Regulatory Takings: The Supreme Court Tries to Prune *Agins* Without Stepping on *Nollan* and *Dolan*

In *Lingle v. Chevron*,[1] the U.S. Supreme Court attempts to clarify its complex regulatory takings jurisprudence, but the *Lingle* ruling may raise as many new questions as it resolves. This case involved a Fifth Amendment takings challenge to a Hawaii statute that capped the rent that oil companies could charge to gasoline retailers who rent company-owned service stations.[2] The unanimous *Lingle* ruling represents a reversal by the Court of a widely-cited takings rule it established a quarter-century ago in *Agins v. City of Tiburon*.[3] In that case the Court declared that zoning is a compensable regulatory taking if it fails to "substantially advance legitimate state interests."[4] In an opinion written by Justice O'Connor, the *Lingle* Court declares that the *Agins* "substantially advances test is not a valid takings test" and "has no proper place in our takings jurisprudence."[5]

Lingle originated with Hawaii's effort to control high gasoline prices. Hawaii's wholesale market for oil products is highly concentrated, and close to half of its retail gas stations are leased from large oil companies by independent lessee-dealers.[6] The challenged Hawaii statute, Act 257, attempted to control retail gasoline prices by limiting the monthly rent oil companies could charge these independent lessee-dealers.[7]

1. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005).
2. *Id.* at 532.
3. Agins v. City of Tiburon, 447 U.S. 255, 260–63 (1980). The plaintiff in *Agins* challenged city zoning ordinances that restricted plans to develop a five-acre property for residential use. The Court found that the ordinances were not an unconstitutional taking because they substantially advanced legitimate government goals and did not deny the owner an economically viable use of the property.
4. *Id.* at 260.
5. *Lingle*, 544 U.S. at 545, 548.
6. *Id.*
7. *Id.* at 533.

Chevron U.S.A., the largest marketer and refiner of gasoline in the state, sued Hawaii in federal court, seeking injunctive and declaratory relief.[8] Relying on the *Agins* test, Chevron argued that the rent cap effected a regulatory taking of its property because the cap would not lower retail gasoline prices and therefore would not substantially advance any legitimate government interest.[9] The district court granted Chevron summary judgment, agreeing that the rent cap was a taking because it would not serve its ostensible purpose of reducing retail gasoline prices.[10] The court reasoned that oil companies would recover lost rental revenue by raising wholesale fuel prices, and that lessors would charge a premium reflecting the value of any rent reduction whenever they transferred their occupancy rights to a new lessee.[11]

The Ninth Circuit vacated the summary judgment decision, holding that there was a genuine issue of material fact about whether the Hawaii statute would confer any benefit to consumers.[12] This led to a one-day bench trial in the district court in which dueling expert economists testified as to the likely effect of the Hawaii statute.[13] Once again, the district court found that the Hawaii statute would not benefit the public by reducing gasoline prices and, therefore, constituted an unconstitutional regulatory taking.[14] This time, the Ninth Circuit affirmed the lower court's conclusion.[15] Hawaii appealed the decisions, challenging the lower courts' application of the *Agins* "substantially advances" test, and the Supreme Court granted certiorari.[16]

In reviewing this challenge, the Court first reviewed its takings jurisprudence and its rules for determining when a government action becomes a regulatory taking.[17] The Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." As the *Lingle* Court noted, the quintessential taking under the Fifth Amendment is a physical invasion or appropriation of property.[18] Since 1922, the Court has also recognized the possibility of a "regulatory taking," a government regulation so onerous to the property owner that its effect is functionally equivalent to a physical invasion or appropriation of the property.[19] The creation of the

8. *Id.* at 533.
9. *Id.* at 533–34.
10. Chevron USA Inc. v. Cayetano (*Chevron I*), 57 F. Supp. 2d 1003, 1014 (D. Haw. 1998).
11. *Id.* at 1010–14.
12. *Lingle*, 544 U.S. at 535.
13. *See id.*
14. *Id.* at 535–36.
15. Chevron U.S.A., Inc. v. Lingle (*Chevron II*), 363 F.3d 846, 848 (9th Cir. 2004).
16. Lingle v. Chevron U.S.A., Inc., 543 U.S. 924 (2004) (granting certiorari).
17. *See Lingle*, 544 U.S. at 536–40.
18. *See id.* at 537.
19. *See id.*; Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

regulatory takings doctrine thus broadened the protection afforded property owners under the Fifth Amendment. At the same time, however, the Court recognized that the use of the doctrine must be limited: "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[20]

The fundamental question addressed by regulatory takings jurisprudence is how to determine when a legitimate government regulatory action crosses the line and becomes an unconstitutional taking. The *Lingle* Court noted that its precedents recognize a *per se* taking "where government requires an owner to suffer a permanent physical invasion of her property,"[21] or when "regulations . . . completely deprive an owner of '*all* economically beneficial use' of her property."[22] Aside from these categorical rules, the Court reaffirmed the standards delineated in *Penn Central Transportation Co. v. New York City*.[23] That ruling identified several factors that should be considered, including "'the economic impact of the regulation, . . . the extent to which the regulation has interfered with distinct investment-backed expectations,'" and whether the governmental action "amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good.'"[24]

In evaluating Hawaii's statute, the Court noted that Chevron had not argued that the rent cap resembled a physical invasion of its property, nor that it substantially affected Chevron's ability to earn revenues from its property.[25] In fact, Chevron actually stipulated before the trial that the Hawaii rent caps gave it latitude to substantially *increase* its rental revenues in that state.[26] Thus Hawaii's statute did not qualify as a *per se* taking and appeared to pass constitutional muster under the standards established by *Penn Central*.

