

1985

## Do "Navigable Waters" Include Wetlands?

Robert H. Abrams

*Florida A&M University College of Law, robert.abrams@fam.u.edu*

Follow this and additional works at: <http://commons.law.famu.edu/faculty-research>



Part of the [Environmental Law Commons](#), and the [Water Law Commons](#)

---

### Recommended Citation

Robert H. Abrams, Do "Navigable Waters" Include Wetlands? 1985-86 Preview U.S. Sup. Ct. Cas. 88 (1985)

This Article is brought to you for free and open access by the Faculty Works at Scholarly Commons @ FAMU Law. It has been accepted for inclusion in Journal Publications by an authorized administrator of Scholarly Commons @ FAMU Law. For more information, please contact [linda.barrette@fam.u.edu](mailto:linda.barrette@fam.u.edu).

---

## Do "Navigable Waters" Include Wetlands?

by Robert H. Abrams

---

United States

v.

Riverside Bayview Homes, Inc.

(Docket No. 84-701)

Argued October 16, 1985

---

Congress, as provided in the Commerce Clause, has power to regulate activities relating to the "navigable waters of the United States." Over time, Congress has extended the range of regulatory enactments passed under this authority from regulation of navigation to include pollution control. At times, Congress and administrative agencies acting pursuant to congressional authorization have used this power to implement regulatory programs that govern fast land activities immediately adjacent to and directly affecting those navigable waters.

### ISSUES

In this case, the permissible scope of federal authority over navigable waters is challenged insofar as the United States Army Corps of Engineers (the Corps) seeks to regulate activities on upland wetlands. Such determination will concentrate on powers granted the Corps by section 404 of the federal Clean Water Act (33 U.S.C. sections 1251, *et seq.*).

Specifically, this case involves the power of the Corps to prevent Riverside Bayview Homes, Inc. (Riverside) from filling a wetland adjacent to a navigable water of the United States. The Supreme Court will be asked to determine whether Riverside's property is properly categorized as wetlands under the Corps' Clean Water Act regulations and, if so, whether regulating such wetlands exceeds the scope of the Corps' authority.

### FACTS

Riverside owns eighty acres of land in Macomb County, Michigan. The land borders Black Creek, a navigable tributary of Lake St. Clair. Lake St. Clair is a navigable water of the United States; it is a connecting lake between Lake Huron and Lake Erie located just

---

*Robert H. Abrams is Associate Dean and a Professor of Law at Wayne State University Law School, Detroit, MI 48202; telephone (313) 577-3973. Leslie Landau, a third-year student at Wayne Law School assisted in preparing this Preview.*

---

north of Detroit. The parcel in question is alongside a major thoroughfare that leads to Detroit in an area where there are several residential subdivision developments. If filled, Riverside's land would be well-suited for similar subdivision development.

In the litigation, Riverside and the Corps hotly contested issues relating to the character of the parcel involved such as whether, in its natural state, it was often inundated by water. While the evidence seems mixed, it is clear that before this litigation arose, some parts of the parcel had been farmed and had hardwood growth indicative of being uplands. Nevertheless, since 1973, large portions of the parcel had been subject to periodic inundation coincident with periods of high water levels on Lake St. Clair. At least in part, the inundation of Riverside's land was attributable to flood control and drainage measures instituted by the Corps to protect adjacent developed areas.

In mid-1976, an inexpensive source of fill material became available and Riverside sought the necessary permissions to fill the parcel. The local township granted Riverside a fill permit. Simultaneously, Riverside consulted with the Corps in an effort to ascertain whether newly-promulgated Corps' regulations required Riverside to obtain a permit from the Corps to fill the property. No definitive response was obtained. In late 1976, the local township formally informed Riverside that under the local zoning ordinance, failure to fill the land as authorized constituted a nuisance and if fill operations were not commended, Riverside would be subject to substantial fines. Riverside began the filling immediately and the Corps went to court to enjoin Riverside from proceeding without a permit issued by the Corps.

The particular regulatory provision in issue has undergone a series of minor changes in wording since its original promulgation. As the statutes and regulations now appear, Corps' jurisdiction over fill operations pursuant to section 404 of the Clean Water Act extends to all "wetlands" that are "adjacent" to navigable waters and their tributaries. Importantly, Corps' section 404 jurisdiction extends to intrastate waters and isolated wetlands if the use, degradation or destruction of those areas could affect interstate commerce. The definitions of "wetlands" and "adjacent" adopted by the Corps are both quite broad—including within their scope lands that are inundated or saturated with sufficient frequency to support typical wetlands vegetation.

As to most of the parcel, the Corps prevailed in obtaining an injunction of Riverside's fill operations until a Corps' permit was obtained. (A small portion of the parcel consisting of lands above a specified elevation were not held subject to the federal permit requirement.) A panel of the Sixth Circuit Court of Appeals reversed the decision, initially on the ground that the Corps could not regulate the land by virtue of the pattern of vegetation present unless that pattern was caused by "frequent flooding by waters flowing from 'navigable waters [of the United States]' as defined in the [Clean Water] Act." The Corps requested rehearing *en banc*, which was denied, but the original panel of judges issued a clarification of the previous opinion which found that the Clean Water Act authorized no jurisdiction whatever over wetlands.

