No. 21-454

In the Supreme Court of the United States

MICHAEL SACKETT & CHANTELL SACKETT,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether the Ninth Circuit set forth the proper test for determining whether wetlands are "waters of the United States" under the Clean Water Act, 33 U.S.C. 1362(7).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Constitution, statutes, and regulations: Page

Statutes and regulations—Continued: Page

Miscellaneous: Page

Miscellaneous—Continued: Page

Miscellaneous—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A39) is reported at 8 F.4th 1075. The opinion of the district court (Pet. App. B1-B32) is not published in the Federal Supplement but is available at 2019 WL 13026870.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2021. The petition for a writ of certiorari was filed on September 22, 2021. The petition was granted on January 24, 2022. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Pertinent statues and regulations are reprinted in the appendix to this brief. App., *infra*, 1a-27a.

STATEMENT

The Clean Water Act (CWA or Act), 33 U.S.C. 1251 *et seq.*, is the preeminent federal law protecting the Nation's waters. Adopted in 1972, the Act was a "total restructuring" of the prior statutory framework. *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 317 (1981) (citation omitted). In its place, the CWA created a comprehensive scheme to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a).

A centerpiece of that comprehensive framework is the term "navigable waters," which the CWA broadly defines as "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). Waters satisfying that definition are often called "covered" or "jurisdictional" waters because they determine the scope of the Act's key programs, including its water-quality standards, oil-spill prevention program, and permitting programs regulating the discharge of pollutants. See 33 U.S.C. 1313, 1321, 1342, 1344.

This case concerns the test for determining when wetlands adjacent to other covered waters are themselves "waters of the United States." 33 U.S.C. 1362(7). Wetlands, such as swamps, bogs, marshes, and fens, are "transitional areas between terrestrial and aquatic ecosystems" characterized by sustained inundation or saturation with water. Environmental Protection Agency (EPA), *Connectivity of Streams & Wetlands to Downstream Waters: A Review & Synthesis of the Scientific Evidence* 2-5 (Jan. 2015) (2015 EPA Report). Wetlands play a critical role in regulating water quality. Among

other things, they provide flood control and trap and filter sediment and other pollutants that would otherwise be carried into downstream waters. See National Research Council, *Wetlands: Characteristics and Boundaries* 35, 38 (1995) (NRC Report).

For more than four decades, the expert agencies charged with administering the Act—the EPA and the U.S. Army Corps of Engineers (the Corps)—have interpreted the "waters of the United States" to include wetlands adjacent to other covered waters. The agencies have consistently treated such adjacent wetlands as covered even if (as is often the case) they are separated from other covered waters by a natural or artificial barrier like a river berm or a dike. The agencies adhered to the view that such a barrier does not categorically preclude jurisdiction over adjacent wetlands even in a 2020 regulation that would have substantially curtailed the CWA's coverage in other respects. See 85 Fed. Reg. 22,250, 22,307 (Apr. 21, 2020). And the agencies are currently engaged in a rulemaking that, among other things, proposes to reaffirm and refine their longstanding definition of covered adjacent wetlands. See 86 Fed. Reg. 69,372 (Dec. 7, 2021).

Consistent with its longstanding interpretation of the CWA, the EPA concluded in this case that the wetlands on petitioners' property near Priest Lake, Idaho, are covered waters. The wetlands at issue are 30 feet from a tributary to Priest Lake and just 300 feet from the lake itself. But petitioners contend that those wetlands are categorically excluded from the CWA's coverage because they are separated from the adjacent tributary by a barrier—here, a road. That categorical limitation is inconsistent with the CWA's text, structure, and history, as well as this Court's precedent. It would

also severely undermine a central component of the CWA's comprehensive scheme for protecting the Nation's waters.

A. Statutory Background

1. Before the CWA, no comprehensive federal law protected the Nation's waters from pollution. In the 1890s, Congress had "passed a series of laws that were later reenacted as the Rivers and Harbors Act of 1899." *United States* v. *Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 663 (1973); see Act of Mar. 3, 1899 (RHA), ch. 425, 30 Stat. 1121. The RHA principally focused on navigability, though it also contained a provision, which remains in force, generally prohibiting the discharge of "refuse matter" into any "navigable water of the United States" or any "tributary of any navigable water." 33 U.S.C. 407. In 1948, Congress enacted the Federal Water Pollution Control Act (FWPCA), ch. 758, 62 Stat. 1155, which focused on water-quality standards rather than the conduct of individual polluters. See *EPA* v. *California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 202-203 (1976).

In 1972, Congress enacted the CWA after concluding that these prior efforts had been "inadequate in every vital aspect." S. Rep. No. 414, 92d Cong., 1st Sess. 7 (1971) (1971 Senate Report). Unlike its predecessors, the CWA was "not merely another law 'touching interstate waters.'" *City of Milwaukee*, 451 U.S. at 317 (citation omitted). Instead, the Act was a "'complete rewriting'" of existing law, designed to "establish an all-

encompassing program of water pollution regulation." *Id.* at 317-318 (citation omitted).[1]

The Act's centerpiece is a prohibition on the unauthorized "discharge of any pollutant." 33 U.S.C. 1311(a). The Act defines a "discharge" to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). The term "pollutant" includes "dredged spoil" and fill material, such as "rock" and "sand." 33 U.S.C. 1362(6). And, as noted above, the Act broadly defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

The CWA establishes two permitting programs for authorizing discharges. Under Section 404, the Corps may issue a permit "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a). Under Section 402, the EPA may issue a permit for the discharge of other pollutants, such as chemical waste or sewage. 33 U.S.C. 1342. The Act allows States, Tribes, and territories to assume responsibility for those permitting programs in some circumstances. 33 U.S.C. 1342(b), 1344(g), 1377(e).

2. In 1974, the Corps published regulations implementing the Section 404 permitting program. 39 Fed. Reg. 12,115 (Apr. 3, 1974). In that rulemaking, the Corps viewed "navigable waters" as a term of art for waters subject to Congress's power to regulate interstate channels of commerce, and it construed Section 404 to apply to the same limited set of waters as a pre-existing permitting program under the RHA. *Ibid.*; see *id.* at

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[1] The 1972 legislation was styled as an amendment to the FWPCA and was renamed the Clean Water Act in 1977. See FWPCA Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816; 33 U.S.C. 1251 note.

12,119. Reviewing courts, Members of Congress, and the EPA all disagreed with that approach. See, *e.g.*, *United States* v. *Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1325 (6th Cir. 1974); H.R. Rep. No. 1396, 93d Cong., 2d Sess. 23-27 (1974); 38 Fed. Reg. 13,528, 13,529 (May 22, 1973). The Corps ultimately was enjoined to adopt new regulations recognizing the agency's "full regulatory mandate." *NRDC, Inc.* v. *Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975).

The Corps then broadened its regulations to assert Section 404 jurisdiction over "waters that have been used in the past, are now used, or are susceptible to use" in interstate or foreign commerce, including waters "subject to the ebb and flow of the tide," and their tributaries; interstate waters; certain other intrastate waters; and wetlands "adjacent" to waters within the foregoing categories. 40 Fed. Reg. 31,320, 31,324 (July 25, 1975). The Corps defined "adjacent" to mean "bordering, contiguous, or neighboring," and specified that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" 42 Fed. Reg. 37,122, 37,144 (July 19, 1977). The regulations defined "wetlands" to mean "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." *Ibid.*

In 1977, Congress substantially amended the CWA while leaving unchanged the definition of "navigable waters." See Clean Water Act of 1977 (1977 Act), Pub. L. No. 95-217, 91 Stat. 1566. In the runup to those amendments, Congress considered proposals to amend

Section 404, and debate on those proposals "centered largely on the issue of wetlands preservation." *Solid Waste Agency of N. Cook Cnty.* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 170 (2001) (*SWANCC*) (citation omitted). The House passed a bill that would have limited the waters and adjacent wetlands to which Section 404 applies. H.R. 3199, 95th Cong. § 16 (1977). Many legislators objected, with one characterizing the proposed limitation as an "open invitation" to pollute other wetlands. 123 Cong. Rec. 26,725 (1977) (statement of Sen. Hart); see *id.* at 26,714-26,716. The Senate ultimately rejected the proposal. *Id.* at 26,728; cf. S. Rep. No. 870, 95th Cong., 1st Sess. 10 (1977) (1977 Senate Report).

Congress instead modified the CWA in other respects while explicitly reaffirming the Act's coverage of "adjacent" wetlands. The 1977 Act exempted certain activities, including many agricultural and silvicultural activities, from the Section 404 permitting program. See § 67(b), 91 Stat. 1600 (33 U.S.C. 1344(f)(1)(A)). To streamline the permitting process, the 1977 Act authorized the Corps to issue "general permits on a State, regional, or nationwide basis." *Ibid.* (33 U.S.C. 1344(e)(1)). And, as particularly relevant here, the 1977 Act established a mechanism for States and Tribes to issue Section 404 permits for discharges into "navigable waters"—except for a subset of covered waters, "including wetlands adjacent thereto," for which the Corps retained exclusive permitting authority. § 67(b), 91 Stat. 1601 (33 U.S.C. 1344(g)(1)); see 33 U.S.C. 1377(e).

3. In 1986, the Corps revised its Section 404 regulations to take account of the 1977 Act and other developments. 51 Fed. Reg. 41,206, 41,206 (Nov. 13, 1986). The EPA adopted comparable regulations, and the agencies'

parallel regulations persisted in substantially the same form for the next 30 years, including the period at issue here. 86 Fed. Reg. at 69,373 & n.5.

Those regulations defined the term "waters of the United States" to include "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide" (*i.e.*, traditional navigable waters), and all "[t]ributaries" of such waters. 33 C.F.R. 328.3(a)(1) and (5) (2008) (emphasis omitted); see 40 C.F.R. 230.3(s)(1) and (5) (2008).[2] The regulatory definition also encompassed "[w]etlands adjacent to" traditional navigable waters or their tributaries. 33 C.F.R. 328.3(a)(7) (2008); see 40 C.F.R. 230.3(s)(7) (2008). The regulations contained the same definitions of "wetlands" and "adjacent" that the Corps had issued before the 1977 Act. See 33 C.F.R. 328.3(b) and (c) (2008); 40 C.F.R. 230.3(t) (2008).

B. The Present Controversy

1. Petitioners own .63 acres of property near Priest Lake, "one of the largest lakes in Idaho." Pet. App. A8. The parcel is bounded by roads to the north and south. *Ibid.* Across the south road is a line of houses fronting

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[2] As used in this brief, the term "traditional navigable waters" encompasses wholly intrastate waters used or susceptible to use in interstate or foreign commerce. Cf. *SWANCC*, 531 U.S. at 172 (referring to Congress's "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made"). Petitioners, by contrast, appear to use the term to refer solely to waters that themselves cross state lines. See, *e.g.*, Pet. Br. 35 (equating "traditional 'navigable waters'" with three categories of "interstate waters") (citation omitted); *id.* at 43 (distinguishing between "traditional navigable waters" and "intrastate navigable waters").

