No. 21-454

IN THE

Supreme Court of the United States

MICHAEL SACKETT; CHANTELL SACKETT,
Petitioners,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, Administrator,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* FORESTRY ORGANIZATIONS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The National Alliance of Forest Owners (NAFO) is a trade association that represents owners of over 47 million acres of private forests in 32 States. NAFO was incorporated in March 2008, and it has worked aggressively since then to sustain the ecological, economic, and social values of forests, and to assure an abundance of healthy and productive forest resources for present and future generations.

The American Forest & Paper Association (AF&PA) serves to advance a sustainable U.S. pulp, paper, packaging, tissue, and wood products manufacturing industry through fact-based public policy and marketplace advocacy. AF&PA member companies make products essential for everyday life from renewable and recyclable resources and are committed to continuous improvement through the industry's sustainability initiative, Better Practices, Better Planet 2030. The forest products industry accounts for approximately four percent of total U.S. manufacturing GDP, manufactures close to $300 billion in products annually, and employs nearly 950,000 men and women.

The Forest Landowners Association (FLA) represents private forestland stakeholders who own and manage over 55 million acres nationwide—from

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[1] Pursuant to Rule 37.6, *amici* affirm that no part of this brief was authored in whole or in part by counsel for any party, and no person or entity has made any monetary contribution to the preparation or submission of the brief other than *amici curiae* and their counsel. All parties have consented to the filing of this brief.

large, multi-generational forest businesses to individual family landowners who view their forest as a long-term investment. FLA is committed to preserving America's tradition of private forest ownership, promoting the importance of forest resources and sustainable forest management, and securing a legacy that can be passed to the next generation.

The Forest Resources Association is a trade association that represents the entire wood supply chain, focusing on the safe, efficient, and sustainable harvest of forest products and their transport from woods to mill. It represents more than 320 organizations and businesses in the forest products industry, including forest landowners, suppliers, consuming mills, associated businesses, and state forestry associations.

Amici also include the following associations from various forested regions nationwide: Alabama Forestry Association, Arkansas Forestry Association, Calforests, Empire State Forest Products Association, Florida Forestry Association, Forestry Association of South Carolina, Georgia Forestry Association, Idaho Forest Owners Association, Louisiana Forestry Association, Mississippi Forestry Association, New Hampshire Timberland Owners Association, North Carolina Forestry Association, Ohio Forestry Association, Inc., Oregon Forest & Industries Council, Pennsylvania Forest Products Association, Southeastern Lumber Manufacturers Association, Tennessee Forestry Association, Texas Forestry Association, Washington Forest Protection Association, and West Virginia Forestry Association.

Each of these organizations has members, including companies, families, and individuals, that work on, own, or manage forest lands in their respective States. These organizations promote stewardship and wise use of forest resources and are dedicated to forest conservation and the sustainable use of natural resources.

Amici have a substantial interest in the scope of federal regulatory authority under the Clean Water Act (CWA). Although many discharges resulting from forestry activities are exempt from permitting under CWA Sections 402(*l*) and 404(f), *see* 33 U.S.C. §§ 1342(*l*) & 1344(f), forest owners must obtain a permit from EPA or an authorized State under CWA Section 402 if, for instance, vegetation management to enable regeneration involves discharges from a point source to "navigable waters."[2] Furthermore, the forestry industry has been a frequent target of CWA citizen suits alleging that forestry activities involve unpermitted discharges that are not covered by any of the statutory exemptions. *E.g.*, *Decker v. Nw. Env't Def. Ctr.*, 568 U.S. 597 (2013) (unsuccessful citizen suit seeking to require CWA permits for discharges of channeled stormwater runoff from logging roads). Regardless of their merit, such suits can take years to resolve, are disruptive to forestry operations, and place significant burdens on the resources of litigants, federal agencies, and courts alike. Accordingly, *amici*

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[2] While several *amicus* AF&PA members own small amounts of forested land, AF&PA members purchase fiber from landowners and are concerned about potential increased fiber prices due to unnecessary regulatory burdens. AF&PA members also hold NPDES permits, but this brief focuses on the forest landowner perspective.

have a strong interest in the establishment of appropriate and predictable boundaries for federal regulatory authority under the CWA.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Since 1975, the Government's interpretations of "navigable waters" have operated as a one-way ratchet to expand federal regulatory authority under the CWA. *See* Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31,320, 31,324-25 (July 25, 1975). Those interpretations reached this Court on three occasions. Win or lose, the Government responded the same way after each case: turn the ratchet again.

After this Court held that the Corps has jurisdiction over wetlands that abutted a navigable waterway in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the Corps broadened its reading of the CWA by introducing the "Migratory Bird Rule" in 1986. *See* 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986). That rule extended the Government's jurisdiction to isolated, intrastate waters that are or would be used as habitat by migratory birds. In *Solid Waste Agency of Northern Cook Country v. U.S. Army Corps of Engineers ("SWANCC")*, this Court explained the "text of the statute will not allow" it "to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water" and that the Migratory Bird Rule impermissibly reads the term "navigable" out of the Act, 531 U.S. 159, 168-72 (2001).

After *SWANCC*, the Government "did not significantly revise its theory of federal jurisdiction."

