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OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-701

TITLE UNITED STATES, Petitioner v. RIVERSIDE BAYVIEW HOMES,
INC., ET AL.

PLACE Washington, D. C.

DATE October 16, 1985

PAGES 1 thru 47



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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :
Petitioner, :
V. : No. 84-701
RIVERSIDE BAYVIEW HOMES, :
INC., ET AL. :
- - - - -x

Washington, D.C.

Wednesday, October 16, 1985

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:05 o'clock a.m.

APPEARANCES:

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Solicitor General, Department of Justice, Washington,
D.C.; on behalf of the petitioner.
EDGAR B. WASHBURN, ESQ., San Francisco, California; on
behalf of the Respondents.

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1 from the Corps of Engineers.

2 Riverside appealed, but in the meantime the
3 regulations defining wetlands had been changed, and so
4 the United States asked that the case be remanded to the
5 District Court to consider the effect of the new
6 regulations on the facts of this case, and on remand,
7 Judge Gilmore, who by this time the case had been
8 reassigned to, applied the facts as found by Judge
9 Kennedy in her lengthy trial to the new regulations, and
10 found again that Riverside's property was a wetland
11 within the Corps' jurisdiction, and again entered a
12 permanent injunction prohibiting Riverside from filling
13 without a permit.

14 On Riverside's second appeal, the Sixth
15 Circuit reversed. In its initial opinion, the Court
16 based its decision on its interpretation of the Corps'
17 revised regulations. The court interpreted the language
18 in the regulations, which we have quoted in our brief,
19 that relates to ground water saturation as being
20 basically irrelevant. The way the court treated it as
21 irrelevant was by -- to not quote it every time the
22 court mentioned the new regulation.

23 Instead, the court concluded that the new
24 regulations under which this case was now to be decided
25 required that any wetland vegetation on a piece of

1 property be caused, actually caused by what the Court of
2 Appeals called frequent flooding, which does not appear
3 in the regulations anywhere, frequent flooding from
4 adjacent navigable waters.

5 Essentially what the court was doing in our
6 opinion was reinstating a requirement in the 1975
7 regulations for periodic inundation that had been
8 eliminated and was the basis for the United States'
9 motion that the case be remanded to the District Court
10 for reconsideration under the revised regulations.

11 Even though the government thought that the
12 Court of Appeals panel opinion had misinterpreted the
13 regulations, we also thought initially that this was
14 perhaps something the government could have corrected
15 administratively by simply issuing revised or clarified
16 regulations explaining that this was never the intent of
17 the regulations, and that could have solved the problem.

18 QUESTION: Ms. Oberly, may I inquire, in your
19 reply brief it seemed to me that for the first time the
20 government was saying that the land in this case is
21 connected by open water to a navigable river of the
22 United States. So is the position you are now taking
23 that there is a direct surface connection between the
24 land at issue here and the navigable waters?

25 MS. OBERLY: Absolutely, Your Honor. There is

1 the clearest, and I had planned to be talking about --

2 QUESTION: Well, why, then, didn't the Corps
3 just show that surface connection before the District
4 Court and not bother with subsurface connections? It
5 just seemed to change the whole theory in your reply
6 brief.

7 MS. OBERLY: Your Honor, in all fairness to
8 Judge Kennedy and the Sixth Circuit, this was one of the
9 first Section 404 cases ever tried. I don't think,
10 again, in all fairness to everybody concerned, but at
11 the time of the trial, anybody knew exactly what they
12 were doing.

13 QUESTION: Well, it does seem to me that if
14 the theory that you now assert is correct, that there is
15 a direct surface connection to navigable water, that the
16 case is substantially --

17 MS. OBERLY: I agree with you completely. I
18 think that much, if not all of what went on before Judge
19 Kennedy was irrelevant, which was the reason why when
20 the case first came up on appeal, the United States
21 moved for the remand from the Court of Appeals back to
22 the District Court, and it was our intention that these
23 irrelevancies which comprise about 90 percent of the
24 District Court record in our view would be just
25 completely set aside. We would start over with a clean

1 slate, try the case properly, and we were always certain
2 as in fact turned out to be the case, that the United
3 States would and should win this case under the new
4 regulations as well as under the old ones, but our hope
5 was to sweep away what had really diverted
6 everybody's --

7 QUESTION: What did the District --

8 MS. OBERLY: -- attention from the pertinent
9 issues in the case.

10 QUESTION: What did the District Court --
11 wasn't there some expert testimony on the connection
12 between this wetland and the navigable waters?

13 MS. OBERLY: There was expert testimony on
14 flooding on the surface, and there was expert testimony
15 on subsurface, in other words ground water --

16 QUESTION: Which was to the effect that there
17 was no connection.

18 MS. OBERLY: That's correct. We think that,
19 A, the findings are irrelevant to our position, and B,
20 the findings are probably clearly erroneous.

21 QUESTION: You just want to be able to try the
22 case again.

23 MS. OBERLY: No, we are tired of this case,
24 and would just as soon not try it again.

25 QUESTION: Well, what, should we just dismiss

1 it as improvidently granted?

2 MS. OBERLY: No, Your Honor, I think that it
3 would be sufficient if you take -- and I plan to talk
4 about the maps and the pictures in the course of my
5 argument. If you take the maps and the pictures, which
6 are --

7 QUESTION: I might say I am glad we finally
8 got a map. It took a long time.

9 MS. OBERLY: Another factor I should mention,
10 which is noted in Footnote 1 of our reply brief, is that
11 for several years the exhibits in the case were lost,
12 and in all candor I did not understand the case until we
13 found the exhibits, and I had the same physical, mental
14 perception of the land we were talking about that the
15 Court of Appeals opinion describes until these exhibits
16 were found, and once they were found, I realized that we
17 were talking -- that what was involved here in terms of
18 both biological and scientific functions the wetlands
19 perform and the actual hydrologic connection between
20 this wetland and navigable waters of the United States
21 was simply not as described in the Court of Appeals
22 opinion. The Court of Appeals did not have the
23 exhibits.

