

No. 21-454

In the Supreme Court of the United States

MICHAEL SACKETT & CHANTELL SACKETT,
PETITIONERS

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
RESPONDENTS.

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

**BRIEF OF FORMER EPA ADMINISTRATORS
WILLIAM K. REILLY AND CAROL M.
BROWNER AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENTS**

Beth S. Brinkmann
Counsel of Record
Gary S. Guzy
Thomas Brugato
Eric Chung
Martin Levy
COVINGTON & BURLING LLP
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000
bbrinkmann@cov.com

June 17, 2022

*Counsel for Amici
Curiae Former EPA
Administrators*

QUESTION PRESENTED

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

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES.....	iv
INTERESTS OF <i>AMICI CURIAE</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. EPA’s Protection of “Waters of the United States,” as Directed by the Clean Water Act, Has Long Included Wetlands and Intermittent Waterways if They Have Significant Effects on Other Waters of the United States.	4
A. Since the 1970s, EPA, the Army Corps of Engineers, and this Court Have Interpreted the Clean Water Act to Protect Wetlands and Intermittent Waterways Where They Have Significant Effects on Other Waters of the United States.	5
B. EPA’s Protection of Wetlands and Intermittent Waterways that Have Significant Effects on Other Waters of the United States Is a National Success Story Demonstrating the Effectiveness of Congress’s Directive.	16
1. The “No Net Loss” of Wetlands Policy and	

General Permitting under the Statute.....	16
2. Coordination Between EPA and the Corps Pursuant to Section 1344(c) Permitting For Dredged or Fill Material	20
3. Protection of the Intermittent Waterway of the Los Angeles River	22
II. Adopting Petitioners’ Proposal Would Significantly Undermine EPA’s Implementation of the Clean Water Act.....	26
CONCLUSION	30

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Alameda Water & Sanitation Dist. v. Reilly</i> , 930 F. Supp. 486 (D. Colo. 1996)	21
<i>City of Milwaukee v. Illinois</i> , 451 U.S. 304 (1981)	6, 26
<i>County of Maui, Hawaii v. Hawaii Wildlife Fund</i> , 140 S. Ct. 1462 (2020)	13, 14, 18
<i>N. Cal. River Watch v. City of Healdsburg</i> , 496 F.3d 993 (9th Cir. 2007)	13
<i>Nat. Res. Def. Council, Inc. v. Callaway</i> , 392 F. Supp. 685 (D.D.C. 1975)	8
<i>Orchard Hill Bldg. Co. v. U.S. Army Corps of Eng’rs</i> , 893 F.3d 1017 (7th Cir. 2018)	13
<i>Pascua Yaqui Tribe v. EPA</i> , 557 F. Supp. 3d 949 (D. Ariz. 2021)	15
<i>Precon Dev. Corp. v. U.S. Army Corps of Eng’rs</i> , 633 F.3d 278 (4th Cir. 2011)	13

<i>Rapanos v. United States</i> , 547 U.S. 715 (2006)	2, 11, 14, 22, 25
<i>Solid Waste Agency of N. Cook Cnty. v.</i> <i>U.S. Army Corps of Eng'rs</i> , 531 U.S. 159 (2001)	10
<i>United States v. Bailey</i> , 571 F.3d 791 (8th Cir. 2009)	13
<i>United States v. Cundiff</i> , 555 F.3d 200 (6th Cir. 2009)	13
<i>United States v. Donovan</i> , 661 F.3d 174 (3d Cir. 2011)	13
<i>United States v. Johnson</i> , 467 F.3d 56 (1st Cir. 2006)	13
<i>United States v. Lucas</i> , 516 F.3d 316 (5th Cir. 2008)	13
<i>United States v. Riverside Bayview</i> <i>Homes, Inc.</i> , 474 U.S. 121 (1985)	6, 9, 10
<i>United States v. Robison</i> , 505 F.3d 1208 (11th Cir. 2007)	13
<i>Ysleta Del Sur Pueblo v. Texas</i> , --- S. Ct. ---, 2022 WL 2135494 (U.S. June 15, 2022)	12

