

Appeal No. 05-1444

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES,
Plaintiff - Appellee,

v.

CHARLES JOHNSON; FRANCIS VANER JOHNSON;
GENELDA JOHNSON; JOHNSON CRANBERRIES LIMITED
PARTNERSHIP, A MASSACHUSETTS LIMITED PARTNERSHIP,
Defendants - Appellants.

On Appeal from the United States District Court for the District of
Massachusetts
Honorable Edward F. Harrington, District Judge
Civil Action No. 99-12465-EFH

**AMICI CURIAE BRIEF OF NATIONAL WILDLIFE FEDERATION,
ASSOCIATION OF STATE WETLAND MANAGERS,
ENVIRONMENTAL LEAGUE OF MASSACHUSETTS,
MASSACHUSETTS PUBLIC INTEREST RESEARCH GROUP and
SIERRA CLUB
IN SUPPORT OF PLAINTIFF-APPELLEE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amici National Wildlife Federation, Association of State Wetland Managers, Environmental League of Massachusetts, Massachusetts Public Interest Research Group, and Sierra Club state that they are all not-for-profit corporations and they have no parent companies, subsidiaries, or affiliates who have issued shares to the public.

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STATEMENT OF INTEREST

Amici curiae include Association of State Wetland Managers (ASWM), Environmental League of Massachusetts (ELM), Massachusetts Public Interest Research Group (MASSPIRG), National Wildlife Federation (NWF), and Sierra Club (collectively “Amici”). Amici represent well over one million members.

NWF and Sierra Club are among the nation’s most respected conservation organizations. ELM and MASSPIRG are highly respected state-based advocacy organizations. All have a long history of involvement in, and expertise concerning, water quality protection and the implementation of the Clean Water Act (CWA or Act).

ASWM is a non-profit membership organization of wetland scientists, policymakers, regulators, consultants and other wetland professionals whose goals include helping states develop wetland regulatory programs and improving the integration of wetlands into water resources and watershed management.

All of these organizations have members who use and rely on a wide array of waters throughout our nation and New England for recreation, scientific study, and protection of their health, safety, property, drinking water, and food supply.

The source of Amici’s authority to file this brief is Federal Rule of Appellate Procedure 29(a). Pursuant to this rule, the undersigned attorneys represent that all parties consented to the filing of this brief.

SUMMARY OF ARGUMENT

Wetlands and headwater streams such as those altered by Appellants, the Johnsons, are essential to the integrity of the waters with which they share hydrological and ecological connections. This brief will provide information to assist the Court in understanding why protecting these waters and wetlands is critically important to the Buzzards Bay ecosystem and necessary to achieving the CWA's goals.¹ The quality of Buzzards Bay, the Weweantic River, and our nation's waters generally depends on the functions and values provided by wetlands and tributaries. An understanding of the ecological interconnections between Buzzards Bay and the wetlands and tributaries involved in this case and of the collective importance of wetlands and tributaries to the quality of our nation's waters is critical to understanding why the United States Environmental Protection Agency's (EPA) exercise of jurisdiction falls squarely within the scope of federal authority under the CWA.

The Johnsons seek to escape responsibility for the damage done to the tributaries and wetlands by advancing arguments that have been rejected by

¹ Some of the background information cited in this brief is not contained in the Court record and is offered to assist the Court solely for its understanding of the functions served by tributaries and wetlands. Courts have held that it is within their discretion to consider extra-record materials presented in amicus curiae briefs when they contain specialized information that may be beneficial to the Court, such as when "necessary to explain technical or complex subject matter." See e.g. National Wildlife Federation v. National Marine Fisheries Service, Slip Copy, Nos. CV 01-640RE and CV 05-23-RE, 2005 WL 878602, *4 (D.Or. 2005).

virtually every court to consider them. Amici have reviewed all of the reported decisions interpreting CWA jurisdiction since the Supreme Court's 2001 decision in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) (SWANCC) and have compiled them in the Addendum to this brief as a summary of relevant legal authority for the Court's convenience. A review of these cases demonstrates that the tributaries and wetlands at issue are well within the jurisdictional scope of the CWA, and that the Act is well within the scope of Congress' constitutional authority under the commerce clause.

Against the backdrop of this case law, it is clear that accepting the extreme arguments advanced by the Johnsons would upset clearly established precedent. At stake in this case is federal water quality protection over a broad array of streams and wetlands across the nation, protections enforced not just by the EPA but other federal agencies such as the U.S. Army Corps of Engineers (Corps). This Court should reject the Johnsons' attack on the CWA and should instead uphold EPA's jurisdiction in this case.

ARGUMENT

I. THE JURISDICTIONAL ISSUES RAISED HERE MUST BE EVALUATED WITHIN THE CONTEXT OF THE BUZZARDS BAY ECOSYSTEM

The central question in this case is whether the tributaries and wetlands that the Johnsons converted to commercial cranberry bogs are “waters of the United States” subject to federal jurisdiction under section 404 of the CWA.² This question cannot be answered simply by focusing on each of the affected streams and wetlands in isolation, counting the number of hydrological connections, and calculating the distance between each one and the nearest “navigable-in-fact” waters.³ Consistent with the CWA’s objective to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” 33 U.S.C. § 1251(a), the analysis must instead start with a clear understanding of the Buzzards Bay ecosystem and the roles the affected tributaries and wetlands play in maintaining the Bay’s ecological health.

In the landmark case upholding the application of the CWA to wetlands, the U.S. Supreme Court stated that:

² Section 404 (a) prohibits the discharge of dredged or fill material into “navigable waters” without a permit. 33 U.S.C. § 1344(a). Section 502 defines the term “navigable waters” to mean “the waters of the United States.” 33 U.S.C. § 1362(7).

³ Waters are navigable-in-fact “when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.” The Daniel Ball, 77 U.S. 557, 563 (1870); U.S. v. Appalachian Electric Power Co., 311 U.S. 377, 406 (1940).

Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for “[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.”

U.S. v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132-133 (1985)(Riverside) (quoting S. Rep. No. 92-414, at 77). Once the aquatic ecosystem of Buzzards Bay is understood, it is clear why federal regulation of these tributaries and wetlands is critical to the control of pollution and within the scope of the CWA Section 404 permit program.

A. Buzzards Bay is a Rich, Diverse, Interconnected Ecosystem with Important Ecological, Commercial, and Recreational Value

Buzzards Bay is located in Southeastern Massachusetts between Western Cape Cod and Rhode Island’s Narragansett Bay.⁴ The Bay’s watershed is composed of a large, interconnected system of wetlands, ponds, lakes, tributary streams, and rivers, including the Weweantic. The Bay drains approximately 432 square miles of land.⁵ While there are some urban areas within the drainage basin, most land in the basin consists of “sparsely settled woodlands, wetlands, agricultural lands, and brushlands.”⁶

⁴ United States Geological Survey (USGS), Buzzards Bay Drainage Basin (2004), at <http://ma.water.usgs.gov/basins/buzzards.htm> (last visited August 28, 2005); Massachusetts Executive Office of Environmental Affairs (EOEA), Buzzards Bay Watershed (2003), at <http://www.mass.gov/envir/water/buzzardsBay/buzzardsBay.htm> (last visited August 28, 2005).