24 QUESTION: I don't regard a USGS map as kind
25 of an open sesame to the correct resolution of a case.

1 I dealt with a number of them in my practice. They can
2 be as wrong as anybody else's.

3 MS. OBERLY: But, Your Honor, this map was --
4 the map that is in our reply brief and the picture to
5 which I will be directing your attention was before
6 Judge Kennedy. She also took a view of the property.

7 QUESTION: Well, did Judge Kennedy make a
8 finding that this map was accurate?

9 MS. OBERLY: Nobody challenged its accuracy.
10 So there was no occasion for her to make a finding.

11 QUESTION: I mean, is your --

12 MS. OBERLY: She did make a finding, Your
13 Honor, and answered, in direct answer to your question,
14 that the property owned by Riverside is adjacent to a
15 navigable water in the United States, to wit, Black
16 Creek. That finding is in her opinion, and it is
17 demonstrated beyond any question by the map that is
18 attached to the back of our reply brief.

19 QUESTION: So the position you are taking now,
20 you feel, is completely consistent with the factual
21 findings of the District Court and of the Court of
22 Appeals?

23 MS. OBERLY: Clearly not of the Court of
24 Appeals, because the Court of Appeals has described a
25 totally different piece of property than what the

1 physical evidence shows exists.

2 QUESTION: And so now we are supposed to hear
3 you and kind of revise the Court of Appeals
4 description?

5 MS. OBERLY: No, Your Honor, I am not asking
6 you to change the facts. I am asking you to recognize
7 that first of all they were handicapped by not having
8 any pictures, second of all the fact that they did --
9 they didn't find new facts, but what they did was apply
10 --

11 QUESTION: What you are bringing here then is
12 essentially a factual dispute about how this land lies,
13 and whether there is a surface connection or not.

14 MS. OBERLY: I think it is more --

15 QUESTION: You say the Court of Appeals is
16 wrong in having described a property a particular way.
17 Is that the case we -- the kind of case we have to
18 hear?

19 MS. OBERLY: No, Your Honor. I think if that
20 were it and it were only this wetland, and whether the
21 Corps had jurisdiction over it, we would not have come
22 here on a case with such a confused record as this one
23 has. Our problem is, as a matter of law, if you were to
24 affirm the Sixth Circuit, we think that there would then
25 be no wetlands regulated under the Clean Water Act. If

1 you affirm the rationale and the statements in the Sixth
2 Circuit's opinion and is judgment, we think that all
3 wetlands, whether adjacent to navigable waters or not,
4 would no longer be within the scope of regulatory
5 authority under the Clean Water Act, and our concern
6 goes far beyond the facts of this case and the
7 relationship of this wetland to --

8 QUESTION: But the problem is if the facts are
9 different than were perceived or articulated by the
10 Courts below, how do we deal with that to get to the
11 legal question? And we have to send it back somehow
12 first so that the -- get sorted out.

13 MS. OBERLY: I don't think you have to, Your
14 Honor, because what we are relying on are trial exhibits
15 for you to see --

16 QUESTION: Well, you didn't -- it sounds to me
17 like there was somewhat of some omissions at the trial
18 stage.

19 MS. OBERLY: Well, there were a lot of
20 excesses that --

21 QUESTION: At the appellate stage. I would
22 think you would be satisfied if we just dismissed as
23 improvidently granted, because that leaves the Court of
24 Appeals opinion here --

25 MS. OBERLY: If the Court of Appeals --

1 QUESTION: -- but only for one circuit.

2 MS. OBERLY: It is a circuit that has
3 substantial and significant wetlands in it, and from the
4 Corps of Engineers perspective would be quite a damaging
5 precedent to leave that opinion out there as precedent.
6 If the Court of Appeals opinion were also to be vacated,
7 if the whole case were to be vacated, and we started
8 over, that would be something else, but to leave the
9 Sixth Circuit opinion there would mean that no wetlands
10 within the Sixth Circuit could be regulated.

11 QUESTION: Why are you trying to win the case
12 on another ground? Why don't you just --

13 MS. OBERLY: Well, I would be happy to --

14 QUESTION: Why did you ever -- why did you --

15 MS. OBERLY: I am happy to win it on any
16 ground, but once we --

17 MS. OBERLY: I know, but if you win it on this
18 ground, if you win it on this ground, you don't disturb
19 the Court of Appeals' view about a wetland.

20 MS. OBERLY: I think we do. I think that
21 there are aspects of the Court of Appeals opinion that
22 this Court would clearly have to say are wrong and
23 inconsistent with the Clean Water Act, even to rule for
24 the government on this narrower ground.

25 QUESTION: Even without this map and this

1 connection with the water, you claim the Court of
2 Appeals is wrong.

3 MS. OBERLY: That's correct. We claim that
4 even before --

5 QUESTION: And I would suppose you would
6 rather win on that than this.

7 MS. OBERLY: We claimed that even before the
8 map had been found, and we are happy to win it that way
9 or -- but it seemed to me important once the exhibits
10 had been located for this Court to see what we were
11 actually talking about in this case, and to the Court of
12 Appeals' credit, they asked to see the exhibits at the
13 oral argument in the Sixth Circuit, and they were told
14 they had been lost, and it wasn't until the government
15 had either petitioned for cert or cert had been granted
16 that someone in the District Court clerk's office found
17 the exhibits, and that is all quite unfortunate, but it
18 doesn't change the fact that in our view, either using
19 these maps or using the theory that is basically set
20 forth in our petition and in our opening brief, this is
21 a wetland, and that the Court of Appeals legal analysis
22 was wrong.

23 QUESTION: Well, using your old theory,
24 without the overlay of the new map and facts, the Corps
25 includes adjacent wetlands as part of the waters of the

1 United States, apparently without any requirement that
2 the wetlands or the discharges to them affect navigable
3 waters or interstate commerce in any way. Is that
4 right?