Statutes

14 U.S.C. § 527	27
16 U.S.C. § 817	27
33 U.S.C. § 1251	2, 5, 7, 30
33 U.S.C. § 1311	7
33 U.S.C. § 1313	27
33 U.S.C. § 1342	3, 7
33 U.S.C. § 1344	3, 7, 8, 17, 20, 21, 22
33 U.S.C. § 1362	3, 7, 8, 27
33 U.S.C. § 1362(7)	3, 7, 27
Clean Water Act of 1977, Pub. L. No. 95-917, 91 Stat. 1566	9
Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7	10

Other Authorities

33 C.F.R. § 328.3(a)	9
118 Cong. Rec. 33756-57 (1972) (statement of Rep. Dingell)	6
40 Fed. Reg. 19,794 (May 6, 1975)	9
40 Fed. Reg. 31,320 (July 25, 1975)	9

42 Fed. Reg. 37,122 (July 19, 1977).....	9, 19
44 Fed. Reg. 32,854 (June 7, 1979).....	9
51 Fed. Reg. 41,206 (Nov. 13, 1986)	10
86 Fed. Reg. 69,372 (Dec. 7, 2021).....	28
S. Rep. No. 92-414 (1972).....	6, 7

INTERESTS OF *AMICI CURIAE*¹

Amici curiae are former Administrators of the United States Environmental Protection Agency.² Each *Amici* was charged in that role with the responsibility of implementing Congress's directive to restore the Nation's waters under the Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1251 *et seq.* ("Clean Water Act"). The tenures of the *Amici* as Administrator total more than 12 years and cross two Presidential Administrations. Their experience is directly relevant to the issues before the Court.

¹ In accordance with Supreme Court Rule 37.6, *Amici curiae* certify that no counsel for a party authored this brief in whole or in part, and that no party or counsel other than the *Amici curiae* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this *amicus* brief.

² *Amici* are Former EPA Administrator William K. Reilly (1989 to 1993) and Former EPA Administrator Carol M. Browner (1993 to 2001).

INTRODUCTION AND SUMMARY OF ARGUMENT

For most of the past several decades, during both Democratic and Republican Administrations, EPA has followed Congress's instruction to provide comprehensive protections to the waters of the United States pursuant to the Clean Water Act. Congress emphasized the need "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

Central to EPA's comprehensive protection has been the long-standing recognition that water moves in hydrological cycles, including unique aspects of how water passes through not only large waterways but also through geographical features such as wetlands and also intermittent rivers and streams, even though not traditionally navigable (collectively referred to as "intermittent waterways"). Upstream water bodies like wetlands and intermittent waterways act as complex living filter systems gathering and gradually releasing water to downstream rivers and lakes while removing pollutants and sediments in the process.

Because of those unique features, Congress's directive necessarily contemplates regulation of waters that "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Rapanos v. United States*, 547 U.S. 715, 780 (2006) (Kennedy, J., concurring in the judgment). Efforts pursuant to the statute have led to the revival of the Nation's waters, greatly enhancing the health and quality of life in the country.

Under the leadership of *Amici* and others, EPA has determined which wetlands are “waters of the United States,” 33 U.S.C. §§ 1342(a), 1362(7), subject to the Clean Water Act, by fact-based assessments applying, in essence, what has become known in shorthand as the “significant nexus” analysis. That analysis considers the unique interconnectedness of the Nation’s waters and recognizes the simple fact that downstream waters can be affected by what happens upstream. That approach adheres to the text, structure, and purpose of the Clean Water Act, and respects this Court’s precedents recognizing that the statute’s grant of authority to the agency is not restricted to traditional navigability by watercraft.

EPA’s protection of wetlands and intermittent waterways under this statutory scheme has been a national success story, confirming the effectiveness of the statute. Administrators of the EPA, including *Amici*, oversaw multiple agency programs that directly furthered Congress’s directive, including a “no net loss” policy that ensured the protection of certain wetlands while reducing regulatory burdens on landowners; the prevention of discharge into certain wetlands under the Section 1344(c) permitting program for dredging and fill; and the preservation of the Los Angeles River.

