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 OF AMICI CURIAE ASSOCIATED INDUSTRIES OF FLORIDA ("AIF") AND THE FLORIDA H2O COALITION ("H2O COALITION") IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae consist of two non-profit corporations: Associated Industries of Florida ("AIF"), and the Florida H2O Coalition ("H2O Coalition").

AIF is the voice of Florida business, and the largest association of business, trade, commercial, and professional organizations in Florida.

It represents the interests of a broad group of corporations, professional associations, partnerships, and proprietorships in all business sectors. It has represented the interests of prosperity and free enterprise before the three branches of state government since 1920. A voluntary association of diversified businesses, AIF was created to foster an economic climate in Florida conducive to the growth, development, and welfare of industry and business and the people of the state. AIF seeks to lessen the burdens government would place on employers, while seeking solutions to conditions that threaten their success.

While AIF is the recognized leader of Florida business in the state Capitol, dealing with significant changes and revisions to federal water policy has frequently required a broader group of interested parties to appropriately address the variety of viewpoints. To this end, AIF established its H2O Coalition

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[1] All parties consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

for the specific purpose of bringing a broad spectrum of stakeholders together to comprehensively address state and federal water policy issues. The AIF H2O Coalition membership consists of a broad and diverse group of stakeholders including agricultural, industrial, manufacturing, power generation, home building, and county and municipal government. The H2O Coalition has enabled AIF, and many Florida interests, to successfully engage with the state and federal governments making updates in the early and mid-2000s to federal Numeric Nutrient Criteria and supporting delegation of federal wetland permitting to the Florida Department of Environmental Protection. Most pertinently, AIF's H2O Coalition also provided significant input on the 2015 Clean Water Rule, including an independent economic impact analysis, the 2020 Navigable Waters Protection Rule, and most recently on the proposed Revised Definition of Waters of the United States, 86 Fed. Reg. 69,372 (Dec. 7, 2021).

The H2O Coalition expressed serious concerns about the 2015 Clean Water Rule, including its overly expansive view of federal jurisdiction, the cost of compliance, and its impact on competing state and local government environmental priorities.

AIF and the H2O Coalition comments on the draft Navigable Waters Protection Rule supported use of the continuous surface water connection standard set forth in *Rapanos v. United States*, 547 U.S. 715, 742 (2006), and made several specific recommendations regarding groundwater, treatment and cooling ponds, and the definition of tributaries. The comments emphasized the importance maintaining state control over state environmental regulation, as advocated in this brief.

The comment letter submitted by AIF and the H2O Coalition on the most recent proposed rule took specific aim at the significant nexus test, referring to it as "entirely too vague and too broad." AIF and the H2O Coalition critiqued the agencies' rationale for the draft rule as not being scientifically established, and not being supported by existing law.

SUMMARY OF THE ARGUMENT

Congress' direction in the Clean Water Act ("CWA") that states retain their primacy over water resource protection is well-established. A broad and ill-defined standard, like the significant nexus test, will expand federal jurisdiction. The expansion of federal jurisdiction is unnecessary in states like Florida, whose environmental regulations cover isolated wetlands and groundwater. In addition, expanded federal jurisdiction will further undermine Florida's targeted permit exemptions for activities in wetlands and its efforts to streamline state environmental permitting for priority projects, like power generation. Use of a vague standard like the significant nexus test is likely to discourage state adoption of the CWA section 404 permitting program, an option specifically offered in the CWA.

ARGUMENT

I. THE SIGNIFICANT NEXUS TEST IS NOT THE PROPER TEST FOR WHETHER A WETLAND IS "WATERS OF THE UNITED STATES" UNDER THE CLEAN WATER ACT, 33 U.S.C. § 1362(7) BECAUSE THE CLEAN WATER ACT EMBRACES FEDERALISM IN ADDRESSING WATER POLLUTION.