5 MS. OBERLY: I don't think that is really
6 quite a fair characterization, Your Honor. The Corps
7 uses adjacency as -- I have called it a sort of
8 administrative presumption that a wetland, that is,
9 again referring to the map at the back of the reply
10 brief, a wetland that is as close to navigable waters,
11 as adjacent to navigable waters as this one is, from a
12 scientific standpoint, can be --

13 QUESTION: Well, must there be --

14 MS. OBERLY: Yes.

15 QUESTION: Okay. Must there be some effect on
16 navigable waters or on interstate commerce?

17 MS. OBERLY: I think you could argue the case,
18 and I could answer the question no and still be correct,
19 but in this case we can demonstrate a connection between
20 the wetland and these navigable waters, and that is all
21 that this Court would have to decide.

22 QUESTION: Well, disregarding this case, on
23 the pure theory, must there be a connection? Must it
24 affect it, or not, interstate commerce?

25 MS. OBERLY: Yes. In this -- for this case,

1 we are willing to concede that there should be a
2 connection for wetland to be treated as adjacent, but we
3 differ with the way the Court of Appeals characterized
4 the connection. The Court of Appeals has a one-way
5 connection only which requires frequent flooding from
6 these water bodies to this wetland. In our opinion, the
7 connection can go either direction --

8 QUESTION: A discharge out.

9 MS. OBERLY: Discharge out. We have -- the
10 record demonstrates, as I will explain in a minute,
11 discharge out. It demonstrates geographic proximity of
12 a wetland to open water bodies forms what we call an
13 aerial connection, aerial in the sense of geographic
14 proximity connection, where scientists and Congress know
15 that a wetland this close to open water bodies works
16 together with the open water bodies.

17 They each perform functions that neither one
18 would perform if they were not together, and so the
19 Corps uses the adjacency presumption as a way of saying,
20 if you see this spatial relationship, you know that this
21 wetland will perform at least some of the functions that
22 Congress was concerned about in protecting this open
23 water bodies.

24 Now, if you had your wetland over here, then
25 that presumption wouldn't make any sense, and in those

1 circumstances the Corps' regulations place upon the
2 Corps the affirmative burden of demonstrating an effect
3 on interstate commerce before the hypothetical wetland
4 up in this corner would be regulated as "isolated
5 wetland."

6 QUESTION: So the person watering his back
7 yard a lot is not going to be brought in in your view?

8 MS. OBERLY: Unless we could show that he has
9 got some interstate commerce activity going on in his
10 back yard, and the Corps would take it upon itself to
11 make that showing itself, and not require the back yard
12 owner to come in and demonstrate it, the absence of the
13 commerce connection to the Corps's satisfaction.

14 And again, the Court of Appeals' opinion is
15 permeated with concern that the government is regulating
16 low lying back yards, that it is quite clear from this
17 picture, from this map, and from the aerial photograph
18 that is in the joint appendix, that this is not a low
19 lying back yard. This is in fact an adjacent wetland,
20 adjacent -- by adjacent, I mean it is immediately next
21 to, abuts, adjoins, borders, whatever other adjective
22 you might want to use, navigable waters of the United
23 States.

24 The reason we think that the Court of Appeals
25 opinion is dangerous and needs to be dealt with is not

1 this particular wetland, but because if you accept the
2 Court of Appeals' reasoning as to a piece of property
3 like this, then the functions that Congress recognized
4 adjacent wetlands perform for open water bodies will
5 never be regulated in the Sixth Circuit.

6 And I would like for a moment to just describe
7 a few of those functions. There are a lot of them
8 listed in our brief. Some of them are quite technical.
9 Some of them are beyond my scientific understanding.
10 But using this map, I think we can just understand a few
11 of them.

12 One, and one of the most important, is
13 trapping of sediment. Again, using the map at the back
14 of the reply brief, we have developed areas to the
15 northwest of Riverside's property. As a hypothetical,
16 we could suppose that the landowners in those areas
17 might water their lawns and fertilize their lawns with
18 chemicals, and then it rains. Those chemicals and the
19 rainwater wash off in whatever direction the land
20 slopes.

21 The evidence in the record is that the land in
22 this area is basically quite flat, but the slope is to
23 the southeast. In other words, it is to Lake St.
24 Clair. And therefore the chemicals that people put on
25 their lawns here to fertilize their lawns are going to

1 wash in this direction every time it rains, but because
2 there is a wetland here filled with wetland vegetation,
3 that vegetation traps the chemicals and other sediment
4 that would otherwise wash into the open water bodies.

5 And basically what the wetland does is provide
6 a free water treatment plant. The chemicals in the
7 sediment would otherwise eventually find their way into
8 the open water bodies.

9 QUESTION: The lawns you are talking about,
10 Ms. Oberly, then are situated to the north and west of
11 the property line?

12 MS. OBERLY: Of the black boundary. That is
13 correct. This is as an example. In reverse, other
14 functions that this wetland and other wetlands perform
15 would be flood control. When the waters of Lake St.
16 Clair and the Great Lakes flood, which happens more and
17 more often -- I think it is a matter of common knowledge
18 that lake levels on the Great Lakes have been rising
19 over the last decade or so -- they go this direction, to
20 the northwest, across Riverside's property.

21 If the wetland -- what the wetland's presence
22 does is, the vegetation acts like a sponge, and it traps
23 flood waters, and then it releases them more slowly,
24 like a sponge.

25 QUESTION: Didn't the District Court have

1 something to say about how often that land was flooded?

2 MS. OBERLY: Yes, she did, and she found it
3 wasn't very often, but it had happened in a manner that
4 was basically consistent with the flood cycle on the
5 Great Lakes, which is an eight to twenty year cycle.
6 The testimony in the record was that you don't have
7 annual flooding on the Great Lakes.

8 You have an uneven eight to twenty year high
9 and low flood cycle, which she found somewhere between
10 four and six, depending on your count, how you count
11 floods over eighty years. That is consistent with the
12 way the Great Lakes flood cycle works.

13 The Court of Appeals was unhappy about that
14 "infrequency, but since in our view frequent flooding
15 isn't an element of the jurisdictional test in any
16 event, the frequency doesn't matter.