⁵ EOEA, Buzzards Bay Watershed, supra n.4.

⁶ USGS, Buzzards Bay Drainage Basin, supra n.4.

Buzzards Bay teems with an array of aquatic species and other wildlife that depend on the unique habitats the Bay provides, including 10,500 acres of eelgrass beds, 500 acres of salt marsh, and 5,000 acres of tidal flats.⁷ The Bay is a popular destination for boating and supports a large commercial fishing industry. In recent years, the health and vitality of Buzzards Bay and its watershed have been increasingly threatened by human and natural causes. Among the greatest threats are the long-term impacts of water pollution and destruction of wildlife habitat.

Pollution in the form of organic nutrients like nitrogen is particularly harmful to the aquatic environment because it can trigger excessive growth of plants and algae (eutrophication). The excess plant growth blocks out sunlight and uses up needed oxygen, making waters inhospitable to many plants and animals.⁸ Many embayments along the shores of Buzzards Bay have high concentrations of nitrogen.⁹

Water quality degradation has affected many forms of wildlife in the Bay, including eelgrass, herring, and shellfish. Eelgrass beds serve as habitat for many

⁷ EOE, Buzzards Bay Watershed, supra n.4.

⁸ For a discussion of eutrophication in estuaries, see EPA, Mid-Atlantic Integrated Assessment (2002), at <http://www.epa.gov/emfjulte/tpmcmaia/html/estEutr.html> (last visited August 28, 2005).

⁹ Buzzards Bay Project National Estuary Program, Nitrogen Action Plan (1991), at <http://www.buzzardsbay.org/nitroact.htm> (last visited August 28, 2005).

species, including commercially important scallops.¹⁰ Eelgrass bed acreage is an excellent indicator of water quality and, in Buzzards Bay, has been reduced by approximately 40% since the 1970s.¹¹

The Bay's herring population has also decreased significantly in the past century due to reduced water quality, dams, and other disruptions of water flow.¹² Herring are a critical link in the ecosystem's food chain, consumed by recreational fish like striped bass and bluefish. Herring are also a food source for the Roseate Tern, a federally listed endangered species whose largest North American colony is in Buzzards Bay.¹³

Finally, water quality degradation has also affected shellfish beds in Buzzards Bay with significant ecological, recreational, and commercial value.¹⁴ As a result of bacterial contamination from land-based sources, many shellfish beds have closed. In 2002, 7,500 acres of shellfish beds in Buzzards Bay were closed year-round.¹⁵

¹⁰ Id.

¹¹ Buzzards Bay Project National Estuary Program, Eelgrass in Buzzards Bay (2004), at <http://www.buzzardsbay.org/eelgrass.htm> (last visited August 28, 2005).

¹² Buzzards Bay Project National Estuary Program, Herring Run Information for Buzzards Bay (2004), at <http://www.buzzardsbay.org/herringruns.htm> (last visited August 28, 2005).

¹³ Id.

¹⁴ Id., at <http://www.buzzardsbay.org/shellfish.htm> (last visited August 28, 2005).

¹⁵ Id., at <http://www.buzzardsbay.org/shellclssuccess.htm> (last visited August 28, 2005).

B. Wetlands and Tributaries Like Those in This Case Play a Vital Role in Protecting Water Quality and in Achieving the Objectives of the CWA

In a case holding that drainage of a wetland without a permit violated the CWA, this Court has recognized that:

Freshwater wetlands are ecologically valuable for various reasons. They act as a natural flood control mechanism by slowing and storing storm water runoff. They help supply fresh water to recharge groundwater supplies. They serve as biological filters by purifying water as it flows through the wetlands. They provide seasonal and year-round habitat for both terrestrial and aquatic wildlife.

U.S. v. Cumberland Farms of Connecticut, 826 F.2d 1151, 1153 (1st Cir.

1987)(Cumberland Farms). Wetlands and their connected waters also have a value beyond those on this list. Wetlands brim with life and color and inspire a sense of awe and wonder, reminding us of the infinite richness and beauty of our natural world.¹⁶ The CWA is the most significant tool for protecting these invaluable ecosystems. What follows is a description of why regulating activities that destroy tributaries and wetlands is necessary to achieve the CWA's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a).

¹⁶ For one example of this inspiring effect, read Henry David Thoreau's descriptions of the marshes and swamps in and around Concord, Massachusetts in his Journal 1840-1858, excerpted in Wetlands Reader, p. 45, S. Wilson and T. Moritz, eds. (Sierra Club Books 1996).

Chemical Integrity – Maintenance of Water Quality

The United States has recognized that wetlands "play a key role in protecting and enhancing water quality." Riverside, 474 U.S. at 133; see also 33 C.F.R. § 320.4(b)(2)(i). Wetlands and tributaries protect and enhance water quality in part through the process of "nutrient uptake." Wetlands filter out organic nutrients and other pollutants such as sediment and heavy metals.¹⁷ Streams also play an important role in removing nutrients, particularly nitrogen. In fact, small streams collectively remove far more nutrients than larger tributaries and rivers.¹⁸ The Section 404 permit program protects the functions and values of wetlands and streams by regulating discharges of dredge and fill material that destroy or degrade those functions. 33 C.F.R. 320.4(b); 40 C.F.R. 230.1; see also National Research Council, Compensating for Wetland Losses Under the Clean Water Act, 140, National Academy Press (2001).

Physical Integrity - Flood and Erosion Control

Wetlands and streams help maintain the physical integrity of waters by controlling flooding and erosion. Wetlands act like sponges, storing and slowly releasing surface water and runoff from sources such as rainfall and snowmelt.¹⁹

¹⁷ J.F. Berry and M.S. Dennison, Wetlands: Guide to Science, Law, and Technology, 8 (Noyes Publications 1993).

¹⁸ Bruce J. Peterson et al., Control of Nitrogen Export from Watersheds by Headwater Streams, Science, April 16, 2001, Vol. 292, 86-90.