Priest Lake, which is about 300 feet from petitioners' property. *Ibid.* Across the north road "lies the Kalispell Bay Fen, a large wetlands complex that drains into an unnamed tributary" of Kalispell Creek, which in turn feeds into Priest Lake. *Ibid.* The unnamed tributary is about 30 feet from petitioners' property. *Id.* at A33. Historically, petitioners' property was part of the larger Kalispell Bay Fen complex, which then drained directly into Priest Lake. J.A. 30-31. Today, petitioners' property remains connected to the fen and the lake by "shallow subsurface flow." J.A. 32, 41.

Petitioners purchased the property in 2004. Pet. App. A8. Eight years earlier, the Corps had determined that the property contains wetlands covered by the CWA. J.A. 10-12. The Corps had provided the then-owner of the property with information on the Corps' nationwide permits, J.A. 12, which can obviate the need to obtain a site-specific permit for some activities, including home construction. See 33 C.F.R. 330.1.

In 2007, without a CWA permit, petitioners—who operated a commercial construction and excavation business—dumped approximately 1700 cubic yards of gravel and sand to fill the wetlands and prepare the site for building. J.A. 19-20, 22-24; Pet. App. A8-A9. In May 2007, EPA and Corps employees inspected petitioners' property in response to a complaint. J.A. 18. They observed soils, vegetation, and pooling water characteristic of wetlands. J.A. 19, 27-29; see Pet. App. A37-A39 (site-visit photos); J.A. 20-21, 46-50 (same). The EPA ultimately informed petitioners that the property contains wetlands subject to CWA jurisdiction. J.A. 14. Petitioners hired their own wetlands consultant, who confirmed that the "site is part of a wetland." J.A. 15.

In November 2007, the EPA issued an administrative compliance order concluding that petitioners' property contains covered wetlands adjacent to other waters of the United States and that petitioners had violated the Act by discharging fill material into the wetlands without a permit. Pet. App. B2, D5-D7; see 33 U.S.C. 1319(a)(3). The order was based in part on the agency's finding that the wetlands on petitioners' property improve Priest Lake's water quality through sediment retention, contribute base flow to the Lake with beneficial effects to fisheries, and provide flood control. J.A. 35-40. The EPA directed petitioners to remove the fill material and restore the wetlands. Pet. App. D7-D8.

2. In 2008, petitioners brought this action under the APA to challenge the EPA's compliance order. Pet. App. A9. The district court dismissed the complaint, concluding that the CWA precludes pre-enforcement judicial review. 2008 WL 3286801, at *2. The court of appeals affirmed, 622 F.3d 1139, 1147, but this Court granted certiorari and reversed, 566 U.S. 120, 131.

3. On remand, the district court granted summary judgment to the EPA. Pet. App. B1-B32. The court first found that substantial evidence supports the EPA's determination that petitioners' property contains "wetlands." *Id.* at B18-B21. The court found that the property "was originally part of a large wetland complex called the Kalispell Bay Fen," which remains "mainly undisturbed" across the road to the north. *Id.* at B20.

The district court also upheld the EPA's determination that the wetlands on petitioners' property are "'water[s] of the United States'" because they are "adjacent to a traditional navigable body of water; namely, Priest Lake." Pet. App. B21. The court explained that Priest Lake "has been and is used in interstate commerce" and

is therefore a "'traditional navigable water'" as defined in the agencies' regulations. *Id.* at B22 (citation omitted). The court also found, as an alternative basis for upholding the EPA's determination that the wetlands on petitioners' property are covered waters, that the wetlands are adjacent to the unnamed tributary across the road to the north, which flows into Kalispell Creek and, in turn, into Priest Lake. *Id.* at B25-B30.

4. The court of appeals affirmed. Pet. App. A1-A39. The court first held that the case was not moot even though the EPA had withdrawn the compliance order while the appeal was pending. *Id.* at A12-A20. The court then rejected petitioners' challenge to the order on the merits. *Id.* at A22-A36.

Petitioners contended that the EPA's order was contrary to the CWA's definition of "navigable waters," 33 U.S.C. 1362(7), as interpreted by a plurality of this Court in *Rapanos* v. *United States*, 547 U.S. 715 (2006). See Pet. App. A20. As relevant here, a four-Justice plurality in *Rapanos* concluded that wetlands are "covered by the Act" based on their adjacency to other covered waters only if the wetlands have "a continuous surface connection" to those other waters. 547 U.S. at 742. In a concurring opinion, Justice Kennedy set forth an alternative test that focused on whether adjacent wetlands have a "significant nexus" to traditional navigable waters. *Id.* at 759 (citation omitted). The four dissenting Justices would have applied a broader test, which meant that at least five Justices concluded that wetlands may be treated as covered waters if they satisfy "either the plurality's or Justice Kennedy's test." *Id.* at 810 (Stevens, J., dissenting).

Here, the court of appeals determined that, under Ninth Circuit precedent, the CWA covers at least those

adjacent wetlands that satisfy Justice Kennedy's "significant nexus" test. Pet. App. A22-A31. Applying that test, the court explained that "[t]he record plainly supports EPA's conclusion that the wetlands on [petitioners'] property are adjacent to a jurisdictional tributary and that, together with the similarly situated Kalispell Bay Fen, they have a significant nexus to Priest Lake, a traditional navigable water." *Id.* at A33.

The court of appeals emphasized that the wetlands are just 30 feet from the unnamed tributary, and that they are separated from the tributary only by an "artificial barrier[]" (a road), which does "not defeat adjacency." Pet. App. A33. With respect to the "significant nexus" requirement, the court found that the EPA had appropriately analyzed the wetlands on petitioners' property together with the Kalispell Bay Fen, and that "[t]he record further supports EPA's conclusion that these wetlands, in combination, significantly affect the integrity of Priest Lake." *Id.* at A35. The court noted that the wetlands "provide important ecological and water quality benefits" to Priest Lake and are "'especially important in maintaining the high quality of Priest Lake's water, fish, and wildlife.'" *Ibid.*

C. Subsequent Regulatory Developments

1. The lower courts decided this case under the regulations in effect when the events at issue occurred. Pet. App. A6-A7 & n.1, B17 n.3. Between 2015 and 2020, the EPA and the Corps undertook three significant rulemakings. In the 2015 Clean Water Rule, the agencies adopted an approach under which some tributaries and adjacent wetlands were deemed "jurisdictional by rule," based on their significant nexus to traditional navigable waters, interstate waters, or the territorial seas, without the need for "case-specific analysis." 80

Fed. Reg. 37,054, 37,058-37,059 (June 29, 2015). In 2019, the agencies repealed the Clean Water Rule. 84 Fed. Reg. 56,626, 56,626 (Oct. 22, 2019).

In the 2020 Navigable Waters Protection Rule (NWPR), the agencies redefined the term "waters of the United States." 85 Fed. Reg. at 22,250. Although the NWPR was in other respects consistent with the *Rapanos* plurality opinion, see *id.* at 22,273, it departed from the plurality's approach to adjacent wetlands. The NWPR provided that a natural berm or other barrier does not defeat CWA coverage of an adjacent wetland, and that an artificial barrier like a levee or a road does not defeat coverage in certain circumstances, such as where the wetland is inundated by flooding from a covered water at least once in a typical year. *Id.* at 22,307-22,313, 22,338.

2. As a result of various stays and injunctions, the Clean Water Rule never fully took effect, and the NWPR took effect nationwide for only three months. 86 Fed. Reg. at 69,382 & nn.15-18. The agencies are currently engaged in another notice-and-comment rulemaking. The proposed rule, which was published in December 2021, would limit the CWA's coverage of adjacent wetlands to wetlands that satisfy either the significant-nexus test or the continuous-surface-connection test. *Id.* at 69,373; see *id.* at 69,449-69,450. The proposed rule thus covers a narrower set of wetlands than the 1986 rule in effect when *Rapanos* was decided and when petitioners' discharges occurred. That proposed approach reflects the agencies' consideration of "the statute as a whole, the scientific record, relevant Supreme Court case law, and the agencies' experience and expertise after more than 30 years of implementing the 1986 regulations." *Id.* at 69,374.

SUMMARY OF ARGUMENT

I. When a wetland is adjacent to another water covered by the CWA, the wetland itself is among the "waters of the United States," 33 U.S.C. 1362(7), if it satisfies the significant-nexus test in Justice Kennedy's concurring opinion in *Rapanos* v. *United States*, 547 U.S. 715 (2006). The mere presence of a berm, levee, or other similar barrier does not defeat CWA coverage.

A. Statutory text, structure, and history establish that adjacent wetlands are "waters of the United States" covered by the CWA. Although the Corps initially took a different view in implementing Section 404, it quickly reversed course and revised its regulations to include "adjacent wetlands." In 1977, Congress approved that approach, amending the Act in a manner that presupposes that "adjacent" wetlands are covered "waters." And in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), this Court unanimously upheld the Corps' regulations interpreting the "waters of the United States" to include adjacent wetlands.

Congress had good reason to include adjacent wetlands in the CWA's comprehensive scheme. Wetlands play an essential role in protecting the chemical, physical, and biological integrity of neighboring waterways, including by filtering pollutants, storing water, and providing flood control. Leaving those wetlands unprotected would thwart the CWA's comprehensive scheme and seriously compromise its protection of traditional navigable waters.

B. There is no sound basis for requiring that wetlands can be treated as covered waters only if they satisfy a continuous-surface-connection test. The *Rapanos* plurality's rationale for adopting such a test rested

largely on a misreading of *Riverside Bayview*. The plurality's brief discussion did not otherwise attempt to ground its continuous-surface-connection test in the text, history, or purpose of the Act, and those considerations all weigh against foreclosing jurisdiction over wetlands that are adjacent to other covered waters but separated by a berm, dike, or other similar barrier. Treating a continuous-surface-connection test as the exclusive criterion for CWA coverage would also lead to arbitrary and illogical results, which is why even the 2020 NWPR rejected that approach.

C. The significant-nexus test, by contrast, ensures that the CWA covers those adjacent wetlands that significantly affect the chemical, physical, and biological integrity of the Nation's traditional navigable waters. The Act is designed to provide comprehensive protections to traditional navigable waters, which necessitates regulating the network of wetlands and tributaries that significantly affect those waters—even in the absence of a continuous surface connection. The significant-nexus test also provides an administrable and now-familiar standard, which is soundly based in science and well within Congress's constitutional authority.

D. This Court has held that the agencies' interpretations of the CWA are entitled to deference, and the Chief Justice's *Rapanos* concurrence emphasized that the agencies could have "avoided" the result in those consolidated cases through notice-and-comment rulemaking. 547 U.S. at 758. The agencies are following that course here and have issued a proposed rule refining their longstanding view of the CWA's coverage of adjacent wetlands.