The significant nexus test is "perfectly opaque." *Rapanos*, 547 U.S. at 756 n.15. As predicted in *Rapanos*, it has not constrained the federal agency that previously manifested a disregard for the limitations in the CWA. *See id*. The test has been widely adopted by the lower courts. *See United States v. Bailey*, 571 F.3d 791, 798 (8th Cir. 2009) (reviewing cases). Petitioners' Brief accurately characterizes the test as "divorced from the statutory text," "illogical," improperly elevating one statutory purpose over other purposes, unclear, and overbroad. *See* Petitioners' Brief on the Merits, at 45–49, *Michael Sackett, et al. v. United States Environmental Protection Agency et al.* (April 11, 2022) (No. 21-454). As further noted by Petitioners, the test elevates one statutory purpose, water quality, over other important Congressional aims, such as preserving the state's primary authority over land and water resources. *See id*. at 46.

By placing primary responsibility for regulating wetlands on the U.S. Army Corps of Engineers ("Corps") and U.S. Environmental Protection Agency ("EPA"), the significant nexus test undermines the states' and local governments' traditional roles in governing land and water use policy. Congress directed

in the CWA that the federal government "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) (2022). Congress sought to avoid the significant constitutional and federalism questions raised by broadly interpreting waters of the United States. *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001). States have traditional and primary power over land and water use. *See id.* (quoting *Hess v. Port Authority Trans–Hudson Corp.*, 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments")); *see also Rapanos*, 547 U.S. at 738 ("Regulation of land use, as through the issuance of the development permits sought by petitioners in both of these cases, is a quintessential state and local power." (citations omitted)). The states and local governments are the traditional and appropriate decision-makers for land and water use decisions based on their localized knowledge of the land and water features and their relative importance at the state and local level.

The significant nexus test is, at best, vague and ambiguous, and has been applied by EPA and the Corps to sweep in a wide range of features. For example, under the significant nexus test as applied by EPA and the Corps in the pre-2015 WOTUS regime, by looking at wetlands alone or in combination with other similarly situated wetlands and layering on that a significant nexus can be established both from "potential of tributaries to carry pollutants and flood waters to traditional navigable waters" and

"potential of wetlands to trap and filter pollutants or store flood waters", EPA and the Corps draw arguments from both sides of the same coin to assert jurisdiction. *See* EPA & Corps, *Memorandum re: Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (Dec. 2008). By broadly empowering EPA and the Corps to assert federal authority over any wetland or surface water with even a remote theoretical connection to traditional navigable waters, the significant nexus test interferes with the traditional state and local power. It coerces applicants to acquiesce to federal jurisdiction to avoid the expense and time of determining what constitutes a significant nexus, and to avoid lengthy and costly battles and litigation. Federal agency regulation on a case-by-case basis of smaller features covered by the significant nexus test, like some mostly isolated wetlands and ephemeral drainages, fails to acknowledge the limitations on the scope of CWA jurisdiction and the necessary balance between traditional state authority and federal jurisdiction to protect the waters of the U.S. The broad significant nexus test threatens the relevance of localized policy considerations, and ignores the congressional direction on state roles and tailored review of site-specific conditions. It fails to consider the imposing federal requirements such as identification of project purpose, practicable alternatives analysis, mitigation hierarchy regulation, public interest test, and EPA's veto power over permit decisions.

A definition of waters of the United States that more precisely instructs potentially regulated applicants on how to read Congress' limits on the reach of

the CWA would benefit the country and preserve the important, traditional role of state and local governments.

II. EXPANSION OF FEDERAL JURISDICTION UNDER THE CWA THREATENS FLORIDA'S COMPREHENSIVE STATE ENVIRONMENTAL REGULATION AND PERMIT PROCESS.

A. Florida Has Broad and Protective Environmental Regulations That Make the Significant Nexus Test Unnecessary.

Not all waters needed to be treated as waters of the United States to be protected. Florida possesses robust and comprehensive regulations governing waters that are independent from, and broader than, the coverage provided by the CWA, 33 U.S.C. §§ 1251 et seq. (2021). *See* Letter from Noah Valenstein, Secretary, Florida Department of Environmental Protection, to Scott Pruitt, Administrator, U.S. Environmental Protection Agency, and Douglas W. Lamont, Senior Official Performing the Duties of the Assistant Secretary of the Army, *Comments on Proposed Rule regarding Definition of "Waters of the United States"—Recodification of Pre-Existing Rules* (Jun. 19, 2017) at 1 (*available at*: https://www.regulations.gov/comment/EPA-HQ-OW-2017-0203-13822) (hereinafter "FDEP Letter") (writing that the state's "authority to regulate water resources is far broader than its approvals from EPA to implement federal programs in 'waters of the United States.'"). Like the CWA, the foundation of Florida's regulations is the definition of the waters being covered, referred to as "Waters of the State" or simply "Waters":

