdiction. In 1976, Riverside began to fill a portion of the property in preparation for a housing development. Asserting that the land was a wetland subject to its jurisdiction, the Corps requested that Riverside file an application for a section 404 permit to fill. At the same time, the Corps obtained a cease and desist order to prohibit Riverside from filling its land pending its application to the Corps.[9]

When Riverside ignored the court order and continued to fill its property, the Corps sought an injunction in the District Court for the Eastern District of Michigan.[10] The district court granted the injunction, prohibiting Riverside from filling those portions of its land that in the court's opinion constituted wetlands, pending the Corps' approval of Riverside's application for a permit to fill.[11] The court also declared unconstitutional a section of the Corps' section 404 regulations that provided that the Corps could delay processing of a permit pending the outcome of litigation between an applicant and the Corps.[12]

Riverside appealed the district court's injunction, and the Corps

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the FWPCA was renamed the Clean Water Act. Pub. L. No. 95-217, 91 Stat. 1567, § 1 (1977).

6. 40 Fed. Reg. 31,320 (1975).

7. 33 C.F.R. § 209.120(d)(2)(h) (1977).

8. 106 S. Ct. 455 (1985).

9. 729 F.2d 391, 392-93 (6th Cir. 1984).

10. No. 77-70041 (E.D. Mich. June 21, 1979). The opinion is reprinted in the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit [November 1984] at 32a-41a, *Riverside*. The Petition also contains the district court's opinions on the granting of a preliminary injunction (Feb. 24, 1977) and on remand (May 10, 1981). [Hereinafter, citations to the district court opinions will be to "Cert. Petition," followed by the page from the Petition and the name of the opinion, e.g., "Prelim. Inj.," "Opinion," or "Remand."]

11. Cert. Petition at 31a (Prelim. Inj.).

12. *Id.* at 41a (Opinion).

appealed the court's declaratory judgment that part of the Corps' regulations was unconstitutional. Before considering the appeal, the Court of Appeals for the Sixth Circuit remanded the case[13] for reconsideration in light of regulations promulgated by the Corps in 1977,[14] subsequent to the district court hearing on the injunction. On remand, the district court affirmed its earlier decision.[15]

Both parties again appealed. The Sixth Circuit Court of Appeals reversed the district court's injunction, holding that the Corps had improperly interpreted its regulations to include Riverside's land as a wetland subject to the Corps' permit jurisdiction.[16] The court of appeals also vacated the district court's declaratory judgment that part of the Corps' regulations was unconstitutional.[17]

The Corps sought a writ of certiorari from the United States Supreme Court to reverse the court of appeals' decision to lift the injunction from Riverside's land. The Supreme Court granted certiorari and unanimously reversed.[18] The Court held that Riverside's property was a wetland within the definition provided in the Corps' regulations,[19] and that those regulations were a valid exercise of the authority given to the Corps by the Clean Water Act.[20]

II
DISCUSSION

The main issue in contention in *United States v. Riverside* was whether Riverside's land was a wetland over which the Corps had jurisdiction. This issue involved two questions. The first was whether the Corps had correctly interpreted its own regulations which defined wetlands to include lands like Riverside's—low-lying and marshy, characterized by wetland vegetation, contiguous to navigable waters, but with no discernible hydrologic connection between the property and the navigable waters other than infrequent flooding. The second, more important, question was whether the Corps' interpretation of its regulations was within the authority granted by section 404 of the Clean Water Act.

