No. 21-454

IN THE
Supreme Court of the United States

MICHAEL SACKETT, et ux.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.
Respondents.

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

BRIEF FOR STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OREGON, VERMONT, WASHINGTON, AND WISCONSIN, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICI STATES

Wetlands are often inextricably linked to navigable waters and thereby directly affect the quantity, quality, and biological integrity of those waters. For that reason, as this Court has already determined, Congress plainly intended the Clean Water Act (CWA) "to regulate wetlands 'inseparably bound up with the "waters" of the United States.'" *Solid Waste Agency of N. Cook Cnty. v. United States Army Corps of Eng'rs*, 531 U.S. 159, 167 (2001) (*SWANCC*) (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985)). As the Court explained in *SWANCC* and as Justice Kennedy reiterated in his concurring opinion in *Rapanos v. United States*, 547 U.S. 715 (2006)—needed to form a majority holding—wetlands with a "significant nexus" to navigable waters are "waters of the United States."

States, federal agencies, and private entities have long relied on that interpretation, which is supported by the CWA's text, history, and purpose, and the commonsense understanding that, at minimum, wetlands with a subsurface-water or other hydrological connection to navigable waters—such as those at issue here—directly affect navigable waters and are thus "waters of the United States." Contrary to that understanding, petitioners here contend that wetlands do not fall under the CWA's jurisdiction unless they have continuous surface-water connections to navigable waters.

The States of New York, California, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Vermont, Washington, and Wisconsin, and the District of Columbia, have compelling

interests in the question presented here. Each of the forty-eight contiguous States contains waters that are downstream from other States and thus relies on the CWA's federal standards to protect their waters from pollutants that are discharged into wetlands in upstream States. Where wetlands are significantly connected to navigable waters, pollutant discharges into those wetlands can have profound effects on the quality and biological integrity of the downstream waters and can also exacerbate risks of flooding downstream. Amici States thus must rely on the CWA's protection of wetlands in upstream jurisdictions to ensure that their residents in downstream locations have adequate water quality and protection from flooding risks.

Indeed, the experience of Amici States shows that the CWA's federal minimum standards are required to protect against the risks of pollution and flooding posed by weaker or non-existent environmental standards or inadequate enforcement in upstream States. Before the CWA, a patchwork of inconsistent state laws proliferated in the absence of uniform federal regulation. Because States could reap the economic benefits of local development while shifting the environmental, regulatory, and economic costs of such development downstream, individual States failed to protect the Nation's interconnected, shared water system. Congress enacted the CWA in large part to remedy this interstate problem, by setting a federal "floor" of national minimum pollutant controls applicable in every State. Removing wetlands connected to navigable waters from the CWA's coverage would subvert the CWA's protections for downstream States, including Amici States.

Moreover, Amici States have structured their regulatory programs in reliance on the CWA's protec-

tion of wetlands with a significant nexus to navigable waters and their tributaries. Thus, in addition to the limitations on their ability to alter regulatory shortcomings in upstream States, Amici States would incur significant costs to fill the regulatory gaps within their own States that would follow an interpretation of the CWA that withdrew federal protection from such wetlands.

STATEMENT

Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA's permit requirements are the key mechanisms for attaining Congress's objective. These permit requirements prohibit the "discharge of any pollutant," including fill material such as rock and sand, without a permit. *Id.* § 1311(a); *see id.* § 1362(6). The term "discharge of a pollutant" is defined to mean "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12). And the CWA defines "navigable waters" to mean the "waters of the United States, including the territorial seas." *Id.* § 1362(7). Under the CWA, a permit is thus required to discharge pollutants or dredged or fill materials into any of the "waters of the United States." *See id.* §§ 1342(a)(1), 1344(a).

In applying the permit requirements to all pollutant discharges into any "waters of the United States," Congress intended the CWA to apply to many waters that had not previously been subject to federal pollution-control oversight. Before the CWA was enacted in 1972, the prior regulatory regime was far narrower in scope. The federal Refuse Act of 1899 applied to discharges of refuse into "any navigable water of the

United States" or "any tributary of any navigable water," *id.* § 407, which was understood to be limited to traditional interstate navigable waters and their tributaries.[1] And even that regime was largely unenforced at the federal level. Given the lack of federal oversight, States were primarily responsible for most water-pollution control within their borders, *see* S. Rep. No. 92-414, at 2 (1971), and downstream States lacked effective remedies to protect themselves from pollutants discharged into waters in upstream States, *see Illinois v. City of Milwaukee*, 406 U.S. 91, 102-03 (1972). In 1972, Congress recognized that this State-led scheme had been "inadequate in every vital aspect," leaving many waters "severely polluted." S. Rep. No. 92-414, at 7.

Congress responded by deliberately replacing this ineffective patchwork of state laws with the CWA, "an all-encompassing program of water pollution regulation." *City of Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981). By applying the CWA broadly to all "waters of the United States," Congress intended the CWA to cover many more waters than those that had been subject to the predecessor legislation, *see* S. Rep. No. 92-414, at 77; *see also id.* at 70 ("Refuse Act authority has significant gaps . . . that render it seriously inadequate as a means of implementation of a water pollution control program").

The CWA also protects the sovereign interests of downstream States that suffer the environmental consequences and economic burdens of weak or non-

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[1] *See* U.S. Env't Prot. Agency, Explanatory Statement, Implementation of the "National Pollutant Discharge Elimination System" Pursuant to Section 402, Federal Water Pollution Control Act Amendments of 1972, at 3 (Feb. 7, 1973).

existent pollution controls upstream. The CWA mandates permitting in every State and requires that a national minimum level of pollution controls be applied to all "waters of the United States." *See Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992) (CWA authorizes Environmental Protection Agency (EPA) "to create and manage a uniform system of interstate water pollution regulation"). Although the CWA's cooperative federalism model contemplates a robust role for the States in implementing key CWA programs, if they choose to adopt such responsibilities, it does not allow States to undermine the minimum water-protection requirements that apply nationwide. 33 U.S.C. §§ 1342(b), 1344(g), 1370.