The flow of water is also impeded by the vegetation inhabiting wetlands and the riparian buffer zones of streams and rivers. Federal regulation of non-navigable tributaries for flood control and other purposes was upheld in Oklahoma v. Atkinson, 313 U.S. 508, 525-6 (1941). Prompted by a 1981 study estimating the flood control benefits of wetlands in the Charles River watershed, the Corps acquired over 8,000 acres of wetlands for conservation in lieu of building dams and other structures.²⁰

Wetlands also inhibit erosion by storing and slowly releasing water. Wetlands intercept stormwater, decreasing volume and velocity, reducing erosion along stream banks and shorelines, and trapping sediment that would otherwise enter the water. Riparian vegetation growing along streams also prevents erosion by strengthening banks with their root structures. In turn, erosion reduction reduces turbidity and siltation in connected waters.²¹

Biological Integrity – Habitat for Animal and Plant Life

In Riverside, the Court noted that “wetlands may ‘serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic ... species.’” 474 U.S. at 135 (citing

¹⁹ W.S. Sipple, EPA Office of Water, Wetlands Functions and Values, at <http://www.epa.gov/watertrain/wetlands/module07.htm> (last visited August 28, 2005).

²⁰ Wetlands: Guide to Science, Law, and Technology at 64, supra n. 17.

²¹ Id. at 65.

33 C.F.R § 320.4(b)(2)(i)). This Court has recognized that wetlands “provide seasonal and year-round habitat for both terrestrial and aquatic wildlife.”

Cumberland Farms, 826 F.2d at 1153. Myriad species of plants and animals depend on wetlands and streams for their survival. A 1991 study concluded that 43% of species listed as endangered or threatened under the Endangered Species Act depended upon wetlands for their survival and recovery.²² Wetlands support a great diversity of waterfowl and wading birds, some of which are highly sensitive to reductions in wetland size and density.²³ Freshwater and saltwater fish depend on wetlands for spawning grounds, food production, and nurseries.²⁴ Tributary streams are essential for many species’ access to wetlands.

Wetland plants, in both living and decomposed forms, are a chief source of nutrients for many forms of life. They are an essential link in the food chain that extends to connected waters.²⁵ Because of this interconnectivity, activities that damage wetlands can have far reaching impacts on plant and animal life

²² Wetlands: Guide to Science, Law, and Technology, supra n.17, at 57.

²³ National Research Council, Wetlands: Characteristics and Boundaries, 37-38 (National Academy Press 1995).

²⁴ Wetlands: Guide to Science, Law, and Technology, supra n.17, at 56.

²⁵ Id. at 59.

throughout the ecosystem with negative consequences for commercial, aesthetic, and recreational values of connected waters.²⁶

C. The Johnsons' Destruction and Conversion of Wetlands and Tributaries Resulted in the Loss of Valuable Ecological Functions Critical to the Health of Buzzards Bay

Cranberry bogs do not perform the same functions as natural wetlands.²⁷

Before the illegal filling took place, the Johnsons' Cross Street site contained the following wetlands or tributaries: upland forested wetlands from which surface and ground water would have flowed towards Beaver Dam Brook, a tributary of the Weweantic; a riparian wetland adjacent to the Brook; and, a small stream channel that flowed directly into the Brook. These saturated wetlands were ideal for the slow decomposition of dead plant materials that fuel the food chain in the Weweantic and Buzzards Bay. These wetlands also filtered out sediment, nutrients, and pesticides, and slowed the flow of floodwaters. Matthew Schweisberg, EPA, Wetland Delineation, Evaluation of Unauthorized Activities, and Assessment of Adverse Effects to Ecological Functions, The Johnson Sites,

²⁶ In 2001, more than 82 million U.S. residents hunted, hiking, fished, bird-watched, or participated in some other type of wildlife-related activity, spending over \$108 billion dollars in the process. U.S. Fish and Wildlife Service, 2001 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation, 7 (2001), available at <http://www.census.gov/prod/2003pubs/fhw01-us.pdf> (last visited August 28, 2005).

²⁷ "While cranberry beds remain wetlands, they are 'cropped wetlands' consisting of a monoculture subject to intensive manipulation for maximizing cranberry production. Most of the functions of natural wetlands are lost or substantially reduced by conversion to cranberry beds." U.S. Army Corps of Engineers, St. Paul District Analysis Regarding Section 404 Review of Commercial Cranberry Operations (1995), as quoted in Schweisberg Report.

Carver, Massachusetts (2001) (Schweisberg Report) at 22-23, included in District Court record as Tab B to Declaration of Matthew Schweisberg in Support of U.S. Motion for Partial Summary Judgment on Liability, February 16, 2004 (Schweisberg Declaration).

The Fosdick site also contained forested wetlands before the Johnsons converted them to cranberry bogs. Springtime surface water runoff and groundwater in the Fosdick wetlands flowed toward perennial and intermittent streams and a nearby reservoir, providing nutrient production, export, and food chain functions, as well as filtration and flood control. Id. at 23-24.

The Forest-Fuller site contained shrub swamp, emergent wetland, mixed forest/shrub wetland, and open water. The main functions of these wetlands were ground water discharge and wildlife habitat. Wildlife habitat was an important function of wetlands on all three sites for many forms of animal life, including red fox, mink, coyote, deer, owls, hawks, osprey, blue heron, frogs, snakes, and turtles. Id. at 24-25.

The Johnsons' failure to obtain a Section 404 permit caused unnecessary damage to these ecologically valuable wetlands that could have been prevented or at least mitigated. The Bay's watershed has already lost 40% of its wetlands;²⁸

²⁸ Coalition for Buzzards Bay, State of the Bay 2003, at http://www.savebuzzardsbay.org/pdf/state_of_the_bay.pdf (last visited August 28, 2005).

protection of what remains is crucial to the ecological integrity of this important resource.

II. THE WETLANDS AND TRIBUTARIES DAMAGED BY THE JOHNSONS ARE WELL WITHIN THE JURISDICTIONAL REACH OF THE CWA AND FEDERAL REGULATIONS

The Johnsons converted nearly fifty acres²⁹ of wetlands and open waters to commercial cranberry bogs and related infrastructure without applying for a Section 404 permit, despite being aware that their activities likely triggered CWA jurisdiction. Joint Appendix (JA) 33. The Johnsons' cranberry operations are within the Buzzards Bay watershed, less than five miles from the Weweantic and less than twenty miles from the Bay. JA 73, 75-76. There is a continuous surface water connection from the sites of the Johnsons' activities to the Weweantic and Buzzards Bay. *Id.* JA 37-38. This is a compact watershed with many interconnected wetlands and waterways in close proximity to the Bay. JA 73, 75-76. The Johnsons' conversion of these wetlands and tributaries has a direct adverse impact on downstream navigable waters. For just that reason, Congress prohibited the destruction of tributaries and wetlands without a permit under CWA Section 404. 33 U.S.C. §§ 1311(a), 1344(a).

