



# Ninth Circuit Upholds the Corps' Adjacency Jurisdiction Over Wetlands

*Baccarat Fremont Developers v. U.S. Army Corps of Engineers*, 425 F.3d 1150 (9th Cir. 2005).

Jonathan Lew, 2L, Roger Williams University School of Law

In *Baccarat*, the Ninth Circuit held that the Army Corps of Engineers (the Corps) could regulate "adjacent wetlands" regardless of whether such wetlands have a "significant hydrological or ecological connection" to navigable waters.<sup>1</sup> Further, the court distinguished the U.S. 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*) by finding that *SWANCC* merely invalidated the migratory bird rule<sup>2</sup> and did not address the issue of jurisdiction over adjacent wetlands.

## Background

Baccarat Fremont Developers purchased a 30.98-acre site that contained 7.66 acres of wetlands. The purchased wetlands were adjacent to two flood control channels that are navigable and connect to the San Francisco Bay. The flood channels run parallel to the site's southern and western boundaries and are separated from the wetlands by man-made berms.

In February 1998, the Corps determined that it had jurisdiction over the 7.66 acres of wetlands under the Clean Water Act (CWA) because the wetlands were adjacent to navigable waterways.<sup>3</sup> On January 29, 2001, Baccarat requested that the Corps reconsider its jurisdiction in light of the Supreme Court's decision in *SWANCC*.<sup>4</sup> The Corps reaffirmed its determination of jurisdiction, explaining that *SWANCC* "did not eliminate the Corps' authority to regulate wetlands adjacent to a tidal waterway."<sup>5</sup>

In February 2002, the Corps offered Baccarat a permit to fill 2.36 acres of wetland subject to the condition that it create 2.36 acres of seasonal freshwater wetlands and enhance the remaining 5.3 acres of existing brackish wetlands. Baccarat sued the Corps in California Superior Court, seeking declaratory and injunctive relief from the Corps' determination that it had jurisdiction over the wetlands. Upon removal to federal District Court, the District Court granted summary judgment to the Corps, finding that the agency has adjacency jurisdiction over the wetlands.

## Supreme Court Case Law

The Supreme Court has explicitly addressed the Corps' jurisdiction over adjacent wetlands based on the CWA in *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). In *Riverside*, the

Supreme Court unanimously upheld the Corps' jurisdiction over wetlands adjacent to waters of the U.S. The Court concluded that all adjacent wetlands are waters of the U.S. even though some adjacent wetlands may not be environmentally significant to their adjoining bodies of water. The fact that a majority of adjacent wetlands have an ecological



Photograph courtesy of ©Nova Development Corp.

connection to waters of the U.S. is sufficient to support broader jurisdiction over other wetlands. The Court rejected the idea that for the Corps to have jurisdiction it must demonstrate a significant hydrological or ecological connection between the wetlands and the adjacent water.

Baccarat argued that all jurisdictional claims by the Corps must be factually based and the Corps cannot assert jurisdiction over all adjacent wetlands because such a broad determination is "arbitrary and capricious" for failure to articulate a rational connection between the facts found and the choice made.<sup>6</sup> The Court disagreed with

Baccarat’s argument because if the Corps encounters a wetland that is not significantly connected to adjacent waterways it may issue a permit authorizing construction. The Corps’ ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the CWA.

Baccarat relied on *SWANCC* to support its contention that adjacent wetlands must be hydrologically or ecologically connected to waters of the U.S. Reading the CWA to extend jurisdiction to inland ponds would effectively read the term navigable waters out of the statute.<sup>7</sup> But *SWANCC* did not address the issue of jurisdiction over adjacent wetlands. The holding in *SWANCC* only overruled the Migratory Bird Rule because it was not “fairly supported by the CWA.” Moreover, *Riverside* seems to control the issue of adjacent jurisdiction and there is no indication that *SWANCC* intended to overrule *Riverside*.

#### Circuit Court Case Law

The Ninth Circuit also reviewed its decision in *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001). In that case, the Ninth Circuit upheld EPA’s jurisdiction over irrigation canals, finding that they were tributaries falling within the regulatory definition of waters of the United States. *Headwaters* only addressed bodies of waters that were connected to tributaries and the holding certainly cannot be read to address the question of whether a significant hydrological or ecological connection to a particular adjacent wetland is required.

The Ninth Circuit joins the Sixth Circuit in rejecting the idea that *SWANCC* modified the holding of *Riverside*. In *Carabell v. U.S. Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004) the Carabells wanted to fill wetlands and the Corps declined to issue a permit. They brought a suit arguing that the Corps lacked jurisdiction over the wetlands. Similar to *Baccarat*, the wetlands on the Carabells’ property are separated from water only by manmade berms. The Sixth Circuit held that *SWANCC* did not decide any issue with regard to adjacent wetlands and

the Corps ultimately had jurisdiction over the Carabells’ land because the wetlands were adjacent to navigable waters.

#### Conclusion

By adopting a narrow reading of *SWANCC*, the Ninth Circuit joins most other circuits in essentially eliminating any requirement for a “significant nexus.” In these circuits, adjacency jurisdiction does not depend on the existence of a significant hydrological or ecological connection between the particular wetlands at issue and the waters of the United States. However, it is important to note that this dispute is ongoing and the Supreme Court has granted certiorari to review the Sixth Circuit’s decision in *Carabell* along with *U.S. v. Rapanos*, 376 F.3d 629 (6th Cir. 2004).<sup>8</sup>☞

#### Endnotes

1. *Baccarat Fremont Developers v. U.S. Army Corps of Engineers*, 425 F.3d 1150, 1158 (9th Cir. 2005).
2. In *SWANCC*, the Corps asserted jurisdiction over intrastate waters used as habitat by migratory birds.
3. The CWA prohibits the discharge of pollutants into navigable waters and grants the Corps the power to issue permits for discharges of dredged or fill material into waters of the U.S. See 33 U.S.C. § 1344(a).
4. In *SWANCC* the petitioner’s proposed waste disposal site was a habitat for migratory birds and the Supreme Court held that federal agency jurisdiction under the CWA did not extend to such non-navigable, isolated, intrastate waters, because the CWA expressly limits such jurisdiction to navigable waters.
5. *Baccarat*, 425 F.3d at 1152.
6. *U.S. v. Riverside Bayview Homes, Inc*, 474 U.S. 121, 134 (1985).
7. *SWANCC*, 531 U.S. at 171-172.
8. Rapanos, a Michigan developer, was convicted of violating the Clean Water Act for filling his wetlands with sand to make the land ready for development. The acreage is bone dry – intentionally – because the county government dug drainage ditches around it 100 years ago so it could be used for farming.