The EPA and U.S. Army Corps of Engineers (Army Corps) have over the years interpreted the scope of "waters of the United States." The regulations applicable here defined that term to include traditional navigable waters, their tributaries, and wetlands adjacent to such waters.[2] 33 C.F.R. § 328.3(a) (2008). As the governing regulations provided when this Court considered them in 1985, in *Riverside Bayview Homes*, 474 U.S. at 124, the regulations applicable here defined "wetlands" to mean areas "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

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[2] The courts below applied the pre-2015 regulatory definitions that are substantively the same as the regulations applicable today. *See Sackett v. EPA*, 8 F.4th 1075, 1080 & n.1 (9th Cir. 2021). In December 2021, the EPA and Army Corps proposed a new rule defining "waters of the United States." *See* Revised Definition of "Waters of the United States," 86 Fed. Reg. 69,372 (Dec. 7, 2021).

adapted for life in saturated soil conditions."[3] 33 C.F.R. § 328.3(b) (2008); *see* 40 C.F.R. § 230.3(t) (2008).

This Court has addressed the scope of the term "waters of the United States" in several cases. *See* Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626, 56,660 (Oct. 22, 2019). In *Riverside Bayview Homes*, the Court upheld the Army Corps interpretation of a regulation providing that "waters of the United States" included wetlands adjacent to other jurisdictional waters, even if the wetlands are not regularly flooded by such waters, giving deference to the Army Corps determination that such wetlands are "inseparably bound up with" other jurisdictional waters. 474 U.S. at 131-35. And in *SWANCC*, this Court explained that "the significant nexus between the wetlands and 'navigable waters'" informs when wetlands are sufficiently connected to other jurisdictional waters to fall under the CWA's coverage. 531 U.S. at 167. Applying that standard, the Court concluded that isolated ponds were not rendered "waters of the United States" solely by their use as migratory bird habitat. *Id.* at 167-72.

This Court again considered the scope of "waters of the United States" in *Rapanos v. United States*, 547 U.S. 715 (2006), which addressed whether certain wetlands were subject to the CWA's permitting requirements. Although the case did not produce a majority

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[3] The Army Corps regulations have also provided that "adjacent" means "bordering, contiguous, or neighboring," and that "adjacent wetlands" include wetlands "separate from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like." Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,251 (Nov. 13, 1986).

opinion, all the Justices agreed that "waters of the United States" includes many waters that are not actually navigable in fact and includes wetlands that have a sufficient connection to navigable waters. *See id.* at 730-31, 742 (Scalia, J., plurality op.); *id.* at 767, 772-75, 782 (Kennedy, J., concurring in the judgment); *id.* at 796-97 (Stevens, J., dissenting). The primary disagreement among the Justices was the extent of the connection between wetlands and other jurisdictional waters that is needed for the wetlands to constitute "waters of the United States."

While four Justices would have held that "a continuous surface connection" to "relatively permanent, standing or continuously flowing bodies of water" is required, *id.* at 739 (Scalia, J., plurality op.), Justice Kennedy's opinion concurring in the judgment, which was needed to form a majority holding, concluded that wetlands constitute "waters of the United States" where they "possess a significant nexus with navigable waters," *id.* at 787 (Kennedy, J., concurring). As Justice Kennedy explained, wetlands with such a significant connection to navigable waters "significantly affect the chemical, physical, and biological integrity of other covered waters." *Id.* at 780. The four dissenting Justices would have held that the wetlands at issue in *Rapanos* necessarily have a significant nexus to navigable waters, to the extent the CWA requires such a showing. *Id.* at 807-08 (Stevens, J. dissenting).

Justice Kennedy and the four dissenting Justices emphasized that limiting "waters of the United States" to include only those wetlands that have a continuous surface-water connection to other jurisdictional waters departed from the scientific evidence and conflicted with the CWA. They explained that the CWA is concerned with downstream water quality, and that wetlands

often have significant connections with navigable waters or their tributaries, including surface-water, subsurface-water, and other connections, that greatly affect downstream water quality. *See id.* at 773-74 (Kennedy, J., concurring in the judgment); *see id.* at 793-98, 808-09 (Stevens, J., dissenting). Through such connections, Justice Kennedy and the dissenting Justices explained, wetlands play an integral part in maintaining the integrity of downstream waters, including by trapping and neutralizing pollutants, controlling surface-water run-off and erosion, and preventing and controlling flooding. *See id.* at 775, 777-78 (Kennedy, J., concurring in the judgment); *id.* at 796-99, 803-04, 807-08 (Stevens, J., dissenting).

Following *Rapanos*, the EPA and Army Corps issued joint guidance stating that the CWA applies to wetlands or other waters if either the plurality's standard or the "significant nexus" standard set forth in Justice Kennedy's concurring *Rapanos* opinion is satisfied as to those wetlands or waters. *See* U.S. Env't Prot. Agency & U.S. Army Corps of Engr's, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* 3 (June 5, 2007). The agencies have been applying the "significant nexus" analysis for more than fifteen years. Courts have also routinely applied the "significant nexus" analysis to determine when wetlands or other waters are within the CWA's jurisdiction. *See, e.g.*, *Precon Dev. Corp. v. United States Army Corps of Eng'rs*, 633 F.3d 278, 294-96 (4th Cir. 2011); *United States v. Agosto-Vega*, 617 F.3d 541, 551 (1st Cir. 2010); *United States v. Cundiff*, 555 F.3d 200, 210-11 (6th Cir. 2009); *Northern Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 1001 (9th Cir. 2007).

SUMMARY OF ARGUMENT

1. The "significant nexus" test properly ensures that, at minimum, wetlands like those at issue here, which have significant subsurface water and other hydrological connections to navigable waters, continue to fall under the CWA's jurisdiction. The "significant nexus" test is thus essential to effectuating Congress's intent because such wetlands can have profound effects on the quality, quantity, and biological integrity of navigable waters. Indeed, pollutant discharges into upstream wetlands with such connections to navigable waters negatively affect the quality and quantity of downstream waters—including navigable waters located in other States downstream from the polluted wetlands.