In arguing that the statute nevertheless constituted a compensable taking, Chevron relied on the precedent of *Agins v. City of Tiburon*.[27] The *Agins* court had declared that an ordinance constitutes a taking if it either (1) "denies an owner economically viable use of his land" or (2)

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20. *Pennsylvania Coal*, 260 U.S. at 413.

21. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 538 (2005) (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)).

22. *Id.* (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992)).

23. *See id.*; Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

24. *Lingle*, 544 U.S. at 538–39 (quoting *Penn Central*, 438 U.S. at 124).

25. *See id.* at 544.

26. *See id.* at 534.

27. *See* Chevron U.S.A., Inc. v. Cayetano (*Chevron I*), 57 F. Supp. 2d 1003, 1008 (D. Haw. 1998).

"does not substantially advance legitimate state interests."[28] The district court and court of appeal accepted Chevron's argument that the Hawaii statute was a taking under this second "substantially advances" prong.[29]

The *Lingle* Court did not take issue with the logic of Chevron's analysis, but instead overruled the "substantially advances" prong of the *Agins* test altogether. The Court found it unacceptable that a regulation could be declared a taking solely on a finding that it does not advance a state interest. Such an inquiry "reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights."[30] Moreover, "[the] test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property."[31] Therefore, the Court concluded, *Agins*' "substantially advances" formula was "regrettably imprecise" and misleading and had "no proper place in [the Court's] takings jurisprudence."[32] In the view of the Court, the question of whether a regulation serves any legitimate public purpose is not a takings issue at all, but rather a due process issue (and one for which the courts should offer legislatures and executive agencies considerable deference).[33]

The *Lingle* ruling can be viewed as limiting the range of possible Takings Clause challenges of government action out of judicial deference to the separation of powers. The Court found that the *Agins* "substantially advances" rule is too intrusive, potentially demanding "heightened means-ends review of virtually any regulation of private property."[34] Such an interpretation "would require courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which courts are not well suited."[35] For example, it will no longer be possible to use the *Agins* "substantially advances" test to challenge a rent control ordinance as a regulatory taking.[36] If challenged, an economic regulation such as a rent control law would be subject to the less exacting "rational basis" review, a standard under which the Supreme Court has

28. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (citing Nectow v. Cambridge, 277 U.S. 183, 188 (1928), and *Penn Central*, 438 U.S. at 138 n.36).

29. *See* Chevron U.S.A., Inc. v. Lingle (*Chevron II*), 363 F.3d 846, 848 (9th Cir. 2004); *Chevron I*, 57 F. Supp. 2d at 1014.

30. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 542 (2005).

31. *Id.*

32. *Id.* at 542, 548.

33. *See id.* at 542, 544–45.

34. *Id.* at 544.

35. *Id.*

36. The "substantially advances" test provided the basis for the Ninth Circuit to overturn a mobile home rent control ordinance in *Cashman v. City of Cotati*, 374 F.3d 887 (9th Cir. 2004), *withdrawn and reh'g granted*, 415 F.3d 1027 (2005) (affirming district court decision in favor of city after *Lingle* foreclosed Cashman's takings claim based on the "substantially advances" test), *cert. denied*, No. 05-676, 2006 U.S. LEXIS 1846 (Feb. 27, 2006).

almost without exception refused to overturn purely economic regulations over the last 50 years.[37]

Less clear is what impact the *Lingle* ruling may have on other Supreme Court precedents that relied on the now-discredited *Agins* "substantially advances" test. Although the *Agins* rule that *Lingle* overturns is one of the most widely-cited takings precedents, the Court maintains that their new ruling will not "disturb" any of its prior holdings, because it has never found a compensable taking based on the *Agins* "substantially advances" test. The Court stated that its prior rulings invoking the formula "merely assumed its validity when referring to it in dicta."[38]

There are two key rulings that the *Lingle* Court goes to particular lengths to reassure us are not disturbed by the new holding:[39] *Nollan v. California Coastal Commission*[40] and *Dolan v. City of Tigard*.[41] These rulings both cited and appeared to rely at least in part on the *Agins* standard.[42] These cases established important limits on government's power to demand exactions of property as a condition of granting discretionary development permits.

The *Nollan* and *Dolan* rulings were motivated by the Court's belief that government could be tempted to use exactions in an extortionate way to extract concessions and public benefits from landowners or developers. To curb this temptation, the Court determined that courts should subject exactions to a heightened scrutiny to ensure that the government appropriately relied on the exactions only to mitigate or offset the negative public impacts of development projects. *Nollan* established that an exaction constituted a regulatory taking if there was not an "essential nexus" between the exaction and the public burden imposed by the development.[43] *Dolan* further established that the nature and extent of the exaction must be "roughly proportional" to the impact on the public of the proposed development project.[44]

At first blush, it appears that the *Nollan* and *Dolan* rules subject government regulation to just the sort of means-ends inquiry now rejected by the *Lingle* ruling. That is, if the exaction does not

37. *See* WILLIAM COHEN, JONATHAN D. VARAT & VIKRAM AMAR, CONSTITUTIONAL LAW 710 (12th ed. 2005).

38. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 546 (2005). In *Agins*, the Court applied the "substantially advances" formula and upheld the challenged zoning regulations as substantially advancing legitimate government goals. *See* Agins v. City of Tiburon, 447 U.S. 255, 261–62 (1980).

39. *See Lingle*, 544 U.S. at 546–48.

40. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

41. Dolan v. City of Tigard, 512 U.S. 374 (1994).

42. *See Nollan*, 483 U.S. at 834, 835 n.3 & 845; *Dolan*, 512 U.S. at 385.

43. *Nollan*, 483 U.S. at 837.

44. *Dolan*, 512 U.S. at 391.

appropriately further some public policy interest, then it may qualify as an unconstitutional regulatory taking. *Lingle* thus seems to leave *Nollan* and *Dolan* on a shaky foundation. According to the Court, however, the holdings in *Nollan* and *Dolan* remain untouched.[45] In *Lingle*, the Court asserts that *Nollan* and *Dolan* rulings did not in fact rely upon the discarded *Agins* rule. Rather, they depended upon the doctrine of "unconstitutional conditions."[46] That doctrine provides that "the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property."[47]

The doctrine of unconstitutional conditions is more commonly invoked in other rights contexts such as free speech. For example, the doctrine tells us that the government should not condition the receipt of welfare benefits on a waiver by recipients of their First Amendment rights.[48] When the infringement on rights is sufficiently related to a government purpose, it may pass constitutional muster—for example, the Central Intelligence Agency has a legitimate interest in restricting the free speech rights of employees "who have access to sensitive information."[49]

The doctrine of unconstitutional conditions provides a basis for considering whether the public interests served by an exaction are sufficient to justify an infringement on constitutional rights. However, any such inquiry must take as its starting point the supposition that the exaction actually infringes on a constitutionally protected right. How do we establish that starting-point? The Court tells us in *Lingle* that we can do so by evaluating whether the exaction resembles a physical taking.[50] The Court explains that *Nollan* and *Dolan* each involved an exaction that strongly resembled a paradigmatic physical taking: the landowners were required to grant physical easements to allow public use of their land. Thus, notes the Court in *Lingle*, both decisions "began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking."[51]

45. *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 548 (2005).

46. *Id.* at 547 (quoting *Dolan*, 512 U.S. at 385).

47. *Id.* (quoting *Dolan*, 512 U.S. at 385).

48. *See* Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. Rev. 593, 605 (1990).

49. *Id.* at 607.

50. *See Lingle*, 544 U.S. at 546.

51. *Id.*

While this might be a satisfactory rationale for the *Nollan* and *Dolan* rulings, it raises the question of what the Court would say about exactions that are *not* similar in character to a physical taking—for example, monetary development impact fees.[52] Since requiring someone to pay a fee does not resemble a *per se* physical taking, could the courts invalidate fees that failed to meet the *Nollan* or *Dolan* standards (as the California Supreme Court has already held)?[53] This question seemed easier to answer in the affirmative before *Lingle*, because the *Nollan* and *Dolan* standards were supportable at least in part based on the *Agins* "substantially advances" rule. Before *Lingle*, the *Nollan* and *Dolan* tests of nexus and rough proportionality could be invoked when exactions seemed poorly fitted to public policy objectives. For example, in *Ehrlich v. City of Culver City*, the California Supreme Court relied on the *Agins* "substantially advances" rule in deciding that the heightened scrutiny of *Nollan* and *Dolan*, with the nexus and rough proportionality requirements, applied to development impact fees.[54] Under *Lingle*, however, the *Agins* "substantially advances" test is invalid and *Nollan* and *Dolan* are seemingly not implicated unless something resembling a physical taking has occurred.[55]

In conclusion, in the post-*Lingle* world, it is no longer possible to assert a takings claim based solely on the allegation that a government regulation fails to substantially advance a legitimate public interest. *Lingle* attempts to leave intact the rest of the Court's takings jurisprudence, and seminal rulings such as *Penn Central*, *Nollan* and *Dolan* remain in force. But *Lingle*'s dicta about the latter two rulings may raise new questions about their scope.

Daniel Pollak

52. Development impact fees are payments exacted from a developer as a condition of a discretionary permit such as a subdivision approval.

53. *See* Ehrlich v. City of Culver City, 12 Cal. 4th 854 (1996).

54. *See id.* at 859–60. In *Ehrlich*, a developer sought approval for a residential condominium development that would replace a private tennis club and recreational facility. *Id.* at 860. The city found that there was a shortage of recreational facilities in the city and required the developer to pay impact fees to fund public recreational facilities and public art. *Id.* at 862. The developer's takings challenge reached the California Supreme Court after being remanded to a state court of appeal by the U.S. Supreme Court. *Id.* at 859. The *Ehrlich* court held that the city had satisfied the nexus requirement but not the rough proportionality requirement. See *Ehrlich*, 12 Cal. 4th at 854.

55. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (internal citations omitted).

