

Journal of Environmental and Sustainability Law

Missouri Environmental Law and Policy Review
Volume 12
Issue 1 *Fall 2004*

Article 4

2004

Narrowing Navigable Waters: The Fifth Circuit Limits Federal Jurisdiction under the Clean Water and the Oil Pollution Acts. *In re Needham*

Lorraine C. Friedlein Buck

Follow this and additional works at: <https://scholarship.law.missouri.edu/jesl>



Part of the [Environmental Law Commons](#)

Recommended Citation

Lorraine C. Friedlein Buck, *Narrowing Navigable Waters: The Fifth Circuit Limits Federal Jurisdiction under the Clean Water and the Oil Pollution Acts. In re Needham*, 12 Mo. Env'tl. L. & Pol'y Rev. 48 (2004)
Available at: <https://scholarship.law.missouri.edu/jesl/vol12/iss1/4>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Environmental and Sustainability Law by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

CASE NOTE

NARROWING "NAVIGABLE WATERS": THE FIFTH CIRCUIT LIMITS FEDERAL JURISDICTION UNDER THE CLEAN WATER AND THE OIL POLLUTION ACTS

*In re Needham*¹

I. INTRODUCTION

"Navigable waters" is defined in the Clean Water and Oil Pollution Acts as "waters of the United States, including territorial seas."² The Supreme Court has held that Congress intended to broadly define "water" in the Acts.³ Although the broad definition of "waters of the United States" may appear straightforward, the courts' application of this definition has been anything but clear and consistent.⁴

II. FACTS AND HOLDING

On January 25, 1999, an employee of Needham Resources, Inc. ("NRI") pumped oil from an oil containment well into an adjacent drainage ditch.⁵ After receiving a complaint regarding the oil spill, the Environmental Protection Agency ("EPA") investigated the spill and contacted James Needham to discuss the matter.⁶ NRI initially hired a private contractor to clean up the oil, but did not have the funds to complete the operation.⁷ The EPA and the United States Coast Guard assumed control of the cleanup, an effort that was funded by the Oil Spill Liability Act.⁸

The Needhams filed for bankruptcy on February 8, 1998.⁹ The following day, the United States sued the Needhams, NRI and D&C in federal court to recoup the \$207,000 it spent in cleanup costs.¹⁰ The government's suit was stayed until resolution of the government's proof of claim against the Needhams on the same issue in the bankruptcy court dispute.¹¹ The Needhams objected to the EPA's proof of claim on the grounds that the oil spill was not regulated by the OPA because the spill did not infiltrate any navigable waters that were subject to federal jurisdiction.¹²

At the bankruptcy hearing, both parties stipulated that the oil was originally discharged into a drainage ditch at the well, spilled into an adjacent waterway, the Bayou Cutoff, and then spilled into another adjacent waterway, the Bayou Folsé.¹³ It is undisputed that the "Bayou Folsé flows directly into the Company Canal, an industrial waterway that eventually flows into the Gulf of Mexico."¹⁴

¹ 354 F.3d 340 (5th Cir. 2003).

² 33 U.S.C. § 1362(7) (2000). *See also* 33 U.S.C. §2701(14)(2000).

³ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985).

⁴ *United States v. Rapanos*, 339 F.3d 447, 451 (6th Cir. 2003).

⁵ *Needham*, 354 F.3D at 343. The well is co-owned by NRI and D&C Operating Inc. ("D&C"). *Id.* NRI is solely owned by James Needham. *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* The Coast Guard, along with the EPA, incurred \$207,000 in cleanup costs. *Id.*

⁹ *Id.* The Needhams originally filed a Chapter 11 bankruptcy petition which was later converted to Chapter 7. *Id.*

¹⁰ *Id.*

¹¹ *Id.* D&C also filed a proof of claim against the Needhams which was contingent upon finding liability under the OPA. *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

The bankruptcy court found that the drainage ditch and its adjacent waterway, the Bayou Cutoff, were neither navigable waters, nor sufficiently adjacent to navigable waters as required for the Act to control.¹⁵ The court, accordingly, sustained the Needham's objection to the EPA's proof of claim, finding that the oil spill was not subject to federal jurisdiction.¹⁶ Without jurisdiction, the OPA could not compel the Needhams to pay for the cleanup.¹⁷