II. In addition to proposing a continuous-surface-connection test for adjacent wetlands, petitioners now

assert that this Court should drastically restrict the tributaries covered by the CWA. Those arguments are not properly before the Court and lack merit in any event.

A. Petitioners' new arguments about tributaries contradict their assurance at the certiorari stage that they were *not* challenging the jurisdictional status of the tributary at issue here. And even if petitioners had not explicitly disclaimed the issue, it still would not be properly presented because it makes no difference to the disposition of this case.

B. If the Court considers petitioners' new arguments, it should reject them. Petitioners' proposed limitations contradict the text, structure, and history of the CWA. Indeed, petitioners' reading would thwart the Act's fundamental design by giving it a narrower scope than even the 1899 RHA.

First, petitioners' proposed exclusion of artificial tributaries is unsound. The text of the Act expressly contemplates that drainage ditches may be covered waters; the distinction between natural and artificial tributaries has no bearing on whether a tributary can carry water and pollutants into traditional navigable waters; and the *Rapanos* plurality indicated that the artificial drainage ditches at issue there would be covered tributaries as long as they contained relatively permanent flows of water (as the tributary here undisputedly does).

Second, petitioners' proposal to exclude all nonnavigable tributaries from the Act's coverage would radically depart from the way the statute has been understood for decades and would contradict the views of all nine Justices in *Rapanos*. Congress deliberately omitted the modifier "navigable" from the CWA's definition of covered waters precisely because it intended

to extend the Act beyond the waters covered by prior statutes keyed to navigability.

III. This Court should affirm the judgment of the court of appeals. That court correctly applied the significant-nexus test in upholding the EPA's determination that the wetlands on petitioners' property, which are located 30 feet from a tributary of Priest Lake and 300 feet from the Lake itself, are covered waters. The wetlands were historically part of a larger complex of wetlands from which water flowed directly into the Lake, and shallow subsurface flow remains. Taken as a whole, the wetland complex significantly affects the integrity of the Lake, including its water quality. Excluding such wetlands from the CWA's coverage would severely compromise the Act's protection of the Nation's navigable waters.

ARGUMENT

I. THE MERE PRESENCE OF A BERM OR OTHER BARRIER DOES NOT DEFEAT CWA COVERAGE OF AN ADJACENT WETLAND THAT HAS A SIGNIFICANT NEXUS TO A TRADITIONAL NAVIGABLE WATER

Petitioners do not dispute that at least some wetlands adjacent to other covered waters are covered by the CWA. Rather, the parties' disagreement concerns the criteria used to determine *which* wetlands are sufficiently connected to other covered waters to come within the "waters of the United States." 33 U.S.C. 1362(7). Petitioners assert that a restrictive version of the "continuous surface connection" test articulated by the plurality in *Rapanos* v. *United States*, 547 U.S. 715 (2006), is the exclusive basis for CWA coverage of wetlands. That rigid approach has no grounding in the CWA's text, structure, or history. It would upend an understanding of the Act's coverage that has prevailed

for nearly half a century. And it would seriously compromise the Act's comprehensive scheme by denying protection to many adjacent wetlands—and thus the covered waters with which those wetlands are inextricably linked.

Petitioners' approach would also make the Act's central jurisdictional provision turn on arbitrary and shifting distinctions. A small surface connection would suffice, but the presence of a berm would defeat coverage despite a pervasive hydrological connection between a waterway and an adjacent wetland. Building a levee to protect a river and its adjacent wetlands could strip the wetlands of CWA coverage. A natural river berm could defeat coverage even though its very existence was a result of floods reflecting the close connection between the river and the neighboring wetlands. And the Act's coverage could come and go as floods or storms created or breached natural barriers like berms and dunes.

This Court should reject petitioners' restrictive test. A continuous surface connection to a covered water is certainly a *permissible* basis for CWA coverage of wetlands. But it has never been—and should not become—the *only* basis. Rather, CWA coverage of wetlands can also be established under Justice Kennedy's significant-nexus test, as it was in this case.

A. The "Waters Of The United States" Include Adjacent Wetlands

As in answering any other question of statutory interpretation, the Court should interpret the CWA's text "with reference to the statutory context, 'structure, history, and purpose.'" *Abramski* v. *United States*, 573 U.S. 169, 179 (2014) (citation omitted). All of those interpretive tools, as well as this Court's precedent, establish that the waters covered by the CWA include adjacent wetlands—even if those wetlands are separated by a berm or other barrier.

1. Although the CWA applies to "navigable waters," Congress broadly defined that term to include "the waters of the United States." 33 U.S.C. 1362(7). The breadth of that definition reflected a deliberate choice. The relevant House bill would have defined "navigable waters" as the "navigable waters of the United States, including the territorial seas." H.R. Rep. No. 911, 92d Cong., 2d Sess. 356 (1972) (emphasis omitted). But in conference the word "navigable" was deleted from that definition, and the conference report urged that the term "be given the broadest possible constitutional interpretation." S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972).

The CWA's broad definition is naturally read to encompass wetlands. Wetlands, such as swamps, bogs, marshes, and fens, are "transitional areas between terrestrial and aquatic ecosystems." 2015 EPA Report 2-5. The presence of water is "universally regarded as the most basic feature of wetlands." T. E. Dahl, U.S. Fish & Wildlife Serv., *Status and Trends of Wetlands in the Conterminous United States 2004 to 2009*, at 20 (Sept. 2011). Indeed, the "essential characteristic[]" of a wetland is "recurrent, sustained inundation or saturation at

or near the surface." NRC Report 3 (emphases omitted).

After the CWA's enactment, the Corps initially excluded most wetlands from the Section 404 permitting program by taking the position that the program applied only to the waters covered by Sections 9 and 10 of the Rivers and Harbors Act (RHA). The Corps' initial view was premised on prior uses of "navigable waters" as a term of art for waters that Congress may regulate as channels of interstate commerce. 39 Fed. Reg. at 12,115. That view was roundly criticized as failing to reflect the full scope of the CWA, and the Corps quickly adopted a broader definition of "waters of the United States" that encompassed wetlands adjacent to other covered waters. See pp. 5-6, *supra*.

The Corps defined "adjacent" to mean "bordering, contiguous, or neighboring," and it has adhered to that definition since 1977. 42 Fed. Reg. at 37,144; see 33 C.F.R. 328.3(c) (2008). That definition does not require that the wetlands directly abut another covered water. To the contrary, the 1977 regulations explicitly provided that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" 33 C.F.R. 323.2(d) (1978); see 33 C.F.R. 328.3(c) (2008) (same).

2. The Corps' revised regulations—and specifically the CWA's application to adjacent wetlands—were the subject of extensive congressional hearings. See, *e.g.*, *Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Senate Comm. on Public Works*, 94th Cong., 2d Sess. 38-44, 68-69, 239, 325-326 (1976); *Development of New Regulations by the Corps of Engineers, Implementing Section*

404: Hearings before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation, 94th Cong., 1st Sess. 5-7, 10, 31 (1975). The House then passed a bill that would have limited Section 404 to a subset of traditional navigable waters and wetlands adjacent to them, but the Senate rejected that proposal. See 123 Cong. Rec. 10,420-10,421, 10,434, 26,728 (1977).

Congress instead modified Section 404 in a way that incorporated into the statutory text an explicit endorsement of the Corps' inclusion of adjacent wetlands. 1977 Act § 67(b), 91 Stat. 1601. That amendment authorizes States and Tribes to administer the Section 404 permitting program covering "the discharge of dredged or fill material into *the navigable waters* (*other than those waters* which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce * * * *including wetlands adjacent thereto*)." 33 U.S.C. 1344(g)(1) (emphases added); see 33 U.S.C. 1377(e) (extension to Tribes).

The italicized reservation of authority to the Corps presupposed that "wetlands adjacent" to traditional navigable waters were subject to the Section 404 program, since otherwise the exclusion of those wetlands from the States' and Tribes' potential permitting authority would have been superfluous. The 1977 legislative record confirms that understanding. See 1977 Senate Report 10 (stating that committee wished to "maintain[]" coverage of wetlands); H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 98, 104 (1977) (stating that the Corps will "continue" to exercise Section 404 jurisdiction over "adjacent wetlands").

By using the pre-existing regulatory term "adjacent" wetlands, Congress signaled its intent to incorporate the Corps' regulatory conception of adjacency. "When a statutory term is 'obviously transplanted from another legal source,' it 'brings the old soil with it.'" *Taggart* v. *Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (citation omitted). Here, that soil includes the Corps' specification that a berm or barrier does not defeat adjacency. And that specification also accords with the term's plain meaning. One would naturally describe a marsh as "adjacent" to a stream even if they were separated by a berm or levee. Contemporaneous dictionaries likewise defined the term "adjacent" in ways that do not require direct abutment. See *Black's Law Dictionary* 62 (rev. 4th ed. 1968) ("Lying near or close to; sometimes, contiguous; neighboring. *Adjacent* implies that the two objects are not widely separated, though they may not actually touch[.]") (capitalization altered; citation and emphasis omitted); *The American Heritage Dictionary of the English Language* 16 (1975) ("Close to; next to; lying near; adjoining."); *Webster's New International Dictionary of the English Language* 32 (2d ed. 1958) ("Lying near, close, or contiguous; neighboring; bordering on.") (emphasis omitted).

3. In *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), this Court considered the "language, policies, and history" of the CWA, including the amendments in the 1977 Act, and unanimously upheld the Corps' exercise of CWA jurisdiction over adjacent wetlands. *Id.* at 139. The Court held that the Corps' regulation defining "the waters of the United States" to include wetlands adjacent to navigable waters "is valid as a construction" of the Act. *Id.* at 131.

The Court first observed that "between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land." *Riverside Bayview*, 474 U.S. at 132. To administer the statute, the Corps therefore "must necessarily choose some point at which water ends and land begins." *Ibid.* The Court further explained that, in drawing that jurisdictional line, the Corps may take into account "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems." *Id.* at 133. It quoted with apparent approval the Corps' statement that "Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system." *Id.* at 134 (quoting 42 Fed. Reg. at 37,128). The Court concluded that "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 Act." *Ibid.*

The Court also viewed the 1977 Act as approving the Corps' assertion of jurisdiction over adjacent wetlands. *Riverside Bayview*, 474 U.S. at 137-139. The Court observed that "the scope of the Corps' asserted jurisdiction over wetlands was specifically brought to Congress' attention, and Congress rejected measures designed to curb the Corps' jurisdiction in large part because of its concern that protection of wetlands would be unduly hampered by a narrowed definition of 'navigable waters.'" *Id.* at 137. The Court also cited Section 404(g)(1) as express textual evidence "that the term 'waters' included adjacent wetlands." *Id.* at 138.