2. Protection under the CWA for wetlands that significantly affect navigable waters is also necessary to maintain the balance between federal and State authority established by the CWA. The CWA preempts certain remedies traditionally used to address interstate water pollution, leaving the federal statutory provisions as the primary mechanism for protecting downstream States from the effects of pollution discharged into upstream waters. The absence of federal standards would significantly hamper downstream States' ability to protect the quality of navigable waters in their own jurisdictions and to prevent and control harmful flooding.

3. The significant nexus test is a familiar and workable standard that has been effectively used to determine when wetlands have a sufficient connection to navigable waters to necessitate federal protection. Indeed, courts applying the standard have provided ample guidance regarding the types of concrete eviden-

tiary showings that may establish the requisite nexus where a case-specific determination is necessary. States have also structured their own water-related regulations based on the longstanding understanding that the CWA covers waters, including wetlands, with a significant nexus to navigable waters. And contrary to the claims of petitioners and their amici, the standard is not onerous: the Army Corps denies less than one percent of dredge and fill permit applications, and many discharges are covered by general permits that do not require an individualized application process.

ARGUMENT

I. States' Experience Confirms That Wetlands with Significant Connections to Downstream Navigable Waters Directly Affect the Quality and Quantity of Those Waters.

This case is not about the regulation of isolated wetlands, as petitioners and their amici suggest. Rather, the wetlands at issue are integrated with waters that are indisputably "waters of the United States"—i.e., Priest Lake in Idaho and its tributaries—through subsurface-water and other hydrological connections. *See Sackett*, 8 F.4th at 1080-81, 1092-93. Because such wetlands are "inseparably bound up" with the adjacent jurisdictional waters, pollutant discharges into the wetlands are effectively the same as discharges into "waters of the United States." *See Riverside Bayview Homes*, 474 U.S. at 134. The Court should thus hold that the Ninth Circuit correctly applied the significant nexus test.

Wetlands are often connected—physically, hydrologically, or in some other manner—to traditional navigable waters or their tributaries even where there

is no visible surface-water connection between the wetlands and the other waters. For example, wetlands may have "a regular shallow subsurface-water connection" to downstream navigable waters—i.e., the water in the wetlands connects to other waters below the surface rather than in plain sight. *See* U.S. Env't Prot. Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* at ES-3 (Jan. 2015). Similarly, floodplain wetlands are often "highly connected" to streams and rivers through shallow groundwater. *Id.* at 4-39. And wetlands may have other "hydrologic, chemical, and biological connections to downstream waters" that closely integrate those wetlands with adjacent navigable waters or their tributaries. *Id.* at ES-11-12.

Coverage of wetlands that significantly affect navigable waters is essential to the CWA because those wetlands can have profound effects on the quality, quantity, and biological integrity of those waters. *See* 33 U.S.C. § 1251(a). Indeed, wetlands with shallow subsurface connections—such as those at issue here—may move water and potential contaminants directly to nearby surface water within days or even hours. *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,089-90 (June 29, 2015). Degrading or destroying such wetlands reduces or eliminates their ability to filter pollutants, including sediments, nutrients, agricultural runoff, and other contaminants, that would otherwise flow into and degrade downstream navigable waters or their tributaries. *Id.* at 37,085.[4] The North Carolina Division of

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[4] *See also, e.g.*, Mark R. Walbridge & Judith P. Struthers, *Phosphorus Retention in Non-Tidal Palustrine Forested Wetlands*

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Water Quality, for example, concluded that certain wetlands in North Carolina are connected via groundwater to streams and rivers, and that water, including potentially contaminated water, flows from the wetlands into the streams and rivers.[5] Wetlands with significant subsurface-water or other hydrologic connections to other jurisdictional waters also play a major role in regulating the chemistry and integrity of such waters. For example, they transform excess nitrate leaking from septic systems and agricultural fields into harmless gases through the natural process of denitrification.[6] *See id.* Wetlands with a significant nexus to navigable waters often reduce the number and severity of floods by temporarily storing water and gradually releasing it into downstream waters, thereby main-

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of the Mid-Atlantic Region, 13 Wetlands 84 (1993); Carol A. Johnston, *Sediment and Nutrient Retention by Freshwater Wetlands: Effects on Surface Water Quality*, 21 Critical Revs. Envtl. Control 491 (1991).

[5] N.C. Div. of Water Quality, *Hydrologic Connectivity, Water Qualify Function, and Biocriteria of Coastal Plain Geographically Isolated Wetlands* 197-98 (2013); Virginia Baker et al., N.C. Div. of Water Quality, *Development of a Wetland Monitoring Program for Headwater Wetlands in North Carolina* 221 (2008) ("[W]etlands reduce the amount of pollutants entering downstream waters.").

[6] *See, e.g.*, Bruce J. Peterson et al., *Control of Nitrogen Export from Watersheds by Headwater Streams*, 292 Science 86 (2001); Lars O. Hedin et al., *Thermodynamic Constraints on Nitrogen Transformations and Other Biogeochemical Processes at Soil-Stream Interfaces*, 79 Ecology 684 (1998); Robert M. Holmes et al., *Denitrification in a Nitrogen-Limited Stream Ecosystem*, 33 Biogeochemistry 125 (1996); Peter M. Groffman et al., *Nitrate Dynamics in Riparian Forests: Microbial Studies*, 21 J. Env't Quality 666 (1992).

taining the normal rate of water flow.[7] Wetlands also provide necessary habitat for aquatic animals that are critical to the functions of downstream ecosystems. *Id.* at 37,068. For these reasons, this Court has made clear that "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the waters of the United States.'" *SWANCC*, 531 U.S. at 167 (quoting *Riverside Bayview Homes*, 474 U.S. at 134).