Four Years after *SWANCC*; Regaining Ground in Federal Wetlands Protection

In *Baccarat Fremont Developers v. United States Army Corps of Engineers*,[1] the Ninth Circuit affirmed the district court's grant of summary judgment in favor of the Army Corps of Engineers (Corps).[2] The court found that the Corps had undisputed jurisdiction over a nearly eight-acre portion of wetlands located on property owned by Baccarat Fremont Developers (Baccarat).[3] This holding confirmed the federal government's regulatory authority over wetlands that are adjacent to waters of the United States, as defined by the Clean Water Act, even without a showing of a significant hydrological connection between the two.[4] This decision comes in the wake of *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*, a 2001 Supreme Court decision that severely limited the Corps' ability to protect inland waterways from pollution.[5] Similar challenges have been brought in several jurisdictions and the Supreme Court resolved two such cases from the Sixth Circuit—combined in *Rapanos v. United States*—in June 2006.[6] The Ninth Circuit's decision in *Baccarat*, to uphold federal authority over "adjacent wetlands" based on adjacency alone, represents a positive step in the direction of wetland protection. However, it must be read in light of increasingly restrictive federal judicial interpretation of the Clean Water Act, particularly the fractured Supreme Court decision in *Rapanos*, that the Corps must demonstrate a "significant nexus" between navigable waters and the adjacent wetlands it asserts jurisdiction over.[7]

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1. Baccarat Fremont Developers v. U.S. Army Corps of Eng'rs, 425 F.3d 1150 (9th Cir. 2005).

2. *Id.* at 1158.

3. *Id.* at 1151, 1158.

4. *Id.* at 1156.

5. Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001).

6. Rapanos v. United States, 126 S. Ct. 2208 (2006), *vacating* Carabell v. U.S. Army Corps of Eng'rs, 391 F.3d 704 (6th Cir. 2004), *and* United States v. Rapanos, 376 F.3d 629 (6th Cir. 2004).

7. *Id.* at 2252 (Kennedy, J., concurring). Because the Court was split 4-1-4, it did not produce a "majority" opinion with a clear holding. Therefore, Justice Kennedy's concurring

BACKGROUND: THE CLEAN WATER ACT AND CORPS' REGULATORY AUTHORITY OVER WETLANDS

The purpose of the Clean Water Act[8] (CWA) is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[9] National waters, or "waters of the United States," are those used for interstate commerce, including those "subject to the ebb and flow of the tide," interstate wetlands, impounds, adjacent wetlands, and "other waters such as intrastate lakes, rivers, streams ... mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds."[10] Wetlands are lands "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."[11] Further, adjacent wetlands are those "separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like."[12] The CWA protects these waters against pollution by requiring approval prior to the discharge of fill material.[13]

In *United States v. Riverside Bayview Homes*, the Supreme Court solidified the Corps' jurisdiction over "adjacent wetlands," holding that the CWA should be broadly construed to endow the Corps with regulatory authority to require permits for discharge of fill materials into these waters without showing a specific environmental significance.[14] The Court unanimously found that the Corps could require owners of a housing development to acquire a permit before placing fill materials into adjacent wetlands.[15] The Court also held that the Corps could define *all* adjacent wetlands as "waters of the United States," despite the fact that some adjacent wetlands might not be environmentally significant to their adjoining bodies of water.[16] It specified that adjacency itself was sufficient, because of the inherent connection between adjacent wetlands and the larger aquatic environment—in this case, 80 acres of low-lying,

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opinion, which details a "significant nexus" test is often cited as the holding. *See, e.g.*, Dahlia Lithwick, *A Supreme Court of One*, WASH. POST, July 2, 2006, at B1 ("it was Kennedy whose opinion in *Rapanos* will thus become the standard for the Corps as it fashions future policy").

8. 33 U.S.C. §§ 1251–1387 (2006). Congress enacted the Federal Water Pollution Control Act Amendments of 1972 in response to growing public concern over water pollution. Congress amended again in 1977, and the law became more commonly known as the Clean Water Act. EPA, Clean Water Act, http://www.epa.gov/region5/water/cwa.htm (last visited June 5, 2006).

9. 33 U.S.C. § 1251(a) (2006).

10. 33 C.F.R. §§ 328.3(a)(1)–(7) (2005).

11. *Id.* § 328.3(b).

12. *Id.* § 328.3(c).

13. 33 U.S.C. § 1344(a) (2006); *see also id.* § 1311(a) (stating that unauthorized pollutant discharge is unlawful).

14. United States v. Riverside Bayview Homes, 474 U.S. 121, 139 (1985).

15. *Id.*

16. *Id.* at 135 & n.9.

marshy land near the shores of Lake St. Clair in Michigan.[17] The Court found that these wetlands, which extended to Black Creek, a navigable waterway, were "inseparably bound up with the 'waters' of the United States," thus requiring no further showing of a hydrological or ecological connection between the two.[18]

Twenty years after *Riverside Bayview*, in *SWANCC*, the Supreme Court limited the CWA's reach over intrastate waters by invalidating the Corps' "Migratory Bird Rule."[19] In a 5–4 decision, it held that the Corps' jurisdiction under the CWA did not extend to inland (non-navigable) ponds that are not adjacent to navigable waters, even if they are used by migratory birds as habitat.[20] The Court rejected the Corps' argument of jurisdiction under the Commerce Clause, stating that the rule "would result in a significant impingement of the States' traditional and primary power over land and water use."[21] Further, the Court noted that this expansive interpretation of navigable waters was inconsistent with the Corps' 1974 regulatory definition, promulgated two years after the CWA's enactment, which defined "navigable waters" as those bodies of water that could be used by the public for commerce or transportation.[22] The Court looked to the language of the CWA, finding that despite its intent to define "navigable waters" broadly, "[nothing] in the legislative history . . . signifies that Congress intended to exert anything more than its commerce power over navigation."[23]