The district court affirmed, finding no basis to disturb the ruling of the bankruptcy court.¹⁸ The Fifth Circuit Court of Appeals found error with the bankruptcy court's two critical findings of fact: (1) that the oil spilled only into the drainage ditch and its adjacent waterway, the Bayou Cutoff, neither of which were navigable in fact; and (2) "that the Gulf of Mexico was the only open body of navigable water in the vicinity of the spill."¹⁹

III. LEGAL BACKGROUND

A. *The Oil Pollution Act*²⁰

The Oil Pollution Act of 1990 ("OPA") was intended to streamline federal law and enhance the Environmental Protection Agency's ability to prevent and respond to catastrophic oil spills in several ways.²¹ The OPA created the national Oil Spill Liability Trust Fund to assist with cleanup costs when a responsible party is unable or unwilling to clean up oil spills.²² The OPA set new requirements for contingency planning by both the industry and the government.²³ The OPA also increased noncompliance penalties, broadened the response and enforcement of the federal government, and preserved the state's authority to promulgate laws regulating the prevention of and response to oil spills.²⁴

The OPA imposes strict liability upon parties responsible for discharging oil into "navigable waters."²⁵ "Navigable waters" is defined in the statute to mean "the waters of the United States, including the territorial seas."²⁶ The legislative history and the identical text strongly indicate that Congress intended the meaning of "navigable waters" to be the same in both the OPA the Clean Water Act.²⁷

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *See id.*

¹⁸ *Id.* at 343-44

¹⁹ *Id.*

²⁰ 33 U.S.C. §§ 2701-2761 (2000).

²¹ *Rice v. Harken Exploration Co.*, 250 F.3d 264, 266 (5th Cir. 2001). The OPA was promulgated largely in response to increased public concern following the Exxon Valdez oil spill in Prince William Sound, Alaska. *Id.*

²² U.S. Environmental Protection Agency, *Oil Pollution Act Overview*, at <http://www.epa.gov/oilspill/opaover.htm> (last updated Jan. 7, 2004). This trust fund is financed by an oil tax and can provide up to \$1 billion per oil spill incident. *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *In re Needham*, 354 F.3d 340, 344 (5th Cir. 2003).

²⁶ *Id.* (citing 33 U.S.C. § 2701(21) (2000)).

²⁷ *Id.* *See also Rice*, 250 F.3d at 267.

B. *The Clean Water Act*²⁸

Congress passed the Clean Water Act (“CWA”) “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”²⁹ and gave the U.S. Army Corps of Engineers and the EPA the authority to achieve this task.³⁰ The CWA was originally enacted as the Federal Water Pollution Control Act of 1972 “to provide a comprehensive national, interstate solution for a perceived national [water pollution crisis].”³¹ For over thirty years, the agencies of the executive branch and the federal courts have construed the geographic jurisdiction of the CWA.³² During that time, it was clear that the entire CWA had one unified jurisdiction based on one statutory definition of “navigable waters” as “the waters of the United States.”³³

The legislative history of the CWA shows that Congress intended to broaden federal regulation over the nation’s waters.³⁴ This is further evidenced by eliminating words in a limiting definition used in prior similar acts to give the broad definition of “the waters of the United States.”³⁵ This definition of “navigable waters” was new to Congress who, in prior acts, defined navigable waters as those that were “navigable-in-fact.”³⁶ Thus, the interpretation of this new Congressional definition of “navigable waters” was also new to the courts.

C. “Navigable Waters” and Federal Jurisdiction

The definition of “navigable waters” in the CWA and OPA has recently been heavily debated in the courts. In *United States v. Riverside Bayview Homes*, the Supreme Court considered the proper interpretation of the definition of “navigable waters” as “waters of the United States” as well as the scope of federal jurisdiction under the CWA.³⁷ In reviewing congressional legislative intent, the Court found that “Congress chose to define the waters covered by the Act broadly” in order “to regulate at least some waters that would not be deemed ‘navigable’ under the classical understanding of that term.”³⁸ The Court interpreted “waters of the United States” broadly so as to include “all wetlands adjacent to other bodies of water over which the Corps has jurisdiction” and upheld CWA regulations that restricted discharging pollutants into non-navigable wetlands adjacent to open waters.³⁹ In the wake of *Riverside*, it was well recognized that “navigable waters,” as defined

²⁸ 33 U.S.C. §§ 1251-1387.