A. The District Court Opinion

When the District Court for the Eastern District of Michigan first decided the case in 1977, the Corps' regulations defining the "waters of

13. 615 F.2d 1363 (6th Cir. 1980).
14. 33 C.F.R. § 323.2(c) (1978).
15. Cert. Petition at 43a-44a (Remand).
16. 729 F.2d at 397.
17. *Id.* at 399.
18. 106 S. Ct. 455 (per White, J.).
19. *Id.* at 460-61.
20. *Id.* at 465.

the United States" subject to its permit program included "[f]reshwater wetlands including marshes, shallows, swamps and similar areas that are contiguous or adjacent to other navigable waters and that support freshwater vegetation."[21] "Freshwater wetlands" were defined as "those areas that are periodically inundated and that are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction."[22]

In its opinion and order granting the Corps' motion for a preliminary injunction, the district court applied the above definition to the facts of *Riverside*. The court found that the parties did not dispute that Riverside's property satisfied the requirement that the land be "characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction."[23] The parties did disagree, however, as to whether Riverside's land was "contiguous or adjacent to other navigable waters." Riverside's property was separated from the nearest navigable water (Black Creek, a tributary of Lake St. Clair) by 200 feet at the closest point and by two ten-acre parcels along most of the property's southern boundary.[24] Despite this lack of direct contiguity, the court found that the property was contiguous to Black Creek. The court held that:

> In determining whether an area is contiguous, the Court must look at whether the wetland type vegetation continues to the navigable waters. Any other interpretation would permit a landowner of contiguous and adjacent wetlands to deed a ten-foot strip between the navigable water and his property to some third person and then claim that the wetlands were no longer contiguous or adjacent.[25]

Because the wetlands vegetation on Riverside's land continued to Black Creek, the court concluded that Riverside's property was contiguous and adjacent to a navigable water.[26]

Next, the court considered whether Riverside's land had been "periodically inundated." This inquiry involved two questions. First, the court had to decide whether Riverside's property had been "inundated" under the terms of the regulation. The court stated that inundated "means flooded, and is easy of definition."[27] The court, however, found the definition more difficult than it was willing to admit. The court ultimately required, without clearly expressing its rationale, that the inundation be caused by the adjacent navigable waters; flooding from other

21. 33 C.F.R. § 209.120(d)(2)(h) (1977).

22. *Id.*

23. Cert. Petition at 23a (Prelim. Inj.). *See also* 729 F.2d at 394.

24. Cert. Petition at 24a (Prelim. Inj.). *See also* 729 F.2d at 394.

25. Cert. Petition at 24a (Prelim. Inj.).

26. *Id.* This vegetation test for determining whether a wetland is contiguous to a navigable water was not discussed by either the court of appeals or the Supreme Court. Both courts based their analyses of the contiguous and adjacent requirement on different theories.

27. Cert. Petition at 26a (Prelim. Inj.).

sources such as rainfall or groundwater apparently was not sufficient. Noting that much of Riverside's property was inundated not by adjacent navigable waters but by groundwater trapped by the underlying soil, the court concluded that only those portions of the property that could be shown to have been periodically inundated by the adjacent navigable waters were subject to the Corps' permit requirement.[28]

The second question involved in the district court's interpretation of "periodic inundation" was how to define "periodic." Noting that no portion of the property had been inundated in more than fourteen of the eighty years of available water level records,[29] the court admitted that the task of determining which portions of Riverside's property had been periodically inundated was an "arbitrary" one.[30] Riverside had argued that "periodic inundation" required that the property be "inundated sufficiently often so that the inundation is the reason for the presence of wetland type vegetation."[31] Although the court noted that the standard proposed by Riverside had a "rational basis," it was "not the one stated in the regulation."[32] The court therefore declined to adopt it. Instead, the court decided, without a convincing rationale, that those portions of Riverside's land that had been inundated at least five times during the eighty years of water level records qualified as periodically inundated and could not be filled. The court therefore enjoined Riverside from filling any part of its property that lay below the elevation that the Lake St. Clair waters had reached at least five times over those eighty years.[33]

In the final portion of its opinion, the district court held that part of the Corps' regulations was unconstitutional. Under section 326.4(e) of the Corps' regulations, the Corps District Engineers were directed not to process permits submitted by applicants against whom the Corps had instituted an action in court "for any unauthorized activity."[34] The district court held that this delay constituted final agency action, subject to fifth amendment proscriptions against taking of property without just compensation.[35] The court further held that the regulation imposed a sanction not contemplated by the Clean Water Act, effecting a "quasi-taking of property unless and until a person relinquishes any right the

28. *Id.* at 25a-26a (1977). *See also* 729 F.2d at 394.