4. Congress had good reason to approve the inclusion of adjacent wetlands within the "waters of the United States." Wetlands affect "the chemical, physical, and biological integrity" of downstream waters by performing essential water-quality functions, "including interruption and delay of the transport of waterborne contaminants over long distances; retention of sediment; retention and slow release of flood waters; and prevention and mitigation of drinking water contamination." 86 Fed. Reg. at 69,392; see 2015 EPA Report ES-3 (explaining that wetlands "improve water quality through the assimilation, transformation, or sequestration of pollutants, including excess nutrients and chemical contaminants such as pesticides and metals"). Allowing wetlands to be filled without any permitting requirement would deprive interconnected aquatic systems of those benefits and thereby threaten the integrity of traditional navigable waters.

The same reasoning applies with full force when an adjacent wetland is separated from the neighboring waters by a berm or barrier. Adjacent wetlands behind berms can serve important water-quality functions, filtering pollutants and sediment before they reach downstream waters, and can help reduce the impacts of storm surges caused by hurricanes. 86 Fed. Reg. at 69,429. Whether natural or manmade, "berms, dikes, and similar features * * * typically do not block all water flow," since water can "overtop" or flow beneath them. *Id.* at 69,421, 69,429. And "filling in wetlands separated from another water by a berm can mean that floodwater, impurities, or runoff that would have been stored or contained in the wetlands will instead flow out to major waterways." *Rapanos*, 547 U.S. at 775 (Kennedy, J., concurring in the judgment).

B. There Is No Sound Basis For Imposing Petitioners' Rigid Continuous-Surface-Connection Requirement

Petitioners urge the Court to adopt, as the exclusive basis for CWA coverage of wetlands, a version of the continuous-surface-connection test advocated by the *Rapanos* plurality. But the plurality's justifications for that test are unpersuasive. And like the plurality, petitioners fail to acknowledge or justify the anomalous results that their rigid requirement would produce.

1. In concluding that only wetlands with a continuous surface connection to other covered waters are protected by the CWA, the *Rapanos* plurality relied primarily on two related propositions that it viewed as implicit in *Riverside Bayview*. First, the plurality suggested that the CWA term "waters" cannot reasonably be construed to cover wetlands *as such*, and that discharges into wetlands therefore can be regulated only when particular wetlands are properly deemed *part of* other waters to which they are adjacent. See 547 U.S. at 740. Second, the plurality concluded that this requirement will be satisfied only when "the wetland has a continuous surface connection with [the adjacent] water." *Id.* at 742. Those propositions are unsound and rest on a misreading of *Riverside Bayview*.

a. The *Rapanos* plurality quoted the *Riverside Bayview* Court's statement that, "[o]n a purely linguistic level, it may appear unreasonable to classify 'lands,' wet or otherwise, as 'waters.'" 547 U.S. at 740 (quoting *Riverside Bayview*, 474 U.S. at 132). In the next sentence of its opinion, however, the *Riverside Bayview* Court stated that "[s]uch a simplistic response * * * does justice neither to the problem faced by the Corps in defining the scope of its authority under § 404(a) nor to the realities of the problem of water pollution that the

[CWA] was intended to combat." 474 U.S. at 132. The Court concluded that "adjacent wetlands may be defined as waters under the Act." *Id.* at 134. And, as explained above, the CWA's text, history, and purpose likewise confirm that adjacent wetlands are themselves "waters" covered by the Act. See pp. 19-24, *supra*.

b. The *Rapanos* plurality read *Riverside Bayview* as resting on the "inherent ambiguity in drawing the boundaries of any 'waters.'" 547 U.S. at 740. The plurality also described *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001), as having read *Riverside Bayview* to be "refer[ring] to the close connection between waters and the wetlands that they gradually blend into." *Rapanos*, 547 U.S. at 741. The plurality concluded that "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right" can be protected by the CWA, because only in that circumstance is it "difficult to determine where the 'water' ends and the 'wetland' begins." *Id.* at 742.

The *Rapanos* plurality misconceived the nature of the line-drawing problem in *Riverside Bayview*. The Court in that case identified "shallows, marshes, mudflats, swamps, [and] bogs" as examples of "areas that are not wholly aquatic but nevertheless fall far short of being dry land," and it observed that "[w]here on this continuum to find the limit of 'waters' is far from obvious." 474 U.S. at 132. The line-drawing problem in *Riverside Bayview* thus did not involve identifying the outer boundary of a covered water *at a particular site*. Rather, it involved the criteria that should be used to determine whether particular *types* of hydrogeographic features should be regarded as "waters" under the Act.

That line-drawing problem—in essence, determining how wet is wet enough—can arise even when a particular swamp or marsh is separated by a barrier from a nearby lake or stream. After discussing at some length the regulatory definition of "wetlands" and its application to the property at issue in that case, see *id.* at 129-131, the *Riverside Bayview* Court upheld as reasonable "the Corps' approach of defining adjacent wetlands as 'waters' within the meaning of" the CWA, *id.* at 132.

2. As further support for its continuous-surface-connection test, the *Rapanos* plurality invoked *SWANCC*'s holding that certain isolated ponds were not covered by the CWA. The *SWANCC* Court had described *Riverside Bayview* as resting on "the significant nexus between the wetlands and" the adjacent waters. 531 U.S. at 167. The *Rapanos* plurality in turn described *SWANCC* as "reject[ing] the notion that the ecological considerations upon which the Corps relied in *Riverside Bayview* * * * provided an *independent* basis for including entities like 'wetlands' * * * within the phrase 'the waters of the United States.'" 547 U.S. at 741 (citation omitted). In the plurality's view, "*SWANCC* found such ecological considerations irrelevant to the question whether physically isolated waters come within the Corps' jurisdiction," because the coverage inquiry for the "[i]solated ponds" at issue in that case "presented no boundary-drawing problem that would have justified the invocation of ecological factors." *Id.* at 741-742.

Contrary to the *Rapanos* plurality's suggestion, the Court in *SWANCC* did not hold that the *particular* "ecological considerations upon which the Corps relied in *Riverside Bayview*," 547 U.S. at 741—*i.e.*, the potential importance of wetlands to the quality of adjacent

waters—were irrelevant to CWA jurisdiction. Rather, the Court held that a *different* ecological concern, namely the potential use of the isolated ponds as habitat for migratory birds, could not justify treating those ponds as "waters of the United States." See 531 U.S. at 164-165, 171-172. That ecological concern was not cognizable because it was unrelated to "what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172. Here, by contrast, as in *Riverside Bayview*, the government seeks to protect adjacent wetlands based on their importance to the integrity of traditional navigable waters nearby.

3. Aside from its mistaken reliance on *Riverside Bayview* and *SWANCC*, the *Rapanos* plurality did not attempt to ground the continuous-surface-connection test in the CWA's text or history. See 547 U.S. at 739-742. And making a continuous surface connection a necessary condition for CWA coverage would affirmatively undermine the Act's purpose by creating an illogical jurisdictional gap. It would include any wetland with a continuous surface connection, no matter how small. But it would categorically exclude wetlands separated from covered waters by a berm, dike, sand dune, or other natural or manmade barrier, even if they are closely connected by subsurface flow or periodic floods—and regardless of such wetlands' ecological importance to covered waters nearby and downstream. "[O]verwhelming" scientific evidence shows that such wetlands may significantly affect downstream waters. 86 Fed. Reg. at 69,398 (discussing the evidence that wetlands lacking a continuous surface connection may nonetheless "improv[e] water quality" downstream)

(citing 2015 EPA Report 4-20 to 4-38); see EPA & Corps, *Technical Support Document for the Proposed "Revised Definition of 'Waters of the United States'" Rule* 179-189 (Nov. 18, 2021) (*Technical Support Document*).

4. The continuous-surface-connection test was not briefed in *Rapanos*. See 547 U.S. at 800 (Stevens, J., dissenting). And the plurality's terse discussion of the issue did not elaborate on that test in any detail: The plurality distinguished a "continuous surface connection" from "an intermittent, physically remote hydrological connection," but gave little further guidance on the application of its test. *Id.* at 742 (plurality opinion). That has not posed difficulties so long as the continuous-surface-connection test has been understood as a sufficient but not necessary condition for CWA coverage. But if this Court made it the exclusive test, it would produce a host of thorny questions and potentially arbitrary results.

Petitioners, for example, repeatedly describe the *Rapanos* plurality's test as requiring a "continuous surface-*water* connection." Pet. Br. 6 (emphasis added); see *id.* at 8, 17, 21-22, 25. That formulation appears in Justice Kennedy's concurring opinion in *Rapanos*, see 547 U.S. at 774, but not in the plurality opinion itself. The plurality opinion instead refers interchangeably to a "continuous surface connection" and a "continuous physical connection." *Id.* at 742, 751 n.13, 757. The agencies have determined that a continuous surface connection can be present when a wetland directly abuts another covered water, even if surface water is not continuously present between the two. See EPA & Corps, *Clean Water Act Jurisdiction Following the U.S. Supreme*

Court's Decision in Rapanos v. United States & Carabell v. United States 7 & n.28 (Dec. 2, 2008) (*Rapanos* Guidance). Petitioners' demand for a continuous surface *water* connection would effectively limit CWA protection of wetlands to areas that are inundated throughout the year. But many wetlands have surface water only seasonally or intermittently, and no scientific or regulatory definition of wetlands demands year-round surface water. See, *e.g.*, 33 C.F.R. 328.3(b) (2008); NRC Report 3-5.

The continuous-surface-connection test would also exclude jurisdiction and allow filling of wetlands that are adjacent to a river but separated from it by a levee. The Mississippi River, for example, features an extensive levee system built to prevent flooding. The Upper Mississippi Valley alone includes more than 10,000 miles of levees. *Technical Support Document* 180. Those levees would preclude CWA coverage under the continuous-surface-connection test even though adjacent wetlands are often a necessary part of the flood-control project—detaining floodwaters to protect surrounding and downstream communities—and even though the wetlands maintain a hydrologic connection to the river system. Cf. R. Daniel Smith & Charles V. Klimas, Eng'r Research & Dev. Ctr., *A Regional Guidebook for Applying the Hydrogeomorphic Approach to Assessing Wetland Functions of Selected Regional Wetland Subclasses, Yazoo Basin, Lower Mississippi River Alluvial Valley* 47 (Apr. 2002).

More broadly, a continuous-surface-connection requirement could make loss of CWA jurisdiction a consequence of building a road, levee, or other barrier—even if the construction had little or no effect on the interde-

pendent relationship between a wetland and a neighboring water. That could create perverse incentives to build or modify such barriers in a manner aimed either at destroying or preserving federal jurisdiction.