²⁹ 33 U.S.C. § 1251(a).

³⁰ *United States v. Deaton*, 332 F.3d 698, 702 (4th Cir. 2003) (holding that the Corps should be given deference in asserting jurisdiction over a roadside ditch).

³¹ Lance D. Wood, *Don’t Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands*, 34 ENVTL. L. RPT. 10187, 10193 (Feb. 2004). Prior to the Federal Water Pollution Control Act, the United States relied on a compilation of state, local, and federal statutes, including common law “nuisance” remedies, which were largely ineffective in dealing with interstate water pollution. *Id.* See also John E. Milner & Charles A. Waggoner, *Overview of Major Federal Environmental Acts and Regulations for the General Practitioner*, 60 MISS. L.J. 1, 89-91 (1990).

³² Wood, *supra* note 31, at 10195. The agencies accomplished this through rulemaking and the courts through various decisions. *Id.*

³³ *Id.* But see generally Virginia S. Albrecht & Stephen M. Nickelsburg, *Could SWANCC Be Right? A New Look at the Legislative History of the Clean Water Act*, 32 ENVTL. L. RPT. 11042 (Sept. 2002) (discussing limited jurisdiction under the CWA).

³⁴ Wood, *supra* note 31, at 10199. The legislative history of the Federal Water Pollution Control Act shows Congress’s focus on the inadequacies of the Water Quality Act of 1965 as its starting point for expanding federal jurisdiction. *Id.* But see Albrecht & Nickelsburg, *supra* note 33.

³⁵ *Id.* The definition of “navigable waters” that was taken out of the bill before passage was “the navigable waters of the United States, portions thereof, and the tributaries thereof, including the territorial seas and the Great Lakes.” *Id.*

³⁶ *Id.* at 10200.

³⁷ 474 U.S. 121, 133 (1985).

³⁸ *Id.*

³⁹ *Id.* at 135. The wetland in *Riverside* actually abutted a navigable waterway. *Id.*

in the CWA, included tributaries.⁴⁰ However, the Court's subsequent decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* muddied the waters.

In *Solid Waste*, the Court found that certain isolated, non-navigable waters exceeded the boundaries of the CWA.⁴¹ The Court refused to extend federal jurisdiction under the CWA to an abandoned sand and gravel pit where migratory birds nested.⁴² The Corps originally concluded that it had no jurisdiction over the site, because it was not a "wetland" or area which supported "vegetation typically adapted for life in saturated soil conditions" as required by the Act.⁴³ When the Corps was informed of a number of migratory birds at the site, it reconsidered and ultimately asserted its jurisdiction pursuant to the Migratory Bird Rule, a subset of the CWA promulgated by the Corps under its congressional authority.⁴⁴ The Court held that using the Migratory Bird Rule to acquire federal jurisdiction over the area exceeded the jurisdiction of the CWA.⁴⁵ In reaching its conclusion, the Court emphasized that the isolated bodies of water at issue were neither navigable-in-fact nor were they adjacent to open water.⁴⁶ The Court specifically stated that the meaning of "navigable waters" under the Act was not before it and it expressed no opinion on its meaning.⁴⁷ *Solid Waste* has rippled through the lower courts in recent years, and its holding has caused a split as to its interpretation to the definition of "navigable waters." In interpreting *Solid Waste*, the courts have reached varying results: "the primary rift being whether the Migratory Bird Rule was the decision's only casualty, or whether the holding limited the Corps' jurisdiction even further."⁴⁸

Shortly after the Supreme Court's decision, the Fifth Circuit found *Solid Waste* to be a limitation on federal jurisdiction.⁴⁹ In *Rice v. Harken Exploration Co.*, the court held that oil discharges onto dry land which eventually reach groundwater were not included in the definition of navigable waters under the OPA, and its regulation should therefore be left to the states.⁵⁰ The *Rice* court interpreted *Solid Waste* to limit the federal jurisdiction and required navigable waters be either navigable-in-fact, or adjacent to such navigable-in-fact waters.⁵¹ However, the Fifth Circuit is the only appellate court to interpret *Solid Waste* as a limitation on the expansive definition of "navigable waters" set out in *Riverside*.⁵²