Rapanos v. United States, 547 U.S. 715, 726 (2006). The Government continued to assert jurisdiction "upstream to the highest reaches of the tributary systems, and over all wetlands adjacent to any and all of those waters." Gary S. Guzy & Robert M. Anderson, *Supreme Court Ruling Concerning CWA Jurisdiction Over Isolated Waters* 7 (Jan. 2001).[3] Those assertions went largely unchecked by lower courts, which affirmed "sweeping assertions of jurisdiction over ephemeral channels and drains as 'tributaries'" and over wetlands with a "mere hydrologic connection" to those so-called tributaries, no matter how insubstantial the connection. *Rapanos*, 547 U.S. at 726, 728 & 740. A majority of this Court rejected the agencies' "mere hydrologic connection" theory in *Rapanos*, though no single opinion was joined by five justices.

After *Rapanos*, the Government expanded its interpretation of the statutory phrase "navigable waters" yet again. This latest and ongoing expansion capitalizes on ambiguities in Justice Kennedy's solo concurrence, which described the "significant nexus" test: "wetlands … 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.'" 547 U.S. at 780 (emphasis added). By broadly construing the italicized language and applying the test not only to wetlands, but also to tributaries, the Government

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[3] https://www.epa.gov/sites/default/files/2017-05/documents/2001_guidance_isolated_wetlands.pdf.

maintains that its CWA jurisdiction extends to the highest reaches of the tributary system (including ordinarily dry channels) and wetlands that are relatively close to those "tributaries." Furthermore, even though *SWANCC* "*specifically rejected* the argument that physically unconnected ponds could be included based on their ecological connection to covered waters," *id.* at 754, the significant nexus test frees the Government to once more claim jurisdiction over geographically isolated waters.

This Court should reject the statutorily unsupported significant nexus test, reverse the decision below, and restore the limits on federal regulatory authority set by Congress and this Court's precedent. The significant nexus test cannot be squared with the CWA's text and structure. Congress used more inclusive terms and phrases such as "watersheds," "river basins," and "any waters" in various provisions of the Act that allow the Federal Government to provide *non-regulatory* support for state efforts to abate water pollution in all of the Nation's waters. By contrast, Congress limited the exercise of federal *regulatory* authority to "navigable waters." The significant nexus test, however, impermissibly rewrites the CWA and eliminates those distinctions. It also undermines the Act's federalism-preserving structure by allowing the Government to bring "virtually all planning of the development and use of land and water resources by the States under federal control." *Rapanos*, 547 U.S. at 737 (plurality).

This expansion of federal regulatory authority under the significant nexus test is not theoretical.

Lower courts and the agencies tasked with implementing the CWA—the Corps and the U.S. Environmental Protection Agency (EPA)—have applied that test in a way that stretches the definition of "navigable waters" to include ephemeral streams and man-made channels located many miles away from the nearest traditional navigable water; wetlands that are near, but that do not necessarily abut, those waters; and even isolated waters. Bringing such features within the statutory phrase "navigable waters" based on ecological considerations effectively reads the term "navigable" out of the CWA and readjusts the federal-state balance contrary to *SWANCC*, 531 U.S. at 171-74.

Finally, the significant nexus test rests on the flawed rationale that wetlands and non-navigable waters are themselves "navigable waters" if they perform important functions related to the integrity of "navigable waters in the traditional sense." *See Rapanos*, 547 U.S. at 779-80. Protecting the integrity of traditional navigable waters does not depend on federalizing countless other water features. Moreover, the forestry sector provides empirical evidence that an expansive reading of "navigable waters" is unnecessary to protect water quality. Regulatory and non-regulatory programs at all levels of government, along with private sector initiatives, have ensured widespread adoption of various best management practices that have proven extremely effective in protecting water resources, regardless of whether such resources are "navigable waters" or state waters.

ARGUMENT

I. THE SIGNIFICANT NEXUS TEST IMPERMISSIBLY ELEVATES ONE OF THE CLEAN WATER ACT'S PURPOSES OVER ITS TEXT AND STRUCTURE.

The phrase "significant nexus" appears nowhere in the CWA, but is instead "taken from *SWANCC*'s cryptic characterization of the holding of *Riverside Bayview*." *Rapanos*, 547 U.S. at 755 (plurality). From there, Justice Kennedy based his explication of that phrase on the CWA's "goals and purposes." *Id.* at 779 (Kennedy, J., concurring). When the court below applied "Justice Kennedy's understanding of 'significant nexus' [as] the governing standard" in this case, Cert. App. A-26, it did so at the expense of the statute's text and structure. Because the significant nexus test "rewrites the statute," this Court should reverse. *See Rapanos* 547 U.S. at 756 (plurality); *see also Badaracco v. Comm'r of Internal Revenue*, 464 U.S. 386, 398 (1984) ("Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement.").

1. As always, statutory interpretation "begins with the text." *Ross v. Blake*, 578 U.S. 632, 638 (2016). 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). In furtherance of that objective, Congress created dozens of regulatory and non-regulatory programs to control "pollution" in all of the Nation's waters. The Act defines "pollution" broadly and in a way that mirrors the statutory objective. *Compare id. with* 33 U.S.C. § 1362(19) ("'pollution' means the man-made or man-

induced alteration of the chemical, physical, biological, and radiological integrity of water").

One of the Act's "principal provisions," which delineates the scope of federal regulatory authority, is 33 U.S.C. § 1311(a). *Rapanos*, 547 U.S. at 723 (plurality). That provision states that "the discharge of any pollutant by any person shall be unlawful," except as in compliance with the Act's discharge permitting programs and related requirements. *See* 33 U.S.C. §§ 1311(a), 1342, 1344. Congress defined "pollutant" more precisely than "pollution," and it defined "discharge of a pollutant" with reference to "navigable waters," rather than the "Nation's waters" generally. *See id.* §§ 1362(6) & (12). This limitation of federal regulatory authority to "navigable waters" was intentional. Indeed, "[i]t would have been an easy matter for Congress to give the [Federal Government] jurisdiction over all wetlands (or, for that matter, all dry lands) that 'significantly affect the chemical, physical, and biological integrity of' waters of the United States[;]" Congress "did not do that, but instead explicitly limited jurisdiction to 'waters of the United States.'" *Rapanos*, 547 U.S. at 756 (plurality). Courts have a "duty to respect not only what Congress wrote but, as importantly, what it didn't write." *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1900 (2019).