> "Waters" include, but are not limited to, rivers, lakes, streams, springs, impoundments, *wetlands*, and all other waters or bodies of water, including fresh, brackish, saline, tidal, surface, or *underground waters*. Waters owned entirely by one person other than the state are included only in regard to possible discharge on other property or water. Underground waters include, but are not limited to, all underground waters passing through pores of rock or soils or flowing through in channels, whether manmade or natural. Solely for purposes of s. 403.0885 [Establishment of Florida's Assumption of National Pollutant Elimination Discharge System], waters of the state also include navigable waters or waters of the contiguous zone as used in s. 502 of the Clean Water Act, as amended, 33 U.S.C. ss. 1251 et seq., as in existence on January 1, 1993, except for those navigable waters seaward of the boundaries of the state set forth in s. 1, Art. II of the State Constitution.

Fla. Stat. § 403.031(13) (2021) (emphasis added). "Thus, in Florida, 'waters of the United States' is a subset of the term 'waters of the state.'" FDEP Letter, at 4.

Elsewhere, Florida law relies upon this definition to regulate pollution. *See, e.g.*, Fla. Stat. § 403.031(3) (2021) (defining pollution to include the presence of injurious "substances, contaminants, noise, or manmade or human-induced impairment of air or waters or alteration of the chemical, physical, biological, or radiological integrity" in "waters of the state."); Fla. Stat. § 403.031(12) (2021) (defining waste

to include substances which pollute waters of the state); Fla. Stat. § 403.061 (2021) (authorizing the Florida Department of Environmental Protection to adopt a comprehensive program for the prevention, control, and abatement of pollution in waters of the state); Fla. Stat. § 403.088(1) (2021) (requiring a permit from the Florida Department of Environmental Protection to discharge waste into waters of the state).

Florida's definition does not need to wrestle with the connectivity question that the significant nexus test attempts to address because it directly regulates underground waters, including those "passing through pores of rocks or soils or flowing through channels, whether manmade or natural." Fla. Stat. § 403.031(13) (2021). Discharges to groundwater are directly regulated by the state. *See* Fla. Admin. Code Ann. Ch. 62-530 (2022). Analogous to the CWA, Florida groundwater falls into one of five classifications, and each classification contains prohibitions on the nature of pollution that can be discharged into it. For example, Class G-III groundwater is groundwater with the same concentration of total dissolved solids as Classes G-I and G-II but determined to not possess a reasonable potential for use as a future source of drinking water. Fla. Admin. Code Ann. r. 62-520.410(1) (2022).[2] Like all groundwater, Class G-III must meet certain

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[2] The full designated use is "non-potable water use, ground water in unconfined aquifers with a total dissolved solids content of 10,000 mg/L or greater; or with a total dissolved solids content of 3,000-10,000 mg/L and either has been reclassified by the Commission as having no reasonable potential as a future source of drinking water, or has been designated by the Department as an exempted aquifer pursuant to subsection 62-528.300(3), F.A.C." 62-520.410(1) (2022).

standards[3] but, unlike more protected classes, allows discharges from underground injection control systems (regulated by other provisions in Florida's environmental rules).

Florida's definition of Waters of the State also explicitly covers wetlands without regard to connectivity to other bodies of water. FDEP Letter, at 5 ("Perhaps most important, there is no requirement that water bodies be connected to or impact a navigable water for the state program to apply."). Protection of Florida's wetlands are accomplished through a wide variety of regulations in chapter 373, Florida Statutes, and various chapters of the Florida Administrative

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[3] The minimum criteria require that:

> All ground water shall at all places and at all times be free from domestic, industrial, agricultural, or other man-induced non-thermal components of discharges in concentrations which, alone or in combination with other substances, or components of discharges (whether thermal or non-thermal):
>
> (a) Are harmful to plants, animals, or organisms that are native to the soil and responsible for treatment or stabilization of the discharge relied upon by Department permits, or
>
> (b) Are carcinogenic, mutagenic, teratogenic, or toxic to human beings, unless specific criteria are established for such components in Rule 62-520.420, F.A.C., or
>
> (c) Are acutely toxic within surface waters affected by the ground water, or
>
> (d) Pose a serious danger to the public health, safety, or welfare, or
>
> (e) Create or constitute a nuisance, or
>
> (f) Impair the reasonable and beneficial use of adjacent waters.