Petitioners’ proposal would upend that approach. Petitioners ask this Court to impose on the agency a framework that has no basis in the statutory structure, or purpose—or indeed in science. The Court should reject that proposal and reaffirm that wetlands and intermittent waterways that have a significant effect on downstream waters of the United

States are covered by the statute, consistent with the significant nexus analysis.

ARGUMENT

I. EPA’S PROTECTION OF “WATERS OF THE UNITED STATES,” AS DIRECTED BY THE CLEAN WATER ACT, HAS LONG INCLUDED WETLANDS AND INTERMITTENT WATERWAYS IF THEY HAVE SIGNIFICANT EFFECTS ON OTHER WATERS OF THE UNITED STATES.

Since shortly after Congress’s 1972 enactment of the Clean Water Act, Administrators of the EPA, including *Amici*, have followed Congress’s directive by applying what is in effect the “significant nexus” analysis to determine which wetlands are subject to the Act—with a few exceptions that in fact underscore the validity of that approach. This is in essence the basic approach EPA has applied—in practical application—for most of the past forty years, and it has not been altered by Congress. In fact, Congress expressly *endorsed* the regulation of adjacent wetlands in 1977, and Congress declined, in major 1987 amendments, to alter the regulatory framework.

Despite Petitioners’ efforts to depict wetlands as “forbidding” “swamps,” Pet. Br. 27, wetlands have long been recognized as vital to protecting a range of important values essential to Congress’s clean water directives, including: production of fish and shellfish; water storage to mitigate effects of floods and droughts; water purification; recreation; timber production; food production; habitat for threatened and endangered aquatic species; education and

research; and open space and aesthetic values.³ Indeed, as President George W. Bush recognized, “[o]ur wetlands help to trap pollution,” “[t]hey reduce the impact of floods,” and they “stabilize shore areas.”⁴ “Wetlands have been called the nurseries of life, and their well-being is vital to the health of our environment.”⁵

A. Since the 1970s, EPA, the Army Corps of Engineers, and this Court Have Interpreted the Clean Water Act to Protect Wetlands and Intermittent Waterways Where They Have Significant Effects on Other Waters of the United States.

1. Congress directed EPA and the Corps to implement the Clean Water Act of 1972 with the objective of “restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). Meeting that objective is no easy task for one of the country’s most vital, interconnected resources. As Former EPA Administrator Russell E. Train observed, “aquatic systems are . . . interrelated and interdependent. We cannot expect to preserve the remaining qualities of

³ Laura Gatz, Cong. Research Service, *Wetlands: An Overview of Issues* (Updated Jan. 5, 2017), RL33483.

⁴ Earth Day Remarks of President George W. Bush (Apr. 22, 2004).

⁵ *Id.*

our water resources without providing appropriate protection for the entire resource.”⁶

The Clean Water Act represented a major departure from prior, unsuccessful efforts at water pollution control that focused only on meeting aspirational state water quality objectives. The new Act augmented that earlier approach with pollution control requirements. “Congress’ intent in enacting the Amendments [in 1972] was clearly to establish an all-encompassing program of water pollution regulation. *Every* point source discharge is prohibited unless covered by a permit, which directly subjects the discharger to the administrative apparatus established by Congress to achieve its goals. The ‘major purpose’ of the Amendments was ‘to establish a *comprehensive* long-range policy for the elimination of water pollution.’ S. Rep. No. 92-414, at 95, 2 Leg. Hist. 1511 (emphasis supplied).” *City of Milwaukee v. Illinois*, 451 U.S. 304, 318-19 (1981) (Rehnquist, J.) (footnotes omitted).

Moreover, as this Court has recognized, Congress “exercise[d] its powers under the Commerce Clause to regulate at least some waters that would not be deemed ‘navigable’ under the classical understanding of that term.” *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985) (citing S. Conf. Rep. No. 92-1236, at 144 (1972) and 118 Cong. Rec. 33756-57 (1972) (statement of Rep. Dingell)). Indeed,

⁶ *Section 404 of the Federal Water Pollution Control Act Amendment of 1972: Hearings Before the Sen. Public Works Comm.*, 94th Cong., 41 (1976) (testimony of EPA Administrator Russell E. Train).