Amici States' experience confirms that where upstream wetlands have significant connections to downstream navigable waters, including, at minimum, subsurface water or other hydrologic connections, pollutant discharges into such wetlands negatively affect the quality and quantity of downstream waters—including navigable waters located in other downstream States. Pollutants that originate upstream naturally flow downstream, and the consequences of dredge and fill activities are likewise felt downstream. Because each of the forty-eight contiguous States has water bodies that are downstream of one or more other States, discharges into "waters of the United States" located in one State flow into other States. For example, as this Court has recognized, pollutants discharged into the Mississippi River in Minnesota can affect the waters of nine down-

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[7] *See, e.g.*, Mark M. Brinson et al., U.S. Army Corps of Eng'rs, Wetlands Rsch. Program Tech. Rep. WRP-DE-11, *A Guidebook for Application of Hydrogeomorphic Assessments to Riverine Wetlands* 15, 21, 24, 27 (1995); Comm. on Characterization of Wetlands, Nat'l Rsch. Council, *Wetlands: Characteristics and Boundaries* 34-35, 40-41 (1995); M.C. Acreman & A.J.D. Ferguson, *Environmental Flows and the European Water Framework Directive*, 55 Freshwater Biology 32 (2010); M. Acreman & J. Holden, *How Wetlands Affect Floods*, 33 Wetlands 773 (2013); U.S. Env't Prot. Agency, Wetlands: Protecting Life and Property from Flooding (2016).

stream States. *See International Paper Co. v. Ouellette*, 479 U.S. 481, 496 n.17 (1987). As another example, this Court also considered the effect of effluent discharged into a stream in Arkansas that connected through creeks to the Illinois River, twenty-two miles upstream of the Arkansas-Oklahoma border. *See Arkansas*, 503 U.S. at 95.

The significant connections between certain wetlands and navigable waters means that degrading those wetlands will impair the navigable waters and harm downstream States, including through the flow of pollutants, changes in water chemistry, and flooding. Indeed, waters from Priest Lake in Idaho—the navigable water affected by the wetlands at issue in this litigation—continue downstream to the Pend Oreille River, eventually reaching Washington.[8] A few further examples illustrate the types of effects that downstream States face across the country. Wetlands constitute a significant portion of the Delaware River watershed in New York and contribute water to the Delaware River, which flows downstream to Pennsylvania, New Jersey, and Delaware.[9] Wetlands in Delaware influence the integrity of the Nanticoke River, which flows downstream into Maryland, ultimately ending in the Chesapeake Bay.[10] Michigan has abundant coastal

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[8] *See* Idaho Dep't of Water Res., Comprehensive Basin Plans, Priest River Basin 4 (1995 as amended 2003); U.S. Geological Survey, *Pend Oreille River at Newport, WA* (data concerning discharges into Pend Oreille River at Newport, Wash.).

[9] *See* New York City Dep't of Env't Prot., Wetlands in the Watersheds of the New York City Water Supply System 16-17 (2009).

[10] Amy D. Jacobs & David F. Bleil, Del. Dep't of Nat. Res. & Env't Control, Condition of Nontidal Wetlands in the Nanticoke

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wetlands near Lake Michigan, an interstate navigable water that also extends into Indiana, Illinois, and Wisconsin.[11] And numerous wetlands in Georgia are connected through a variety of noncontinuous surface flows to Boone Creek, a tributary of the St. Marys River, which forms part of the Georgia-Florida border.[12]

Amici States' experiences also demonstrate that discharges of pollutants, including dredge and fill materials, into upstream wetlands contribute to flooding risks in downstream States. For example, a recent study showed that wetlands located along the Otter Creek in Vermont—which eventually flows into Lake Champlain, a waterbody shared by New York and Vermont—limited downstream flooding following Tropical Storm Irene. Researchers found that the floodplain wetland system on Otter Creek reduced water flows downstream by at least a factor of approximately 2.5 during the storm.[13] In New York, the flood protections provided by such upstream wetlands are critically important because many state residents reside within

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River Watershed, Maryland and Delaware 2, 20 (2008). Wetlands in the District of Columbia also act as buffers to protect the Chesapeake Bay from pollution. Decl. of Jeffrey Seltzer ¶ 9 (Nov. 20, 2020), *California v. Wheeler*, No. 3:20-cv-03005 (N.D. Cal.), ECF No. 214-9.

[11] Dennis A. Albert, *Between Land and Lake: Michigan's Great Lakes and Coastal Wetlands* (2003).

[12] R. Rhett Jackson et al., *Waters of the US: A Case Study from the Edge of the Okefenokee Swamp*, 41 Wetlands 8 (2021).

[13] The protections afforded by the Otter Creek wetland system during Tropical Storm Irene also reduced damages downstream by $627,000 to $2 million. *See* Keri B. Watson et al., *Quantifying Flood Mitigation Services: The Economic Value of Otter Creek Wetlands and Floodplains to Middlebury, VT*, 130 Ecological Econ. 16 (2016).

areas prone to flooding.[14] If discharges and fill activities were allowed to reduce the flood protection provided by wetlands, the resulting flooding could cause vast damage to New York residents.

Other States too would face an increased risk of flooding if the CWA's protections for upstream wetlands were removed. Coastal wetlands avoided an estimated $625 million in direct damages from Hurricane Sandy across twelve States.[15] In Massachusetts specifically, for example, the destruction of non-floodplain wetlands in upstream States would increase flood-associated risks.[16] In short, States' experience shows that the effects of pollution in upstream States is felt downstream and that the protection of upstream wetlands is crucial to fulfilling Congress's objective in enacting the CWA.

II. Federalism Principles Confirm That Wetlands with Significant Connections to Navigable Waters Are Covered by the Clean Water Act (CWA).

The cooperative federalism principles that Congress incorporated into the CWA strongly support the conclusion that the CWA's permit requirements apply to wetlands with a significant nexus to navigable waters, including at least those wetlands that, like the wetlands at issue here, have significant subsurface-

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[14] Decl. of William Nechamen ¶ 5 (May 4, 2020), *California*, ECF No. 30-22.

[15] Siddarth Narayan et al., *The Value of Coastal Waters for Flood Damage Reduction in the Northeastern USA*, 7 Sci. Reps. art. 9463 (2017).

[16] Decl. of Kathleen M. Baskin ¶ 8 (Nov. 17, 2020), *California*, ECF No. 214-1.

water or other hydrologic connections to navigable waters or their tributaries. The CWA's history and structure make clear that Congress intended the CWA to preserve an important role for States in protecting the quality and quantity of waters in their jurisdictions by granting States authority to implement the CWA's permitting regime and impose higher standards if they choose to do so. At the same time, the CWA protects States from upstream pollution by imposing nationwide minimum pollution-control standards.