CWA Section 404 jurisdiction depends upon whether these streams and wetlands are "waters of the U.S." under the Act. The Corps' regulations provide

²⁹ Schweisberg Declaration, ¶ 13.

that “waters of the U.S.” include “[w]etlands adjacent to waters (other than waters that are themselves wetlands) that are subject to jurisdiction under the Act.” 33 C.F.R. § 328.3(a)(7). The regulations define “adjacent” as “bordering, contiguous, or neighboring.” 33 C.F.R. § 328.3(c).

The Supreme Court addressed the extent of CWA jurisdiction over adjacent wetlands in Riverside, finding that the legislative history and language of the 1972 Act and its 1977 amendments pointed to a clear congressional intent to reach wetlands adjacent to waters subject to CWA jurisdiction. Riverside, 474 U.S. at 138. The Court upheld the Corps’ regulation of wetlands on the basis of their adjacency to “waters of the U.S.,” finding that it was reasonable to conclude that adjacent wetlands are “inseparably bound up” with these waters. Id. at 134. An essential basis for this conclusion was the effect that adjacent wetlands have on the entire aquatic ecosystem. The Court noted the Corps’ finding that “wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment,” and that:

[W]etlands that are not flooded by adjacent waters may still tend to drain into those waters ... wetlands may serve to filter and purify water draining into adjacent bodies of water ... and to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion In addition, 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. at 134-135 (internal quotations and citations omitted). The Court concluded that “[i]f it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand.” Id. at 135.

The Court’s ruling in SWANCC reaffirms this holding. 531 U.S. at 167. Indeed, SWANCC did not involve wetlands at all. Rather, SWANCC simply ruled that the Corps could not base CWA jurisdiction over an isolated, non-navigable pond exclusively on use by migratory waterfowl. Id. at 174. Nothing like that is involved here. In fact, in SWANCC, the Court recognized the significant effects of adjacent wetlands as a basis for CWA jurisdiction in Riverside, referring to the “significant nexus” between wetlands and adjacent navigable waters. Id. at 167. The wetlands at issue here are exactly the kind of “adjacent wetlands” that the Riverside court found to be within federal jurisdiction.

Nevertheless, the Johnsons argue that Section 404 does not apply because “many of the ‘waters’ at issue are barely waters at all.” Johnson’s Opening Brief 15. This betrays a fundamental misunderstanding of what wetlands are – they are transitional areas between streams and uplands. The Riverside court explicitly recognized this fact. Riverside, 474 U.S. at 132 (“On a purely linguistic level, it may appear unreasonable to classify ‘lands,’ wet or otherwise, as ‘waters.’ Such a simplistic response, however, does justice neither to the problem faced by the

Corps in defining the scope of its authority under § 404(a) nor to the realities of the problem of water pollution that the Clean Water Act was intended to combat. In determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins. . . .

[B]etween open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs — in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land.”).

A. No Court Has Held That Tributaries Like Those Filled by the Johnsons are Excluded From Jurisdiction Under the CWA

As described below, tributaries are covered by the CWA when they share hydrological or ecological connections with waters of the U.S. The tributaries in this case easily meet this test. The Johnsons, however, attempt to resurrect an oft-rejected argument. They posit that the tributaries are not subject to CWA jurisdiction because they were separated from navigable-in-fact waters by “several miles and several other non-navigable waters,” a connection the Johnsons argue is too attenuated for the Act to apply. Johnsons’ Opening Brief 8. This argument that the distance or number of links within a tributary system should be given controlling weight in determining CWA jurisdiction is completely at odds with the overwhelming weight of authority. See Addendum.

For example, in U.S. v. Deaton, 332 F.3d 698, 710 (4th Cir. 2003)(Deaton), the Fourth Circuit held that the intended reach of the CWA encompasses the

“entire tributary system” of navigable waters. See also U.S. v. Rapanos, 339 F.3d 447, 452 (6th Cir. 2003) (criminal case); Carabell v. U.S. Army Corps of Engineers, 391 F.3d 704, 710 (6th Cir. 2004)(Carabell); and Headwaters v. Talent Irrigation District, 243 F.3d 526, 533-4 (9th Cir. 2001)(Headwaters). In Deaton, the Fourth Circuit held that a tributary that was the first of five links in a tributary system was a “tributary” subject to the CWA. Deaton at 712. Further, other Circuits have found the CWA to cover tributaries other than streams and rivers, including a manmade ditch (Id.), a ditch with intermittent flow (Treacy v. Newdunn, 344 F.3d 407, 417 (4th Cir. 2003)(Newdunn)), and irrigation canals (Headwaters at 526). As Judge Posner noted in a recent case involving an extended tributary system that included a man-made ditch, “[a] stream can be a tributary, why not a ditch? A ditch can carry as much water as a stream, or more; many streams are tiny. It wouldn’t make much sense to interpret the regulation as distinguishing between a stream and its manmade counterpart.” U.S. v. Gerke Excavating, Inc., 412 F.3d 804, 805-6 (7th Cir. 2005)(Gerke).

In Deaton, the Fourth Circuit broadly interpreted “significant nexus”³⁰ to include the “entire tributary system of navigable waterways:”

³⁰ While the Supreme Court has recognized that a “significant nexus” was the basis for jurisdiction in Riverside and has been the basis of jurisdiction in numerous lower court decisions after SWANCC, this is not the only basis for CWA jurisdiction. Other bases for jurisdiction clearly exist, as reflected in Corps’ regulations in which the definition of “waters of the U.S.” includes waters “(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or (ii) From which fish or shellfish are or could be taken and sold

There is also a nexus between a navigable waterway and its non-navigable tributaries . . . this nexus, in light of the breadth of congressional concern for protection of water quality and aquatic ecosystems, is sufficient to allow the Corps to determine reasonably that its jurisdiction over the whole tributary system of any navigable waterway is warranted.

Deaton, 332 F.3d at 712 (internal quotations and citations omitted).

In this case, the tributaries filled by the Johnsons clearly fall within CWA jurisdiction because they shared both hydrological and ecological connections with the Weweantic. These streams were part of a network of tributaries all connected to the Weweantic; indeed the hydrologic connections here are more direct than the relationship between the jurisdictional wetlands and Black Creek in Riverside. In Riverside, as noted in Justice Stevens' SWANCC dissent, the District Court found no "direct" hydrological connection between wetlands and waters of the U.S., but found "occasional surface runoff from the property into nearby waters to constitute a meaningful connection." SWANCC, 531 U.S. at 176, n.2 (Stevens dissenting)(emphasis added). As this was a sufficient basis for jurisdiction in Riverside, it follows that the interconnected network of tributaries altered by the Johnsons clearly shared a nexus with other "waters of the U.S." sufficient to establish CWA jurisdiction.

in interstate or foreign commerce; or (iii) Which are used or could be used for industrial purposes by industries in interstate commerce." 33 C.F.R. § 328.3(a)(3).