A continuous-surface-connection test would also yield vexing problems as applied to natural barriers like "berms, banks, or dunes." 85 Fed. Reg. at 22,307. As the agencies explained in the 2020 NWPR, those "natural separations" are themselves "evidence of a dynamic and regular direct hydrological surface connection," *ibid.*, and are thus evidence that the wetlands are "inseparably bound up with" the adjacent waters, *id.* at 22,311. A "natural river berm," for example, "can be created by repeated flooding and sedimentation events when a river overtops its banks and deposits sediment between the river and a wetland." *Ibid.* For precisely that reason, the 2020 NWPR "maintain[ed] jurisdiction" over adjacent wetlands separated by natural barriers even as it followed the *Rapanos* plurality in other respects. *Id.* at 22,307. Any other rule would mean that CWA jurisdiction would appear and disappear as floods, storms, erosion, and other natural processes created or breached river berms and other barriers. Under a strict reading of petitioners' test, even a beaver dam built between a wetland and a covered water could sever jurisdiction over the wetland.

C. The Significant-Nexus Test Is A Permissible Basis For Identifying Adjacent Wetlands Covered By The CWA

The CWA's broad term "waters of the United States" and the included concept of adjacent wetlands are not self-defining and require administrative or judicial construction. Any viable construction must be consistent with the Act's text, structure, and purpose; must comport with this Court's precedent; and must not

rely on arbitrary, unreasonable, or unworkable lines. A continuous-surface-connection test alone does not satisfy that standard, but Justice Kennedy's significant-nexus test does. Under that test, adjacent wetlands are covered by the Act if they "possess a 'significant nexus' to" traditional navigable waters. *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring in the judgment) (citation omitted). And wetlands "possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780. Petitioners' various criticisms (Br. 45-49) of that test lack merit.

1. The significant-nexus test responds to the fact that the crucial CWA language is "Janus-faced," with two parts pointing in potentially different directions. *Scialabba* v. *Cuellar de Osorio*, 573 U.S. 41, 57 (2014) (plurality opinion). On the one hand, the text of the *definition*—"the waters of the United States, including the territorial seas," 33 U.S.C. 1362(7)—is broad and unqualified. That definition could be read literally to refer to all water bodies within the United States. Cf. *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 492 (1987) (stating that the Act applies to "virtually all bodies of water"). Under that reading, the statute's coverage would be limited only by the outer bounds of Congress's authority to regulate interstate commerce.

On the other hand, the *term being defined* ("navigable waters") had been used in prior laws with a more limited reach. When "a statute includes an explicit definition," a court "must follow that definition." *Stenberg* v. *Carhart*, 530 U.S. 914, 942 (2000). But the term being

defined nonetheless may shed light on how the definition is best read. See, *e.g.*, *Johnson* v. *United States*, 559 U.S. 133, 140 (2010). Thus, in *SWANCC* the Court observed that the "term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." 531 U.S. at 172; see pp. 27-28, *supra* (discussing *SWANCC*). Although *SWANCC* did not involve wetlands, the Court's reasoning indicates that CWA coverage of wetlands is warranted to the extent, but only to the extent, such coverage will further the Act's overarching purpose of protecting traditional navigable waters.

The significant-nexus test reasonably implements that understanding of the CWA's text and design. It recognizes both that protection of traditional navigable waters is the ultimate objective of the CWA's discharge prohibition and that the protection of such waters requires restrictions on discharges into additional waters as well. A "significant nexus" is a shorthand description of adjacent wetlands that "significantly affect the chemical, physical, and biological integrity" of traditional navigable waters. *Rapanos*, 547 U.S. at 780-781 (Kennedy, J., concurring in the judgment). That standard is grounded in Congress's stated intent to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* at 759 (quoting 33 U.S.C. 1251(a)).

Riverside Bayview strongly supports that approach. There, the Court recognized that, in determining whether wetlands are appropriately treated as "waters" under the CWA, the Corps could take account of "the problem of water pollution that the [Act] was intended

to combat." 474 U.S. at 132. The Court identified "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems" as a principal factor supporting the Corps' decision "to interpret the term 'waters' to encompass wetlands adjacent to waters as more conventionally defined." *Id.* at 133. And the Court recognized that, in determining the proper characterization of hydrogeographic features that differ substantially *both* from paradigmatic "waters" (*e.g.*, lakes and streams) *and* from dry land, the agencies can take into account the statutory purpose—ensuring adequate protection for traditional navigable waters—for which that determination is being made. *Id.* at 134. That reasoning strongly suggests that a "significant nexus" to a traditional navigable water is a sufficient basis for CWA coverage of a wetland.

2. Petitioners argue (Br. 46) that the significant-nexus test gives undue weight to protection of water quality at the expense of other objectives, including preserving "the primary responsibilities" of States in controlling pollution, 33 U.S.C. 1251(b). But restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters is the CWA's primary goal, set forth in the first words of the first section of the statute. And the statute is designed to address that objective through a "comprehensive" federal program of pollution control. 33 U.S.C. 1252(a).

Achievement of Congress's purposes requires regulation of discharges *both* into traditional navigable waters *and* into other waters whose "interconnection[s]" with traditional navigable waters make them an appropriate subject of federal concern. *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment); see 1971

Senate Report at 77 (noting that "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source") (quoted in *Riverside Bayview*, 474 U.S. at 133). Federal protection of the Chesapeake Bay, for example, would be fundamentally incomplete and ineffectual if polluters could dump fill into the interconnected network of adjacent wetlands in the same watershed. The significant-nexus test identifies those wetlands that implicate the CWA's core concern of safeguarding traditional navigable waters.

The significant-nexus test also respects the role of States and Tribes by limiting the Act's coverage to wetlands and other waters that "significantly affect the integrity of waters where the federal interest is indisputable," such as traditional navigable waters and the territorial seas, while leaving other "[w]aters that do not implicate" such a federal interest "entirely to state and tribal protection and management." 86 Fed. Reg. at 69,399-69,400.

3. Petitioners are wrong to assert that the significant-nexus test is "'opaque'" or produces "illogical" results. Pet. Br. 46-47 (citation omitted). In fact, application of the test reflects the empirical judgments that scientists routinely make. In 2015, the EPA produced an exhaustive "peer-reviewed compilation and analysis" of the "current scientific understanding of the connectivity of and mechanisms by which streams and wetlands, singly or in combination, affect the chemical, physical, and biological integrity of downstream waters." 80 Fed. Reg. at 37,061-37,062. That report explains the basic science behind evaluating the degree of connection that wetlands and other waters have with downstream waters, as well as the associated effects of those connections. 2015 EPA Report ES-4; see *Technical Support*

Document 62-89. Whether the significant-nexus test is satisfied in a particular case is "not a purely scientific determination." 86 Fed. Reg. at 69,390. But the test is built on scientific and measurable concepts, and the agencies' application of it in a given case is subject to judicial review. See 5 U.S.C. 706(2)(A).

Petitioners' amici assert that the continuous-surface-connection test is easier to apply than the significant-nexus test. *E.g.*, Am. Petroleum Inst. Br. 17-21. But a continuous-surface-connection test would yield hard questions of its own. See pp. 29-31, *supra*. And any greater simplicity offered by the continuous-surface-connection test would come at the expense of arbitrariness and a profound mismatch with the CWA's design. Cf. *County of Maui* v. *Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1470, 1476 (2020) (rejecting similar arguments about a need for bright-line certainty in favor of a fact-specific test). The significant-nexus test is administrable, and the agencies now have "over a decade of nationwide experience" with it. 86 Fed. Reg. at 69,405. And individuals uncertain about the status of wetlands on their property may obtain, at no cost to them, a jurisdictional determination from the Corps. See Corps, *Regulatory Guidance Letter: No. 16-01*, at 1-2 (Oct. 2016).

Moreover, a finding of CWA jurisdiction over adjacent wetlands means only that *unauthorized* discharges into the wetlands are prohibited. See 33 U.S.C. 1311(a); cf. *Riverside Bayview*, 474 U.S. at 135 n.9. The Corps may grant a permit to authorize the discharge of dredged or fill material into covered wetlands and other waters, and its nationwide-permitting program, including for residential developments, provides a streamlined and cost-efficient way for individuals and businesses to undertake dredge and fill activities that will

have only minimal adverse environmental effects. 33 U.S.C. 1344(a) and (e)(1); see 33 C.F.R. 330.1(b).

Repeating certain cost estimates cited by the *Rapanos* plurality, 547 U.S. at 721, petitioners assert (Br. 10) that the Section 404 permitting process is cumbersome or expensive. Those figures are overstated. The vast majority of Section 404 authorizations occur under the Corps' streamlined general permits, rather than site-specific permits. See Corps, *Regulatory Impact Analysis for 2021 Reissuance and Modification of Nationwide Permits* 10 (Jan. 3, 2021). Many general permits allow project proponents to discharge pollutants without submitting any application to the Corps. *Id.* at 9. Even for those general permits that require advance notice to the agency, the average processing time for applications is less than two months. *Id.* at 11. The Corps estimates that the total Section 404 permitting cost for a typical project covered by a nationwide permit requiring advance notice varies from about $4400 to $14,700. *Id.* at 25. Those costs to individual dischargers are far outweighed by the public benefits that result from the CWA's protection of wetlands. See 86 Fed. Reg. at 69,446.

4. Finally, a principal advantage of the significant-nexus test is that it focuses directly and specifically on protecting traditional navigable waters, which is the ultimate justification for the CWA's discharge prohibition. Other aspects of the jurisdictional inquiry, such as the determination whether a wetland is adjacent to another covered water, are useful but inexact proxies for importance to the larger aquatic environment. But an affirmative finding under the significant-nexus test is by definition a finding that Congress's core purpose is implicated.

Petitioners' constitutional concerns (Br. 47-48) are therefore insubstantial. By design, the significant-nexus test permits jurisdiction over wetlands only if they significantly affect the waters over which Congress has unquestioned Article I authority. See, *e.g.*, *United States* v. *Lopez*, 514 U.S. 549, 558 (1995); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981). Indeed, although petitioners advocate a highly restrictive view of the CWA's coverage, they (a) recognize that "Congress's power over the channels of interstate commerce authorizes federal regulation of" activities that do not occur on traditional navigable waters "but nonetheless affect[] them" (Pet. Br. 35), and (b) construe the CWA's text as manifesting Congress's "desire to go to the full extent of the channels of commerce power" (*id.* at 44). Taken together, those propositions further confirm that the CWA protects wetlands with a "significant nexus" to traditional navigable waters.