While in *Riverside Bayview*, the Court reaffirmed the Corps' ability to "regulate at least some waters that would not be deemed 'navigable,'" *SWANCC* limited *Riverside Bayview* to the question of waters adjacent to what would more traditionally be thought of as "navigable" waters.[24] *SWANCC* thus narrowed the scope of what the Corps could classify as "other waters" (those non-navigable waters over which the government could assert jurisdiction).[25] It denied CWA protection for isolated waters (such as these inland ponds), unless the Corps could show that they are

17. *Id.* at 124, 134–35.

18. *Id.* at 131, 134–35.

19. Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001). The Court granted certiorari following a Seventh Circuit Court of Appeals ruling in favor of the Corps, which had denied a section 404(a) permit to a consortium of landowners who wanted to use these ponds as a landfill, or disposal site for non-hazardous solid waste. *Id.* at 165–66.

20. *Id.* at 162.

21. *Id.* at 174.

22. *Id.* at 168.

23. *Id.* at 168 n.3.

24. *Id.* at 167 (quoting United States v. Riverside Bayview Homes, 474 U.S. 121, 133 (1985)).

25. *Id.* at 171.

connected to waterways that are in fact navigable and used for interstate commerce.[26]

BACCARAT: CONFIRMING THE CORPS' JURISDICTION OVER ADJACENT WETLANDS

The present case arises from Baccarat development company's attempt to fill some of the wetlands on its land. In 1997, Baccarat purchased 30.98 acres of land in Fremont, California, with the intent of building a large office, research and manufacturing facility—the Fremont-Cushing Plaza Project.[27] However, wetlands comprised a portion of this land and they adjoined man-made barriers, or berms. The berms separated the wetlands from tidal flood control channels that run into the San Francisco Bay.[28]

In 1998, Baccarat sought a determination from the Corps' San Francisco District (District) regarding its jurisdiction over these wetlands. The District found that the CWA gave it regulatory authority over "adjacent wetlands," including a 7.66-acre portion of Baccarat's land.[29] Pursuant to section 404(a) of the CWA,[30] Baccarat then requested a permit to fill a third of these acres.[31]

Meanwhile, on January 9, 2001, the Supreme Court made a final determination in *SWANCC*.[32] Twenty days later, Baccarat asked the District to reconsider its jurisdiction in light of the Court's decision.[33] On May 8, 2001, the District asserted that *SWANCC* did not undermine its authority over Baccarat's wetlands. It reaffirmed its ability to regulate these lands, finding that they were adjacent to tidal waterways and the presence of man-made berms did not "defeat adjacency."[34] On appeal, the South Pacific Division of the Corps confirmed that *SWANCC* did not modify the District's jurisdiction. However, it did find that the administrative record did not contain enough evidence to justify the District's determination that these waters were in fact "adjacent" to flood control channels.[35] On remand, the District once again asserted its

26. *Id.*

27. Baccarat Fremont Developers v. U.S. Army Corps of Eng'rs, 425 F.3d 1150, 1152 (9th Cir. 2005).

28. 425 F.3d at 1152.

29. *Id.*

30. 33 U.S.C. § 1344(a) (2006).

31. 425 F.3d at 1152.

32. Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001).

33. Baccarat Fremont Developers v. U.S. Army Corps of Eng'rs, 425 F.3d 1150, 1152 (9th Cir. 2005). Baccarat contested the Corps jurisdiction over only five of the six areas delineated as wetlands, as the sixth receives direct tidal flow through a culvert from a flood control channel. *Id.*

34. *Id.*

35. *Id.*

jurisdiction under the CWA.[36] However, this time, it also included a memorandum containing six justifications for a finding of adjacency:

(1) that barriers such as berms do not defeat adjacency pursuant to 33 C.F.R. § 328.3(c);
(2) that the wetlands are in reasonable proximity to [Alameda County Flood Control District] flood control channels;
(3) that the wetlands serve important functions that contribute to the aquatic environment in general and to the nearby tidal waters in particular;
(4) that the wetlands' functions are particularly important given the reduction of wetlands in the San Francisco Bay area;
(5) that the wetlands are within the 100 year floodplain of tidal waters; and
(6) that the wetlands are part of a hydric soil unit that is contiguous with the area covered by tidal waters.[37]

Having issued its final decision, the District offered Baccarat a conditional permit in March 2002.[38] This permit allowed Baccarat to fill the contested 2.36 acres of wetland if it mitigated the impact by enhancing the remaining portion of brackish wetlands and creating a minimum of 2.36 additional acres of on-site wetlands.[39]

Despite agreeing to the conditional permit, Baccarat continued its quest to invalidate the Corps' jurisdiction over the disputed portion of wetlands and to enjoin enforcement of the conditions. First, it sought declaratory and injunctive relief in district court.[40] Then, when the court granted the Corps' motion for summary judgment,[41] Baccarat again appealed. On appeal, the Ninth Circuit affirmed the district court's ruling that the Corps' decision was properly based on congressional intent, and that its application of the CWA involved no clear error of judgment.[42]