The narrow construction of the CWA that petitioners and their amici urge rests on an oversimplified view of federalism and is inconsistent with the CWA's core principles. *See* W. Va. Amicus Br. 7-13; Pet. Br. 24. Congress did not intend States to retain sole regulatory authority over waters within their borders when their activities could harm other States, which have limited options to protect themselves and their residents from upstream pollution. And principles of federalism do not support such a result either. When the States formed a union and renounced the use of force to protect themselves from other States, they "did not thereby agree to submit to whatever might be done" by other States or "renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests." *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907). The CWA vindicates these sovereign interests of the States by protecting them from the harms generated by pollutant discharges in upstream States and by giving them a mechanism for enforcing that interest. The arguments advanced by petitioners and their amici that federalism compels a narrow reading of the CWA ignore these important principles. Considering the interests of the States in their totality, federalism supports federal

jurisdiction over waters that have a significant connection to navigable waters or their tributaries. Indeed, Congress specifically intended the CWA to apply to such waters, including wetlands, precisely because discharges there may impair waters in downstream States.

A. The CWA requires minimum water-pollution controls in each State to protect downstream States from upstream pollution.

In enacting the CWA, Congress recognized that States face powerful incentives to compete for industry by establishing less stringent water-protection standards than their neighbors, thereby externalizing to downstream States the environmental and economic harms resulting from such lower standards. *See Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1378 (D.C. Cir. 1977). Congress enacted a "self-consciously comprehensive program" to address these interstate pollution problems, *Milwaukee*, 451 U.S. at 319; *see id.* at 325-26, which arise from the interconnectedness of many navigable waters, their tributaries, and adjacent wetlands (see *supra*, at 10-16).

To protect downstream States from a "race to the bottom" of water-quality protections, the CWA establishes a uniform national floor of pollutant controls that each State must follow. The CWA requires implementation of its permit programs in every State and requires that permits include discharge limitations that adhere to minimum federal standards. *See* 33 U.S.C. § 1370. In addition, Congress included procedures for resolving interstate disputes concerning pollutant discharges. *See Milwaukee*, 451 U.S. at 325-26. For example, any State with jurisdiction over waters of the United States

affected by a proposed pollutant discharge in another State must receive notice and an opportunity to object to a permit. *See* 33 U.S.C. § 1342(b)(3), (b)(5), (d)(2). These nationwide pollution protections are critical to maintaining water quality in downstream States and do not apply to waters outside the scope of the CWA.

History confirms that the cooperative federalism model embodied in the CWA must be applied to wetlands with a significant nexus to navigable waters. Before the CWA, States were primarily responsible for most water-pollution control within their borders, S. Rep. No. 92-414, at 2, and lacked a remedy to protect themselves from pollution from upstream States apart from a common-law nuisance claim, *see Illinois*, 406 U.S. at 101-03. Congress rejected this regime as "inadequate in every vital aspect," S. Rep. No. 92-414, at 7, and replaced it with the CWA's "all-encompassing program of water pollution regulation," *Milwaukee*, 451 U.S. at 318. See *supra*, at 3-4. Artificially limiting the CWA's application to exclude wetlands that lack a continuous surface-water connection to navigable waters but are nevertheless "inseparably bound up with the 'waters' of the United States," *see Riverside Bayview Homes*, 474 U.S. at 134, would ignore Congress's clearly expressed intent, *see SWANCC*, 531 U.S. at 167, and undermine the protections Congress provided to downstream States.

Although the cooperative federalism embodied in the CWA contemplates that States will serve important roles in protecting the waters within their respective jurisdictions, those roles are meant to further the CWA's core remedial objectives of preserving the quality and quantity of the Nation's waters. The role of the States under the CWA does not support removing from the CWA's coverage those wetlands with important func-

tional connections to navigable waters—thereby subverting the CWA's protections for downstream States—as petitioners and amici suggest (*see, e.g.*, W. Va. Amicus Br. 7-9).

For example, the CWA states that it is Congress's policy to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution," and "to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). This provision does not remotely suggest that Congress envisioned a narrow scope for the CWA's coverage that would allow States to keep *exclusive* regulatory authority over waters, including wetlands, that significantly affect navigable waters flowing downstream. To the contrary, it preserves state responsibility "to prevent and abate pollution by assigning them a large role" in administering the CWA's permit and other regulatory programs. *See* S. Comm. on Public Works, 93rd Cong., 1 *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 403 (1973). States thus may develop water quality standards for their waters and operate CWA permit programs within their respective jurisdictions, when approved to do so by the EPA or the Army Corps. States also review federally licensed projects and approve or deny certifications for those projects. *See* 33 U.S.C. §§ 1251(b), 1313, 1341, 1342(b), 1344(h). And States may implement and enforce additional state water-quality protections in their respective jurisdictions that go beyond the national minimum protections established by the CWA. *Id.* § 1370. But States carry out these rights and responsibilities as part of "a regulatory partnership," *Ouellette*, 479 U.S. at 499, "between the States and the Federal Government animated by a shared objective: 'to restore and maintain the chemical,

physical, and biological integrity of the Nation's waters.'" *Arkansas*, 503 U.S. at 101 (quoting 33 U.S.C. § 1251(a)). These state rights and responsibilities do not provide any plausible basis for undermining the scope of the CWA's protections.

B. Absent protection under the CWA, downstream States have limited remedies to address pollutant discharges into wetlands located in upstream States.

Additional federalism principles further support interpreting the CWA to cover wetlands that have a significant nexus to navigable waters. Specifically, if the CWA's permit programs do not apply to certain wetlands in upstream States, downstream States would have limited ability to protect themselves from the negative effects of pollutants that are discharged into the upstream wetlands—even when the wetlands are significantly connected with downstream navigable waters and the discharge of pollutants into them will thus degrade downstream water quality or increase downstream flood risks.