To be sure, Congress clearly knew how to refer to more than just navigable waters by using broader or more precise terms. And that is what it did when constructing the Act's comprehensive, non-regulatory framework for supporting state efforts to prevent, reduce, and eliminate pollution in all of the Nation's waters. For example, the Act authorizes EPA to:

- "make grants to any State, municipality, or intermunicipal or interstate agency for the purpose of assisting in the development of any project which will demonstrate a new or improved method of preventing, reducing, and eliminating the discharge into *any waters* of pollutants from sewers which carry storm water or both storm water and pollutants" (33 U.S.C. § 1255(a)(1) (emphasis added));
- "make grants to any State or States or interstate agency to demonstrate, in *river basins or portions thereof*, advanced treatment and environmental enhancement techniques to control pollution from all sources … [and] … for research and demonstration projects for prevention of pollution of *any waters* by industry, including, but not limited to, the prevention, reduction, and elimination of the discharge of pollutants" (33 U.S.C. §§ 1255(b), (c) (emphasis added));
- enter into agreements with any State to develop plans "for the elimination or control of pollution, *within all or any part of the watersheds* of the Great Lakes" (33 U.S.C. § 1258(a) (emphasis added));
- "make grants to State, interstate, and regional water pollution control agencies" and public or nonprofit entities to help develop and implement a "pollution prevention, control, and restoration plan" for the "Lake Champlain *drainage basin*," which means all or part of nearly twenty

> counties in New York and Vermont "that contain *all of the streams, rivers, lakes, and other bodies of waters, including wetlands*, that drain into Lake Champlain" (33 U.S.C. §§ 1270(e), (f), (g)(2) (emphasis added)).

These and other non-regulatory provisions advance the statutory objective of restoring the integrity of all of the Nation's waters. The exercise of federal regulatory authority also furthers the Act's objective, but that authority is limited to "navigable waters." Nothing in the Act suggests that Congress, when it used varying terms to refer to the Nation's waters or subsets thereof, "intended that they be understood to be redundant." *Bailey v. United States*, 516 U.S. 137, 146 (1995), *superseded by statute on other grounds as recognized in Welch v. United States*, 578 U.S. 120, 133 (2016). Rather, the obvious explanation is that "Congress used [different] terms because it intended each term to have a particular, nonsuperfluous meaning." *Id.*; *see also Jones v. United States*, 529 U.S. 848, 857 (2000) (rejecting the Government's "expansive interpretation" that would give "the statute's limiting language … no office"). A broad reading of "navigable waters" that includes any wetlands or water features that significantly affect "navigable waters" undermines the distinctions that Congress drew between "navigable waters" and other categories of waters and risks rendering the term "navigable" "devoid of significance." *Rapanos*, 547 U.S. at 731 (plurality).

The significant nexus test also "makes a mess" of the CWA's definitional provisions by failing to give effect to Congress's distinction between "navigable waters" and "point sources." *See NLRB v. SW Gen.,*

Inc., 137 S. Ct. 929, 941 (2017). As the *Rapanos* plurality found "[m]ost significant of all, the CWA itself categorizes the channels and conduits" "separately from 'navigable waters,' by including them in the definition of 'point source'." *Rapanos*, 547 U.S. at 735 (plurality); *see also* 33 U.S.C. § 1362(14) (defining "point source" as "any discernible, confined and discrete conveyance, including but not limited to any … ditch, channel, [or] conduit … from which pollutants are or may be discharged"). Relatedly, the CWA defines "discharge of a pollutant"—a term that is central to the Act's key regulatory mechanism, *see* 33 U.S.C. § 1311(a)—as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12)(A). This definition "would make little sense" if a significant number of man-made ditches and channels are deemed to be both point sources and navigable waters. *See Rapanos*, 547 U.S. at 735 (plurality). The text therefore reflects that such features "by and large" are *not* "waters of the United States." *Id.* at 736.

2. The CWA's structure reinforces the conclusion that Congress did not intend for the term "navigable waters" to encompass every wetland or water feature that significantly affects "navigable waters." "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666 (2007) (internal quotation marks and citation omitted). The significant nexus test not only ignores Congress's deliberate choice of words, but also fails to account for the CWA's explicit policy to preserve "primary state responsibility for

ordinary land-use decisions." *See Rapanos*, 547 U.S. at 755-56 (plurality) (citing 33 U.S.C. § 1251(b)).

The CWA's cooperative federalism scheme "anticipates a partnership between the States and the Federal Government[.]" *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). As discussed above, the Act envisions a comprehensive approach to controlling pollution in all waters: the Federal Government has authority alongside States to address discharges of pollutants to navigable waters, but in the rest of the Nation's waters, States are solely responsible for controlling pollution, armed with technical guidance and grant funding from the Federal Government. When dividing authority this way, Congress specifically reserved to States "the primary responsibilities and rights … 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." 33 U.S.C. § 1251(b). Congress further stated that "[e]xcept as expressly provided," "nothing in this chapter shall … be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." *Id.* § 1370.