The primary issue in *Baccarat* was whether the Corps could assert jurisdiction over these wetlands without showing a "significant

36. *Id.* at 1153.
37. *Id.*
38. *Id.* The issuance of a final permit was preceded by a Conditional Water Quality Certification and Waiver of Discharge Requirements by the San Francisco Regional Water Quality Control Board. *Id.* Under section 401 of the Clean Water Act, an applicant for a section 404(a) permit from the Corps must first receive a state agency certification that the proposed discharge will comply with the Act. 33 U.S.C. § 1341(a)(1) (2006). In this case, the state agency is the Water Resources Control Board, a subsection of the California Environmental Protection Agency. This Board enforces California's water protection laws through nine regional boards, including the San Francisco Region. California EPA Water Resources Control Board, http://www.waterboards.ca.gov (last visited June 5, 2006).
39. Baccarat Fremont Developers v. U.S. Army Corps of Eng'rs, 425 F.3d 1150, 1153 (9th Cir. 2005).
40. Baccarat Fremont Developers v. U.S. Army Corps of Eng'rs, 327 F. Supp. 2d 1121, 1124 (N.D. Cal. 2003).
41. *Id.* at 1128.
42. 425 F.3d at 1157.

hydrological or ecological connection" to the jurisdictional waters on which adjacency was based.[43] Baccarat did not dispute the fact that the wetlands were adjacent to navigable flood control channels, only that the Corps had not proven an ecologically significant connection between the waters. The Ninth Circuit reviewed the district court's judgment *de novo*, applying the arbitrary and capricious standard of the Administrative Procedure Act.[44] It found that the Corps retained authority under the CWA and could therefore dictate the terms under which Baccarat could develop its wetlands, including enforcing the mitigating condition.[45]

The court found no evidence in the words of the CWA itself, nor the intent of Congress, to justify an assertion that the Corps is required to show a significant connection between the wetlands it is charged with protecting and the "waters of the United States" to which they are adjacent.[46] Further, it reasoned that if the Corps determines that no hydrological connection exists between contested wetlands and adjacent aquatic ecosystems, it may issue permits for their development.[47] Accordingly, the court found that the wetlands at issue in *Baccarat* fall under the Corps' purview, regardless of whether the Corps demonstrated a significant hydrological or ecological connection.[48]

The court specifically rejected Baccarat's contention that *SWANCC* established a duty to show a significant nexus between the wetlands in question and the adjacent waters of the United States,[49] stating, "*SWANCC* simply did not address the issue of jurisdiction over adjacent wetlands."[50] The court explained that the isolated, inland ponds at issue in *SWANCC* were not being contested on the basis of adjacency, but rather on the validity of the Corps' Migratory Bird Rule.[51] It also rejected Baccarat's argument that *SWANCC* modified *Riverside Bayview*, noting that the Court repeatedly referred to *Riverside Bayview* "without giving any indication that it intended to modify or overrule that unanimous ruling."[52] The Ninth Circuit clarified that *Riverside Bayview*, which interpreted the CWA as explicitly granting the Corps authority over non-navigable wetlands adjacent to open waters, controlled the case at bar.[53]

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43. *Id.* at 1154.

44. *Id.* at 1153; *see also* 5 U.S.C. § 706(2)(A) (2006).

45. Baccarat Fremont Developers v. U.S. Army Corps of Eng'rs, 425 F.3d 1150, 1158 (9th Cir. 2005).

46. *Id.*

47. *Id.* at 1156.

48. *Id.*

49. *Id.* at 1151–52.

50. *Id.* at 1156.

51. *Id.* at 1154.

52. *Id.* at 1156.

53. *Id.* at 1155 (citing to United States v. Riverside Bayview Homes, 474 U.S. 121, 135 (1985)).

The Ninth Circuit held that the Corps' assertion of jurisdiction over "adjacent wetlands" was reasonably based on the *inherent* ecological connection between the wetlands and the larger aquatic environment.[54] Further, adjacency alone was adequate for the Corps to assert regulatory authority over Baccarat's wetlands.[55] The court noted that even though the Corps was not required to show that the wetlands were "significantly intertwined" with the ecosystem of adjacent waters of the Bay, their written justification did demonstrate a significant nexus between the two.[56] Specifically, the court pointed to the Corps' memo, which explained that the wetlands were within reasonable proximity to flood control channels, benefited the general aquatic environment and tidal waters of the Bay, served a heightened function due to the loss of wetlands in the Bay, were within the 100-year floodplain of the tidal waters, and were contiguous with the tidal water area.[57]

The Ninth Circuit also went on to distinguish its holding in a recent case, *Headwaters, Inc. v. Talent Irrigation District*,[58] where the question at issue was not adjacent wetlands, but Environmental Protection Agency jurisdiction over irrigation canals that only intermittently exchanged water with local streams and lakes. In *Headwaters*, the court found that canals receiving water from natural streams and lakes were connected as tributaries to other navigable waters, and therefore distinguishable from the inland ponds at issue in *SWANCC*, so "[e]ven tributaries that flow intermittently are 'waters of the United States.'"[59] Baccarat argued that pursuant to *Headwaters*, the Corps was required to demonstrate a hydrological connection between the wetlands and adjacent waterways in order to assert jurisdiction. However, the court explained that *Headwaters* was inapplicable to *Baccarat* because it addressed tributaries, which must be physically connected (even intermittently) to navigable waters, and not adjacent wetlands, which do not require a physical connection.[60]