17 What I am trying to point out is that wetlands
18 do perform this flood control function, and that when
19 you remove the wetland by filling it in, instead of a
20 wetland you need a Corps of Engineers flood control
21 project, and it is a lot more extensive than cattails
22 acting as a sponge to trap overflow.

23 QUESTION: Basically what is the
24 constitutional authority for this statute or these
25 regulations?

1 MS. OBERLY: The commerce clause.

2 QUESTION: Just straight the commerce clause.

3 MS. OBERLY: Yes.

4 QUESTION: And the navigable water is just a
5 stand-in for an effect on commerce. If you are adjacent
6 to -- or if you connect with a navigable water, you are
7 in interstate commerce?

8 MS. OBERLY: That is correct, for an adjacent
9 wetland.

10 QUESTION: Uh-huh.

11 MS. OBERLY: The Act in our view also covers
12 wetlands that are not adjacent to navigable waters, that
13 are called isolated wetlands.

14 QUESTION: If then, what?

15 MS. OBERLY: If the Corps of Engineers
16 affirmatively demonstrates that the use --

17 QUESTION: There is a connection?

18 MS. OBERLY: -- or destruction of that wetland
19 would have an effect on interstate commerce.

20 QUESTION: One way or the other, either --
21 running either way, or not?

22 MS. OBERLY: That's correct. It doesn't
23 matter which way.

24 QUESTION: Well, an effect by some connection
25 with waters in --

1 MS. OBERLY: It could be used -- it could be
2 interstate travelers. It could be migratory birds. I
3 am talking about isolated wetlands now, and again this
4 is not a case of an isolated wetland.

5 QUESTION: But it would be your view that an
6 isolated wetland that provided refuge for birds would be
7 enough for Corps of Engineers jurisdiction?

8 MS. OBERLY: If they were migratory birds,
9 yes.

10 QUESTION: If there was an aerial connection,
11 as you say.

12 MS. OBERLY: Yes.

13 (General laughter.)

14 QUESTION: Is the movement of birds interstate
15 commerce?

16 MS. OBERLY: It can -- Yes.

17 QUESTION: What case do you rely on?

18 MS. OBERLY: Missouri versus Holland would be
19 an example.

20 QUESTION: That was a treaty power case.

21 MS. OBERLY: It is a treaty power case, but I
22 think it demonstrates the importance --

23 QUESTION: Well, it demonstrates the treaty
24 power.

25 MS. OBERLY: North Dakota -- United States

1 versus North Dakota. I may have it backwards. I think
2 it is North Dakota versus United States, which dealt
3 with prairie potholes in North Dakota as important
4 breeding grounds for migratory waterfowl. That was a
5 statutory construction case. But I think the Court has
6 recognized in quite a few cases that --

7 QUESTION: That the migration of birds is
8 interstate commerce?

9 (General laughter.)

10 MS. OBERLY: That it can be. If --

11 QUESTION: Well, what -- in what cases --

12 MS. OBERLY: Duck hunters.

13 QUESTION: In what cases have we recognized
14 that?

15 MS. OBERLY: I may be unable to give you a
16 case, Your Honor, but I would suggest that duck hunters,
17 interstate travelers who go to wildlife refuges to view
18 ducks, migratory ducks who come from out of state, all
19 of that together combines to make not just the birds
20 alone but the viewing of the birds and --

21 QUESTION: It has an effect.

22 MS. OBERLY: It has an effect sufficient to
23 constitute a connection with interstate commerce.

24 QUESTION: Can the states legislate contrary
25 to the Migrant Birds Act? Can Minnesota, for example,

1 go contrary to the Federal Act on movement of ducks from
2 Canada?

3 MS. OBERLY: Not to my knowledge.

4 QUESTION: Haven't we treated that in some
5 case?

6 MS. OBERLY: If you have, I am afraid that I
7 am not --

8 QUESTION: Of course, there is an argument on
9 this case that even if -- whatever power Congress might
10 have to legislate with respect to isolated potholes or
11 wetlands, they didn't in this case. They just talked
12 about effects on navigable waters.

13 MS. OBERLY: That is why, Your Honor, I was
14 trying to explain --

15 QUESTION: Yes.

16 MS. OBERLY: -- what it is that an adjacent
17 wetland, not an isolated wetland --

18 QUESTION: How about an isolated?

19 MS. OBERLY: This case isn't an isolated
20 wetland. And so I therefore think it would be
21 inappropriate for the Court to decide in this case what
22 Congress intended with respect to isolated wetlands. I
23 also --

24 QUESTION: So we should be careful -- we
25 should be careful not to decide that case.

1 MS. OBERLY: I don't think you have that case
2 before you, but if you wish to put it before you, I
3 think it is quite clear that in the legislative history
4 of the 1977 amendments to the Clean Water Act, that
5 Congress fully understood, and there is one portion in
6 particular -- it is a fairly lengthy section, but one
7 portion of the Congressional --

8 QUESTION: Maybe some people who made the
9 legislative history understood that, but is it reflected
10 in the Act? That is the question.

11 MS. OBERLY: Yes, Your Honor. It is reflected
12 in Section 404(g) of the Act, which was an addition made
13 in 1977, but as far as the debate is concerned, I would
14 like to -- when the Court is studying the case, I think
15 the most helpful part is the Senate debate on the 1977
16 amendments, and it is quite extensive, at 123
17 Congressional Record, Page 26,710 to Page 26,728.

18 Those pages demonstrate beyond question that
19 Congress understood fully every aspect of the Corps of
20 Engineers wetland regulatory program, including its
21 regulation of isolated wetlands, its regulation of
22 adjacent wetlands, how the Corps was phasing in expanded
23 jurisdiction, and Congress made a deliberate choice.

24 Congress was getting vehement complaints from
25 farmers and from foresters, others who said the Corps

1 has gone completely overboard. If you don't stop it,
2 our normal activities like maintaining drainage ditches
3 will be subject to 404 permits, and you can't ever have
4 meant that, and Congress came up with two alternatives.