Although the CWA gave States "a strong voice" in regulating pollutant discharges that occur within their respective borders, it provided them with only an "advisory role" in regulating pollutant discharges occurring in other States. *Ouellette*, 479 U.S. at 490. See *supra*, at 18-19 (downstream States affected by proposed discharge receive notice and opportunity to object to permit). A State may not establish its own permit system to regulate out-of-state pollutant discharges. *Ouellette*, 479 U.S. at 491. And this Court has held that the CWA's comprehensive regulation of upstream sources preempts traditional common-law

remedies that downstream States might otherwise have for upstream sources of pollution, leaving downstream States with little recourse except, for example, a common-law nuisance lawsuit under the law of the upstream State. *See Milwaukee*, 451 U.S. at 317 (federal common law preempted); *Ouellette*, 479 U.S. at 490-91, 494 (common law of an affected State preempted). The CWA's comprehensive scheme and States' lack of clear authority to control pollutant discharges into wetlands in upstream States require a construction of the CWA that protects waters in downstream States by covering wetlands that, at minimum, have a significant subsurface or other hydrologic connection to downstream waters—like those at issue here—and not only wetlands with continuous surface-water connections to traditional navigable waters.

The suggestion of petitioners and their amici that state regulation of wetlands will alone be sufficient to protect downstream States defies Congress's rejection of the prior ineffective scheme of patchwork state laws. *See Milwaukee*, 451 U.S. at 318; S. Rep. No. 92-414, at 7. Indeed, the current state-law regimes enacted by many States demonstrate the disastrous downstream effects that could result if the CWA's coverage of wetlands is severely limited to only those wetlands with continuous surface-water connections to traditional navigable waters. Many States have laws that restrict state-law water-quality protections by tying them to the scope of the federal minimum protections imposed by the CWA. At least six States prohibit the implementation of any state standards that are more stringent

than the CWA's standards.[17] To the extent that those restrictions are interpreted to allow regulation only of those wetlands also covered by the CWA, state-law protections will not apply to any waters, including wetlands, that are not "waters of the United States." Removing wetlands significantly connected with navigable waters from the CWA's jurisdictional scope would thus also remove state-law protections for those wetlands in certain States—leaving downstream States with even less protection.

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[17] *See, e.g.*, **Arizona**: Ariz. Rev. Stat. Ann. § 49-104(A)(16) (Arizona's environmental laws and regulations can be "no more stringent than the corresponding federal law that addresses the same subject matter"). **Idaho**: Idaho Code Ann. §§ 39-3601, 39-7210. **Kentucky**: Ky. Rev. Stat. Ann. § 13A.120(1). **Mississippi**: Miss. Code Ann. § 49-17-34(2). **South Dakota**: S.D. Codified Laws § 1-41-3.4. **Wisconsin**: Wis. Stat. Ann. § 283.11(2).

Other States limit the circumstances in which a state standard may deviate from the federal standard. *See, e.g.*, **Colorado**: Colo. Rev. Stat. Ann. § 25-8-202(8)(a) (to adopt rules more stringent than federal standards regulator must demonstrate at a public hearing that more stringent rules "are necessary to protect the public health, beneficial use of water, or the environment of the state"). **Florida**: Fla. Stat. Ann. § 403.804(2) (stricter standard must be supported by study of "economic and environmental impact which sets forth the benefits and costs" of the stricter standard). **Iowa**: Iowa Code Ann. §§ 455B.105(3), 455B.173(2)(b). **Maine**: Me. Rev. Stat. Ann. tit. 38, § 341-H(3). **Michigan**: Mich. Comp. Laws Ann. §§ 24.232(8), 24.245(3). **Minnesota**: Minn Stat. Ann. § 103G.2375 (barring Minnesota from adopting state dredge and fill program under 33 U.S.C. § 1344(g) that is more stringent than federal standards; Minnesota has not yet adopted such a program). **Montana**: Mont. Code Ann. §§ 75-5-203, 75-6-116. **Oklahoma**: Okla. Stat. Ann. tit. 27a, § 1-1-206. **Oregon**: Or. Rev. Stat. Ann. §§ 183.332, 468B.110(2). **Tennessee**: Tenn. Code Ann. § 4-5-226(k). **Texas**: Tex. Water Code Ann. § 26.017(5). **Utah**: Utah Code Ann. § 19-5-105. **Virginia**: Va. Code Ann. §§ 62.1-44.15(3a), (10), 62.1-44.19:7(B). **West Virginia**: W. Va. Code §§ 22-1-3, 22-5-4(a)(4).

Contrary to the contentions of petitioners and their amici, such a drastic contraction of the jurisdictional scope of the CWA and certain state-law water-quality protections would not eliminate the environmental and economic burdens that result from pollutant discharges into wetlands. Rather, it would shift those burdens to downstream States, their residents, and permit holders or applicants located in those States. Downstream States would experience the deleterious environmental effects that result when pollutants degrade wetlands that significantly affect navigable waters or their tributaries, including the flow of pollutants into downstream waters and the loss of flood protections. See *supra*, at 10-16. Downstream States and their residents would also be forced to bear the regulatory and economic costs of, for example, improving the quality of waters that have suffered from upstream pollution and rebuilding after floods that were exacerbated by upstream dredging or pollution of wetlands. Such a shift in regulatory and cost burdens conflicts with the CWA's core structure of regulating pollutant discharges, including dredge and fill discharges, at their source rather than in downstream locations. *See* S. Rep. No. 92-414, at 77 ("[I]t is essential that discharge of pollutants be controlled at the source."); *see also* 33 U.S.C. §§ 1342(a) (regulating "discharge of any pollutant"), 1344(a) (regulating "discharge of dredged or fill material").

Excluding from the CWA's coverage wetlands that significantly affect navigable waters would also transfer regulatory and economic costs onto private landowners and businesses in downstream States. As pollutant discharges into upstream wetlands impair the water quality of downstream waters, downstream States would be forced to impose disproportionately stringent permit limits on in-state pollutant discharg-

ers to try to maintain the water-quality standards mandated by the CWA for in-state navigable waters, their tributaries, or adjacent wetlands.[18] Overall, petitioners' narrow construction of the CWA's scope would unfairly allow upstream States to reap "the labor and fiscal benefits" of economic activity that discharges pollutants into wetlands significantly connected to navigable waters, while shifting the costs of such pollution to downstream States—precisely the interstate problem that Congress sought to prevent through the CWA. *See* Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. Pa. L. Rev. 2341, 2343 (1996).