29. Cert. Petition at 29a (Prelim. Inj.).

30. *Id.* The available records provided only monthly mean water levels for Lake St. Clair, giving no indication of how long during each month the property had been inundated or whether it could have been inundated by the other navigable waters near the property, such as Black Creek and the Clinton River.

31. *Id.* at 30a. *See also* 729 F.2d at 395.

32. Cert. Petition at 30a (Prelim. Inj.).

33. *Id.* at 30a-31a. The court also added one-half foot to compensate for normal fluctuations above and below the monthly mean water level data.

34. 33 C.F.R. § 326.4(e) (1978) (now § 326.3(c)).

35. Cert. Petition at 39a (Opinion) (citing Stanard v. Oleson, 74 S. Ct. 768, 772 (1954) (Douglas, Circuit Justice)). *See also* 729 F.2d at 399.

person may have to engage in litigation with the Corps of Engineers."[36] The court concluded that the regulation exceeded the Corps' statutory authority and was therefore invalid; further, the court held that it was unconstitutional "in that it impedes defendant's access to the court for adjudication of its constitutional rights."[37]

B. The Court of Appeals Opinion

Riverside appealed the district court's injunction, but by the time the appeal was heard by the Sixth Circuit Court of Appeals in 1983, the Corps had revised its definition of wetlands.[38] The new definition provided:

> The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.[39]

The court of appeals interpreted the new regulations as requiring a causal connection between the presence of wetland vegetation and inundation from adjacent navigable waters: "Neither inundation nor aquatic vegetation would be sufficient, standing alone, to bring a piece of land within the [wetland] definition. Both must be present, and the latter must be caused by the former."[40] Based on its interpretation of the Corps' wetlands definition, the court concluded that "[t]he definition thus covers marshes, swamps and bogs directly created by such [navigable] waters, but not inland low-lying areas such as the one in question here that sometimes become saturated with water."[41]

In reaching its conclusion, the court of appeals looked primarily at the language of the Corps' regulations to determine "what the Corps contemplated in promulgating the regulation."[42] But, unlike the district court, the court of appeals also focused on the scope of the authority which the Clean Water Act had given the Corps to create its own definition of "waters" subject to its jurisdiction. The court stated that the

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36. Cert. Petition at 40a (Opinion) (citing 33 U.S.C. § 1344(g) and 5 U.S.C. § 558(c)); *see also* 729 F.2d at 399.

37. Cert. Petition at 41a (Opinion); *see also* 729 F.2d at 399.

38. 729 F.2d 392. Before considering the case, the court of appeals remanded it to the district court for reconsideration in light of the new regulations. On remand, the district court reaffirmed its earlier findings of fact and law, holding simply that the new definition of wetlands was "broader than its predecessor." Cert. Petition at 43a (Remand). The court of appeals then accepted the case on appeal.

39. 33 C.F.R. § 323.2(c) (1978).

40. 729 F.2d at 396.

41. *Id.* at 398.

42. *Id.* at 396. In this regard, the court noted that "the Corps expressly adverted to the situation of 'areas that are not aquatic but experience an abnormal presence of aquatic vegetation' and emphasized that such lands were not intended to be covered by the regulations." *Id.*

Corps' construction of "waters" had given the Corps "apparently unbounded jurisdiction," exceeding the statutory authority conferred on the Corps by section 404 of the Clean Water Act and thus potentially constituting an unconstitutional taking of private property.[43] Noting that the Act made "no reference to 'lands' or 'wetlands' or flooded areas at all," the court wrote:

> Congress may, indeed, have meant to extend the protections of the Act beyond the straightforward definition it provided of "navigable waters." The question, however, is how far away from "navigable waters" Congress contemplated that the regulations under the Act could drift. It is certainly not clear from the statute that the Corps' jurisdiction goes beyond navigable waters and perhaps the bays, swamps and marshes into which those navigable waters flow. Neither is it clear that Congress intended to subject to the permit requirement inland property which is rarely if ever flooded.[44]

The court concluded, therefore, that Riverside's property was beyond the Corps' section 404 jurisdiction.