Code. *See, e.g.*, Fla. Stat. § 373.414 (2021) (describing process for wetlands regulation); Fla. Admin. Code Ann. r. 62-330.010(1), (2) (2022) (describing implementation of wetlands permitting); Fla. Admin. Code Ann. r. 62-340.300 (2022) (describing delineation of state wetlands). These definitions in state law provide regulatory certainty to the regulated public and allow for narrow exemptions or streamlined permitting (discussed next) where appropriate in the state's policy determination.

Protecting Florida's environment does not need expansive regulation of waters of the United States under the significant nexus test, which serves only to add delay and an unnecessary layer of governmental review.

B. Florida's Environmental Statutes and Regulations Are Jeopardized by Expanding Federal Jurisdiction under the Clean Water Act.

While Florida's protection and delineation of state wetlands is superficially similar to the federal approach, there are some important distinctions. First, Florida's wetland delineation methodology is different by protecting isolated wetlands. As described by one commentator:

> Throughout most of the state, Florida affords considerable protection to its isolated wetlands under section 373.414, Florida Statutes. Section 373.414, incorporating rule 62-340. 200 of the Florida Administrative Code, defines wetlands beginning with the same operational sentence as the Corps' definition: "those areas that are inundated or saturated

> by surface water or ground water at a frequency and a duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soils."
>
> Florida's rule further defines wetlands:
>
> Soils present in wetlands generally are classified as hydric or alluvial, or possess characteristics that are associated with reducing soil conditions. The prevalent vegetation in wetlands generally consists of facultative or obligate hydrophytic macrophytes that are typically adapted to areas having soil conditions described above. These species, due to morphological, physiological, or reproductive adaptations, have the ability to grow, reproduce or persist in aquatic environments or anaerobic soil conditions. Florida wetlands generally include swamps, marshes, bayheads, bogs, cypress domes and strands, sloughs, wet prairies, riverine swamps and marshes, hydric seepage slopes, tidal marshes, mangrove swamps, and other similar areas. Florida wetlands generally do not include longleaf or slash pine flatwoods with an understory dominated by straw palmetto.
>
> The statutory definition employed under section 373.414 is thus unique to Florida's local characteristics and inclusive of isolated wetlands.

Debra Alise Spungin, *Troubled Waters: Florida's Isolated Wetlands in the Aftermath of Solid Waste Agency of Northern Cook County v. U.S. Army Corps of*

Engineers, 26 NOVA L. REV. 371, 384 (2001) (emphasis added) (internal citations omitted); *see also* FDEP Letter, at 5 ("The state's [Wetland] Permitting program is more comprehensive than the federal dredge and fill program under section 404 of the Clean Water Act because it also regulates alterations of uplands that may affect surface water flows, and addresses issues of the flooding and stormwater treatment."). Use of the significant nexus test increases the number of federal wetlands and the duplicative regulation of wetlands otherwise regulated only under state law.

Second, Florida's wetland permitting process is also substantially different and more comprehensive than its federal counterpart. Permits are available from Florida's five water management districts, almost of all of which have taxing authority independent from state budget allocations. *See* Fla. Const., art. VII, § 9(b) (2021); Fla. Stat. § 373.413(2) (2021). Permits from the state's water management districts allow for application of specialized local knowledge, accommodation of unique local characteristics, and greater efficiency. Again, broader coverage of wetlands under a WOTUS definition applying the significant nexus test means fewer such permits are issued solely through this unique process.