The Fourth Circuit held that the broad jurisdiction of the CWA still applied in light of *Solid Waste*.⁵³ In *United States v. Deaton*, the court acquiesced to the CWA's jurisdiction over wetlands that are "adjacent to, and drain into, a roadside ditch whose waters eventually flow into" a navigable river and bay.⁵⁴ In its ruling, the

⁴⁰ *United States v. Phillips*, 367 F.3d 846, 856-57 (9th Cir. 2004). The court noted that tributaries have been included in the meaning of "navigable waters" under the CWA since 1975. *Id.* (citing *Riverside*, 474 U.S. at 123-23).

⁴¹ 531 U.S. 159, 172-74 (2001). *Solid Waste* did not overturn *Riverside*. *In re Needham*, 354 F.3d 340, 345 (5th Cir. 2003).

⁴² *Solid Waste*, 531 U.S. at 162.

⁴³ *Id.* at 164 (quoting 33 C.F.R. § 328.3(b) (1999)).

⁴⁴ *Solid Waste*, 531 U.S. at 164.

⁴⁵ *Id.* at 174.

⁴⁶ *Id.* at 168. The facts in *Solid Waste* are distinguishable from *Riverside* where the water was in fact adjacent to a navigable waterway. *Id.* at 172-74. See also *Needham*, 354 F.3d at 345.

⁴⁷ *Solid Waste*, 531 U.S. at 171.

⁴⁸ *United States v. Lamplight Equestrian Ctr., Inc.*, 2002 WL 360652 at *5 (N.D. Ill. Mar. 8, 2002).

⁴⁹ *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001).

⁵⁰ *Id.* at 271. The court also affirmed its earlier decision that groundwater was unregulated by the CWA. *Id.* (citing *Exxon Corp. v. Train*, 554 F.2d 1310, 1322 (5th Cir. 1977)).

⁵¹ *Id.* at 269.

⁵² Where the Third Circuit had not ruled on the issue, a New Jersey district court followed the *Rice* court's interpretation of *Solid Waste*. *FD & P Enters., Inc. v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 2d 509, 513-14 (D.N.J. 2003).

⁵³ *United States v. Deaton*, 332 F.3d 698, 702 (4th Cir. 2003).

⁵⁴ *Id.*

court said that the Corps was well within its delegated authority under the CWA to regulate non-navigable tributaries and their adjacent wetlands.⁵⁵

The Sixth Circuit also applied broad federal jurisdiction under the CWA after the *Solid Waste* decision.⁵⁶ In *United States v. Rapanos*, the court found federal jurisdiction under the CWA over wetlands that flow into a man-made drain, which flows into a creek, which flows into a navigable river.⁵⁷ In doing so, the court stated that *Solid Waste* did not restrict the CWA's coverage to only wetlands that were adjacent to navigable waters.⁵⁸

The Ninth Circuit agreed with the Fourth and Sixth Circuits, and held that *Solid Waste* did not narrow the scope of the CWA.⁵⁹ In *United States v. Phillips*, the court concluded that a creek did not have to be navigable-in-fact, and that a tributary could be considered navigable water.⁶⁰ None of the waters in *Deaton*, *Rapanos* or *Phillips* were navigable, or truly adjacent to navigable waters.⁶¹

District courts with no direct appellate authority on an applicable "navigable waters" issue, subsequent to *Solid Waste*, are also split as to the scope of the Supreme Court's ruling. Some courts have agreed with the Fifth Circuit and limited federal jurisdiction under the CWA,⁶² while others have held that *Solid Waste* did not narrow the breadth of the Act.⁶³

IV. INSTANT DECISION

In appealing the bankruptcy court's decision, the United States challenged the court's conclusion that the spilled oil did not contaminate waters regulated by the Oil Pollution Act ("OPA").⁶⁴ Specifically, the United States asserted that the oil was spilled into navigable-in-fact waters, or alternatively, into waters that were adjacent to navigable waters.⁶⁵ The court ultimately agreed with the latter of the two arguments and divided its opinion into two parts: (1) defining the OPA's jurisdiction;⁶⁶ and (2) reviewing the bankruptcy court's findings of fact.⁶⁷

A. Defining "Navigable Waters"⁶⁸

⁵⁵ *Id.* at 708.