Congress explicitly defined “navigable waters” for purposes of the statute to not be limited to only waters that are “navigable,” but to more broadly mean “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7). That is consistent with the interconnected nature of the system, and the fact that wetlands and intermittent waterways can drastically alter the integrity of downstream traditionally navigable waters without being permanent or physically adjacent to them.⁷ Downstream water quality depends on the protection of upstream waters with which they bear a significant nexus, and suffers if they are degraded.⁸

As to discharges into waters of the United States, Congress recognized that because “[w]ater moves in hydrologic cycles, . . . it is essential that discharge of pollutants be controlled at the source.” S. Rep. No. 92-414, at 77 (1972). The statute mandates a national goal of eliminating discharge of pollutants into waters of the United States, 33 U.S.C. § 1251(a)(1); prohibits “discharge of any pollutant by any person” except under provisions of the statute, 33 U.S.C. § 1311; defines pollutant to include “rock” and “sand,” 33 U.S.C. § 1362(6); and regulates discharge permits, 33 U.S.C. § 1342(a)(1), including for dredge or fill material, 33 U.S.C. § 1344. Congress specified that “discharge of pollutants” includes “any addition of any

⁷ Judy L. Meyer et al., *Where Rivers are Born: The Scientific Imperative for Defending Small Streams and Wetlands* 6-7, 10-15 (2003).

⁸ See, e.g., Bruce J. Peterson et al., *Control of Nitrogen Export from Watersheds by Headwater Streams*, 292 *Science* 86, 89 (Apr. 6, 2001).

pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12). The permitting program for dredge and fill material under Section 1344 is complementary to the statute’s Section 1342 industrial permitting program and they both serve as vital elements of the comprehensive Congressional framework for pollution discharges.

2. EPA and the Army Corps of Engineers have followed the Clean Water Act’s directives by addressing discharges in certain upstream waters such as wetlands when they affect the integrity of traditionally navigable downstream waterways. The agencies have made fact-based determinations that consider the unique interconnectedness of the waters. This approach is consistent with the significant nexus analysis discussed by this Court. The statutory text, structure, and framework all require this approach.

The Army Corps of Engineers initially, and incorrectly, hewed to its old approach even after the 1972 enactment of the Clean Water Act by adopting an unduly narrow definition of “waters of the United States,” which was rejected in litigation, *Nat. Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975), and criticized by EPA.⁹

By 1975, however, the Corps appropriately prevented discharges into intermittent waterways and wetlands if they were necessary “for the protection of water quality,” even if not adjacent to traditionally navigable waterways. Army Corps of

⁹ Letter from EPA Administrator Russell E. Train to Corps Lt. Gen. W.C. Gribble, Jr. (Jan. 15, 1974).

Engineers, 40 Fed. Reg. 31,320, 31,324-25 (July 25, 1975); EPA, 40 Fed. Reg. 19,794 (May 6, 1975) (parallel EPA guidance).

In 1977, the Corps confirmed that wetlands and intermittent waterways are part of the waters of the United States if “they are the type, the degradation or destruction of which could affect interstate commerce.” 42 Fed. Reg. 37,122, 37,128 (July 19, 1977). In a major revision to the Act in 1977, Congress did not disrupt or modify the definition of “waters of the United States.” Clean Water Act of 1977, Pub. L. No. 95-917, 91 Stat. 1566.

EPA made clear it agreed in 1979. 44 Fed. Reg. 32,854, 32,901 (June 7, 1979). It defined “waters of the United States” to include significant wetlands and intermittent waterways, “the use, degradation or destruction of which would affect or could affect interstate or foreign commerce.” *See also* 33 C.F.R. § 328.3(a).

3. In 1985, this Court addressed the statute’s use of the term “waters of the United States” and reached a similar conclusion in the context of evaluating wetlands “adjacent” to traditionally navigable waters. The Court reasoned that “the evident breadth of congressional concern for protection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term ‘waters’ to encompass wetlands adjacent to waters as more conventionally defined.” *Riverside Bayview Homes*, 474 U.S. at 133.