### BACKGROUND AND SIGNIFICANCE

Without regard to its outcome, the *Riverside* case is of national interest. Section 404 jurisdiction over wetlands potentially affects millions of acres of land in all fifty states. Roughly 450,000 acres of wetlands are developed each year, many of which are subject to the Corps' claimed permitting authority under the present rules. While there is little likelihood that the Corps would exercise its permitting authority to inhibit development activities on a large scale, there is equally little doubt that the Corps can and does limit many wetlands-based projects under its currently asserted jurisdiction.

Environmentally, wetlands fill activities are a significant event. Wetlands serve as important habitat for many species of waterfowl. Droughts in recent years have inhibited natural reproduction of many of these species. For example, it is estimated that nationwide, the mallard duck population has decreased by 20% in the last three years. To the extent that the Corps might exercise its permit power to preserve wetlands, species like the mallard would benefit. Wetlands also serve other important functions in regard to moderating the effects of flooding and serving as recharge areas for underground water supplies. By using the section 404 permitting power to prevent loss of wetlands, the Corps likewise provides flood control and water supply benefits to large segments of the population.

In contrast to the practical significance of the case, the legal issues that must be decided are narrow and not of general significance. Virtually all legal attention in the case is focused on matters of statutory drafting and construction of a single section of a single Act. Congress can always enact a new provision. Thus, for example, if the Supreme Court affirms the Sixth Circuit's decision and holds the Corps without jurisdiction over wetlands, it seems plain that Congress could, by resort to the commerce power generally (as opposed to the power of Congress over the navigable waters of the United States), establish an identical federal regulatory power

over wetlands as that now claimed by the Corps. Whether Congress would have the political will to do so is open to question, but the legal issue of power appears to be fairly well settled.

### ARGUMENTS

*For the United States* (Counsel, Anne S. Abny and Ellen J. Durkee, Department of Justice, Washington, DC 20530; telephone (202) 633-2217)

1. The Corps was given implicit authority to determine administratively the precise scope of its jurisdiction under section 404 of the Clean Water Act.
2. Congress intended that the Clean Water Act be construed broadly to prevent discharges of pollutants, including discharges caused by wetlands fill activities.
3. Congress intended that the term "navigable water" in the Clean Water Act be given the broadest interpretation possible.
4. Congress considered and rejected attempts to limit the scope of section 404 coverage of lands that are not frequently inundated by water.
5. Congress intended that wetlands adjacent to navigable waters be subject to regulation under section 404 of the Clean Water Act.
6. The Corps' regulatory definition of wetlands based on vegetation patterns is scientifically sound and promotes both Congress' water quality concerns and regulatory efficiency.
7. Any claim that exercising jurisdiction over wetlands results in a taking of Riverside's property is premature in this case.

*For Riverside Bayview Homes, Inc.* (Counsel of Record, Edgar B. Washburn, 144 Second Street, San Francisco, CA 94188; telephone (415) 543-8131)

1. Congress conferred on the Corps jurisdiction over "navigable waters" and did not use that term to mean "adjacent wetlands" as well.
2. "Navigable waters" as used in the Clean Water Act does not mean lands containing wet soils and covered by certain types of vegetation.
3. Congress did not intend to authorize the Corps to exercise power to control land use; that police power function is traditionally reserved to the states and their political subdivisions.
4. If the delegation of authority to the Corps is as broad as is claimed by the Corps, the delegation of authority is an unconstitutional delegation of the legislative function by Congress.
5. Legislative history not coterminous with the initial passage of section 404 of the Clean Water Act is not relevant to that section's proper interpretation.
6. The Corps' interpretation of its own powers under the Clean Water Act is entitled to little deference due to the inconsistent claims of authority made by the Corps at various times.

7. The Corps' application of its definition of navigable waters and adjacent wetlands to the Riverside parcel is not supported by the facts, is arbitrary and is therefore invalid.
8. The injunction of fill activities originally won by the Corps amounts to a taking of Riverside's property.

#### **AMICUS BRIEFS**

##### ***In Support of the United States***

A brief was filed by twenty environmental organizations and the states of Alaska, Florida and Michigan.

Another brief was filed by the states of California,

Connecticut, Hawaii, Illinois, Louisiana, Maryland, Minnesota, Missouri, Montana, Nebraska, New Mexico, North Carolina, Rhode Island, Tennessee, Vermont, West Virginia and Wisconsin, as well as four units of California state and local government.

##### ***In Support of Riverside Bayview Homes, Inc.***

Briefs were filed by the Chamber of Commerce of the United States; the Pacific Legal Foundation and two other groups; Citizens of Chincoteague (Virginia) for a Reasonable Wetlands Policy; the American Petroleum Institute, and the Mid-Atlantic Developers Association.

---



**PREVIEW** OF UNITED STATES SUPREME COURT CASES  
750 North Lake Shore Drive, Chicago, Illinois 60611

First Class Mail  
U.S. Postage  
Paid  
Arlington, Virginia  
Permit No. 675