5 One was to exempt the farmers' activities from
6 regulation. The other alternative was to narrow by
7 legislative definition the geographic scope of the
8 waters and wetlands subject to Corps of Engineers
9 jurisdiction, and the legislative history I have quoted
10 to you demonstrates that Congress deliberately rejected
11 the argument Riverside is urging in this Court, and
12 instead chose to opt for the exemption route, and what
13 it did in the new amendments to Section 404 was exempt
14 normal farming and forestry activities from any
15 regulation.

16 But it affirmatively left unchanged the waters
17 and wetlands that are covered by the Act, and when I say
18 that we know it is not just waters, it is also wetlands,
19 I did refer you to Section 404(g), because what Section
20 404(g) does is establish a mechanism whereby states who
21 qualify can take over the Section 404 permit program and
22 administer it in lieu of the Corps of Engineers upon
23 showing that they have adequate authority, but they are
24 never under any circumstances -- a state may never take
25 over the 404 program insofar as it applies to

1 traditional navigable waters and their adjacent
2 wetlands, and that is spelled out exactly, precisely the
3 way I have said it in Section 404(g).

4 So, here, going back to this wetland, the map
5 in the back of the reply brief, we have a wetland that
6 Michigan would never be allowed to regulate because it
7 falls within the category of wetlands that Congress and
8 the Corps of Engineers both deem the most important to
9 the national interest, and therefore not subject or
10 suitable for delegation to local control, and again, I
11 come back to the point that our concern is not just this
12 wetland or even just the Sixth Circuit. Our concern is,
13 if the Sixth Circuit is upheld, this is the one category
14 of wetland that we know for sure Congress wanted to
15 regulate. We know that by the language of Section
16 404(g).

17 And if this wetland is held to be by this
18 Court, or if the Sixth Circuit is affirmed, outside of
19 the Corps' jurisdiction, then there are no wetlands,
20 isolated or whatever adjective you might use, that are
21 covered at all. That is clearly contrary to legislative
22 intent.

23 QUESTION: Ms. Oberly, I am still -- going
24 back to the very beginning of the argument, I have to
25 confess some uncertainty about the whole case. I

1 understood Judge Kennedy to find that there was no
2 hydrologic connection between this property and any of
3 the navigable waterways.

4 MS. OBERLY: She found --

5 QUESTION: And is your map supposed to
6 demonstrate that that basic point was just dead wrong?

7 MS. OBERLY: It is dead wrong. It is also
8 irrelevant, though, and I am not asking the Court to
9 find that she was clearly erroneous, although I am
10 convinced that she was.

11 QUESTION: When you say it is an adjacent --
12 what do you mean by saying it is an adjacent wetland?
13 Do you mean that there is a hydrological connection?

14 MS. OBERLY: Yes, in two different senses. In
15 this case there is a hydrologic connection through a
16 visible surface connection, whereas all the evidence she
17 took pertained to subsurface ground water flow, and that
18 is the way in which I mean that her finding and her
19 evidence is irrelevant, because --

20 QUESTION: And that nobody offered any
21 evidence about surface flow?

22 MS. OBERLY: She had the same maps, but she
23 made no findings.

24 QUESTION: I don't know what -- I am a little
25 bit like Justice Rehnquist. I don't really know what

1 the map proves, just looking at the map. It proves that
2 there is a surface flow? Is that what you are saying?

3 MS. OBERLY: It proves -- the testimony in the
4 record is that the property slopes to the southeast.
5 Therefore water from the wetland -- this doesn't require
6 you to find facts. It is already a fact in the record
7 that the property slopes to the southeast. Water from
8 the wetland has to drain to these open water bodies.

9 And, yes, there is a surface connection. If
10 there were a concrete wall between --

11 QUESTION: Well, it has to drain, unless it
12 sinks into the ground before it flows, I suppose. It
13 doesn't seem to me you necessary have surface --

14 MS. OBERLY: It's -- I mean, it's true that
15 the soil here is quite wet, but at some point the ground
16 is going to have all that it can hold, and the testimony
17 in the record is, this has been a wetland for decades,
18 possibly for over 100 years.

19 QUESTION: Did she make any finding on this?

20 MS. OBERLY: On which?

21 QUESTION: On the point that Justice Stevens
22 asked you about.

23 MS. OBERLY: The surface connection?

24 QUESTION: Yes.

25 MS. OBERLY: No, and she made no finding one

1 way or the other. But it's --

2 QUESTION: She said as I understood it there
3 was no hydrological connection. You say that just
4 refers to subsurface. It doesn't include surface.

5 MS. OBERLY: Because what she described as the
6 only evidence she was talking about was underground
7 holes that had been dug on the property to see how
8 quickly water came in.

9 QUESTION: This was that expert testimony.

10 MS. OBERLY: That's correct, but she made no
11 surface findings except as to flooding, and that was
12 this direction. She made no surface findings as to
13 drainage in this direction.

14 QUESTION: It seems to me you are asking us to
15 make a finding in the first instance on that point based
16 on a map.

17 MS. OBERLY: I don't think you have to make a
18 finding. I think that the one or two factors I have
19 given you, all of which are in the record, demonstrate
20 beyond any question --

21 QUESTION: That because there is a slope to
22 the property, necessarily there is a surface flow all
23 across that -- it is not that clear to me. Maybe I am
24 stupid.

25 MS. OBERLY: I am not sure if I am permitted

1 to --

2 QUESTION: Ms. Oberly, before you sit down,
3 could I try to straighten out one bit of confusion?
4 There is a good bit of discussion in your brief about
5 Black Creek, which is to the east.

6 MS. OBERLY: That's correct.

7 QUESTION: Now, this property seems to me from
8 the map to be also adjacent to the Clinton River. Is
9 that of any significance, or is the entire flow to the
10 southeast?

11 MS. OBERLY: The direction of the flow is to
12 the southeast, and we are not relying on the adjacency
13 to the Clinton River, partly because within the property
14 boundary, the part that is closest to the Clinton River
15 is prior filled area, and therefore probably upland
16 area.

17 QUESTION: So of no significance at all.

18 MS. OBERLY: And so -- it is not of no
19 significance, because eventually Black Creek, even going
20 to the east, if you then go north, Black Creek comes
21 back to the Clinton River.