The Court specifically observed that “Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes, and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed ‘navigable’ under the classical understanding of that term.” *Id.* at 132-33. And the Court reaffirmed several years later that “[i]t was the significant nexus between the wetlands and ‘navigable waters’ that informed [the Court’s] reading of the [Clean Water Act] in *Riverside Bayview Homes v. Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 167 (2001).

The Corps and EPA continued to protect wetlands and intermittent waterways as part of the waters of the United States where their use, degradation, or destruction could affect traditionally navigable downstream waterways. Indeed, in 1986, the regulations were revised and continued to define waters of the United States as including “all other waters such as . . . rivers, streams (including intermittent streams) . . . [and] wetlands, . . . , the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters.” 51 Fed. Reg. 41,206, 41,250 (Nov. 13, 1986); *see also id.* at 41,216-17 (Corps regulatory notice clarifying scope of discharge permit program). When Congress next amended the statute in 1987, it again had an opportunity to alter this definition, but did not do so. Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7.

EPA issued guidance in 2007 and 2008 and a Clean Water Rule in 2015 that reaffirmed the essence of its

longstanding approach.¹⁰ EPA explained that some wetlands unassailably fall within the Clean Water Act's ambit, such as those adjacent to traditional navigable waters or those abutting non-navigable tributaries of traditional navigable waters. Whether other wetlands are covered depends on whether the wetland "significantly affect[s] the chemical, physical and biological integrity of downstream traditional navigable waters."¹¹ Such wetlands may include those adjacent to non-navigable tributaries that are not relatively permanent and those adjacent to (but not directly abutting) relatively permanent non-navigable tributaries. EPA recognized that the statute did not, however, extend to swales or gullies, for example.¹²

4. In 2006, this Court was again faced with a Clean Water Act question and Justice Kennedy provided a concurring opinion that reflected, at its core, a through line back to EPA and the Corps' longstanding understanding of "waters of the United States" for purposes of the Act. *Rapanos*, 547 U.S. at 758-87 (Kennedy, J., concurring in the judgment).

¹⁰ EPA, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (June 5, 2007), ("EPA Post-*Rapanos* Guidance"); EPA, *Questions and Answers Regarding the Revised Rapanos & Carabell Guidance* (Dec. 2, 2008); *Clean Water Rule: Definition of "Waters of the United States"* 80 Fed. Reg. 37053 (June 29, 2015).

¹¹ EPA, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* (June 5, 2007).

¹² *Id.*

Although four Members of the Court took a narrower view, another four Members agreed that wetlands would be covered by the Act under either analysis.

Justice Kennedy explained that wetlands are “waters of the United States” if they “possess a ‘significant nexus’ to” traditional navigable waters, even if they are not directly adjacent. *Id.* at 759. He explained that “wetlands possess the requisite nexus, and thus come within the statutory phrase ‘navigable waters,’ if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” *Id.* at 780.

Justice Kennedy’s analysis is consistent with “the Act’s text, structure, and purpose,” as EPA and the Corps had long recognized, because destruction of such wetlands and intermittent waterways “can impair downstream water quality” and potentially increase levels of nutrients, toxins, and pathogens through greater runoff, release of pollutants, and loss of filtering capacity. *Id.* at 774. Justice Kennedy used the shorthand terminology “significant nexus” to capture the essence of this test, which also reflected how EPA and the Corps had interpreted the reach of the Act.