Finally, the court of appeals vacated the district court's declaratory judgment that the Corps' delay of Riverside's permit application was unconstitutional. The court of appeals noted simply that the delay question was now moot because Riverside's land was no longer subject to the Corps' jurisdiction.[45] Furthermore, even if Riverside were still required to apply for a Corps permit, the Corps had amended the regulation to facilitate review of permits of applicants litigating with the Corps.[46] The court thus concluded that it was unnecessary to pass on the constitutionality of the Corps' delay regulation.[47]

The court of appeals also denied the Corps' petition for rehearing. Reaffirming its narrow construction of the Corps' wetland definition, the court noted simply that a broader construction lacked "an adequate limiting principle" and was inconsistent with the language of the Clean Water Act.[48]

C. The Supreme Court Opinion

The Supreme Court reversed the court of appeals, holding that the court had misinterpreted both the language of the Corps' regulations and the intent and scope of the Clean Water Act.[49]

The Supreme Court dismissed the challenges to the constitutionality

43. *Id.* at 397-98.
44. *Id.* (footnote omitted).
45. *Id.* at 399.
46. *Id.* (citing 33 C.F.R. § 326.3(c)).
47. *Id.* at 399.
48. *Id.* at 401.
49. 106 S. Ct. 455.

of the Corps' regulations as "spurious."[50] First, the Court rejected the court of appeals' argument that the Corps' permit program could effect a taking in violation of the fifth amendment. The Court held that "the mere assertion of regulatory jurisdiction by a government body does not constitute a regulatory taking . . . . Only when a permit is denied and the effect is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred."[51] When the lawsuit commenced, the Corps had not yet denied a permit to Riverside; its requirement of a permit application therefore did not constitute a regulatory taking.[52] Even if the Corps denied the permit, the Court was willing to view such a denial as a taking only in "extreme circumstances"—at a minimum, Riverside would have to demonstrate that the denial of a permit precluded it from putting its land to any other economically viable use.[53]

Second, the Court held that regardless of whether the Corps' denial of a permit could be considered a taking, the overall permit program would not be unconstitutional. The Court held that:

> the possibility that the application of a regulatory program may in some instances result in the taking of individual pieces of property is no justification for the use of narrowing constructions to curtail the program if compensation will in any event be available in those cases where a taking has occurred.[54]

The Court thus held that the Corps' regulations were constitutional.

Having settled the constitutional question, the Court next determined the extent of the Corps' jurisdiction over wetlands. The Court concluded generally that "the Court of Appeals' fears that application of the Corps' permit program might result in a taking did not justify the court in adopting a more limited view of the Corps' authority than the terms of the regulation might otherwise support."[55] The Court specifically rejected the court of appeals' holding that the requisite wetland vegetation must be caused by inundation from adjacent navigable waters:

> The plain language of the regulation [defining wetlands] refutes the Court of Appeals' conclusion that inundation or 'frequent flooding' by the adjacent body of water is a *sine qua non* of a wetland under the regulation. Indeed, the regulation could hardly state more clearly that saturation by

50. *Id.* at 460.

51. *Id.* at 459 (citing Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 293-97 (1981)).

52. In a subsequent footnote, the Court noted that Riverside's permit application had been denied by the time the case reached the Supreme Court. Even then, however, the "proper course is not to resist the Corps' suit for enforcement by denying that the regulation covers the property, but to initiate a suit for compensation in the Claims Court." 106 S. Ct. at 460 n.6. *See infra* note 54 and accompanying text.