22 QUESTION: I was going to say, it just flows
23 between the Clinton River and the lake.

24 MS. OBERLY: You can view this whole area,
25 Your Honor, as the lateral boundary of Lake St. Clair,

1 as opposed to giving these individual water bodies
2 separate names. But we are relying primarily on the
3 adjacency to Black Creek which in turn feeds into Lake
4 St. Clair.

5 My time has expired.

6 CHIEF JUSTICE BURGER: Mr. Washburn.

7 ORAL ARGUMENT OF EDGAR B. WASHBURN, ESQ.,

8 ON BEHALF OF THE RESPONDENTS

9 MR. WASHBURN: Mr. Chief Justice, and may it
10 please the Court, I must admit that I am somewhat amazed
11 by the government's position that has been articulated
12 here today. Essentially the government is displeased
13 with the findings of the trial court, findings which the
14 government did not object to in the Court of Appeals,
15 and which were affirmed by that Court, and is now
16 offering for the first time what it, I presume, is
17 proposing as evidence of facts that were found to be to
18 the contrary before Judge Kennedy.

19 I don't mean to dwell on this issue, but I
20 would like to point out that this very contention was
21 made before Judge Kennedy, and was rejected by Judge
22 Kennedy. She found that there was no hydrologic
23 connection between the Riverside property and any nearby
24 water body. That included Lake St. Clair, the Clinton
25 River, Black Creek, or any of the canals that drained

1 into Black Creek.

2 QUESTION: Do you have at the tip of your
3 fingers or tongue a citation to the record as to where
4 she made that finding? I don't mean to interrupt your
5 argument if you don't.

6 MR. WASHBURN: It is at the appendix to the
7 government's petition for certiorari at Pages 24, 25,
8 34, 35, 36, 37, 28, and 31. There are a series of
9 findings that she made in her memorandum opinion. She
10 found that although there were wetland type plants
11 growing on the property, that their existence was
12 totally unrelated to the proximity of this particular
13 piece of land to any water body, and moreover was
14 completely unrelated to any inundation that may have
15 occurred in the past. And in that respect she found
16 that the property had been flooded on an irregular basis
17 no more than six times in 80 years.

18 QUESTION: Would you suggest that is not very
19 much flooding?

20 MR. WASHBURN: In my opinion, Your Honor, that
21 is very infrequent flooding.

22 QUESTION: Six in eight years?

23 MR. WASHBURN: Eighty years.

24 QUESTION: I thought you said eight.

25 MR. WASHBURN: Pardon me. I thought I said

1 80. I meant to say 80.

2 QUESTION: It is much like the Great Salt
3 Lake. It is about that frequency, and they are
4 concerned about it out in Utah.

5 MR. WASHBURN: I don't believe that is the
6 situation for the Great Salt Lake, Your Honor. That has
7 been rising and falling over long periods of time. The
8 government makes the statement that this whole area
9 should be considered a part of Lake St. Clair. I might
10 add that if that is the case, hundreds if not thousands
11 of homes and businesses will also be part of Lake St.
12 Clair. I think the argument just doesn't square with
13 the facts.

14 The point is that Judge Kennedy made critical
15 findings on the relationship of this land to any water
16 body, both surface and subsurface. The government
17 maintains that she had no evidence before her concerning
18 surface conditions. She viewed the site. She was able
19 to see what was going on, and she made findings with
20 respect to the hydrologic connection.

21 There is no suggestion that she limited her
22 findings to only an underwater connection. She did find
23 that the type of soils that were on the property could
24 not transmit, or it was so impervious that water would
25 not move more than 50 feet through it, and on that basis

1 concluded that soils were not saturated because of the
2 relationship or proximity to any water body, the nearest
3 water body being more than 200 feet away, and that was a
4 canal that ultimately flowed into Black Creek.

5 The point is, this is an isolated wetland. It
6 is an area that is unconnected by either ground water or
7 surface water to any water body. It does possess poor
8 drainage, and that is the reason why the wetland type
9 vegetation was growing there. This was the basis of her
10 findings, and those findings were relied upon by the
11 Court of Appeals in its decision.

12 The government before the Court of Appeals and
13 its petition here, and I guess up until the time of its
14 reply brief, was maintaining that any land such as
15 Riverside's which possesses wet soils for any reason,
16 and those soils accommodate the growth of trees and
17 other vegetation that are tolerant of wet conditions is
18 a wetland which in turn means it is a navigable water,
19 and regulated under the Clean Water Act.

20 And this is so, contended the government,
21 irregardless, irrespective of the relationship of this
22 land to a water body, or any connection, either
23 subsurface or surface connection, just as long as there
24 was some other water body in the area.

25 We think that the Court of Appeals was correct

1 in rejecting this construction of the phrase "navigable
2 waters." Wetlands are not mentioned as being within the
3 jurisdiction of the government under the Clean Water
4 Act. The definitional terms are contained in the 1972
5 amendments, and the Act applies to navigable waters.

6 Nowhere in that definition does the term
7 "wetlands" appear, and in fact nowhere in the several
8 thousand pages of legislative history surrounding the
9 adoption of that Act does the word "wetlands" or
10 anything equivalent to it appear.

11 QUESTION: That is the original Act?

12 MR. WASHBURN: That's the original Act, Your
13 Honor.

14 QUESTION: Yes.

15 MR. WASHBURN: Congress in adopting the 1972
16 amendments, had something specific in mind. And what it
17 had in mind was the fact that prior efforts at water
18 pollution control had been restricted principally by
19 agencies such as the Corps of Engineers, who had refused
20 to exercise jurisdiction over any water bodies other
21 than waters that crossed state lines.

22 As a result, Congress in 1972 sought to
23 correct what it perceived to be a severe limitation, and
24 to in essence follow cases decided by this Court
25 concerning the definition of navigable waters. The

1 legislative history, and in particular the conference
2 report to the 1972 amendments, is very clear on saying
3 what Congress intended.