⁵⁶ *United States v. Rapanos*, 339 F.3d 447, 453 (6th Cir. 2003).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *United States v. Phillips*, 367 F.3d 846, 855-56 (9th Cir. 2004). *See also* *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001) (holding that polluted irrigation canals were "navigable waters" because they receive water from natural streams and lakes and release water to streams and creeks).

⁶⁰ *Phillips*, 367 F.3d at 855-56. The court affirmed the district court's decision which rejected applying a restricted definition of "navigable waters" under the CWA. *Id.* at 856.

⁶¹ *In re Needham*, 354 F.3d 340, 345 (5th Cir. 2003).

⁶² *E.g.*, *FD & P Enters., Inc. v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 2d 509, 516 (D.N.J. 2003) (holding that *Solid Waste* substantially altered the meaning of "navigable waters" by requiring a substantial nexus beyond a mere hydrological connection) and *United States v. RGM Corp.*, 222 F. Supp. 2d 780 (E.D. Va. 2002) (holding that the wetlands were not "navigable waters" under the CWA because they were not adjacent to navigable waters).

⁶³ *E.g.*, *United States v. Jones*, 267 F. Supp. 2d 1349 (M.D. Ga. 2003), *Carabell v. U. S. Army Corps of Eng'rs*, 257 F. Supp. 2d 917 (E.D. Mich. 2003), *United States v. Lamplight Equestrian Ctr., Inc.*, 2002 WL 360652 (N.D. Ill. Mar. 8, 2002), *United States v. Interstate Gen. Co.*, 152 F. Supp. 2d 843 (D. Md. 2001).

⁶⁴ *Needham*, 354 F.3d at 344.

⁶⁵ *Id.*

⁶⁶ *See id.*

⁶⁷ *See id.* at 346.

⁶⁸ *See* Oil Pollution Act ("OPA"), 33 U.S.C. § 2701(21) (2000). The Fifth Circuit court reviewed the bankruptcy court's statutory interpretation of the Act de novo. *Needham*, 354 F.3d at 344.

When oil is discharged into “navigable waters,” the OPA imposes strict liability upon the parties responsible.⁶⁹ Navigable waters are defined by the Act to mean “the waters of the United States, including the territorial sea.”⁷⁰ The Fifth Circuit refused to approve the broad regulatory definition of “navigable waters” as defined by the Act,⁷¹ although other circuits had recently done so.⁷² The court specifically stated that the United States cannot regulate such waters as puddles, sewers, and roadside ditches.⁷³ The Fifth Circuit held that the United States was only permitted to regulate bodies of water that are actually navigable or adjacent to navigable waters.⁷⁴

B. Reviewing Findings of Fact

The court used a clear error standard in reviewing the facts found by the bankruptcy court, meaning that it can only review if the lower court has made a clear and definite mistake.⁷⁵ In its review, the two critical factual areas the court focused on were: (1) the finding that the oil spilled only into the drainage ditch adjacent to the well and Bayou Cutoff, neither of which were navigable-in-fact; and (2) that the Gulf of Mexico was the only open body of navigable water in the vicinity of the spill.⁷⁶ The court focused on the stipulations made at the bankruptcy hearing in its factual review.

At the bankruptcy hearing, both parties stipulated that the oil was not only discharged into Bayou Cutoff, but also into Bayou Folse, the furthest body of water from the source of the spill.⁷⁸ The stipulation was consistent with the evidence presented, and neither party asked that the stipulation be disregarded.⁷⁹ In light of the stipulation, the court found that the bankruptcy court should have established whether Bayou Folse, not Bayou Cutoff, was navigable-in-fact or adjacent to an open navigable body of water.⁸⁰

Inland waterways may fall within the definition of navigable waters “when they are used or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted.”⁸¹ In relying on testimony from the bankruptcy hearing, the court concluded that it is undisputed that Bayou Folse is adjacent to the Company Canal.⁸² Like the Company Canal, inland waterways that are unobstructed, traveled on with consistency and support commerce are navigable-in-fact.⁸³

⁶⁹ *Needham*, 354 F.3d at 344.