Connected by more than “occasional surface runoff,” the unnamed tributary on the Cross Street site filled by the Johnsons originally flowed directly into Beaver Dam Brook, a tributary of the Weweantic. JA 37-38. Similarly, tributaries on the Fosdick Street site were also originally tributaries of the Weweantic. Id. Water flowed from these tributaries, through other tributaries, into the Weweantic and Buzzards Bay. JA 73, 75-76. These hydrological connections are direct, well beyond what is required to establish a “significant nexus,” and are thus clearly sufficient to establish the affected tributaries as “waters of the U.S.” See North Carolina Shellfish Growers Ass'n v. Holly Ridge Associates, LLC., 278 F.Supp.2d 654, 671 (E.D.N.C., 2003) (“Where a hydrological connection exists between a body of water and a traditional navigable water such that pollutants discharged into the body can move downstream and degrade the quality of the navigable water, the ‘significant nexus’ required for CWA jurisdiction under SWANCC is clearly present.”); see also Deaton, 332 F.3d at 707 (“Any pollutant or fill material that degrades water quality in a tributary of navigable waters has the potential to move downstream and degrade the quality of the navigable waters themselves.”)

B. The Wetlands and Bogs That the Johnsons Converted to Cranberry Bogs are Adjacent Wetlands That Fall Easily Within CWA Jurisdiction

In Riverside, the Court held that wetlands “adjacent” to waters subject to CWA jurisdiction are themselves jurisdictional. 474 U.S. at 134. Further, all of

the Circuits that have addressed the question of adjacent wetlands jurisdiction have found that SWANCC does not limit Riverside's fundamental holding that "adjacent" wetlands are subject to CWA jurisdiction. See Addendum. The cases cited by the Johnsons are inapposite. Cf. Rice v. Harken Exploration Co., 250 F.3d 264 (5th Cir. 2001); In re. Needham, 354 F.3d 340 (5th Cir. 2003).³¹ The Johnsons argue that a wetland must "actually abut" a navigable water in order to be subject to the CWA. Johnsons' Opening Brief 40. This argument was rejected in Rapanos, where the Sixth Circuit held that jurisdiction was proper in light of expert testimony that the wetlands at issue had a hydrologic connection with adjacent tributaries even though they did not actually abut the tributary. U.S. v. Rapanos, 376 F.3d 629, 639 (6th Cir. 2004)(civil case)(Rapanos). Furthermore, as the Seventh Circuit made clear in Gerke, SWANCC does not require adjacent waters to be navigable-in-fact in order for wetlands to be jurisdictional; rather, "[w]hether the wetlands are 100 miles from a navigable waterway or 6 feet, if water from the wetlands enters a stream that flows into the navigable waterway, the wetlands are 'waters of the United States' within the meaning of the [A]ct." Gerke, 412 F.3d at 807 (citations omitted). In this case, as the record clearly demonstrates, the

³¹ These cases are not entitled to the same weight as the decisions by other Circuits because they are factually or legally distinguishable. In Rice, the court was dealing with the issue of a discharge to dry land and groundwater, not wetlands or tributaries. 250 F.3d at 270. In Needham, the court actually upheld the Corps' exercise of jurisdiction, so its analysis of the limits of the Corps' authority under SWANCC is dicta. 354 F.3d at 347.

wetlands were connected to "waters of the U.S." and subject to CWA jurisdiction. JA 37-38, 73, 75-76.

The wetlands altered by the Johnsons satisfy the adjacency requirement because all three sites share hydrological surface water connections to "waters of the U.S." JA 37-38. A hydrological connection to "waters of the U.S." was the basis for upholding jurisdiction over wetlands in Rapanos, 376 F.3d at 639 (jurisdiction "can be satisfied by a hydrological connection") and Gerke, 412 F.3d at 807 (wetlands were "adjacent" to a tributary ditch because they were drained by the ditch). Further, even a hydrologic connection is above and beyond what other Courts have found to constitute a "significant nexus." For instance, in Carabell, jurisdiction was upheld over a wetland separated from a ditch by an artificial berm; no hydrological connection was found. 391 F.3d at 704.

Another basis for jurisdiction recognized by the Supreme Court is the ecological connection that exists between waters and adjacent wetlands. Such a connection was central to the Court's decision to uphold jurisdiction over wetlands in Riverside.³² In finding that "the Corps's 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

³² Justice Stevens noted that, in Riverside, "the ecological connection between the wetlands and the nearby waters also played a central role in this Court's decision." SWANCC, 531 U.S. at 176, n.2 (Stevens dissenting).

Act,” the Court noted, “the evident breadth of Congressional concern for water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret ‘waters’ to encompass wetlands adjacent to waters as more conventionally defined.” Riverside, 474 U.S. at 133. See also Northern California River Watch v. City of Healdsburg, 2004 WL 201502 (N.D.Cal. 2004)(“[A]s in Riverside Bayview, the pond, the river, and the wetlands all share the same ecosystem. The wetlands in question help filter pollutants entering the aquifer and hence the river proper. In every way the pond and wetlands are ‘adjacent to’ the Russian River.”)

This type of ecological connection exists between the Johnsons’ wetlands and “waters of the U.S.” Saturated wetlands on all three sites were ideal for the production of organic material, an important link in the Weweantic and Buzzards Bay food chain. Schweisberg Report 22-25. These altered wetlands also provided habitat for wildlife and performed other functions including nutrient uptake, filtering out sediment, and flood control. Id. Because of these functions, these wetlands had an ecological connection with adjacent waters that constitutes a “significant nexus.” Moreover, the damage caused by the Johnsons’ alteration of these wetlands does not stop at adjacent waters; their actions affect water quality, wildlife habitat, and recreational and commercial opportunities throughout the

Buzzards Bay ecosystem. It is crucial that the destruction of wetlands in this vibrant, diverse, interdependent watershed does not go unchecked.

Knowledgeable commentators have pointed out the drastic effect that adopting the extremely narrow definition of jurisdictional waters proposed by the Johnsons would have on achieving the goals of the CWA.³³ Such a reading flies in the face of Congress' choice "to define the waters covered by the Act broadly" in order to protect not just water quality but the entire "aquatic ecosystem."

Riverside, 474 U.S. at 132. The decision in this case will have wide ramifications for the entire CWA regulatory program for both the Corps and EPA.

III. THE JOHNSONS' CONSTITUTIONAL CHALLENGE IS WITHOUT MERIT

The Johnsons argue in the alternative that if the CWA does apply to the wetlands and tributaries at issue, then the Act must be seen as an unconstitutional exercise of Congress' commerce clause authority. Johnsons' Opening Brief 10-11, 29-40. This argument has been tried and rejected many times before. It should be rejected here as well.