4 It referred to cases of this Court, and then
5 stated that it was intending to bring within the Clean
6 Water Act's regulatory scheme navigable waters that were
7 used in interstate commerce, their tributaries, as long
8 as they were connected to interstate commerce, and then
9 articulated that there could either be a connection
10 through use of those waters in interstate commerce or if
11 the waters ultimately connected to some other method of
12 interstate commerce.

13 QUESTION: Do you think that there is no
14 indication that Congress would have been concerned about
15 pollution flowing from adjacent wetlands into navigable
16 waters of the United States, and want to regulate them?

17 MR. WASHBURN: The Act does regulate that,
18 Your Honor, under Section 402. If a pollutant
19 ultimately ends up in a navigable water, it is subject
20 to regulation under Section 402 as a point discharge.
21 What we have here is attempting to define the area where
22 that pollutant may come from if it is a wetland, and
23 being a navigable water itself, in instances where there
24 is absolutely no connection between that wetland and the
25 water body. So in answer to your question, Congress was

1 concerned, and it is regulated.

2 Under the government's construction of the
3 Act, something in the neighborhood of 100 million acres
4 of wetlands will be covered. We find this to be really
5 not credible to say that Congress intended to regulate
6 this acreage, which is the size of the state of
7 California, without ever having mentioned that fact in
8 either the Act or the legislative history when it
9 adopted it in 1972.

10 This is not to say that the Clean Water Act
11 does not regulate wetlands. The government's statement
12 that no wetlands will be regulated is simply incorrect.
13 For example, tidal wetlands are regulated. They are
14 inundated by waters of the United States, or navigable
15 waters, and come within the purview of the Act. As a
16 result, the tidal wetlands that border the Chesapeake
17 Bay or San Francisco Bay or tidal areas in Florida come
18 within the regulatory scheme of the Clean Water Act.

19 In a like fashion, those wetlands that are a
20 part of or are regularly inundated by lakes and rivers
21 also are regulated. What is not regulated are those
22 types of lands such as Riverside's which have no water
23 connection, surface water connection to a water body.
24 Congress did not intend to bring that type of area
25 within the regulatory scheme of the Act.

1 The government in its briefs, at least, argues
2 that in 1977, Congress's refusal to adopt amendments
3 that would have severely restricted the definition of
4 navigable waters should be equated to a legislative
5 endorsement of the Corps' 1977 regulations.

6 First off, the 1977 regulations were first
7 promulgated the same day that the bill that amended the
8 1977 Act was introduced into Congress, and the language
9 as far as these provisions were concerned did not
10 change, so unless Congress is more clairvoyant than I
11 believe it to be, it didn't even know what those 77
12 regulations were at that time.

13 They certainly didn't know what the Corps was
14 contemplating to do in the future in furtherance of
15 those regulations, but more importantly, Congress did
16 not change the definition of navigable waters. What it
17 did was to reject a proposed amendment that would have
18 placed the regulation of navigable waters back to where
19 it had been prior to 1972. In doing that, I don't think
20 that it is appropriate to read into Congress's inaction
21 a positive finding in affirmance of the Corps' conduct
22 as manifested by its 1977 regulations.

23 This Court has consistently held that a
24 failure of Congress to act is not tantamount to a
25 manifestation of legislative intent. And we see no

1 reason why that doctrine should be departed from in this
2 particular instance.

3 I would also note that in the legislative
4 history to the 1977 legislative effort, Congress again
5 restated what it thought it had done in 1972, and that
6 was to regulate not only navigable waters, but also
7 tributaries of those waters and intrastate waters that
8 were navigable in fact.

9 That is consistent with what the legislative
10 history surrounding the 1972 effort stated, and we see
11 that Congress really was doing nothing different. It
12 was just restating what it originally intended, which is
13 to get out from under the restrictive definitions of
14 navigable waters that the Corps of Engineers had
15 administratively employed prior to 1972.

16 The government in its briefs had argued that
17 one of the purposes of the Clean Water Act was to
18 prevent the conversion of any wetlands to any other
19 use. This has been in essence the foundation upon which
20 it has been urging a liberal construction of the term
21 navigable waters.

22 One of the problems with this contention is
23 that if the goal is to prevent the conversion of
24 wetlands to any other use, the most common methods of
25 converting wetlands to other uses are not covered by the

1 Act. For example, draining wetlands, dredging or
2 digging up wetlands as long as you don't put the dredge
3 spoils on the wetlands themselves, removing vegetation
4 from wetlands, and burning wetlands are not covered.

5 In fact, the 1984 Congressional Office of
6 Technology Assessment Report on the Status of Wetlands
7 pointed out that since 1950, only 6 percent of the
8 wetland conversions that had occurred occurred through
9 urbanization and methods such as filling. The remaining
10 94 percent had occurred through methods that were
11 unregulated and are unregulated by the Clean Water Act.

12 The point is that the Clean Water Act was not
13 designed to be a wetland protection statute insofar as
14 isolated areas are concerned. It was an act designed to
15 prevent the pollution of the nation's waters, and by
16 defining navigable waters in the Act, Congress intended
17 to include navigable waters, non-navigable tributaries
18 of those waters, and non-navigable portions of those
19 water bodies.

20 It intended to eliminate requirements that the
21 waters cross state lines, and it also intended to
22 abandon the requirement that the activity occur below
23 the ordinary high water line, and would permit
24 regulation as far as the water body extended, in other
25 words, as far as the surface waters flowed. That is

1 what Congress had in mind. That is what it stated it
2 intended to do, and in our opinion that is what it did.

3 The Court of Appeals in reading the Act
4 arrived at the same conclusion. It concluded, and I
5 think very reasonably so, that the term navigable waters
6 as used in the Act does not mean that land that becomes
7 wet and has no relationship to any water body.

8 QUESTION: You think the regulation then just
9 exceeds the statutory authority where it says that a
10 wetland is any area that is inundated or saturated by
11 surface or ground water, whether it has got any
12 connection with navigable water or not?

13 MR. WASHBURN: To the extent it is applied in
14 a fashion that does not require surface connection, yes,
15 it is invalid.