⁷⁰ *Id.* (quoting 33 U.S.C. § 2701(21)). This definition is consistent with the definition found in the Clean Water Act (“CWA”). *Needham*, 354 F.3d at 342. *See also* *Rice v. Harken Exploration Co.*, 250 F.3d 264, 267 (5th Cir. 2001) (citing 33 U.S.C. § 1362(7)). Neither the OPA nor the CWA extend federal jurisdiction to the farthest reach of the Commerce Clause. *Id.* at 269-70.

⁷¹ *Needham*, 354 F.3d at 345.

⁷² *See* *United States v. Deaton*, 352 F.3d 698, 702 (4th Cir. 2003) and *United States v. Rapanos*, 339 F.3d 447, 449 (6th Cir. 2003).

⁷³ *Needham*, 354 F.3d at 345.

⁷⁴ *Id.* at 345-46.

⁷⁵ *Id.* at 344.

⁷⁶ *Id.* at 346.

⁷⁷ *Id.*

⁷⁸ *Id.* Federal law requires that stipulations of fact are controlling, conclusive, and must be enforced by the courts unless contrary evidence or injustice is substantial. *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* “Under *Rice*, and in light of the stipulation, the proper inquiry is whether Bayou Folse,” the furthest body of water affected by the spill, “is navigable-in-fact or adjacent to an open body of navigable water.” *Id.* (citing *Rice v. Harken* 250 F.3d 264, 269 (5th Cir. 2001)).

⁸¹ *Id.* (quoting *The Daniel Ball*, 77 U.S. 557, 563(1871)).

⁸² *Id.* at 347. A witness at the hearing stated that “[t]he Company Canal is an industrial corridor . . . contain[ing] shipyards, repair facilities, dry docks [and a] gas freeing operation.” *Id.*

⁸³ *Id.*

The remaining question of fact for the court was whether the Bayou Folse was adjacent to the Company Canal.⁸⁴ For waters to be considered adjacent, the law requires a "significant nexus" between the water in question and the navigable-in-fact water.⁸⁵ A witness testified at the bankruptcy hearing that Bayou Folse flows directly into the Company Canal, proving that the two waters were clearly adjacent.⁸⁶ Relying on the stipulations made at the bankruptcy hearing and the corresponding witness testimony, the court reversed the ruling of the bankruptcy court and held that the oil spill triggered federal jurisdiction pursuant to the OPA.⁸⁷

V. COMMENT

In the wake of *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, the circuits have split in deciding the jurisdictional scope of § 404 of the Clean Water Act ("CWA").⁸⁸ Some circuits have interpreted *Solid Waste* as narrowing federal jurisdiction by requiring water be navigable, or adjacent to navigable waters, to be subject to federal regulation.⁸⁹ In others, the courts have allowed virtually limitless federal jurisdiction subjecting a remote, shallow drainage ditch eight miles from the closest navigable water to the federal law.⁹⁰

Regulatory agencies have not provided any clarification for landowners as to the federal government's jurisdiction under the CWA.⁹¹ In a joint statement by the Environmental Protection Agency and the Army Corps of Engineers given on the same day the *In re Needham* decision was released, the agencies stated that they would not promulgate any rules on activities in isolated wetlands.⁹² Instead, the agencies will leave the decision to the courts to decide on a case-by-case basis whether federal jurisdiction applies and what activities may be allowed in wetlands.⁹³ Without further guidance, the judiciary is likely to continue making inconsistent and unpredictable decisions.⁹⁴

The courts that have found limited federal jurisdiction under the CWA have done so interpreting *Solid Waste* as a significant shift in the boundaries of the CWA.⁹⁵ The Fifth Circuit uses the most limiting jurisdictional definition, providing that CWA regulation only applies "if the body of water is actually navigable or is adjacent to an open body of navigable water."⁹⁶ The Third Circuit's New Jersey District Court also followed the Fifth Circuit's lead, but in doing so relied on the district court's ruling in *US v. Rapanos*⁹⁷ which has since been overturned.⁹⁸

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* The case was remanded for consideration of the Needham's remaining defenses. *Id.*

⁸⁸ *FD & P Enters., Inc. v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 2d 509, 513 (D.N.J. 2003).