³³ See generally Lance Wood, Environmental Law Review, 34 ELR 10187 (2004) (Noting that if *SWANCC* is interpreted broadly as holding that CWA jurisdiction is limited to traditional navigable waters of the U.S. and wetland areas that "actually and directly adjoin open water areas" of those waters, "the geographic jurisdiction of the CWA at present is actually only a tiny fraction (my estimate is less than 1%) of what the [EPA], the [Corps] . . . plus most of the federal courts, had previously believed.") Mr. Wood is Assistant Chief Counsel, Environmental Law and Regulatory Programs, U.S. Army Corps of Engineers.

First, the Johnsons try to gloss over the fact that there are two independent bases for the exercise of commerce clause authority under the CWA: regulation of the “channels of commerce;” and, regulation of economic activities which, in the aggregate, have a substantial impact on interstate commerce. Gonzales v. Raich, 125 S.Ct. 2195, 2205 (2005). The Johnsons summarily dismiss the “channels of commerce” ground and devote most of their argument to the rather bold proposition that the CWA does not regulate economic activity at all. Johnsons’ Opening Brief 29-35.

To the contrary, as the Fourth Circuit held in Deaton, “Congress’ authority over the channels of interstate commerce is broad enough to allow it to legislate, as it did in the [CWA], to prevent the use of navigable waters for injurious purposes.” 332 F. 3d at 707. Moreover, as the Seventh Circuit held in Gerke, this power extends beyond the regulation of activities injurious to navigability: “Congress’ power to regulate commerce is not limited to removing obstructions . . . Congress may forbid the pollution of navigable waters even if the pollution has no effect on navigability.” 412 F.3d at 807. Further, recognizing that “[a]ny pollutant or fill material that degrades water quality in a tributary of navigable waters has the potential to move downstream and degrade the quality of the navigable water themselves,” the Deaton Court noted that “the principle that Congress has the authority to regulate discharges into nonnavigable tributaries in order to protect

navigable waters has long been applied to the [CWA].” 332 F.3d at 707 (citations omitted). Both Gerke and Deaton held that extending CWA jurisdiction to the entire tributary system of navigable waters, as well as adjacent wetlands, was a valid exercise of Congress’s power to regulate the channels of commerce. Gerke at 807; Deaton at 708, 712; see also Newdunn, 344 F.3d at 416.

Second, the Johnsons’ argument that the CWA does not regulate economic activities which, in the aggregate, have a substantial effect on commerce, cannot hold water in light of the Supreme Court’s decision in Raich. The regulated activity at issue here is the commercial production of cranberries through the conversion of natural wetlands to cranberry bogs for the purpose of growing and selling products in interstate commerce. This is precisely the kind of economic activity that is subject to commerce clause regulation. Wickard v. Fillburn, 317 U.S. 111, 118-29 (1942); Raich, 125 S.Ct. at 2205-07. The Johnsons’ argument that these are small, insignificant wetlands and streams that cannot have any measurable impact on commerce is beside the point. As the Seventh Circuit stated in Gerke, “[o]bviously, filling in a 5.8 acre tract ... is not going to have a measurable effect on the depth of the Wisconsin or Mississippi Rivers. But that cannot be the test. The sum of many small interferences with commerce can be large, and so to protect commerce Congress must be able to regulate an entire class

of acts if the class affects commerce, even if no individual act has a perceptible effect.” 412 F.3d at 806.

It is worth noting in this context that the majority of Massachusetts’ 15,000 or more acres of cranberry bogs are located in the Buzzards Bay watershed.³⁴ The Johnsons’ activities are thus clearly part of a broader class of activities that affect commerce. Further, as Justice Stevens noted in his majority opinion in Raich, “the Court need not determine whether respondents’ activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.” 125 S.Ct. 2197 (citing U.S. v. Lopez, 514 U.S. 549, 557 (1995)(Lopez)). Here, it is entirely “rational” for Congress to regulate the piecemeal destruction of wetlands by commercial activities like cranberry production.

Likewise, the Johnsons’ contention that the CWA lacks an “express jurisdictional element” to ensure that every activity to be regulated is economic is not persuasive. Johnsons’ Opening Brief 35-36. Again, the Raich decision pulls the rug out from under the Johnsons’ theory, stating: “we have often reiterated that where the entire class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of

³⁴ Buzzards Bay Project National Estuary Program, Information About Cranberry Bogs and the Environment (2005), at <http://www.buzzardsbay.org/craninfo.htm> (last visited August 28, 2005).

the class.” 125 S.Ct. at 2197-2198. Unless a “particular statute or provision [falls] outside Congress’ commerce power in its entirety,” the fact that the statute may apply in instances where the activity is not strictly commercial is not fatal to the exercise of commerce clause authority. *Id.* at 2209. Unlike the statute in Lopez, which was a “brief, single subject statute making it a crime for an individual to possess a gun in a school zone,” *Id.* at 2209, the Section 404 permitting system is an essential part of a larger, comprehensive regulatory scheme. See City of Milwaukee v. Illinois and Michigan, 451 U.S. 304, 318 (1981) (“The ‘major purpose’ of the [CWA] was ‘to establish a comprehensive long-range policy for the elimination of water pollution.’” (quoting S.Rep. No. 92-414 at 95)). The Johnsons are asking this Court to accept the argument that pollution does not have economic consequences and that the activities that cause the pollution are not economic in nature. Neither is plausible.

Similarly unpersuasive is the Johnsons’ argument that jurisdiction in this case violates the commerce clause because congressional findings concerning the CWA contain “no explanation for how the aggregate filling of a remote wetland miles distant from the nearest navigable water will impact navigation, much less interstate commerce.” Johnsons’ Opening Brief 38. The Raich Court dismissed a similar contention with the observation that the Court has “never required Congress to make particularized findings in order to legislate . . . absent a special

concern such as the protection of free speech.” 125 S.Ct. at 2208. Further, the Court stated “Congress cannot be expected (and certainly should not be required) to include specific findings on each and every substance contained [in the Controlled Substance Act].” Id. at 2208, n.32. This reasoning applies equally to the CWA.

Finally, the Johnsons’ contention that the connection between the regulated activity and the substantial effect on interstate commerce is too attenuated is unpersuasive. Johnsons’ Opening Brief 38-39. In Raich, the Supreme Court made it clear that the attenuation factor is not dispositive when the regulation is part of a comprehensive scheme. The Court noted that Lopez and U.S. v. Morrison, 529 U.S. 598 (2000) “do not declare non-economic intrastate activities to be categorically beyond the reach of the Federal Government. Neither case involved the power of Congress to exert control over intrastate activities in connection with a more comprehensive scheme of regulation.” Raich, 125 S.Ct. at 2218. Indeed, in Gerke the Seventh Circuit rejected the argument that the regulation of upstream wetlands was unconstitutional on attenuation grounds, stating “[n]othing in the Constitution forbids interpreting the CWA to cover any wetlands that are connected to navigable waters.” 412 F.3d at 807. The Johnsons’ wetlands and tributaries are not outside of the CWA’s reach merely because they were connected to navigable waters by a number of tributary links; the connection is direct, clear,

and well within the scope of Congress's authority as well as Corps and EPA jurisdiction under the CWA.