Treating wetlands, manmade drainage ditches, and remote water features as "navigable waters" because they (alone or in combination) significantly affect waters that are navigable in the traditional sense would be inconsistent with Congress's careful design and the federalism-preserving structure of the CWA. Such a reading of the CWA threatens to bring

"virtually all 'planning of the development and use of land and water resources' by the States under federal control" and "'result in a significant impingement of the States' traditional and primary power over land and water use.'"[4] *Rapanos*, 547 U.S. at 737-78 (plurality) (quoting *SWANCC*, 531 U.S. at 174).

Interpreting "navigable waters" to include ditches would be especially intrusive of local authority. *Cf. New Orleans Gaslight Co. v. Drainage Comm'n of New Orleans*, 197 U.S. 453, 460 (1905) (controlling drainage "is one of the most important purposes for which the police power can be exercised" by state and local governments). Local governments typically construct, maintain, and manage ditches for various beneficial uses, such as transportation and flood control. *See* Nat'l Ass'n of Counties, *et al.*, *Comments on Proposed Revised Definition of "Waters of the United States"* 2 (Feb. 7, 2022) ("Counties … own and manage many public safety ditches to funnel water away from low-lying areas to prevent accidents and flooding of homes and businesses[;] [f]ailure to maintain ditches can result in flooding that leads to property damage and loss of crops.").[5] If, however, such ditches are "navigable waters" under the CWA, States would need to establish water quality standards applicable to those ditches (*e.g.*, designating them for fishing and swimming uses and

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[4] Indeed, "[r]egulation of land use, as through the issuance of the development permits" that the Federal Government maintains the Sacketts must obtain under CWA section 404, "is a quintessential state and local power." *Rapanos*, 547 U.S. at 738 (plurality).

[5] https://www.regulations.gov/comment/EPA-HQ-OW-2021-0602-0427.

promulgating numeric or narrative water quality criteria necessary to support those uses), and the ditches would need to be managed accordingly. Congress's use of the phrase "waters of the United States" is hardly the sort of "'clear and manifest'" statement that authorizes the Federal Government to insert itself into the most routine local decisions over how best to manage drainage. *See Rapanos*, 547 U.S. at 738 (plurality) (quoting *BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 544 (1994)). Accordingly, the Court should "read the statute as written to avoid the significant constitutional and federalism questions raised by" the ongoing application of the significant nexus test to deem features like man-made ditches and channels "navigable waters." *See SWANCC*, 531 U.S. at 174.

II. LOWER COURT DECISIONS AND AGENCY INTERPRETATIONS HAVE STEADILY EXPANDED THE SIGNIFICANT NEXUS TEST TO THE POINT OF NULLIFYING *SWANCC*.

In the first few years following *Rapanos*, some lower courts limited application of Justice Kennedy's significant nexus test to the wetlands context. *E.g., S.F. Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 707 (9th Cir. 2007) ("No Justice, even in dictum, addressed the question whether all waterbodies with a significant nexus to navigable waters are covered by the Act."); *Benjamin v. Douglas Ridge Rifle Club*, 673 F. Supp. 2d 1210, 1215 n.2 (D. Or. 2009) ("Justice Kennedy's significant nexus test is inapplicable to determining the jurisdictionality of tributaries to waters of the United States. … Justice Kennedy limits the applicability of his legal standard to wetlands adjacent to jurisdictional waters."). Other

courts, however, applied the test more broadly to non-wetland features. *E.g.*, *United States v. Robison*, 505 F.3d 1208, 1223-24 (11th Cir. 2007) (analyzing whether a non-navigable tributary is a "navigable water" using the significant nexus test); *Env't Prot. Info. Ctr. v. Pac. Lumber Co.*, 469 F. Supp. 2d 803, 822-23 (N.D. Cal. 2007) (evaluating whether ephemeral and intermittent streams are "navigable waters" under the significant nexus test).

Over time, the more expansive view of the significant nexus test has ossified. Using that test, lower courts have found that even man-made channels and ephemeral streams come within the phrase "navigable waters." *E.g.*, *United States v. HVI Cat Canyon, Inc.*, 314 F. Supp. 3d 1049, 1063-64 & n.16 (C.D. Cal. 2018) (noting that "even ephemeral streams may be jurisdictional under the CWA so long as they possess a significant nexus to a [traditional navigable water]" and affirming the Government's assertion of jurisdiction over a manmade feature "locally known as 'asphalt creek'" and "'drainages' which are dry most of the year"); *United States v. Vierstra*, 803 F. Supp. 2d 1166, 1170-72 (D. Idaho 2011), *aff'd*, 492 F. App'x 738 (9th Cir. 2012) (determining that the Government's evidence supports a finding of a significant nexus between a man-made canal that flows during irrigation season and a navigable river).

Although "Justice Kennedy created the significant nexus test specifically because he was disturbed by the assertion of jurisdiction over wetlands situated along a ditch 'many miles from any navigable-in-fact water,' carrying 'only insubstantial

flow toward it,'" *Precon Devel. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278, 295 (4th Cir. 2011) (citation omitted), courts have continued to uphold those sorts of assertions of jurisdiction under the significant nexus test, presumably because they view that test to be a "flexible inquiry into the ecological relationship between the wetlands (or in this case, the waterway) at issue and traditional navigable waters," *Wis. Resources Prot. Council v. Flambeau Min. Co.*, 903 F. Supp. 2d 690, 715 (W.D. Wisc. 2012); *accord HVI Cat Canyon*, 314 F. Supp. 3d at 1058 (same). In one case, the court upheld jurisdiction over creeks and a tributary with "insignificant flow and contribut[ing] less than one percent of the water to their nearest respective [traditional navigable water]," located "tens of miles" away. *HVI Cat Canyon*, 314 F. Supp. 3d at 1063-64.