INTERPRETING *SWANCC* AND ITS APPLICATION TO *BACCARAT*

In an extensive dissenting opinion to the *SWANCC* decision, Justice Stevens (joined by Justices Souter, Ginsburg, and Breyer) stated, "[t]oday . . . the Court takes an unfortunate step that needlessly weakens

54. *Id.*
55. *Id.*
56. *Id.* at 1155, 1157.
57. *Id.* at 1157.
58. Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526 (9th Cir. 2001).
59. *Id.* at 533–34.
60. Baccarat Fremont Developers v. U.S. Army Corps of Eng'rs, 425 F.3d 1150, 1156 (9th Cir. 2005).

our principal safeguard against toxic water."[61] He explained that while the Rivers and Harbors Act of 1899 had originally charged the Corps with regulating pollution discharge into waterways to "protect their use as highways for the transportation of interstate and foreign commerce," the Corps' regulatory scope had been broadened under the CWA to include "protecting the quality of our Nation's waters for esthetic, health, recreational, and environmental uses."[62] The dissent saw nothing in the text, stated purpose, or congressional history of the original 1972 CWA to support the majority's strict interpretation of "other waters," and argued that the 1977 amendments to the CWA actually extended the Corps' authority to "isolated waters," such as the ponds at issue in *SWANCC*.[63]

While *SWANCC* did constrain the CWA to only those waters with a clear connection to some sort of navigable waterway, it specifically preserved the Corps' jurisdiction over wetlands adjacent to navigable waters by sanctioning *Riverside Bayview*.[64] In *Baccarat*, the Ninth Circuit based its holding on this small carve-out, finding that the Corps had broad authority to regulate adjacent wetlands.[65] The court bolstered its argument by pointing to a portion of *SWANCC* that upholds "Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands adjacent to navigable waters."[66]

INTERPRETING *SWANCC*: OTHER APPLICATIONS

The Ninth Circuit's holding in *Baccarat* is strikingly similar to the Sixth Circuit's decision in *Carabell v. UNITED STATES Army Corps of Engineers*.[67] In *Carabell*, landowners sought to invalidate the Corps' jurisdiction over "adjacent wetlands" separated from navigable waters by man-made berms.[68] The wetlands in question were located on the landowners' property, adjacent to a ditch that connected to a drain that connected to a lake.[69] The Sixth Circuit held that these wetlands were clearly adjacent under the plain language of section 328.3(a)(7), which specifically lists berms as not defeating adjacency.[70] Like the Ninth

61. Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 175 (2001) (Stevens, J., dissenting).

62. *Id.*; *see also* Rivers and Harbors Appropriation Act of 1899, ch. 425, § 13, 30 Stat. 1152 (codified as amended in scattered sections of 33 U.S.C.).

63. *SWANCC*, 531 U.S. at 182.

64. *Id.* at 167–68.

65. *Baccarat*, 425 F.3d at 1156.

66. *SWANCC*, 531 U.S. at 167.

67. Carabell v. U.S. Army Corps of Eng'rs, 391 F.3d 704 (6th Cir. 2004), *vacated by* Rapanos v. United States, 126 S. Ct. 2208 (2006).

68. *Id.* at 705.

69. *Id.* at 708.

70. *Id.* "Adjacent wetlands" include "wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like." 33 C.F.R. § 328.3(c) (2006).

Circuit, the Sixth Circuit rejected the argument that the decision in *SWANCC* limited *Riverside Bayview* to weaken the Corps' jurisdiction over adjacent wetlands.[71]

Other Circuits have interpreted *SWANCC* with varying results.[72] For instance, the Fourth Circuit interpreted it narrowly, holding that the Corps' jurisdiction "extends to any branch of a tributary system that eventually flows into a navigable body of water"[73] In contrast, the Fifth Circuit criticized the Fourth Circuit's interpretation of *SWANCC* to include tributaries "that are neither themselves navigable nor truly adjacent to navigable waters."[74] While the Fifth Circuit ultimately upheld the Corps' regulatory authority over an inland waterway, it only did so because it found that the waters at issue were "truly adjacent to an open body of navigable water."[75]

EPILOGUE: *BACCARAT* IN LIGHT OF THE U.S. SUPREME COURT'S DECISION IN *RAPANOS*

In June 2006, the Supreme Court issued a combined decision for *Carabell* and a companion case that also originated in the Sixth Circuit.[76] The question before the Court was whether the Corps has jurisdiction over wetlands adjacent to tributaries that flow into navigable waters but that are not themselves navigable-in-fact.[77] The Court held that the Corps only has jurisdiction over these wetlands if it can establish a "significant nexus," such that "the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[78] This definition of navigable waters does not exclude wetlands merely for lack of "continuous surface connection to other jurisdictional waters,"[79] or because they are adjacent to waters that

71. Baccarat Fremont Developers v. U.S. Army Corps of Eng'rs, 425 F.3d 1150, 1157 (9th Cir. 2005).

72. *See, e.g.*, FD&P Enters., Inc. v. U.S. Army Corps of Eng'rs, 239 F. Supp. 2d 509, 513 (D.N.J. 2003) ("[i]n the wake of [*SWANCC*], courts have struggled with evaluating the jurisdictional reach of § 404(a) of the CWA. Because the Third Circuit has not yet spoken on this issue, this court must look to other federal jurisdictions for guidance."). *See generally* Caitlin Sislin, In Brief, *After SWANCC, the Fourth and Fifth Circuits Dispute Federal Jurisdiction over Non-navigable Waterways*, 31 ECOLOGY L.Q. 745 (2004).