CONCLUSION

For the foregoing reasons, Amici urge the Court to uphold the judgment of the Federal District Court.

Respectfully Submitted,



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³⁵ We would like to recognize the extraordinary effort of student clinician Derek Campbell for his assistance in the preparation of this brief.


CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

1. Exclusive of the table of contents, table of authorities, certificate of compliance, certificate of service and addendum, this brief contains 6974 words as counted by Word.
2. This brief has been prepared using 14 point, Times New Roman, proportionally spaced typeface.

8/29/05

Date



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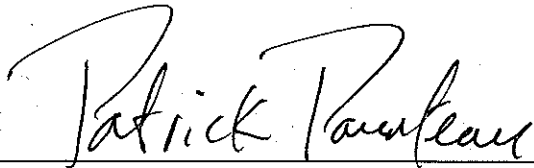
CERTIFICATE OF SERVICE

I, Patrick A. Parenteau, Esquire, hereby certify that on August 30, 2005, I served the Brief of Amici Curiae on the following parties by placing the required number of copies in the Federal Express overnight mail service:

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ADDENDUM

As of August 28, 2005, there have been thirty four reported decisions by the U.S. Courts of Appeal and U.S District Courts interpreting the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001)(*SWANCC*). Following is a digest of each reported decision. In all but two cases decided by the Fifth Circuit, the courts have upheld Clean Water Act jurisdiction over non-navigable tributaries and adjacent wetlands in the face of challenges based on *SWANCC*.

Circuit Court Decisions Upholding CWA Jurisdiction in the Face of Challenges Based on a Broad Reading of SWANCC

***United States v. Gerke Excavating, Inc.*, 412 F.3d 804, 805-08 (7th Cir. 2005) reh'g denied (7th Cir. 2005)**(Court of Appeals held that dumping of stumps and sand based fill into wetlands drained by a ditch that runs into non-navigable creek that flows into non-navigable river that flows into the navigable Wisconsin River was jurisdictional under the Clean Water Act (CWA))

***Parker v. Scrap Metal Processors, Inc.* 386 F.3d 993, 1009 (11th Cir. 2004), reh'g en banc denied (11th Cir. 2004)**(Court of Appeals held that runoff from a scrap metal processing site in Georgia that ran off the site into erosion gullies that fed a small stream that was a tributary to the Yellow River (a navigable tributary) was jurisdictional under the CWA)

***Carabell v. United States Army Corps of Engineers*, 391 F.3d 704, 708-10 (6th Cir. 2004)**(Court of Appeals held that forested wetland separated from a non-navigable man made ditch which flowed into Lake St. Clair (a navigable water body) was jurisdictional under the CWA)

***United States v. Rapanos*, 376 F.3d 629, 643-44 (6th Cir. 2004), reh'g en banc denied (6th Cir. 2004)**(Court of Appeals upheld a civil action against Rapanos for destroying a wetland where adjacency and substantial nexus existed)

***United States v. Rapanos*, 339 F.3d 447, 453 (6th Cir. 2003), cert. denied 541 U.S. 942 (2004), petition for reh'g denied 541 U.S. 1070 (2004)**
(Court of Appeals reinstated a criminal conviction for filling wetlands which were adjacent and hydrologically connected to a 100 year old man-made drain which flowed into a creek which flowed into a navigable in fact river)

***United States v. Deaton*, 332 F.3d 698, 712 (4th Cir. 2003), cert. denied 541 U.S. 972 (2004)**(Court of Appeals upheld the Corp's jurisdiction over a wetland adjacent to a roadside ditch that connects through a culvert and an eight mile long series of nonnavigable ditches and creeks to the navigable Wicomico River and ultimately to the Chesapeake Bay 25 miles later. The Court deferred to the Corp's interpretation of the CWA to include all nonnavigable tributaries)

***United States v. Phillips*, 356 F.3d 1086, 1093-95 (9th Cir. 2004)** (Court of Appeals upheld District Court jury instruction that a tributary of navigable waters was jurisdictional under the CWA)

***In re Needham*, 354 F.3d 340, 344-47 (5th Cir. Dec. 16, 2003)**(Court of Appeals held that an oil spill which was pumped into a drainage ditch the spilled into Bayou Cutoff and then into Bayou Flose, a water body adjacent to Company Canal which ultimately flowed into the Gulf of Mexico, was jurisdictional although the court, in dicta, also stated that other tributaries would not be jurisdictional under a broad interpretation of *SWANCC*)

***United States v. Rueth Development Co.*, 335 F.3d 598, 603-05 (7th Cir., 2003), cert. denied 540 U.S. 1050 (2003)**(Court of Appeals affirmed a consent decree in a Section 404 civil enforcement case which the plaintiff sought to reopen based on *SWANCC*. The Court upheld CWA act jurisdiction based on adjacency)

***United States v. Krilich*, 152 F. Supp. 2d 983, 994-95 (N.D. Ill. 2001), aff'd 303 F.3d 784 (7th Cir. 2002), cert. denied 538 U.S. 977 (2003)**(Court of Appeals upheld District Court decision that *SWANCC* was not an adequate basis for reopening a 1992 consent decree in a CWA Section 404 enforcement action because *SWANCC* did not represent such a significant change in the law that refusal to reopen was an abuse of discretion)

***Treacy v. Newdunn Associates LLC*, 344 F.3d 407, 417 (4th Cir. 2003), cert. denied 541 U.S. 972 (2004)**(Court of Appeals held that wetlands that abutted and had a hydrologic connection to a drainage ditch which flows via a culvert to non-navigable portions of a stream before flowing into traditional navigable water were jurisdictional under the CWA. The court also held that Virginia's regulation of waters was based upon independent state powers and were not simply tied to CWA jurisdiction)

***United States v. Interstate General Co.*, 152 F.Supp. 2d 843, 846-47 (D.Md. 2001) aff'd (4th Cir. 2002)**(Court of Appeals upheld District Court decision rejecting the argument in a civil enforcement action that *SWANCC* restricted CWA jurisdiction to navigable-in-fact waters and wetlands immediately adjacent thereto)

***Community Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943, 954-55 (9th Cir. 2002)**(Court of Appeals held that a drain that carried flows from an animal feeding operation either directly or by connecting waterways into the Yakima River was jurisdictional under the CWA)

***Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526 533-34 (9th Cir. 2001)**(Court of Appeals held that shallow irrigation canals tributary to other waters of the United States were jurisdictional under the CWA)

District Court Decisions Upholding CWA Jurisdiction in the Face of Challenges Based on a Broad Reading of SWANCC

***U.S. v. Thorson*, No. 03-C-74-C, 2004 W.L. 737522, *7-15 (W.D. Wis. 2004)**(District court held that wetlands adjacent to a drainage ditch connected to a nonnavigable, tertiary tributary of the navigable Wisconsin River were subject to CWA jurisdiction.)