III. States Rely on the Significant Nexus Standard, Which Is Workable and Not Overly Burdensome.

The "significant nexus" test is a familiar one that federal agencies, States, courts, and private parties have relied on and applied for more than fifteen years. As the EPA and Army Corps have explained, the agencies have been applying CWA regulations dating back to 1986, and have been doing so "consistent with the Supreme Court's decisions in *SWANCC* and *Rapanos*." 84 Fed.

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[18] *See* Texas Parks & Wildlife Dep't, Comment Letter on Advance Notice of Proposed Rulemaking: Clean Water Act Regulatory Definition of "Waters of the United States" 7 (Apr. 15, 2003) (EPA-HQ-OW-2002-0050) (limiting CWA coverage to traditional navigable waters "would most likely result in more restrictive discharge permit limits to those discharging into the navigable waters to compensate for those dischargers who would no longer be required to meet standards set by" the CWA); Indiana Dep't of Env't Mgmt., Comment Letter on Advance Notice of Proposed Rulemaking: Clean Water Act Regulatory Definition of "Waters of the United States" 11 (April 16, 2003) (EPA-HQ-OW-2002-0050) (noting impact on drinking water).

Reg. at 56,660. The agencies explained that they, "their co-regulators, and the regulated community are thus familiar" with the significant nexus analysis "and have amassed significant experience operating under those pre-existing regulations." *Id.*

States have relied on the significant nexus test to protect the quantity and quality of navigable waters; the health, safety, and economic interests of state residents who use those waters; and the fish and other wildlife that rely on those waters. See *supra*, at 18-21. Moreover, States have structured their own water-related regulations based on the settled understanding that the CWA covers waters, including wetlands, with a significant nexus to navigable waters and their tributaries. Many States rely on the CWA as the sole source of legal protection for wetlands in their jurisdictions. Other States rely in part on the CWA, augmenting those federal protections with state laws and resources.[19] If

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[19] Approximately twenty States and the District of Columbia have specific wetland protection laws or regulations. *See, e.g.*, **California**: Cal. Water Code § 13140; Cal. Code Regs tit. 23, § 2926. **Connecticut**: Conn. Gen. Stat. Ann. §§ 22a-28 et seq., 22a-36 et seq., 22a-90 et seq., 22a-359. **Florida**: Fla. Stat. Ann. §§ 373.403 et seq., 373.414. **Indiana**: Ind. Code Ann. §§ 13-11-2-221.5, 13-18-22-1 et seq. **Maine**: Me. Rev. Stat. Ann. tit. 38, § 480-A et seq. **Maryland**: Md. Code Ann., Env't §§ 5-901 et seq., 16-101 et seq. **Massachusetts**: Mass. Gen. Laws ch. 131, § 40; *see also id.* ch. 130, § 105. **Michigan**: Mich. Comp. Laws Ann. § 324.30301 et seq. **Minnesota**: Minn. Stat. Ann. § 103G.221 et seq. **New Hampshire**: N.H. Rev. Stat. Ann. § 482-A:1 et seq. **New Jersey**: N.J. Stat. Ann. §§ 13:9A-1 et seq., 13:9B-1 et seq. **New York**: N.Y. Env't Conserv. Law §§ 24-0101 et seq., 25-0101 et seq. **North Carolina**: N.C. Gen. Stat. Ann. §§ 113A-100 et seq., 113-229–113-230. **Ohio**: Ohio Rev. Code Ann. §§ 1506.01 et seq., 6111.021 et seq. **Oregon**: Or. Rev. Stat. Ann. § 196.800 et seq. **Pennsylvania**: 32 Pa. Stat. and Cons. Stat. § 693.1 et seq. **Rhode Island**: 2 R.I. Gen. Laws

(*continues on next page*)

federal jurisdiction under the CWA were restricted as petitioners propose, many States would have to develop new regulatory programs to fill the void. At a minimum, this process would take time and money. And even when operational, these substitutes for the CWA's uniform federal program would result in a patchwork of regulatory requirements among the States—to the detriment of downstream States and contrary to Congress's intent.

New York, for example, designed its Freshwater Wetlands Act to work in tandem with the CWA by applying distinct state-law protections to regulated activities affecting certain larger freshwater wetlands. *See* N.Y. Env't Conserv. Law § 24-0107. New York relies on federal protections under the CWA to protect freshwater wetlands that fall outside the scope of the Freshwater Wetlands Act. Massachusetts's regulation of wetlands also relies on federal law. For example, wetlands across Massachusetts—including specific wetlands identified in Bolton and in Marlborough—are not protected by Massachusetts state law because they do not meet size and location thresholds.[20] Such wetlands

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Ann. § 2-1-18 et seq.; 46 R.I. Gen. Laws Ann. § 46-23-1 et seq. **Tennessee**: Tenn. Code Ann. § 69-3-108. **Vermont**: Vt. Stat. Ann. tit. 10, § 913 et seq. **Virginia**: Va. Code Ann. §§ 28.2-1300 et seq., 62.1-44.5, 62.1-44.15. **Washington**: Wash. Rev. Code Ann. § 77.55.011 et seq. **Wisconsin**: Wis. Stat. Ann. § 281.36. **District of Columbia**: D.C. Code §§ 2-1226.38(3), 8-103.06, 8-103.09(d).

Some States have statutory or regulatory regimes directed towards only coastal wetlands. *See, e.g.*, **Alabama**: Ala. Admin. Code r. § 335-8-2-.02–335-8-2-.03. **Georgia**: Ga. Code Ann. § 12-5-280 et seq. **Louisiana**: La. Stat. Ann. § 49:214.21 et seq. **Mississippi**: Miss. Code Ann. § 49-27-1 et seq. **South Carolina**: S.C. Code Ann. § 48-39-10 et seq.

[20] *See* Decl. of Kathleen M. Baskin, *supra*, ¶ 14; *see also* 310 Code Mass. Regs. § 10.57.

would be outside of the CWA's jurisdiction if this Court were to require that wetlands have a surface-water connection to navigable waters to be "waters of the United States," even though they are otherwise "inseparably bound up with the 'waters' of the United States." *Riverside Bayview Homes*, 474 U.S. at 134.