This evolution of the significant nexus test in the courts mirrors the Government's gradual expansion of the test through administrative interpretations. Shortly after *Rapanos*, EPA and the Corps issued interpretive guidance on how to apply the significant nexus test to "non-navigable, not relatively permanent tributaries and their adjacent wetlands[.]" *See* U.S. EPA & Dep't of the Army, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* 7 (June 5, 2007).[6] Under that guidance, any significant nexus analysis would focus on the flow characteristics and functions of a particular tributary, along with the functions performed by any

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[6] https://www.epa.gov/sites/default/files/2016-04/documents/rapanosguidance6507.pdf.

wetlands adjacent to the tributary to determine if they (alone or in combination) significantly affect the integrity of a downstream traditional navigable water. *See id.* at 7. Nothing in the guidance contemplated applying the significant nexus test to other water features, such as isolated ponds. In fact, the agencies made it clear that "[n]othing in [their] guidance should be interpreted as providing authority to assert jurisdiction over waters deemed non-jurisdictional by *SWANCC*." *Id.* at 8 n.29.

By 2011, EPA and the Corps set out to broaden the scope of the significant nexus test, first through additional guidance and then through rulemaking. *See Draft Guidance on Identifying Waters Protected by the Clean Water Act* (May 2, 2011) ("Draft Guidance");[7] *accord* 80 Fed. Reg. 37,054 (June 29, 2015). Both of those actions extended the significant nexus test beyond tributaries and their adjacent wetlands to encompass various "other waters" such as prairie potholes,[8] isolated lakes and ponds, and pocosins.[9] *See* Draft Guidance at 19-20; 80 Fed. Reg. at 37,065, 37,104-05. Moreover, the geographic scale of a significant nexus analysis swelled from evaluating a particular tributary and its adjacent

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[7] https://www.regulations.gov/document/EPA-HQ-OW-2011-0409-0002.

[8] Prairie potholes are "a complex of glacially formed wetlands, usually occurring in depressions that lack permanent natural outlets, located in the upper Midwest." 80 Fed. Reg. at 37,105.

[9] Pocosins are "evergreen shrub and tree dominated wetlands found predominantly along the Central Atlantic coastal plain." *Id.*

wetlands to evaluating all similarly situated waters within "the watershed which drains to the nearest traditional navigable water, interstate water or territorial sea"—areas that can range from hundreds-of-thousands of acres to potentially millions of acres in size.[10] 80 Fed. Reg. at 37,091; *accord* Draft Guidance at 8. Finally, under this revamped significant nexus test, the geographic isolation of a water feature is of no moment. The agencies touted that "in some cases the lack of a hydrologic connection would be a sign of the water's function in relationship to the traditional navigable water[.]" 80 Fed. Reg. at 37,093; *accord* Draft Guidance at 9 (same).

While EPA and the Corps eliminated the use of the significant nexus test in 2020,[11] the agencies have reverted to applying that test. As the Government's brief in opposition explained, the agencies are no longer applying the 2020 Navigable Waters Protection Rule and are instead "applying the pre-2015 regulatory regime." *See* Br. for the Resp'ts in Opp'n at 19. And to ensure that the regulatory text aligns with the current regime, the agencies proposed a rule that "generally maintains the legal status quo." Revised Definition of "Waters of the United States,"

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[10] If such a watershed is too large, the Government can use a "smaller watershed," but "generally no smaller than a typical 10-digit hydrologic unit code (HUC-10) watershed in the same area," which still ranges from 40,000-250,000 acres in size. *See* Draft Guidance at 8; 80 Fed. Reg. at 37,092.

[11] *See* The Navigable Waters Protection Rule, 85 Fed. Reg. 22,250, 22,325 (Apr. 21, 2020) ("[T]he final rule eliminates the case-specific application of Justice Kennedy's significant nexus test, and instead establishes clear categories of jurisdictional waters and non-jurisdictional waters and features[.]").

86 Fed. Reg. 69,372, 69,446 (Dec. 7, 2021). In the agencies' own words, "the regulatory scope [of] the presently implemented pre-2015 regulatory regime is approximately the same as the proposed rule." *Id.* In that proposal, the agencies:

- apply the significant nexus test to tributaries, adjacent wetlands, *and* "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds" (86 Fed. Reg. at 69,449);

- declare they can "implement the scope of the significant nexus analysis" through a "more regionalized approach," such as by looking at entire watersheds, "defined by where a tributary and its upstream tributaries drain into a traditional navigable water," rather than just focusing the significant nexus analysis on a particular tributary and its adjacent wetlands (86 Fed. Reg. at 69,439);

- reiterate that "other waters" that are isolated "from the stream network or from jurisdictional waters" can nonetheless meet the significant nexus test, and it may be "their relative isolation from the stream network (e.g., lack of a hydrologic surface connection) that contributes to the important effect that they have downstream" (86 Fed. Reg. at 69,393).

Furthermore, in a supporting document, the agencies elaborate on how "other waters" that are

"distant from the stream network or from jurisdictional waters" can meet the significant nexus test because they provide functions that restore and maintain the chemical, physical, and biological integrity of navigable waters. *Technical Support Document for the Proposed "Revised Definition of 'Waters of the United States'" Rule* 206-07 (Nov. 18, 2021).[12] For instance, such waters can be "biologically connected … through the movement of seeds, macroinvertebrates, amphibians, reptiles, birds, and mammals." *Id.* at 207. Plants and macroinvertebrates, in particular, can "achieve dispersal over a variety of distances," such as by "'hitchhiking' on or inside highly mobile animals" for "hundreds of kilometers." *Id.* at 207-08. Because of these, and other functions, that remote waters can provide to traditional navigable waters, the agencies believe it is appropriate to apply the significant nexus test to those waters.