***Northern California River Watch v. City of Healdsburg*, No. C01-04686 WHA, 2004 W.L. 201502, *10-12 (N.D. Ca., 2004)**(District court held that an abandoned sand and gravel pit used for sewage treatment that was hydrologically connected by groundwater to the nearby Russian River was subject to CWA jurisdiction.)

***Baccarat Fremont Developers v. U.S. Army Corps of Engineers*, 327 F.Supp. 2d 1121, 1127-28 (N.D. Cal. 2003)**(District court held that wetlands separated from jurisdictional waters by man-made berms are “waters of the U.S.”)

***United States v. Jones*, 267 F.Supp. 2d 1349, 1360 (M.D. Ga. 2003)** (District court held that Oil Pollution Act applied to discharge of oil into a storm drain that flowed into a drainage ditch that flowed into a creek that flowed into the navigable Ocmulgee River.)

***North Carolina Shellfish Growers Association v. Holly Ridge Associates*, 278 F. Supp. 2d 654, 669-75 (E.D. N.C. 2003)**(District court held that wetlands and other water bodies were jurisdictional under the CWA because there was a “significant nexus” between these waters and a traditionally navigable water “whether the hydrologic connection occurs in a channelized flow or a networks of flat bottoms and braids, continuously or intermittently.”)

***United States v. Robert L. Hummel*, No. 00 C 5184, 2003 WL 1845365, *4-7 (N.D. Ill. 2003)** (District court held that a “significant nexus” exists for wetlands which are hydrologically connected to a creek that flows into the navigable in fact Des Plaines River 11 miles away)

***San Francisco v. Cargill Salt Division*, No. C 96-2161 SI (N.D. Cal., May 5, 2003)** (District court held that a pond that was separated from a navigable in fact water by a man-made berm was jurisdictional under the CWA; appeal pending.)

***United States v. Bruce Dyer*, No. 00-11013 (D. Mass., March 12, 2003)**(District court refused to reopen consent decree based upon SWANCC for filling of wetlands adjacent to the Taunton River because the wetlands were adjacent to a navigable waterway)

***FD & P Enterprises, Inc. v. United States Army Corps of Engineers*, 239 F.Supp. 2d 509, 516-17 (D.N.J. 2003)** (District Court denied summary judgment because there were genuine issues of material fact regarding whether the filling of wetlands would have a substantial nexus to navigable in fact waters)

***United States v. Adam Bros Farming, Inc. et. al*, 369 F.Supp. 2d (C.D. Cal. 2003) motion to amend den'd 369 F.Supp. 2d 1180 (C.D. Cal. 2004)** (District court held that there was at least a material question of fact pertaining to the hydrologic connection (surface flow, pumping) between a farm and downstream waters and wetlands to preclude summary judgment on the issue of CWA jurisdiction)

***United States v. The New Portland Meadows, Inc.*, No. 00-507-AS, 2002 W.L. 31180956, *5-7 (D. Or. 2002)**(District court granted partial summary judgment for the United States based on a finding that ditches which are hydrologically connected to traditionally navigable waters by pumping are subject to CWA jurisdiction)

***California Sportfishing Protection Alliance v. Diablo Grande, Inc.*, 209 F.Supp. 2d 1059, 1074-76 (E.D. Cal. 2002)** (District court held that a creek running over a weir and into an underground pipeline which eventually connected to the San Joaquin River was jurisdictional under the CWA)

***United States v. Lamplight Equestrian Center, Inc.* No. 00-6486, 2002 WL 360652, *4-9 (N.D. Ill. 2002)** (District court held that CWA jurisdiction existed for a wetland that drained through a man made drainage ditch, then through a 50 foot delta or meandering swale, then into Brewster Creek (a nonnavigable stream) and ultimately into the navigable in fact Fox River because there was a significant nexus)

***Colvin v United States*, 181 F.Supp. 2d 1050, 1055 (C.D. Cal. 2001)** (District court held that the Salton Sea, a large, isolated, navigable in fact lake was a water of the United States and unaffected by *SWANCC*)

***Idaho Rural Council v Bosma*, 143 F.Supp. 2d 1169, 1178-81 (D. Id. 2001)**(District court held that discharges from a concentrated animal feeding operation were subject to CWA jurisdiction including a spring that ran into a pond that drained across a pasture into a canal that flowed into a creek that was either navigable in fact or flows into a navigable in fact river)

***United States v. Buday*, 138 F.Supp. 2d 1282, 1285-92 (D. Mt. 2001)** (District Court held in a criminal enforcement action that that wetlands surrounding a small, intermittent, non-navigable tributary some 235 miles upstream from the navigable in fact Clark Fork River were jurisdictional under the CWA)

***Aiello v. Town of Brookhaven*, 136 F.Supp. 2d 81, 119 (E.D.N.Y, 2001)**
(District Court concluded that non-navigable pond and creek that flowed into a lake which in turn flowed into a traditional navigable water were jurisdictional under the CWA)

***Robert Brace v. United States*, 51 Fed. Cl. 649, 652-53 (2002)** (U.S. Court of Federal Claims denied U.S. motion for summary judgment based on ruling that there was a factual dispute as to whether, post-*SWANCC*, a sufficient jurisdictional nexus existed between the wetlands at issue and navigable waters)

Fifth Circuit Court of Appeals

The Fifth Circuit is the lone Court of Appeals to express a broader view of *SWANCC*, but it has done so in cases under the Oil Pollution Act, not under the CWA, and its statements are fairly characterized as dicta since they were not necessary to the outcome in either case.

***Rice v. Harken Exploration Co.*, 250 F.3d 264, 269-72 (5th Cir. 2001), reh'g en banc denied, 263 F.3d 167 (5th Cir. 2001)**(Court of Appeals held that the Oil Pollution Act (OPA) does not apply to discharges of oil onto dry land that seeped through the ground into groundwater which, in turn, contaminated several intermittent streams where there was little evidence in the record concerning how often the creek runs, how much water flows in it, and whether the creek ever flowed into a navigable body of water)

***United States v. Needham*, 354 F.3d 340, 344-46 (5th Cir. 2003)**(Court held that the OPA does not apply to oil spill into a drainage ditch some sixty miles from the Gulf of Mexico shoreline and navigable waters)