53. 106 S. Ct. at 459. *See also id.* at 459 n.4, 460 n.6.

54. *Id.* at 460. The Court noted that in this case Riverside could have received compensation under the Tucker Act, 28 U.S.C. § 1491 (1982).

55. 106 S. Ct. at 460.

> either surface or ground water is sufficient to bring an area within the category of wetlands, provided that the saturation is sufficient to and does support wetland vegetation.[56]

The Court pointed particularly to the fact that the Corps' 1977 amended definition of wetlands[57] eliminated the requirement in the old regulations[58] that the putative wetland be periodically inundated. "In fashioning its own requirement of 'frequent flooding' the Court of Appeals improperly reintroduced into the regulation precisely what the Corps had excised."[59] The Court held that, without this invalid requirement of frequent flooding, Riverside's land qualified as a wetland within the meaning of the Corps' wetland definition.[60]

In a footnote, the Court also rejected the court of appeals' conclusion that wetlands created by groundwater saturation rather than by inundation from adjacent navigable waters were "abnormal" and therefore not intended to be within the Corps' permit jurisdiction:

> This interpretation is untenable in light of the explicit statements in both the regulation and its preamble that areas saturated by ground water can fall within the category of wetlands. . . . Evidently, the Corps had something else in mind when it referred to 'abnormal' growth of wetlands vegetation—namely, the aberrational presence of such vegetation in dry, upland areas.[61]

Riverside's land, the Court held, was not such an area.

Having determined the proper interpretation of the Corps' wetland definition, the Court turned to the more significant question of whether that definition was consistent with the authority granted to the Corps under section 404 of the Clean Water Act. The Court considered "whether it is reasonable, in light of the language, policies, and legislative history of the Act for the Corps to exercise jurisdiction over wetlands adjacent to but not regularly flooded by rivers, streams, and other hydrographic features more conventionally identifiable as 'waters.' "[62]

The Court first examined the legislative history of the Clean Water Act. Noting that the Act was intended "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"[63] the Court stated that Congress' overarching objective in passing the Act was to protect "aquatic ecosystems."[64] The Court also noted:

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56. *Id.* at 460-61.
57. 33 C.F.R. § 323.2(c) (1978).
58. 33 C.F.R. § 209.120(d)(2)(h) (1977).
59. 106 S. Ct. at 461.
60. *Id.* The Court found that the land satisfied all the requirements for a wetland: it was adjacent to a navigable water and it had a prevalence of wetland vegetation supported by saturated soil conditions.
61. *Id.* at n.7.
62. *Id.* at 461-62 (footnote omitted).
63. 33 U.S.C. § 1251 (1982).
64. 106 S. Ct. at 462.

> In keeping with these views, Congress chose to define the waters covered by the Act broadly. . . . Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term.[65]

The Court further held that the congressional debate over the 1977 Clean Water Act amendments showed that wetlands specifically were intended to be protected by the Act. First, the Court noted that, during the debate, Congress had rejected measures designed to curb the Corps' asserted jurisdiction over wetlands in large part because of its concern that protection of wetlands would be "unduly hampered" by narrowing the Corps' jurisdiction.[66] Second, one 1977 amendment to the Clean Water Act expressly mentioned adjacent wetlands;[67] another provided for the preparation of a National Wetlands Inventory to assist in the implementation of the Act.[68] The Court held that, by enacting these provisions, Congress had indicated its intent to include wetlands within the jurisdiction of the Clean Water Act. The Court concluded that, by defining the waters covered by the Act to include wetlands, the Corps was "implementing congressional policy rather than embarking on a frolic of its own."[69]

The Court gave the Corps broad discretion in determining how best to implement this congressional policy, allowing it to determine its own definition of "waters" subject to the Clean Water Act.[70] The Court held:

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65. *Id.* (citing S. CONF. REP. NO. 1236, 92d Cong., 2d Sess. 144 (1972); 118 CONG. REC. 33,756-57 (1972) (statement of Rep. Dingell)). The Senate specifically recognized that "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." 106 S. Ct. at 462 (quoting S. REP. NO. 414, 92d Cong., 1st Sess. 77 (1972), *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 3668, 3742).