Third, Florida directly accommodates statewide priorities through its wetland permitting that are not similarly accommodated, if addressed at all, in the CWA and its implementing regulations. A prime example is agriculture. Florida places a high value on the state's agriculture industry. *See* Fla. Stat. § 403.927 (2021) ("The Legislature recognizes the great value of farming and forestry to this state. . . . "). Florida law allows for persons engaged in

agriculture to impact wetlands if doing so is normal and customary in the area. *See* Fla. Stat. § 373.406(2) (2021). Disputes over the applicability of this important exemption are resolved by the Florida Department of Agriculture and Consumer Services, giving farmers a uniquely expert resource to determine what is normal and customary. *See* Fla. Stat. § 373.407 (2021). Florida's agricultural protections are thus broader and more protective than their federal counterparts under the CWA,[4] but this protection is meaningless if the expansion of federal wetlands permitting through application of the broader significant nexus test covers previously non-federal wetlands.

Other statutory exemptions exist addressing Florida's extensive coastal environment. *See, e.g.*, Fla. Stat. § 403.813(b)–(s) (2021) (with various limits, exempting small docks, small boat ramps, maintenance dredging, maintenance of insect control structures,

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[4] Wetlands permitting under section 404 of the CWA contains an exemption for normal farming. *See* 33 U.S.C. § 1344(f)(1)(A) (2022). The CWA agricultural exemption, however, is interpreted narrowly. *See United States v. Huebner*, 752 F.2d 1235, 1240–41 (7th Cir. 1985); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 925 n.44 (5th Cir. 1983). It is explicitly limited by 33 U.S.C. § 1344(f)(2) (2022), known as the recapture provision, which provides that the normal farming exemption does not apply to "any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject." The federal exemption is further circumscribed by restrictions against "abandonment" of prior converted cropland, which can cause a loss of the exemption over time, absent ongoing active farming. *See* 84 Fed. Reg. 5154, 5158 (summarizing history of prior converted cropland exclusion and describing abandonment). The result is that the CWA exemption is primarily limited to historical uses, while Florida's agricultural exemptions apply to ongoing operations.

installation of aids to navigation, swales, small bridges, subaqueous transmission lines, connecting seawalls, removal of aquatic plants and detrital material, floating vessel platforms, and boatlifts). Florida regulations provide similar exemptions. *See, e.g.*, Fla. Admin. Code. r. 62-330.051 (2022) (with limitations, not requiring permits, *inter alia*, for minor roadway safety construction, boating-related work, certain pipes and culverts, paths for pedestrians, bicycles, and golf carts, and shoreline stabilization structures). These specific exemptions are typically placed in rule with limits on the scope of the exemption based on a determination that, done within the prescribed scope, the exemption possesses no significant environmental risk. *See, e.g.*, Fla. Admin. Code r. 62-330.051(4)(b) (2022) (limiting exemption for culverted roadway crossings to less than 24 inch diameter pipes and a construction project area of one acre). Broader federal jurisdiction not recognizing these exemptions undermines the chief benefit of these exemptions if permittees must seek a CWA section 404 permit for the same activities.

In some cases, broader coverage of waters under the CWA, explicitly constrains state jurisdiction. *See, e.g.*, Fla. Stat. § 373.4146(3) (2021) (in statute authorizing assumption of federal permitting under section 404 of the CWA, allowing application of state law to federal waters but only to the extent state law "does not conflict with federal requirements."); Fla. Stat. § 403.703(35) (2021) (defining solid waste as sludge unregulated under the federal Clean Water Act or Clean Air Act); Fla. Stat. § 403.7045 (2021) (prohibiting regulation under state resource recovery and management act of suspended solids and dissolved materials discharges which are point sources requiring

permits under the Clean Water Act); Fla. Stat. § 403.7047 (2021) (exempting fossil fuel combustion products that are beneficially reused from coverage as solid or hazardous waste but not applying exemption to any federal law, including CWA National Pollutant Discharge Elimination System permits).

Florida's unique administrative process provides for more accountability and transparency regarding state water permitting and rulemaking, as well as a more meaningful ability to administratively challenge state rules and permits. For example, if Florida seeks to adopt a more stringent water quality standard than a standard adopted by federal regulations, the Florida Department of Environmental Protection must have the standard approved by the Governor and Florida Cabinet. *See* Fla. Stat. § 403.061(32) (2021). Adoption of water quality standards requires approval of the Florida's Environmental Regulation Commission, an authority independent of the Secretary of the Florida Department of Environmental Protection. *See* Fla. Stat. § 403.804(1) (2021); Fla. Stat. § 403.805(1) (2021). Florida permit applicants have greater flexibility for obtaining environmental permits under state law. *See, e.g.*, Fla. Stat. § 403.201 (2021) (allowing the Florida Department of Environmental Protection to grant variances from environmental statutes but only to the extent such variances do not conflict with federal requirements); Fla. Stat. § 120.542(2) (2021) (allowing administrative agencies to grant variances from rules that "create a substantial hardship or would violate principles of fairness" so long as the purpose of the underlying statute is achieved). These protections are not available for federally-based permits.