D. The Agencies' Understanding Of The CWA's Coverage Of Adjacent Wetlands Is Entitled To Deference

Congress entrusted the administration of the CWA to the Corps and the EPA, and it authorized both agencies to issue regulations implementing the Act. See 33 U.S.C. 1344, 1361. Since before the 1977 Act, the agencies' regulations have construed the CWA to cover wetlands (like the ones at issue here) that are adjacent to, but do not directly abut, a tributary of a traditional navigable water. See 42 Fed. Reg. at 37,144; p. 20, *supra*. In upholding that interpretation of the Act, the Court in *Riverside Bayview* held that the agencies' interpretation warrants deference so long as it is "reasonable." 474 U.S. at 131 (citing *Chevron U.S.A. Inc.* v. *NRDC,*

Inc., 467 U.S. 837, 842-845 (1984)). Petitioners do not ask this Court to revisit that approach here.

In *Rapanos*, the Chief Justice likewise explained that, given the "broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the Clean Water Act, the Corps and the EPA would have enjoyed plenty of room to operate" if they had addressed the relevant questions through rulemaking. 547 U.S. at 758 (Roberts, C.J., concurring). But the Chief Justice observed that the agencies had failed to complete a notice-and-comment rulemaking after this Court's decision in *SWANCC*. *Ibid.* And he emphasized that the agency could have "avoided" the result in *Rapanos* had it responded to the *SWANCC* decision by identifying additional jurisdictional limitations by regulation.

Here, the agencies are taking the path prescribed by the Chief Justice. The agencies are currently engaged in notice-and-comment rulemaking that, among other things, addresses the CWA's coverage of wetlands and responds to this Court's decision in *Rapanos*. See 86 Fed. Reg. at 69,373. Before *Rapanos*, the agencies treated adjacency to other covered waters, without more, as a sufficient basis for exercising regulatory jurisdiction over wetlands. See *Riverside Bayview*, 474 U.S. at 131. The current proposed rule, however, generally requires *also* satisfying either the significant-nexus test or the continuous-surface-connection test. 86 Fed. Reg. at 69,373, 69,449-69,450. The proposed rule thus covers a narrower set of wetlands than the 1986 rule that was in effect when *Rapanos* was decided and when petitioners' discharges occurred. That approach reflects the agencies' consideration of "the statute as a whole, the scientific record, relevant Supreme Court

case law, and the agencies' experience and expertise after more than 30 years of implementing the 1986 regulations." 86 Fed. Reg. at 69,374.

The comment period on the proposed rule closed on February 7, 2022. 86 Fed. Reg. at 69,372. The agencies currently expect to issue a final regulation by the end of the year.

II. PETITIONERS' RESTRICTIVE VIEW OF THE TRIBUTARIES COVERED BY THE CWA IS NOT PROPERLY BEFORE THE COURT AND LACKS MERIT IN ANY EVENT

In addition to arguing that the CWA covers only those wetlands with a continuous surface connection to other covered waters, petitioners now assert (*e.g.*, Br. 5-6, 22-24) that the Court should adopt a highly restrictive view of the tributaries protected by the Act. Petitioners argue that, even if their wetlands had a continuous surface connection to the tributary that feeds into Priest Lake, those wetlands would fall outside the CWA's coverage because the tributary (1) is a "constructed channel" rather than a natural hydrogeographic feature and (2) "is not a traditional navigable water or an intrastate navigable water." Pet. Br. 50, 52 (citation omitted). The Court should not consider those arguments because they contradict assurances petitioners made in seeking this Court's review and are irrelevant to the disposition of this case. If the Court does consider petitioners' new arguments, it should reject them. Petitioners' restrictive view of the CWA contradicts every opinion in *Rapanos*, as well as the text, purpose, and history of the Act. Indeed, petitioners' new interpretation would radically transform the CWA, giving it a more constricted scope than the 1899 RHA.

A. The Court Should Not Consider Petitioners' New Arguments About Covered Tributaries

For two independent reasons, the Court should not consider petitioners' new arguments about tributaries.

First, in seeking this Court's review, petitioners stated (Cert. Reply Br. 8) that they were *not* disputing "the extent to which the Clean Water Act regulates tributaries of traditional navigable waters," and specifically added that they were not "contest[ing] jurisdiction over" the unnamed tributary in this case. Petitioners touted (*id.* at 9) the limited nature of their challenge as reason to grant certiorari. Petitioners' merits brief, by contrast, argues (at 50, 52) that the tributary is *not* a "water[] of the United States." The Court should not entertain arguments that petitioners have unequivocally disclaimed.

Second, petitioners' new arguments have no bearing on the proper disposition of this case. The court of appeals held that the EPA had "reasonably determined that [petitioners'] property contains wetlands that share a significant nexus with Priest Lake, such that the lot was regulable under the CWA and the relevant regulations." Pet. App. A36. In this Court, petitioners do not dispute that significant-nexus finding, nor do they contest Priest Lake's status as a traditional navigable water. If the Court holds that the significant-nexus test provides a permissible basis for CWA coverage, the court of appeals' judgment therefore must be affirmed. And if the Court holds that a continuous surface connection is required, the judgment below can be reversed on that ground alone, since the government does not contend that petitioners' wetlands have a continuous surface connection either to the tributary or to Priest Lake itself. Petitioners essentially ask the Court to decide

whether a continuous surface connection to the unnamed tributary *would have* supported CWA coverage if such a connection existed. But the Court's resolution of that question would be academic.

B. Petitioners' New Arguments Lack Merit

If the Court considers petitioners' new arguments concerning the jurisdictional status of the tributary, it should reject them. Petitioners' arguments are built on the premise that the CWA departed only incrementally from prior federal water-pollution statutes. But as the Act's text and structure demonstrate—and as this Court has long recognized—the CWA was a complete overhaul of existing law that marked a dramatic step forward in the United States' commitment to environmental protection. The practical implications of petitioners' arguments, moreover, go well beyond protection of wetlands. Petitioners' theory would, for example, allow the unpermitted filling of every tributary to Priest Lake, choking off the Lake's sources of water and destroying its chemical, physical, and biological integrity.

1. Petitioners argue (Br. 5-6) that CWA coverage of adjacent wetlands is limited to those wetlands that have a "continuous surface-water connection" to "a stream, ocean, river, lake, or similar hydrogeographic feature that in ordinary parlance would be called a 'water.'" Petitioners contend that, even if the wetlands on their property had such a connection to the unnamed tributary across the road, the wetlands still would not be covered because the tributary is "not a 'water' but rather a 'constructed channel,' *i.e.*, a type of non-water." Pet. Br. 50 (citation omitted).

Petitioners' proposed distinction between natural and artificial tributaries is unsound. Most obviously, it

would render superfluous Section 404's exception for "the discharge of dredged or fill material * * * for the * * * maintenance of drainage ditches," 33 U.S.C. 1344(f)(1)(C), because drainage ditches would not be covered in the first place. More broadly, many of the Nation's urban waterways are channelized, and the CWA has long been understood to encompass "natural, modified, or constructed" tributaries of other covered waters. 80 Fed. Reg. at 37,078. The Act's specialized definition of "navigable waters" does not turn on any such distinctions, which have no bearing on a tributary's capacity to carry water (and pollutants) into traditional navigable waters. See, *e.g.*, *Technical Support Document* 149 n.47 (explaining that manmade ditches "perform many of the same functions as natural tributaries," including "convey[ing] water that carries nutrients, pollutants, and other constituents, both good and bad, to downstream traditional navigable waters").

Petitioners' proposed distinction is also inconsistent with *Rapanos*. That decision addressed consolidated cases involving wetlands connected to traditional navigable waters by "ditches or man-made drains." *Rapanos*, 547 U.S. at 729 (plurality opinion). The *Rapanos* plurality construed the Act to cover only tributaries that are "relatively permanent," on the theory that only those tributaries are akin to the "'geographical features'" listed in a dictionary definition of "water," *i.e.*, "'streams, oceans, rivers, and lakes.'" *Id.* at 739 (brackets and ellipsis omitted) (quoting *Webster's New International Dictionary* 2882 (2d ed. 1954)). The plurality concluded that the cases should be remanded for the lower courts to determine whether the channels at issue satisfied the plurality's rule that CWA coverage of tributaries is limited to those with "relatively permanent"

flow. *Id.* at 757. Those further lower-court proceedings would have been superfluous if the manmade character of the ditches and drains had precluded their treatment as CWA "waters."

Petitioners rely (Br. 23, 26 n.10, 50-51) on a footnote in which the *Rapanos* plurality observed that "relatively continuous flow is a *necessary* condition for qualification as a 'water,' not an *adequate* condition." 547 U.S. at 736 n.7. But the context in which that statement appeared makes clear that the plurality was merely explaining why some water-treatment systems may be excluded from the scope of the "waters of the United States." See *ibid.* In the same footnote, the plurality stated that, when "ditches, channels, conduits and the like * * * 'hold water permanently,'" "we usually refer to them as 'rivers,' 'creeks,' or 'streams,'" *ibid.* (citation omitted), and that "[t]his distinction is particularly apt in the context of a statute regulating *water* quality," *ibid.* The clear thrust of the opinion was that, so long as a particular tributary is relatively permanent (as the tributary at issue in this case undisputedly is), its natural or manmade character is irrelevant.[3]

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[3] Many of petitioners' amici urge the Court to adopt the *Rapanos* plurality's view that a nonnavigable tributary must be relatively permanent to come within the "waters of the United States." *E.g.*, Freeport-McMoran Inc. Br. 20-24. That question is not presented here. As the government explained in its brief in opposition (at 21-22), the EPA determined that the unnamed tributary across the road from the wetlands on petitioners' property is "relatively permanent," and the court of appeals upheld that determination. Pet. App. A33-A34; see J.A. 30, 33. Petitioners acknowledge (Br. 51) that "[t]he ditch does have a continuous (though small) year-round flow." This case therefore presents no occasion to address the proper treatment of ephemeral or intermittent tributaries.

2. As the second step of their new framework, petitioners would limit the term "waters of the United States" to "traditional navigable waters and intrastate navigable waters that link with other modes of transport to form interstate channels of commerce." Pet. Br. 42; see *id.* at 36-42.[4] Petitioners thus would exclude from the "waters of the United States" all nonnavigable tributaries of traditional navigable waters—and presumably nonnavigable interstate waters and nonnavigable impoundments as well, see 33 C.F.R. 328.3(a)(2) and (4) (2008). Pet. Br. 23-24. Petitioners' argument is at odds with the views of all nine Justices in *Rapanos*, and it would undo Congress's considered and deliberate choice to expand the CWA beyond the traditional navigable waters covered by the prior statutes Congress had found lacking.

The *Rapanos* plurality recognized that a wetland may be treated as a covered water if it has a continuous surface connection to a "relatively permanent" tributary that "connect[s] to" traditional navigable waters, without any further inquiry into the tributary's navigability or status as a link in a channel of commerce. 547 U.S. at 742. The plurality further observed that the 1977 Act's authorization for States to administer the Section 404 program for "navigable waters . . . *other than*" those used or suitable for use "to transport interstate or foreign commerce," *id.* at 731 (quoting 33 U.S.C. 1344(g)(1)), "shows that the Act's term 'navigable waters' includes something more than traditional navigable waters," *ibid.* And neither Justice Kennedy

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[4] As noted above (see p. 8 n.2, *supra*), petitioners, unlike the government, use the term "traditional navigable waters" to refer solely to interstate waters.

nor the dissenting Justices in *Rapanos* endorsed the jurisdictional limitation that petitioners advocate. See *id.* at 782-783 (Kennedy, J., concurring in the judgment); *id.* at 807-808 (Stevens, J., dissenting).