Petitioners and their amici are incorrect in contending that the significant nexus analysis is "unworkable." *See e.g.*, W. Va. Amicus Br. 5. As an initial matter, certain categories of wetlands may reasonably be inferred to have a significant nexus with navigable waters without the need for case-specific determinations. *See, e.g.*, *Rapanos*, 547 U.S. at 780-81 (Kennedy, J., concurring in the judgment). Where necessary, the case-specific analysis simply calls for looking at the facts to discern whether a wetland has hydrologic or other connections that significantly affect navigable waters or their tributaries. Such fact-specific inquiries are routine both in the law generally and in environmental permit regimes specifically.[21] Indeed, agencies, courts, and private parties have routinely applied the significant nexus test to the circumstances presented in specific cases without great difficulty. For example, the Sixth Circuit found a significant nexus between wetlands and navigable waters where evidence showed that the wetlands filtered acid runoff and sediment from a nearby mine and that excavating and filling those wetlands had increased flood peaks in down-

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[21] For example, New York courts routinely consider whether wetlands fall within the scope of New York's Tidal Wetlands Act and local ordinances. *See, e.g.*, *Matter of Pletenik v. Town of Brookhaven*, 70 A.D.3d 954 (N.Y. App. Div. 2010) (municipal ordinance); *Matter of Jack Coletta, Inc. v. New York State Dep't of Env't Conservation*, 128 A.D.2d 755 (N.Y. App. Div. 1987) (New York Tidal Wetlands Act).

stream waters. *Cundiff*, 555 F.3d at 210-11. The Ninth Circuit concluded that a pond had a significant nexus to a navigable river because the pond waters seeped "into the river through both the surface wetlands and the underground aquifer," which resulted in increased chloride levels in the river. *Northern Cal. River Watch*, 496 F.3d at 1000-01. And in finding that groundwater created a significant nexus between wetlands and a navigable water, the Third Circuit observed that water-testing evidence had demonstrated that bromide and dye dissolved into the wetlands complex then flowed into downstream waters. *United States v. Donovan*, 661 F.3d 174, 186 (3d Cir. 2011). Although different cases will present different facts relevant to the significant nexus analysis, these cases make clear that the significant nexus test is workable.

Indeed, contrary to the suggestion of petitioners and their amici (*see* Pet. Br. 47; W. Va. Amicus Br. 22-23), courts have repeatedly applied the significant nexus test in concluding that the specific evidence presented did not establish a significant nexus between the waters at issue and navigable waters indisputably subject to the CWA. Even before *Rapanos*, this Court found that a significant nexus was not present in *SWANCC*, concluding that a pond isolated from any jurisdictional waters was not sufficiently connected to such waters based solely on their use as migratory bird habitat. 531 U.S. at 171-72. And applying the considerations set forth in *Rapanos*, appellate courts have required concrete showings to establish a significant nexus. For example, the Fourth Circuit concluded that the evidence before it did not establish a significant nexus between wetlands and a navigable river seven miles away, where the administrative record contained no evidence of the actual flow of adjacent tributaries

and little evidence to connect the wetlands to a navigable water. *Precon Development Corp.*, 633 F.3d at 294. And in other cases, courts have likewise concluded that the evidence presented was too speculative to establish the requisite significant nexus between wetlands and navigable waters.[22] The claims of petitioners' amici (*e.g.*, W. Va. Amicus Br. 12) that the significant nexus test extends the CWA's jurisdiction to waters that are purportedly far removed from navigable waters ignores the way the test is typically administered in practice.

The practical experience of Amici States also belies the assertions of petitioners and their amici that the significant nexus test is too onerous and unduly hampers commercial activity. Permitting authorities have "considerable flexibility in establishing permit terms and conditions." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 85 (2d Cir. 2006) (quotation marks omitted); *see* 40 C.F.R. § 125.3. And general permits can be issued to "an entire class of hypothetical dischargers in a given geographical region," allowing covered discharges to commence automatically without the time and expense of an individualized application process. *See Northwest Env't Advocates v. EPA*, 537 F.3d 1006, 1011 (9th Cir. 2008) (quotation marks omitted); *see* 40 C.F.R. § 122.28. In fact, more than 97 percent of the regulatory workload

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[22] *See also Orchard Hill Bldg. Co. v. United States Army Corps of Eng'rs*, 893 F.3d 1017, 1024-25 (7th Cir. 2018); *Lewis v. United States*, No. 2:18-cv-1838, 2020 WL 4798496, at *9 (Aug. 18, 2020), *op. modified on denial of reconsideration*, 2020 WL 6269931 (E.D. La. Oct. 26, 2020), *appeal docketed*, No. 21-30163 (5th Cir. Mar. 25, 2021); *Black Warrior River-Keeper, Inc. v. Drummond Co.*, 387 F. Supp. 3d 1271, 1289-90 (N.D. Ala. 2019); *Hawkes Co. v. United States Army Corps of Eng'rs*, No. 13-cv-107, 2017 WL 359170, at *3, 7-11 (D. Minn. Jan. 24, 2017).

of the Army Corps is processed in the form of general permits.[23]

Indeed, an overwhelming number of applications to the Army Corps, the agency primarily responsible for issuing permits for dredge and fill that typically involve wetlands, result in permit issuance. As the Army Corps has explained, "less than one percent of all requests for permits are denied," and the limited denials are usually to applicants who "have refused to change the design, timing, or location of the proposed activity" to accommodate the concerns raised by the Army Corps.[24] And "concerned landowners need not risk fines or endure the permit-application process before deciding whether to build on or alter their property" because they can obtain a "jurisdictional determination" from the Corps as to whether their property contains "waters of the United States." *See* 33 C.F.R. §§ 320.1(a)(6), 325.9, 331.2; *Orchard Hill Bldg.*, 893 F.3d at 1020-21. States thus rely on the CWA to protect wetlands that satisfy the significant nexus standard, and that standard has proved workable.

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[23] Congressional Rsch. Serv., *The Army Corps of Engineers' Nationwide Permits Program: Issues and Regulatory Developments* 2 (2017).

[24] U.S. Army Corps of Eng'rs, *Regulatory Program Frequently Asked Questions* (n.d.).

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

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June 2022

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