Florida is not the only state with wetland regulations independent from federal law. *See* § 13:1. Introduction, L. of Wetlands Reg. § 13:1 (2021). *See, e.g.*, Conn. Gen. Stat. Ann. § 22a-36 et seq. (2021) (Connecticut); Del. Code Ann. tit. 7, § 6601 (2021) (Delaware); Ga. Code Ann. § 12-5-280 (2021) (Georgia); Iowa Code Ann. § 456B.13 (2021) (Iowa); La. Stat. Ann. § 49:214.28 (2021) (Louisiana); Me. Rev. Stat. tit. 38, § 480-C (2021) (Maine); Md. Code Regs. 26.23.02.01 (2021) (Maryland); Mass. Gen. Laws Ann. ch. 131, § 40 (2021) (Massachusetts); Mich. Comp. Laws Ann. § 324.30301 (2021) (Michigan); Minn. Stat. Ann. § 103G.005 (2021) (Minnesota); Miss. Code. Ann. § 49-27-1 (2021) (Mississippi); N.H. Rev. Stat. Ann. § 482-A:11 (2021) (New Hampshire); N.J. Stat. Ann. § 13:9B-1 (2021) (New Jersey); N.Y. Env't Conserv. Law § 24-0703 (2021) (New York); 15A N.C. Admin. Code 2H.1301 (2021) (North Carolina); Or. Admin. R. 141-085-0680 (2021) (Oregon); 2 R.I. Gen. Laws Ann. § 2-1-18 (2021) (Rhode Island); S.C. Code Ann. § 48-39-150 (2021) (South Carolina); 10 V.S.A. Ch. 37, § 905(b) (2021) (Vermont); Va. Code Ann. § 62.1-44.2 (2021) (Virginia); Wash. Rev. Code Ann. § 90.48.080 (2021) (Washington); W.S. § 35-11-309(b) (2021) (Wyoming). These laws, like Florida's wetland laws, are sure to be restricted by an expansion of the federal WOTUS definition using the vague and open-ended significant nexus test.

C. Federal Water Regulations Impede Florida's Efforts to Streamline the Regulatory Process for Certain Types of Projects.

Overlap of federal permitting has provided a constant challenge for Florida's efforts to streamline

permitting. *See, e.g.*, Fla. Stat. § 373.4144(1) (2021) (stating legislative desire to "eliminate overlapping federal regulations and state rules that seek to protect the same resources and avoid duplication of permitting between the United States Army Corps of Engineers and the [D]epartment [of Environmental Protection]."); Fla. Stat. § 403.0885(1) (2021) ("The Legislature finds and declares that it is in the public interest to promote effective and efficient regulation of the discharge of pollutants into waters of the states and eliminate duplication of permitting programs by the United States Environmental Protection Agency under s. 402" of the CWA.). Logically, a broader definition of Waters of the U.S. necessarily increases the likelihood of overlapping state and federal jurisdiction of the same waters, frustrating Florida's legislative intent.

Florida has attempted to streamline the permitting process in several ways, all of which are complicated by broader federal permitting. For example, Florida has a voluntary process to create ecosystem management agreements "regarding any environmental impacts with regulated entities to better coordinate the legal requirements and timelines applicable to a regulated activity, which may include permit processing, project construction, operations monitoring, enforcement actions, proprietary approvals, and compliance with development orders and regional and local comprehensive plans." Fla. Stat. § 403.0752(1) (2021). These agreements must be consistent with federal regulation, so that when federal regulation expands, Florida entities attempting to negotiate such an agreement are constrained. Fla. Stat. § 403.0752(9) (2021).