The judicial and agency expansions of the significant nexus test detailed above cannot be reconciled with *SWANCC*, as they would extend federal regulatory authority to countless water features that are "a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." *SWANCC*, 531 U.S. at 173. In *SWANCC*, the Court concluded "the text of the statute will not allow" for the Government's jurisdiction to "extend[] to ponds that are *not* adjacent to open water." 531 U.S. at 168; *see also Rapanos*, 547 U.S. at 728 (plurality) (recounting

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[12] https://www.epa.gov/system/files/documents/2021-12/tsd-proposedrule_508.pdf.

how lower courts upheld the Government's broad theories of jurisdiction "even after *SWANCC's* excision of 'isolated' waters and wetlands from the Act's coverage"). *SWANCC* also reinforced the independent significance of Congress's use of the term "navigable," as the Court could not agree "that Congress' separate definitional use of the phrase 'waters of the United States' constitutes a basis for reading the term 'navigable waters' out of the statute." *SWANCC*, 531 U.S. at 172. Finally, the Court "read the statute as written to avoid the significant constitutional and federalism questions raised by" an interpretation that would bring isolated, intrastate, non-navigable ponds and mudflats within the phrase "navigable waters." *Id.* at 174.

Despite these holdings, the significant nexus test has devolved into the sort of unbounded inquiry into ecological factors and connections (or lack thereof) between traditional navigable waters and non-navigable water features perhaps even dozens of miles away that "would swiftly overwhelm *SWANCC* altogether; after all, the ponds [this Court held to be non-jurisdictional] in *SWANCC* could … offer nesting, spawning, rearing and resting sites for aquatic or land species, and serve as valuable storage areas for storm and flood waters." *Rapanos*, 547 U.S. at 749 (plurality). Using the significant nexus test to assert jurisdiction over isolated features based on biological connections such as the dispersal of seeds or macroinvertebrates to a distant navigable water is especially untenable. Like the now-defunct Migratory Bird Rule, such an interpretation of the CWA reads the term "navigable" out of the statute and presents the same federalism concerns that drove the holding

in *SWANCC*. And it would result in bringing non-navigable water features within the scope of the phrase "navigable waters" in circumstances that are just as "surprising" and "bizarre" as "requir[ing] a permit … for pollutants carried to navigable waters on a bird's feathers." *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1471 (2020).

III. INTERPRETING "NAVIGABLE WATERS" TO INCLUDE ANY WATER FEATURE CONNECTED TO A "NAVIGABLE WATER" IS UNNECESSARY TO PROTECT WATER QUALITY.

Under the significant nexus test, the rationale for bringing wetlands within the statutory phrase "navigable waters" is as follows: where wetlands "perform critical functions related to the integrity" of downstream navigable-in-fact waters, they too must be regulated as "navigable waters" to ensure the downstream waters are protected. *See Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring). Elsewhere in his opinion, Justice Kennedy appeared to apply the significant nexus test to not only wetlands, but also other "nonnavigable waters," though he did not parse whether wetlands and nonnavigable waters function in the same way relative to downstream navigable waters. *See id.* at 759, 767. This has allowed the Government to take the view that an expansive reading of the term "navigable waters" is needed due to the risk that pollutant discharges into wetlands and their adjacent tributaries will ultimately impair the quality of traditional navigable waters. *See, e.g.*, 86 Fed. Reg. at 69,394 ("[I]t would be impossible to achieve Congress's objective if the scope of authority

were constrained to waters traditionally understood as navigable because those channels cannot be protected without protecting the tributaries that flow into them and wetlands adjacent to them."); *see also id.* at 69,393 (explaining that "[s]ometimes it is [other waters'] relative isolation from the stream network (e.g., lack of a hydrologic surface connection) that contributes to the important effect that they have downstream").

These justifications do not withstand scrutiny. As explained in Part A below, the Federal Government can protect navigable waters by regulating upstream discharging activities without having to federalize intervening water features and wetlands that may convey pollutants through connections to downstream navigable waters. In Part B, we explain how a vast array of regulatory and non-regulatory forest practices programs at the state and local levels, as well as private sector initiatives, work together to ensure that forest management activities are protective of water quality, without the need for a federal regulatory overlay.

A. The CWA's Discharge Prohibition And Regulatory Programs Ably Protect "Navigable Waters" From Polluting Activities Upstream.

Under the CWA's plain terms, the Federal Government has authority to regulate upstream activities that result in the addition of pollutants from point sources to navigable waters. Thus, there is no need to also treat wetlands or other water features through which pollutants are added, many of which may be several miles upstream of any navigable-in-

fact water, as "navigable" under the atextual significant nexus test. The CWA is best read as authorizing the Federal Government to protect the integrity of navigable waters by regulating point source discharges to such waters, while providing financial and technical assistance under the Act's non-regulatory programs to bolster state and local efforts to protect all other waters. A "central provision" of the CWA is the prohibition of the discharge of any pollutant except as in compliance with specified provisions of the Act, such as the "requirement that individuals, corporations, and governments secure National Pollutant Discharge Elimination System (NPDES) permits before discharging pollution from any point source into the navigable waters of the United States." *Decker v. Nw. Env't Def. Ctr.*, 568 U.S. 597, 602 (2013) (citing 33 U.S.C. §§ 1311(a), 1362(12)). The NPDES program regulates the disposal of most "pollutants," which the Act defines broadly. *See* 33 U.S.C. §§ 1342, 1362(6). Discharges of dredged or fill material, however, are instead subject to regulation under the section 404 permit program. *See Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 274 (2009) (holding that "if the Corps has authority to issue a permit for a discharge under § 404, then the EPA lacks authority to do so under § 402"); *see also* 40 C.F.R. § 232.2 (defining "fill material").