⁸⁹ *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001). *See also FD & P Enters.*, 239 F. Supp. 2d at 513 (following *Rice*).

⁹⁰ *United States v. Deaton*, 332 F.3d 698, 712 (4th Cir. 2003). *See also United States v. Rapanos*, 339 F.3d 447, 453 (6th Cir. 2003) (holding the CWA provided jurisdiction over wetlands that flow into a man-made drain, which flows into a creek, which flows into a navigable river).

⁹¹ Nat'l Ass'n of Homebuilders. *NAHB Calls on Supreme Court to Define Federal Jurisdiction Under Clean Water Act*, at http://www.nahb.org/news_details.aspx?sectionID=148&newsID=683 (Dec. 17, 2003).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *FD & P Enters., Inc. v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 2d 509, 513 (D.N.J. 2003). *See generally* Albrecht & Nickelsburg, *supra* note 33 (discussing limited jurisdiction under the CWA).

⁹⁶ *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001), *followed by In re Needham*, 354 F.3d 340, 346 (5th Cir. 2003).

⁹⁷ *FD & P Enters., Inc.*, 239 F. Supp. 2d at 514.

⁹⁸ *United States v. Rapanos*, 190 F. Supp. 2d 1011 (E.D. Mich. 2002), *overruled by United States v. Rapanos*, 339 F.3d 447, 454 (6th Cir. 2003).

The other side of the debate leaves the scope of the CWA's jurisdiction unchanged by the *Solid Waste* decision.⁹⁹ The Ninth Circuit has concluded that *Solid Waste* applies to isolated waters with no hydrological connection to navigable waters.¹⁰⁰ Other courts have interpreted *Solid Waste* to have changed the critical jurisdictional issue as to whether there is a "significant nexus" between the wetlands at issue and navigable waters, which has shown by these courts not to significantly alter the CWA's jurisdiction.¹⁰¹ Still other courts have limited *Solid Waste* to its impact on 33 CFR § 328.3(a)(3) and have not extended it any further.¹⁰²

The decisions favoring broad jurisdiction of the CWA are further supported by two recent cases. In *United States v. Deaton*, the Fourth Circuit held that the CWA applied to wetlands that are "adjacent to, and drain into, a roadside ditch whose waters eventually flow into" a navigable river and bay.¹⁰³ In *United States v. Rapanos*, the Sixth Circuit asserted authority under the CWA over wetlands that flow into a man-made drain, which flows into a creek, which flows into a navigable river.¹⁰⁴ Both the *Deaton* and *Rapanos* courts looked to prior rulings and congressional intent to apply broad reaching federal authority under the CWA.

Congress passed the CWA with the goal of ending water pollution in the United States altogether by 1985.¹⁰⁵ Case law prior to *Solid Waste* has provided the government with broad jurisdiction in using the CWA to curtail water pollution.¹⁰⁶ *Solid Waste* specifically did not overturn any prior case law relying on the expanded jurisdiction, but only ruled that a specific provision of the Act, the Migratory Bird Rule, did not give rise to federal jurisdiction.¹⁰⁷

In adopting a narrow federal jurisdiction in *Needham*, the Fifth Circuit relies mainly on its own prior holding in *Rice*.¹⁰⁸ However, the holding in *Rice* contradicts the congressional purpose of the OPA. According to *Rice* "the OPA, like the CWA, does not extend federal regulation to the outermost limits of the Commerce Clause."¹⁰⁹ *Rice* further stated that the OPA was passed in response to the Exxon Valdez oil spill and was intended to provide quick and efficient cleanup and compensation for future oil spills, similar to Exxon Valdez, and to internalize the costs of spills within the petroleum industry.¹¹⁰ This conflicts with Congress's intent, as interpreted by the *Rice* court, that the CWA and OPA have the same definition.¹¹¹ Since the Exxon Valdez oil spill occurred in 1990,¹¹² long after the CWA was last amended in 1977,¹¹³ Congress could not have intend to create a narrower jurisdiction in the OPA than that of the CWA.