Florida also allows for streamlined permitting for large economic development projects that, once triggered, require state agencies to make final determinations on permits within their jurisdiction in 90 days and require that challenges to such permits come before an administrative law judge and be resolved in a process lasting approximately 120 days. Fla. Stat. § 403.973(1), (8), (14) (2021). Federal permits, however, cannot be required to fall within this streamlined process. *See* Fla. Stat. § 403.973(8), (9) (2021) (excepting federal permits from otherwise mandatory permit issuance timelines and streamlining). An expansion of federal permitting therefore minimizes the utility of this process.

Vague federal permitting programs are an outlier to another permitting provision unique to electric generating facilities and transmission lines, in part II of chapter 403, Florida Statutes. *See* Fla. Stat. § 403.503(2) (2021) ("The Legislature finds that the efficiency of the permit application and review process at both the state and local level would be improved with the implementation of a process whereby a permit application would be centrally coordinated and all permit decisions could be reviewed on the basis of standards and recommendations of the deciding agencies."). Strict timelines and procedures are imposed on state and local agencies for reviewing and acting upon these applications through a single coordinated process for larger power plants and long transmission lines. The review encompasses pertinent environmental requirements, including protection of water resources. *See* Fla. Stat. § 403.5064 (2021); Fla. Stat. § 403.5065 (2021); Fla. Stat. § 403.5066 (2021) and Fla. Stat. § 403.509 (2021) (describing process and timelines).

Federal permits cannot be so constrained, so expansion of federal permitting expands the scope of the process that must occur outside of Florida's power plant siting process.

D. State Assumption of 404 Permitting Is Inhibited by the Significant Nexus Test.

The CWA explicitly allows for delegation to qualifying states of the federal permitting program under section 404. *See* 33 U.S.C. § 1344(g) (2022). Interested states must apply for and receive approval to operate the program. *See* 33 U.S.C. § 1344(h) (2022). Once approved, operation of the state program remains subject to oversight by EPA. *See* 33 U.S.C. § 1344(j) (2022).

Unlike the continuous surface connection standard articulated in the *Rapanos* plurality, 547 U.S. at 742, the significant nexus test is relatively subjective. This subjectivity is apt to constrain states, like Florida, operating a delegated permitting program under section 404 of the CWA and discourage states who might otherwise seek delegation of the program.[5] The significant nexus test burdens the states with the same case-by-case determination that the federal agencies employ, unless of course, the applicant acquiesces to federal wetland jurisdiction. *See* Florida Department of Environmental Protection's Frequently Asked Questions (FAQ) and Answers (*available at*: https://floridadep.gov/water/submerged-lands-

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[5] Three states have been approved to operate the CWA Section 404 permitting program. *See* 85 Fed. Reg. 83,533 (Dec. 22, 2020) (Florida); 59 Fed. Reg. 9,933 (Mar. 2, 1994) (New Jersey); 49 Fed. Reg. 38,947 (Oct. 2, 1984) (Michigan).

environmental-resources-coordination/content/state-404-program-frequently) (stating "To provide certainty, streamlining, and efficiency, DEP will consider that any wetlands or other surface waters delineated in accordance with Chapter 62-340, F.A.C., that are regulated under Part IV of Chapter 373, F.S. could be considered WOTUS, and will treat them as if they are, unless the applicant specifically requests a WOTUS determination and provides information clearly demonstrating why they believe one or more waters are not WOTUS. The 'Information Required for a WOTUS Determination in State-assumed Waters' form is provided to assist applicants in providing the necessary information.")

Implementing a relatively subjective and amorphous standard under federal oversight is not an approval most state regulatory agencies are likely to seek. When Florida assumed permitting under the federal CWA 404 program, it was subject only to the continuous surface water connection standard, as implemented through the Navigable Waters Protection Rule. Given Florida's legislatively-stated desire to avoid duplicative permitting and streamline regulatory processes, it seems unlikely Florida would have pursued approval to implement the section 404 program if the significant nexus test had been in the applicable federal rule at the time Florida sought approval. An expansive and relatively subjective standard, like the significant nexus test, will be more likely to discourage state assumption of the 404 permitting program. Congress could not have had this result in mind when it provided authority for states to implement section 404 of the CWA.

CONCLUSION

For the reasons stated, the judgment of the U.S. Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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