The Federal Government enjoys powerful authority under these two permitting programs to regulate discharging activities where pollutants

reach navigable waters.[13] This is true when "a point source directly deposits pollutants into navigable waters, or when the discharge reaches the same result through roughly similar means." *Cnty. of Maui*, 140 S. Ct. at 1476. Furthermore, the term "discharge of a pollutant" "includes within its reach point sources that do not themselves generate pollutants" but simply "convey" pollutants to navigable waters. *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004).

Because the Act restricts the "*addition* of any pollutant *to* navigable waters," courts have been able to address situations where a pollutant is discharged indirectly into a navigable water without seeing a "need to classify [] intervening conduits as 'waters of the United States.'" *Rapanos*, 547 U.S. at 743-44 (plurality) (emphasis added). The foregoing illustrates how the Federal Government can effectively protect the integrity of "navigable waters" by addressing upstream discharges that reach such waters under the Act's regulatory programs. There is no need to adopt a linguistically implausible interpretation of "navigable waters" that extends to every upstream water feature that connects to a navigable-in-fact water.

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[13] Fill material, which 40 C.F.R. § 232.2 defines as material that has the effect of "[r]eplacing any portion of a water of the United States with dry land" or "[c]hanging the bottom elevation of any portion of a water of the United States," generally stays in place and does not pose the same risk of migrating to navigable waters as pollutants that are regulated under the NPDES program.

B. Rigorous Governmental And Private Sector Programs Effectively Protect Water Quality In And Around Forested Landscapes.

In the United States, forestry activities on private land overwhelmingly occur under the auspices of comprehensive state-approved Best Management Practices (BMPs) that are designed to protect water quality and habitat for aquatic organisms. In the forestry context, BMPs refer to a practice or combination of practices designed to prevent or mitigate water quality impacts. *See* Decision Not to Regulate Forest Road Discharges Under the Clean Water Act, 81 Fed. Reg. 43,492, 43,496 (July 5, 2016). BMPs, established by state natural resource agencies in consultation with forest managers, reflect local conditions and have proven extremely effective at protecting water quality in areas under active forest management. Erik B. Schilling, *et al.*, *Forestry Best Management Practices and Conservation of Aquatic Systems in the Southeastern United States* 1-3, Water 13(19), 2611, (2021) ("Schilling").[14] BMPs typically apply whether or not the water bodies in question are "navigable waters" under the CWA. Any attempt to justify expansion of federal jurisdiction as necessary to protect water quality from forestry activities would therefore be misplaced.

State-approved BMPs provide a smorgasbord of practices covering all aspects of forestry that may affect water quality. BMPs include identifying and avoiding high-erosion hazard areas; minimizing the

[14] https://doi.org/10.3390/w13192611 (last visited Apr. 13, 2022).

total land area disturbed; minimizing road crossings and other incursions into waterbodies; and anticipating and mitigating erosion from precipitation events. They also include such measures as vegetative buffers adjacent to waterbodies, where activity is modified or limited to reduce the potential for nonpoint source pollution runoff from sediment and other pollutants, known as "streamside management zones" or "SMZs." Schilling at 3. Streamside management zones can also provide shade to the waterbodies, which is important for aquatic organisms sensitive to temperature; and aid in maintaining streambank stability, which reduces erosion. *Id.*

Other BMPs include locating forest roads and trails away from streams as much as possible and employing road construction and maintenance methods particularly designed to reduce and capture erosion and limit stormwater runoff. *Id.* at 4; *see also* 81 Fed. Reg. at 43,496 (identifying BMPs such as using gravel and buffers as erosion control for construction of forest roads, in particular). Yet another area where BMPs are used is in the context of chemical fertilizer and herbicide applications. The use of chemicals generally occurs only in the effort to regenerate forest stands following harvest. While these chemicals are used infrequently, they are critical for regeneration of a healthy and productive forest stand. When they must be used, BMPs such as limiting application rates, application only under favorable weather conditions, and streamside management zones are "highly effective" in limiting

runoff, thereby limiting nutrient and chemical loading in a waterbody.[15] Schilling at 6-7.

To complement state programs,[16] BMPs are required for landowners seeking certification under such third-party programs as the American Tree Farm System[17] (ATF), Sustainable Forestry Initiative[18] (SFI), and Forest Stewardship Council[19] (FSC). *See* 81 Fed. Reg. at 43,499, 43,503-04.

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[15] In addition, herbicide applications in the forest must comply with rigorous requirements for handling and safe use under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 *et seq*., as well as with the terms of the applicable pesticide general permit issued by EPA or authorized States under CWA Section 402. *See generally* U.S. EPA, *Pesticide Permitting*, https://www.epa.gov/npdes/pesticide-permittinghttps://www.epa.gov/npdes/pesticide-permitting (last visited Apr. 13, 2022).