16 QUESTION: Or an underground connection.

17 MR. WASHBURN: The underground connection, I
18 would say the same thing. The surface water connection
19 is what the Clean Water Act was seeking to regulate.
20 Ground water is not regulated by the Clean Water Act.

21 QUESTION: But that is what is infirm about
22 these regulations, you say.

23 MR. WASHBURN: As applied, Your Honor, yes.
24 The Court of Appeals construed the regulations as
25 requiring a surface water connection.

1 QUESTION: Do you defend that?

2 MR. WASHBURN: I have to admit I have some
3 problems reading the regulations and arriving at that
4 conclusion.

5 QUESTION: Yes.

6 MR. WASHBURN: But I think if the regulations
7 are to be saved, that type of construction is required.

8 QUESTION: But you -- as far as adjacency is
9 concerned, would you say this is neighboring?

10 MR. WASHBURN: I would say it is not far away.

11 (General laughter.)

12 MR. WASHBURN: It is 200 feet away, Your
13 Honor, from the nearest canal.

14 QUESTION: But if there was a connection --

15 MR. WASHBURN: I would say --

16 QUESTION: -- then you would think the statute
17 would authorize it.

18 MR. WASHBURN: If there was a surface water
19 connection, I would --

20 QUESTION: Or a ground water connection.

21 MR. WASHBURN: Pardon me?

22 QUESTION: Or a ground water connection.

23 MR. WASHBURN: The Act doesn't regulate ground
24 water.

25 QUESTION: Well, it may not. It may not. But

1 if you want a connection -- suppose the expert had
2 testified that this wetland involved here was made wet
3 constantly and regularly by an underground seepage from
4 the river, from navigable waters. There was a
5 hydrological connection between the navigable waters.

6 MR. WASHBURN: My position would be the same.
7 It is that Congress in adopting this Act did not intend
8 to regulate that type of area. In other words, an area
9 that was only moist from a ground water connection.
10 That gets into a very complicated --

11 QUESTION: I see. I see.

12 MR. WASHBURN: -- matter. Congress has
13 struggled with this, how to regulate ground water.
14 Fortunately, here we don't have that factual situation.
15 The findings are that there was no underground
16 connection.

17 The second problem from our perspective of the
18 government's position is that once you depart from the
19 requirement of the surface connection, there really is
20 no limit to how far away from a navigable water an area
21 can be and still be treated as a navigable water within
22 the Act. The adjacency requirement that is in the
23 regulations was originally, in our opinion, inserted to
24 describe those areas that were inundated by that water
25 body. But the government has abandoned that requirement

1 in the 1977 regulations, and is now moving away from the
2 water body, and we just don't know how far away they
3 intend to go.

4 We have heard in their reply brief that all
5 that is necessary is some sort of aerial relationship.
6 We don't know what that is. One thing for certain,
7 however, is that that type of aerial relationship offers
8 no objective criteria by which a landowner can determine
9 whether or not his property is subject to regulation
10 under the Clean Water Act.

11 Given the --

12 QUESTION: I suppose it a fortiori would be
13 contrary to the statute in your view to attempt to
14 regulate that kind of a wetland.

15 MR. WASHBURN: Yes. If the relationship is
16 something other than a water connection, surface water
17 connection.

18 The government in its final pages of its brief
19 seems to say that landowners should not be concerned
20 about the indefiniteness and imprecise nature and
21 perhaps even difficulties of determining whether or not
22 their property is subject to regulation, because all
23 that is needed is to engage in the permit procedure
24 where everything can be worked out administratively.

25 In the government's words, jurisdictional

1 rules are of limited utility. Well, they may be of
2 limited utility from the perspective of the Corps of
3 Engineers, but it is certainly not from a landowner's
4 perspective. The process is time consuming. It is
5 expensive. And it is uncertain.

6 The permit most likely will be denied, or if
7 it is granted, it will be granted with conditions that
8 require the provision of what is called mitigation, and
9 in this instance, under the present regulations of the
10 Corps and the EPA, litigation is construed as meaning
11 that there should be no net loss of wetland area. As a
12 result, if a landowner such as Riverside is to secure a
13 permit to fill ten acres, Riverside must acquire ten
14 acres of non-wetlands, convert them to a wetland, and
15 then give it to the government.

16 The point is that from the landowner's point
17 of view, the jurisdictional determination is the
18 critical determination, for once jurisdiction attaches,
19 all sorts of bad things begin to happen from the
20 landowner's perspective. We think that landowners are
21 entitled to a boundary that not only comports with the
22 meaning of the Clean Water Act, and that is, it is
23 limited to navigable waters and those areas that are
24 connected to them by a surface water connection, but
25 also that the agencies implementing that Act use

1 objective criteria by which that particular boundary can
2 be ascertained.

3 In this instance, the Corps' regulations
4 satisfies neither requirement. It is out of compliance
5 with the Act, and it offers no objective criteria by
6 which a landowner can gauge his conduct. I might add
7 finally, and this is particularly appropriate in the
8 state of Michigan, that wetlands, even isolated
9 wetlands, are not unregulated. As I pointed out
10 earlier, many wetlands are presently covered by the
11 Clean Water Act.

12 States such as Michigan also possess their own
13 wetland regulatory schemes. Michigan, for example, has
14 a scheme that does regulate isolated wetlands under the
15 police power. We think that is where wetland regulation
16 should be. We think there is no need for the courts to
17 construe the Clean Water Act in a fashion that will
18 basically amend the Act to be one of wetland protection
19 when that was not Congress's intent.

20 In other words, there is neither a need nor a
21 necessity for that type of interpretation to occur.

22 Unless there are any further questions, that
23 concludes my presentation.

24 CHIEF JUSTICE BURGER: Thank you, counsel.
25 The case is submitted.

1 (Whereupon, at 12:00 o'clock noon, the case in
2 the above-entitled matter was submitted.)
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CERTIFICATION.

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84-701 - UNITED STATES, Petitioner v. RIVERSIDE BAYVIEW HOMES, INC., ET AL

E that these attached pages constitutes the original
unscript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)