Petitioners' argument also lacks any sound basis in the pre-CWA history on which they rely. Petitioners' central premise is that, by 1972, the phrase "waters of the United States" had become "a traditional statutory shorthand for those waterbodies subject to Congress's power to regulate the aquatic channels of interstate commerce." Pet. Br. 29 (emphasis omitted). That premise is false. The phrase "*navigable* waters of the United States" was a term of art, but Congress deliberately omitted the qualifier "navigable" from the CWA definition. See p. 19, *supra*. And while the agencies' longstanding approach gives substantial operative effect *both* to that definition *and* to the defined term, petitioners' requirement of actual navigability would effectively read the definition out of the statute.

Petitioners point (Br. 30-32) to the RHA, a statute that principally addressed navigation. But the critical term in each of that law's operative provisions was "navigable." No provision referred to the "waters of the United States" without that qualifier, which Congress deliberately omitted from the definition at issue here. See, *e.g.*, RHA §§ 9-10, 30 Stat. 1151. Petitioners emphasize (Br. 30-32) a portion of Section 10 that refers to "other water[s] of the United States" without any mention of navigability. But the qualifier "other" refers back to the preceding list of terms—"port, roadstead, haven, harbor, canal, navigable river"—which make clear that the reference is limited to navigable waters. § 10, 30 Stat. 1151. No analogous list of terms appears in the definition at issue here.

Despite the RHA's overall focus on navigability, Section 13—the one section of that law dealing specifically with pollution—generally prohibits dumping refuse material into any "navigable water of the United States or into any tributary of any navigable water of the United States," as well as depositing refuse material "on the bank of any navigable water, or on the bank of any tributary of any navigable water." 33 U.S.C. 407. That provision does not limit the covered "tributar[ies]" to those that are themselves used or susceptible to use for navigation. Petitioners' approach would therefore have the anomalous result of excluding from the CWA's coverage nonnavigable tributaries encompassed by Section 13.

Beyond their misplaced reliance on the RHA, petitioners identify no other evidence *in the art*, such as a treatise or case law, supporting their claim that the phrase "waters of the United States" had acquired a specialized meaning. Petitioners identify no pre-1972 statute or decision in which Congress or this Court used that phrase, standing alone, as a "shorthand for all waters subject to Congress's power to regulate the aquatic channels of interstate commerce." Pet. Br. 32. Instead, the only source petitioners identify (Br. 31) is a 1976 law-review article. And that article refutes their position by recognizing that the phrase "'waters of the United States,'" as used in the CWA, "indicates a desire to break with traditional notions of navigability." Charles D. Ablard & Brian Boru O'Neill, *Wetland Protection and Section 404 of the Federal Water Pollution Control Act Amendments of 1972*, 1 Vt. L. Rev. 51, 66 (1976).

Most crucially, petitioners' argument (Br. 36-42) reflects a fundamental misconception of the impetus for the CWA and its relation to prior law. The Act was not

"merely another law 'touching interstate waters,'" but rather "a 'total restructuring' and 'complete rewriting' of [then] existing water pollution legislation." *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 317 (1981) (citations omitted). Congress concluded that prior measures had been "inadequate in every vital aspect," and it enacted a wholly new scheme of point-source-based pollution controls. *EPA* v. *California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 203 (1976) (citation omitted). The Act cannot reasonably be understood as merely a response to a perceived failure by the agencies to use the tools Congress had already given them (see Pet. Br. 39). Rather, it reflected Congress's fundamental dissatisfaction with prior law.

III. THE COURT OF APPEALS' JUDGMENT SHOULD BE AFFIRMED

The court of appeals correctly held that the wetlands on petitioners' property are among the "waters of the United States" protected by the CWA. Pet. App. A33. The wetlands are located only 30 feet from a tributary of Kalispell Creek, which in turn feeds into Priest Lake, a traditional navigable water. *Id.* at A33-A34; see J.A. 20-21, 46, 48-49 (photos of the saturated property, after partial excavation and filling, and the tributary). Although the wetlands are separated from that tributary by a road, the court correctly recognized that the presence of a manmade barrier does not "defeat adjacency." Pet. App. A33.

The court of appeals also correctly upheld the EPA's determination that the wetlands have a "significant nexus" to Priest Lake. Pet. App. A34-A36. The court found ample evidence that the wetlands on petitioners' property are similarly situated to the Kalispell Bay Fen

across the road—indeed, historically petitioners' wetlands and the fen were "part of one wetland system." J.A. 30; see Pet. App. A35. The court of appeals further found that, together, those wetlands "significantly affect the integrity of Priest Lake." Pet. App. A35; see J.A. 21, 47 (photos of Kalispell Bay Fen). The EPA identified numerous physical, chemical, and biological benefits that the wetlands provide to the Lake—including improving the Lake's water quality through sediment retention, contributing base flow to the Lake with beneficial effects to fisheries, storing water, and providing flood control. J.A. 35-40; see Pet. App. A35-A36, B27-B30. The EPA also determined that, notwithstanding the road, "shallow subsurface flow is occurring" between the wetlands on petitioners' property and both the Lake and the wetlands across the road. J.A. 32. Petitioners do not dispute those findings in this Court.

The Kalispell Bay Fen is "one of the five largest" complexes of wetlands along the shoreline of Priest Lake and thus is "'especially important in maintaining the high quality of Priest Lake's water, fish, and wildlife.'" Pet. App. A35 (citing agency findings reprinted at J.A. 43); see J.A. 31-32, 44-45. If petitioners prevail in this case, they will be able to discharge fill material into the wetlands at issue without any permitting requirement. And the same scene will play out across the country, severely weakening the Act's protections for adjacent wetlands and, in turn, the traditional navigable waters that the CWA's permitting regime is ultimately intended to protect. That result would thwart Congress's comprehensive pollution-control regime.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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* The Solicitor General is recused in this case.

APPENDIX

1. 33 U.S.C. 1251(a) and (b) provide:

Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

2. 33 U.S.C. 1311(a) provides:

Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

3. 33 U.S.C. 1344 provides:

Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

(b) Specification for disposal sites

Subject to subsection (c) of this section, each such disposal site shall be specified for each such permit by the Secretary (1) through the application of guidelines developed by the Administrator, in conjunction with the Secretary, which guidelines shall be based upon criteria comparable to the criteria applicable to the territorial seas, the contiguous zone, and the ocean under section

1343(c) of this title, and (2) in any case where such guidelines under clause (1) alone would prohibit the specification of a site, through the application additionally of the economic impact of the site on navigation and anchorage.

(c) Denial or restriction of use of defined areas as disposal sites

The Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection.

(d) "Secretary" defined

The term "Secretary" as used in this section means the Secretary of the Army, acting through the Chief of Engineers.

(e) General permits on State, regional, or nationwide basis

(1) In carrying out his functions relating to the discharge of dredged or fill material under this section, the Secretary may, after notice and opportunity for public hearing, issue general permits on a State, regional, or

nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Any general permit issued under this subsection shall (A) be based on the guidelines described in subsection (b)(1) of this section, and (B) set forth the requirements and standards which shall apply to any activity authorized by such general permit.

(2) No general permit issued under this subsection shall be for a period of more than five years after the date of its issuance and such general permit may be revoked or modified by the Secretary if, after opportunity for public hearing, the Secretary determines that the activities authorized by such general permit have an adverse impact on the environment or such activities are more appropriately authorized by individual permits.

(f) Non-prohibited discharge of dredged or fill material

(1) Except as provided in paragraph (2) of this subsection, the discharge of dredged or fill material—

(A) from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices;

(B) for the purpose of maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways,

and bridge abutments or approaches, and transportation structures;

(C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches;

(D) for the purpose of construction of temporary sedimentation basins on a construction site which does not include placement of fill material into the navigable waters;

(E) for the purpose of construction or maintenance of farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;

(F) resulting from any activity with respect to which a State has an approved program under section 1288(b)(4) of this title which meets the requirements of subparagraphs (B) and (C) of such section,

is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title).

(2) Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired

or the reach of such waters be reduced, shall be required to have a permit under this section.

(g) State administration

(1) The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program.

(2) Not later than the tenth day after the date of the receipt of the program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall provide copies of such program and statement to the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service.

(3) Not later than the ninetieth day after the date of the receipt by the Administrator of the program and statement submitted by any State, under paragraph (1) of this subsection, the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such program and statement to the Administrator in writing.

(h) Determination of State's authority to issue permits under State program; approval; notification; transfers to State program

(1) Not later than the one-hundred-twentieth day after the date of the receipt by the Administrator of a program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall determine, taking into account any comments submitted by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, pursuant to subsection (g) of this section, whether such State has the following authority with respect to the issuance of permits pursuant to such program:

(A) To issue permits which—

(i) apply, and assure compliance with, any applicable requirements of this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, and sections 1317 and 1343 of this title;

(ii) are for fixed terms not exceeding five years; and

(iii) can be terminated or modified for cause including, but not limited to, the following:

(I) violation of any condition of the permit;

(II) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(III) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.

(B) To issue permits which apply, and assure compliance with, all applicable requirements of section 1318 of this title, or to inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title.

(C) To assure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application.

(D) To assure that the Administrator receives notice of each application (including a copy thereof) for a permit.

(E) To assure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing.

(F) To assure that no permit will be issued if, in the judgment of the Secretary, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby.

(G) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.

(H) To assure continued coordination with Federal and Federal-State water-related planning and review processes.

(2) If, with respect to a State program submitted under subsection (g)(1) of this section, the Administrator determines that such State—

(A) has the authority set forth in paragraph (1) of this subsection, the Administrator shall approve the program and so notify (i) such State and (ii) the Secretary, who upon subsequent notification from such State that it is administering such program, shall suspend the issuance of permits under subsections (a) and (e) of this section for activities with respect to which a permit may be issued pursuant to such State program; or

(B) does not have the authority set forth in paragraph (1) of this subsection, the Administrator shall so notify such State, which notification shall also describe the revisions or modifications necessary so that such State may resubmit such program for a determination by the Administrator under this subsection.

(3) If the Administrator fails to make a determination with respect to any program submitted by a State under subsection (g)(1) of this section within one-hundred-twenty days after the date of the receipt of such program, such program shall be deemed approved pursuant to paragraph (2)(A) of this subsection and the Administrator shall so notify such State and the Secretary who, upon subsequent notification from such State that it is administering such program, shall suspend the issuance of permits under subsection (a) and (e) of this section for activities with respect to which a permit may be issued by such State.