[16] At the federal level, the U.S. Forest Service and the U.S. Bureau of Land Management incorporate their own BMPs into management of silvicultural activities on federal lands. *See generally*, USDA, Forest Service, *National Best Management Practices for Water Quality Management on National Forest System Lands* 128-40 (2012), https://www.fs.fed.us/naturalresources/watershed/pubs/FS_National_Core_BMPs_April2012.pdf; *see also* 81 Fed. Reg. at 43,500-02 (describing monitoring and success of Forest Service program and similar efforts by the U.S. Bureau of Land Management).

[17] https://www.treefarmsystem.org/view-standards (last visited Apr. 13, 2022).

[18] http://www.sfiprogram.org/sfi-standards/ (last visited Apr. 13, 2022).

[19] https://us.fsc.org/en-us/certification (last visited Apr. 13, 2022).

Landowners that sell wood to mills with certified fiber sourcing likewise must ensure BMPs are employed. Schilling at 9.[20]

Nationwide, monitoring of forestry BMP implementation on private lands is rigorous and continuous, and it consistently demonstrates high implementation rates, regardless of whether States implement BMP programs through mandatory, quasi-mandatory, or voluntary means. *See* 81 Fed. Reg. at 43,498; *see also* Schilling at 8. EPA has found that "all states with significant forestry operations have developed BMP manuals and most states have established forest management programs tailored to state-specific conditions (e.g., topography, climate, and industry activity) that address runoff from forest roads." 81 Fed. Reg. at 43,497.

The high implementation rates have resulted in measurable environmental benefits. A robust body of scientific literature reinforces the conclusion that properly implemented forestry BMPs protect not only water quality, but also in-stream habitat conditions for species. As EPA found in 2016 when it declined to designate stormwater discharges from forest roads for regulation under 33 U.S.C. § 1342(p)(6), "[t]he scientific literature increasingly demonstrates the effectiveness of BMPs in preventing, minimizing, and mitigating discharges affecting water quality and aquatic habitats." 81 Fed. Reg. at 43,496. EPA further emphasized that:

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[20] *See also* Sustainable Forestry Initiative, The SFI 2022 Fiber Sourcing Standard, https://forests.org/fibersourcingstandard/ (last visited Apr. 13, 2022).

> state, federal, regional, tribal government, and private sector programs already exist nationwide to address water quality problems caused by discharges from forest roads. Many of these programs have been improved and updated in recent years. Program implementation rates are generally high and have been shown to be effective in protecting water quality when properly implemented.

Id. at 43,493; *see also Decker*, 568 U.S. at 614 (explaining that EPA's decision not to require NPDES permits for logging road runoff "exists against a background of state regulation with respect to stormwater runoff from logging roads").

Studies published since the time of EPA's findings in 2016 further confirm that properly implemented forestry BMPs are protective of water quality. *E.g.*, Schilling at 7-8 (describing 2021 results of literature review). Together, these studies show that "[s]treams in forested areas are known to have higher water quality than streams with water draining from other land uses[.]" *Id.* at 1.

Notably, the U.S. Fish and Wildlife Service (FWS)—the agency charged with implementing the Endangered Species Act (ESA) for terrestrial and freshwater species—has also recognized the importance of forestry BMPs in protecting and enhancing water quality, especially when promulgating "Section 4(d)" rules, which are species-specific rules for protection of a species listed as threatened. 16 U.S.C. § 1533(d). Under ESA Section 4(d), FWS may exempt certain activities from the

prohibition on "incidental take" of a species, as defined in the ESA. In recent years, due to a shift in policy, FWS has been promulgating Section 4(d) rules more frequently. And when promulgating such rules for aquatic species, the Service has often exempted forest management activities that comply with state-issued BMPs from the incidental take prohibition. *E.g.*, Endangered and Threatened Wildlife and Plants; Threatened Species Status With Section 4(d) Rule for Neuse River Waterdog, Endangered Species Status for Carolina Madtom, and Designations of Critical Habitat, 86 Fed. Reg. 30,688, 30,728 (June 9, 2021); Endangered and Threatened Wildlife and Plants; Section 4(d) Rule for Trispot Darter, 85 Fed. Reg. 61,614, 61,619 (Sept. 30, 2020). In FWS's words:

> [d]evelopment and refinement of BMPs has resulted in substantial improvements to forestry's impacts on water quality in recent decades and has created a culture of water stewardship in the forest landowner community, making this stakeholder group an important ally in the conservation of imperiled species.

86 Fed. Reg. at 30,694.

The forestry sector's demonstrated success in protecting water resources illustrates why federalizing as many waters as possible under a broad reading of "navigable waters" is unnecessary. In fact, EPA has warned of the perverse consequences of adding yet "another federal program" in the forestry space: the "diver[sion of] resources from on-the-ground stream protection efforts to bureaucratic reshuffling." 81 Fed. Reg. at 43,506. Stream

protection efforts should remain local. That water-quality protection efforts like BMPs are largely the province of States makes eminent sense. BMPs are by nature site-specific. State natural resource agencies, with their more intimate knowledge of local conditions, are better suited to continue developing and implementing BMPs. Thus, it is unsurprising that EPA has recognized that "[w]ide variations in topography, climate, ownership, management, and use across the nation's network of forest roads make the establishment of any nationwide regulatory program a complex and difficult endeavor." *Id.* at 43,493; *see also id.* at 43,498-99. The federal interference threatened by the expansion of CWA jurisdiction is therefore unnecessary to advance EPA's water-quality goals in the forestry context. Not only is it unnecessary, but it could even "be duplicative or counterproductive," particularly where there are "extensive rules" governing water-quality protection during silvicultural activities. *Decker*, 568 U.S. at 614.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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