73. United States v. Deaton, 332 F.3d 698, 711 (4th Cir. 2003), *cert. denied*, 541 U.S. 972 (2004).

74. *In re* Needham, 354 F.3d 340, 345 (5th Cir. 2003).

75. *Id.* at 347.

76. Rapanos v. United States, 126 S. Ct. 2208 (2006), *vacating* Carabell v. U.S. Army Corps of Eng's, 391 F.3d 704 (6th Cir. 2004), *and* United States v. Rapanos, 376 F.3d 629 (6th Cir. 2004).

77. *Id.* at 2241 (Kennedy, J., concurring); *see also supra* text accompanying note 7.

78. *Rapanos*, 126 S. Ct. at 2241, 2248.

79. *Id.* at 2244.

flow only intermittently.[80] Like *SWANCC*, *Rapanos* agreed with *Riverside Bayview*, that the Corps could assert jurisdiction over wetlands based on adjacency alone, so long as the adjacent body of water is navigable-in-fact.[81] However, *Rapanos* holds that the Corps must make a case-by-case determination regarding the extent of the ecological connection between wetlands adjacent to tributaries that are not actually or potentially navigable, and must find that this connection is significant in order to assert jurisdiction.[82]

Therefore, *Baccarat* is still good law because, unlike *Carabell*, the specific issue of adjacency—the fact that the wetlands were adjacent to a navigable-in-fact body of water—was never challenged.[83] Even if adjacency had been contested, the *Baccarat* court disposed of this argument by noting that the Corps had demonstrated a substantial ecological connection between the wetlands and their adjacent waterways.[84] So far, the Supreme Court has taken a miserly view of the Corps' authority under the CWA, but even this strict interpretation has led it to concede that wetlands that are directly adjacent to the nation's navigable waters are still protected under federal law.[85]

CONCLUSION

While the lower courts have largely interpreted *SWANCC* to recognize federal jurisdiction over waters closely adjacent to navigable waters of the United States, the gradations of "adjacency" have not been adequately clarified.[86] *SWANCC* limited the Corps' jurisdiction to "actually navigable waters, their tributaries, and wetlands adjacent to each,"[87] but this still leads to interpretive issues over what is "truly" adjacent. *Rapanos* does little to ameliorate this, with its instruction to

80. *Id.* at 2243.

81. *Id.* at 2248 (citing United States v. Riverside Bayview Homes, 474 U.S. 121, 131–32 n.8 (1985) (limiting its holding to wetlands adjacent to "bodies of open water")).

82. *Id.* at 2249.

83. Baccarat did not contest the fact that the wetlands were *adjacent*, but rather the Corps assertion of *jurisdiction* over adjacent wetlands. Baccarat Fremont Developers v. U.S. Army Corps of Eng'rs, 425 F.3d 1150, 1154 (9th Cir. 2005). Baccarat argued that the Corps had failed to demonstrate the wetlands' inherent connection to the navigable waterways they abutted. *Id.*

84. *Id.* at 1157–58. This demonstrated ecological connection would have likely satisfied the Supreme Court's "significant nexus" requirement. *See* Rapanos v. United States, 126 S. Ct. 2208, 2241 (2006).

85. *See, e.g., id.* at 2249; Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 167 (2001).

86. *See, e.g.*, Bradford C. Mank, *The Murky Future of the Clean Water Act after SWANCC: Using a Hydrological Connection Approach to Saving the Clean Water Act*, 30 ECOLOGY L.Q. 811, 822 (2003) (advocating for "a reasonable definition of SWANCC's significant nexus test to include all non-navigable wetlands and tributaries that contribute a significant amount of water to navigable waters and err on the side of inclusion if non-navigable waters have a significant ecological effect on navigable waters").

87. *See SWANCC*, 531 U.S. at 177.

demonstrate a significant nexus on a case-by-case basis. The divergence of views expressed by the justices in their 4-1-4 split decision[88] illustrates the lack of consensus about the Corps' jurisdiction over tributaries, ponds, and other non-navigable waters that are not clearly connected to waters used for navigation.

The interpretive tension seems to be between the federal government's ability to protect the nation's waters through the CWA and the Supreme Court's demonstrated desire to limit federal authority through narrow interpretations of the Commerce Clause. With recent changes in the composition of the Court, attempts to scale back federal power will likely increase.[89] Ultimately, this restriction of the Corps' regulatory sphere will lead to inadequate enforcement of CWA wetland fill prohibitions. If the Court's reasoning in *SWANCC* and *Rapanos* is taken to its logical conclusion—that Congress intended to limit the CWA to protect only navigable waterways and those waters closely connected to them—then the future protection of all inland, and more remotely connected waters, is in jeopardy.

Tova Wolking

88. *See, e.g.*, Linda Greenhouse, *Justices Divided on Protections Over Wetlands*, N.Y. TIMES, June 20, 2006, at A1.

89. *See* Felicity Barringer, *Justices Debate Federal Role In Regulating Water Pollution*, N.Y. TIMES, February 22, 2006, at A1.