66. 106 S. Ct. at 464. The Court recognized that it was imputing significance to congressional inaction. Nonetheless, "a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it." *Id.* (citing Bob Jones University v. United States, 461 U.S. 574, 599-601 (1983); United States v. Rutherford, 442 U.S. 544, 554, 554 n.10 (1979)).

The Court cited the following instances when the Corps' jurisdiction had been challenged in congressional debate: H.R. 3199, 95th Cong., 1st Sess. § 16 (1977) (House bill as reported out of committee limited the Corps' section 404 jurisdiction); S. 1952, 95th Cong., 1st Sess. § 49(b) (1977) (Corps' definition of "navigable waters" retained); 123 CONG. REC. 10,426-32, 26,710-29 (1977) (House and Senate debates centered on wetlands preservation).

67. 106 S. Ct. at 465 (citing CWA § 404(g)(1), 33 U.S.C. § 1344(g)(1)).

68. 106 S. Ct. at 465 (citing CWA § 208(i)(2), 33 U.S.C. § 1288(i)(2)).

69. 106 S. Ct. at 465 (quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375 (1969)).

70. "An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." 106 S. Ct. at 461 (citing Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc., 105 S. Ct. 1102 (1985); Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)).

> In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.[71]

Furthermore, the Court held that the Corps' definition of regulable wetlands could not be invalidated simply by showing that a particular wetland claimed by the Corps to be subject to its permit requirement was not ecologically significant to adjacent navigable waters. The Court reasoned that the Corps' definition of wetlands was valid as long as it was reasonable for the Corps to conclude that "in a majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem."[72] If a particular wetland is "in fact lacking in importance to the aquatic environment," or if its importance is outweighed by other values, the Corps could simply allow development of the wetland by issuing a permit.[73]

The Court thus left the Corps virtually free of judicial supervision in the administration of its wetland permit program. Given its expansive view of the Corps' competence in implementing the Clean Water Act, it is not surprising that the Court concluded that the "language, policies, and history of the Clean Water Act compel a finding that the Corps has acted reasonably in interpreting the Act to require permits for the discharge of fill material into wetlands adjacent to the 'waters of the United States.' "[74]

CONCLUSION

The Supreme Court's decision in *United States v. Riverside Bayview Homes, Inc.* supports claims that the Clean Water Act can be invoked to protect wetlands from development. First, the decision states unequivocally that wetlands are validly included in the Corps' permit program pursuant to section 404 of the Act. The Corps is correct in considering wetlands that meet certain criteria to be among the "waters of the United States" protected by the Act. The decision also gives the Corps broad

71. 106 S. Ct. at 463. The Court cited several examples of the Corps' ecological judgment. First, the Corps had determined that wetlands adjacent to navigable waters help protect and enhance water quality. *Id.* (citing 42 Fed. Reg. 37,128 (1977)). Furthermore, the Court noted that the Corps had concluded that wetlands may serve to filter and purify water and to slow surface runoff and thus prevent flooding and erosion. *Id.* (citing 33 C.F.R. § 320.4(b)(2)(iv), (v), (vii) (1985)). Finally, the Corps had found that adjacent wetlands may "serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic . . . species." *Id.* (quoting 33 C.F.R. § 320.4(b)(2)(i) (1985)).

72. 106 S. Ct. at 463 n.9 (citing 33 C.F.R. § 320.4(b)(4) (1985)).

73. *Id.*

74. 106 S. Ct. at 465.

discretion in determining which wetland areas will be subject to its permit requirement. Apparently, all that is required is that the wetlands be shown to constitute an ecologically important component of the "aquatic ecosystem" comprising the "waters of the United States."