Further, Congress intended the CWA to broaden federal jurisdiction to include "isolated waters."¹¹⁴ The legislative history of the 1972 and 1977 Amendments of the CWA focused on the inadequacies of the Water Quality Act of 1965 as the starting point for expanding federal jurisdiction of the CWA.¹¹⁵ The legislature was

⁹⁹ *FD & P Enters., Inc.*, 239 F. Supp. 2d at 515.

¹⁰⁰ *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533-34 (9th Cir. 2001) (holding that irrigation canals that "are tributaries to the natural streams with which they exchange water" are "waters of the United States" and subject to the CWA).

¹⁰¹ *United States v. Lamplight Equestrian Ctr., Inc.* 2002 WL 360652 at *6 (N.D. Ill. 2002).

¹⁰² *United States v. Interstate Gen. Co.*, 152 F. Supp. 2d 843, 847 (D. Md. 2001).

¹⁰³ *United States v. Deaton*, 332 F.3d 698, 702 (4th Cir. 2003).

¹⁰⁴ *United States v. Rapanos*, 339 F.3d at 447, 453 (6th Cir. 2003).

¹⁰⁵ *FD & P Enters., Inc. v. U.S. Army Corps of Eng'rs.* 239 F. Supp. 2d 509, 515 (D.N.J. 2003).

¹⁰⁶ *Id.*

¹⁰⁷ *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs.* 531 U.S. 159, 174 (2001). The Court held that providing federal jurisdiction pursuant to the "Migratory Bird Rule" would exceed the Corps' authority under the CWA. *Id.*

¹⁰⁸ *In re Needham*, 354 F.3d 340, 344 (5th Cir. 2003) (citing *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269-70 (5th Cir. 2001)).

¹⁰⁹ *Id.*

¹¹⁰ *Rice*, 250 F.3d at 266.

¹¹¹ *Id.* at 267.

¹¹² *Id.* at 266.

¹¹³ *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs.* 531 U.S. 159, 187 (2001).

¹¹⁴ *Id.* at 177.

¹¹⁵ *Wood*, *supra* note 31, at 10199.

clear by removing the “navigable-in-fact” language ensuring that the CWA was to regulate all bodies of water in the nation, not just those that are navigable-in-fact.¹¹⁶ Congress specifically changed the definition of navigable waters from the prior Act, which is considered to be interpreted narrowly, to the broader definition of “navigable waters of the United States.”¹¹⁷

The Fifth Circuit has narrowly interpreted both the clear language of the CWA and OPA and the rulings of the Supreme Court in *Solid Waste* to hold that waters that are not navigable-in-fact, nor adjacent to such waters, are not subject to federal jurisdiction.¹¹⁸ It was an interesting coincidence that the EPA and the Corps decided on the day that the *Needham* opinion was released not to promulgate any rules further defining federal jurisdiction in such cases. Certainly Congress did not intend some states to be subject to narrow jurisdiction while others are afforded broad jurisdiction. Without agency guidance, nothing short of a Supreme Court ruling will clarify the scope of *Solid Waste* and decide once and for all what is meant by “navigable waters”.

VI. CONCLUSION

Whether the Fifth Circuit took the broad or narrow approach is of no consequence to the Needhams, who would have lost their argument under either interpretation. However, the decision to apply a narrow federal jurisdiction of “navigable waters” has far reaching effects beyond the Needhams. Apparently citizens in Georgia cannot expect federal intervention if a wetland that is not near a navigable-in-fact body of water becomes polluted by a builder or corporation, those in California can rely on federal intervention, and those in Missouri will have to wait and see what the Eighth Circuit decides when it gets its chance.

LORRAINE C. FRIEDLEIN BUCK

¹¹⁶ *Solid Waste*, 531 U.S. at 180-81.

¹¹⁷ Wood, *supra* note 31, at 10200. The original definition of “navigable waters” was waters that were “navigable-in-fact.” *Id.*

¹¹⁸ *In re Needham*, 354 F.3d 340, 347 (5th Cir. 2003).