(4) After the Secretary receives notification from the Administrator under paragraph (2) or (3) of this subsection that a State permit program has been approved, the Secretary shall transfer any applications for permits pending before the Secretary for activities with respect to which a permit may be issued pursuant to such State program to such State for appropriate action.

(5) Upon notification from a State with a permit program approved under this subsection that such State intends to administer and enforce the terms and conditions of a general permit issued by the Secretary under subsection (e) of this section with respect to activities in such State to which such general permit applies, the Secretary shall suspend the administration and enforcement of such general permit with respect to such activities.

(i) Withdrawal of approval

Whenever the Administrator determines after public hearing that a State is not administering a program ap-

proved under subsection (h)(2)(A) of this section, in accordance with this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, the Administrator shall so notify the State, and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days after the date of the receipt of such notification, the Administrator shall (1) withdraw approval of such program until the Administrator determines such corrective action has been taken, and (2) notify the Secretary that the Secretary shall resume the program for the issuance of permits under subsections (a) and (e) of this section for activities with respect to which the State was issuing permits and that such authority of the Secretary shall continue in effect until such time as the Administrator makes the determination described in clause (1) of this subsection and such State again has an approved program.

(j) Copies of applications for State permits and proposed general permits to be transmitted to Administrator

Each State which is administering a permit program pursuant to this section shall transmit to the Administrator (1) a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State, and (2) a copy of each proposed general permit which such State intends to issue. Not later than the tenth day after the date of the receipt of such permit application or such proposed general permit, the Administrator shall provide copies of such permit application or such proposed general permit to the Secretary

and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service. If the Administrator intends to provide written comments to such State with respect to such permit application or such proposed general permit, he shall so notify such State not later than the thirtieth day after the date of the receipt of such application or such proposed general permit and provide such written comments to such State, after consideration of any comments made in writing with respect to such application or such proposed general permit by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, not later than the ninetieth day after the date of such receipt. If such State is so notified by the Administrator, it shall not issue the proposed permit until after the receipt of such comments from the Administrator, or after such ninetieth day, whichever first occurs. Such State shall not issue such proposed permit after such ninetieth day if it has received such written comments in which the Administrator objects (A) to the issuance of such proposed permit and such proposed permit is one that has been submitted to the Administrator pursuant to subsection (h)(1)(E), or (B) to the issuance of such proposed permit as being outside the requirements of this section, including, but not limited to, the guidelines developed under subsection (b)(1) of this section unless it modifies such proposed permit in accordance with such comments. Whenever the Administrator objects to the issuance of a permit under the preceding sentence such written objection shall contain a statement of the reasons for such objection and the conditions which such permit would include if it were issued by the Administrator. In any case where the Administrator objects to the issuance of

a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing or, if no hearing is requested within 90 days after the date of such objection, the Secretary may issue the permit pursuant to subsection (a) or (e) of this section, as the case may be, for such source in accordance with the guidelines and requirements of this chapter.

(k) Waiver

In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (j) of this section at the time of the approval of a program pursuant to subsection (h)(2)(A) of this section for any category (including any class, type, or size within such category) of discharge within the State submitting such program.

(*l*) Categories of discharges not subject to requirements

The Administrator shall promulgate regulations establishing categories of discharges which he determines shall not be subject to the requirements of subsection (j) of this section in any State with a program approved pursuant to subsection (h)(2)(A) of this section. The Administrator may distinguish among classes, types, and sizes within any category of discharges.

(m) Comments on permit applications or proposed general permits by Secretary of the Interior acting through Director of United States Fish and Wildlife Service

Not later than the ninetieth day after the date on which the Secretary notifies the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service that (1) an application for a permit under subsection (a) of this section has been received by the Secretary, or (2) the Secretary proposes to issue a general permit under subsection (e) of this section, the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to such application or such proposed general permit in writing to the Secretary.

(n) Enforcement authority not limited

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

(*o*) Public availability of permits and permit applications

A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or portion thereof, shall further be available on request for the purpose of reproduction.

(p) Compliance

Compliance with a permit issued pursuant to this section, including any activity carried out pursuant to a general permit issued under this section, shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1317, and 1343 of this title.

(q) Minimization of duplication, needless paperwork, and delays in issuance; agreements

Not later than the one-hundred-eightieth day after December 27, 1977, the Secretary shall enter into agreements with the Administrator, the Secretaries of the Departments of Agriculture, Commerce, Interior, and Transportation, and the heads of other appropriate Federal agencies to minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of permits under this section. Such agreements shall be developed to assure that, to the maximum extent practicable, a decision with respect to an application for a permit under subsection (a) of this section will be made not later than the ninetieth day after the date the notice for such application is published under subsection (a) of this section.

(r) Federal projects specifically authorized by Congress

The discharge of dredged or fill material as part of the construction of a Federal project specifically authorized by Congress, whether prior to or on or after December 27, 1977, is not prohibited by or otherwise subject to regulation under this section, or a State program approved under this section, or section 1311(a) or 1342 of this title (except for effluent standards or prohibitions under section 1317 of this title), if information on the effects of such discharge, including consideration of the guidelines developed under subsection (b)(1) of this section, is included in an environmental impact statement for such project pursuant to the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.] and such environmental impact statement has been submitted to Congress before the actual discharge of dredged or fill material in connection with the construction of

such project and prior to either authorization of such project or an appropriation of funds for such construction.

(s) Violation of permits

(1) Whenever on the basis of any information available to him the Secretary finds that any person is in violation of any condition or limitation set forth in a permit issued by the Secretary under this section, the Secretary shall issue an order requiring such person to comply with such condition or limitation, or the Secretary shall bring a civil action in accordance with paragraph (3) of this subsection.

(2) A copy of any order issued under this subsection shall be sent immediately by the Secretary to the State in which the violation occurs and other affected States. Any order issued under this subsection shall be by personal service and shall state with reasonable specificity the nature of the violation, specify a time for compliance, not to exceed thirty days, which the Secretary determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection is issued to a corporation, a copy of such order shall be served on any appropriate corporate officers.

(3) The Secretary is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction for any violation for which he is authorized to issue a compliance order under paragraph (1) of this subsection. Any action under this paragraph may be brought in the district court of the United States

for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such acton[1] shall be given immediately to the appropriate State.

(4) Any person who violates any condition or limitation in a permit issued by the Secretary under this section, and any person who violates any order issued by the Secretary under paragraph (1) of this subsection, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

(t) Navigable waters within State jurisdiction

Nothing in this section shall preclude or deny the right of any State or interstate agency to control the discharge of dredged or fill material in any portion of the navigable waters within the jurisdiction of such State, including any activity of any Federal agency, and each such agency shall comply with such State or interstate requirements both substantive and procedural to control the discharge of dredged or fill material to the same extent that any person is subject to such requirements. This section shall not be construed as affecting

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[1] So in original. Probably should be "action".

or impairing the authority of the Secretary to maintain navigation.

4. 33 U.S.C. 1362 provides in pertinent part:

Definitions

Except as otherwise specifically provided, when used in this chapter:

* * * * *

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

(8) The term "territorial seas" means the belt of the seas measured from the line of ordinary low water along

that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.

* * * * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * * * *

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

* * * * *

5. 33 C.F.R. 323.2(a)-(d) (1978) provide:

Definitions.

For the purpose of this regulation, the following terms are defined:

(a) The term "waters of the United States" means:[1]

(1) The territorial seas with respect to the discharge of fill material. (The transportation of dredged material by vessel for the purpose of dumping in the oceans, including the territorial seas, at an ocean dump site approved under 40 CFR 228 is regulated by Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended (33 U.S.C. 1413). See 33 CFR 324. Discharges of dredged or fill material into the territorial seas are regulated by Section 404.):

(2) Coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, including adjacent wetlands;

(3) Tributaries to navigable waters of the United States, including adjacent wetlands (manmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States under this definition).

(4) Interstate waters and their tributaries, including adjacent wetlands; and

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[1] The terminology used by the FWPCA is "navigable waters" which is defined in Section 502(7) of the Act as "waters of the United States including the territorial seas." For purposes of clarity, and to avoid confusion with other Corps of Engineers regulatory programs, the term "waters of the United States" is used throughout this regulation.

(5) All other waters of the United States not identified in paragraphs (1)-(4) above, such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.[2]

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[2] In defining the jurisdiction of the FWPCA as the "waters of the United States," Congress, in the legislative history to the Act, specified that the term "be given the broadest constitutional interpretation unencumbered by agency determinations which would have been made or may be made for administrative purposes." The waters listed in paragraphs (a)(1)-(4) fall within this mandate as discharges into those waterbodies may seriously affect water quality, navigation, and other Federal interests, however, it is also recognized that the Federal government would have the right to regulate the waters of the United States identified in paragraph (a)(5) under this broad Congressional mandate to fulfill the objective of the Act: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (Section 101(a)). Paragraph (a)(5) incorporates all other waters of the United States that could be regulated under the Federal government's Constitutional powers to regulate and protect interstate commerce, including those for which the connection to interstate commerce may not be readily obvious or where the location or size of the waterbody generally may not require regulation through individual or general permits to achieve the objective of the Act. Discharges of dredged or fill material into waters of the United States identified in paragraphs (a)(1)-(4) will generally require individual or general permits unless those discharges occur beyond the headwaters of a river or stream or in natural lakes less than 10 acres in surface area. Discharges into these latter waters and into most of the waters identified in paragraph (a)(5) will be permitted by this regulation, subject to the provisions listed in paragraph 323.4-2(b) unless the District Engineer develops information, on a case-by-case basis, that the concerns for the aquatic environment as expressed in the EPA Guidelines (40 CFR 230) require regulation through an individual or general permit. (See 323.4-4).

The landward limit of jurisdiction in tidal waters, in the absence of adjacent wetlands, shall be the high tide line and the landward limit of jurisdiction and all other waters, in the absence of adjacent wetlands, shall be the ordinary high water mark.

(b) The term "navigable waters of the United States" means those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark (mean higher high water mark on the Pacific coast) and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce. (See 33 CFR 329 for a more complete definition of this term.)

(c) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps marshes, bogs and similar areas.

(d) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

6. 33 C.F.R. 328.3(a)-(c) (2008) provide:

Definitions.

For the purpose of this regulation these terms are defined as follows:

(a) The term *waters of the United States* means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a) (1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section.

(8) Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean

Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.

(b) The term wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(c) The term adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

7. 40 C.F.R. 230.3 (2008) provides in pertinent part:

Definitions.

For purposes of this part, the following terms shall have the meanings indicated:

* * * * *

(s) The term *waters of the United States* means:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under this definition;

(5) Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;

(6) The territorial sea;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet

the criteria of this definition) are not waters of the United States.

Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

(t) The term *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.