This ecological significance standard may well allow for a broader interpretation of the Corps' regulations than that adopted by the Court in *Riverside*. For example, the Court expressly reserved judgment on the question of whether wetlands not adjacent to other waters covered by the Act were potentially subject to the Corps' jurisdiction.[75] The *Riverside* Court's concern for the aquatic ecosystem suggests that the Corps may be able to forego the requirement that a wetland be "adjacent"[76] to other waters covered by the Act as long as the Corps determines that the wetland is ecologically significant. The requirement that a wetland be "inundated or saturated by surface or groundwater"[77] may also begin to erode under pressure from concern for the "aquatic ecosystem." Under the *Riverside* rationale, the Corps, in its broad discretion, could validly claim jurisdiction over an isolated wetland area—not adjacent to a navigable water, supported only by standing rainwater, but characterized by a prevalence of wetland vegetation—on the basis that it is ecologically important to the overall aquatic ecosystem.[78]

The *Riverside* decision also suggests that the Clean Water Act, as implemented by the Corps, may be used to preserve ecologically valuable wetlands even in the absence of "discharge of dredged or fill material."[79] As presently construed, the Act does not prohibit tilling, draining, plowing, grazing, or even spraying wetland areas.[80] If the Court is truly concerned, however, with the ecological integrity of the aquatic ecosystem, it may support the Corps if the Agency decides to include such activities within its permit program.[81]

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75. *Id.* at 462 n.8. In particular, the Court cited two provisions of the Corps' regulations under which the Corps claims jurisdiction over "[a]ll interstate waters including interstate wetlands," 33 C.F.R. § 323.2(a)(2), and "[a]ll other waters such as . . . wetlands, . . . the use, degradation, or destruction of which could affect interstate or foreign commerce." 33 C.F.R. § 323.2(a)(3).

76. 33 C.F.R. § 323.2(a)(7) (1985).

77. *Id.*

78. Given the Corps' findings that wetlands provide wildlife habitat and support the aquatic food chain, *see supra* note 71, the Corps probably would also find that isolated wetlands are ecologically significant.

79. CWA § 404, 33 U.S.C. § 1344(a).

80. S.F. Chronicle, Mar. 3, 1985, at B2, col. 2 (statement of John Eft, Attorney, U.S. Army Corps of Engineers, San Francisco); interview with Edgar B. Washburn, Washburn & Kemp, in San Francisco (Apr. 25, 1986) (Mr. Washburn was one of the counsel for Riverside in the Supreme Court proceedings).

81. The Corps has apparently begun to try to prohibit these activities under its existing regulations. *See, e.g.,* Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 920-27 (5th Cir. 1983); United States v. Akers, 86 L.A. Daily Journal, Daily Appellate Reports 1109 (9th Cir., filed Mar. 26, 1986).

Because the *Riverside* decision gives the Corps broad discretion to implement the Clean Water Act, much of the decision's effect on wetlands protection or development will depend on the Corps' willingness to take advantage of the power given to it. The Corps is viewed with almost equal reservation by parties on both sides of the wetlands issue; how far the Corps will go in protecting (or allowing the development of) wetlands remains to be seen.[82] In the future, however, if the Supreme Court follows the rationale of *Riverside*, the Court will look generously upon the Corps' claims of jurisdiction over wetlands. So long as the Corps can justify its jurisdictional claims by demonstrating that wetlands play a significant role in maintaining the ecologic integrity of the aquatic ecosystem, this should satisfy the *Riverside* test.

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82. For a brief discussion of the possible influence of the Assistant Secretary of the Army (chief administrator of the Corps) on Corps policy, as well as a discussion of the *Riverside* case, see "The Supreme Court Endorses a Broad Reading of Corps Wetland Jurisdiction Under FWPCA § 404," 16 ENVTL. L. REP. (ENVTL. L. INST.) 10,008 (Jan. 1986).