Assessing the impact on the chemical, physical, and biological integrity of downstream waterways is an approach that faithfully executes the framework created by Congress to protect these crucial resources. Although any fact-based test may “generate borderline cases” that can prove challenging, *Ysleta*

Del Sur Pueblo v. Texas, --- S. Ct. ---, 2022 WL 2135494, at *12 (U.S. June 15, 2022), courts also have been wholly capable of assessing agency determinations under the significant nexus analysis of whether wetlands or intermittent waterways are covered by the Act.¹³

The Court’s reasoning in *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020), further supports this understanding of the statute. There, the Court considered whether the Clean Water Act applies to a pollutant that “leaves a ‘point source’ and then travels through groundwater before reaching navigable waters.” *Id.* at 1469. The Court held “that the statute requires a permit when there is a *direct discharge* from a point source into navigable waters *or* when there is *the functional equivalent of a direct discharge*.” *Id.* at 1475-77. (emphasis added). The functional equivalent analysis “best captures, in broad terms, those circumstances in which Congress intended to require a federal permit.” *Id.* at 1476. And the Court rejected an overly circumscribed interpretation that would “open a loophole allowing easy evasion of the statutory provision’s basic

¹³ See, e.g., *Orchard Hill Bldg. Co. v. U.S. Army Corps of Eng’rs*, 893 F.3d 1017, 1021 (7th Cir. 2018); *United States v. Donovan*, 661 F.3d 174, 182 (3d Cir. 2011); *Precon Dev. Corp. v. U.S. Army Corps of Eng’rs*, 633 F.3d 278, 288 (4th Cir. 2011); *United States v. Cundiff*, 555 F.3d 200, 210 (6th Cir. 2009); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009); *United States v. Lucas*, 516 F.3d 316, 327 (5th Cir. 2008); *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 1000 (9th Cir. 2007); *United States v. Robison*, 505 F.3d 1208, 1222 (11th Cir. 2007); *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006).

purposes,” but the Court also rejected views extending agency authority beyond the scope of the statute. *Id.* at 1473-74.

Just as with that functional equivalent analysis in *Maui*, the significant nexus analysis here effectuates “the statute’s structure, its purposes, [and] the text of the provisions that actually govern” with respect to wetlands. *Id.* at 1475.

5. Since 1975, one Administration took a different approach, promulgating in 2019 the Navigable Waters Protection Rule (NWPR), which disregarded EPA’s synthesis of more than 1,200 published and peer reviewed scientific reports and the independent engineering and scientific advice rendered by EPA’s Science Advisory Board.¹⁴ Under the NWPR, tidal wetlands, even within 300 yards of the Gulf of Mexico, could not be regulated because they were deemed “non-adjacent” to navigable waters based on separation from the ocean by a three foot high dune.¹⁵ The NWPR limited the scope of wetlands subject to regulation to those that touch or demonstrate evidence of a regular surface water connection to other waters of the United States. That limitation was “counter to the ample scientific information before the agencies demonstrating the effects of

¹⁴ Cong. Research Service, *The Wetlands Coverage of the Clean Water Act (CWA): Rapanos and Beyond* (Apr. 27, 2016) (describing basis for EPA’s 2015 Clean Water Rule), RL33263, at 13.

¹⁵ David Groves, *How the Trump Administration Eased Destruction of the Nation’s Wetlands and Streams*, 51 *Envtl. L. Rep.* (ELI) 10194, 10194-95 (2021).

wetlands on downstream waters when they have other types of surface connections.” Revised Definition of “Waters of the United States,” 86 Fed. Reg. 69,372, 69,409 (Dec. 7, 2021).

Echoing the judicial vacatur of the Corps’ original rule nearly five decades earlier, on August 30, 2021, a federal district court vacated the NWPR based on “fundamental, substantive flaws that cannot be cured without revising or replacing the NWPR’s definition of ‘waters of the United States.’” *Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949, 955 (D. Ariz. 2021), *appeal dismissed*, No. 21-16791, 2022 WL 1259088 (9th Cir. Feb. 3, 2022). The district court recognized that EPA and the Corps had “agree[d] there exist substantial concerns about certain aspects of the NWPR . . . including whether the NWPR adequately considered the CWA’s statutory objective and the effects of the NWPR on the integrity of the nation’s waters.” *Id.* (internal quotation marks omitted). For instance, the district court noted that the agencies “are concerned that the NWPR did not look closely enough at the effect ephemeral waters have on traditional navigable waters when deciding to categorically exclude ephemeral waters from the definition of waters of the United States.” *Id.* (internal quotation marks omitted). EPA and the Army Corps have proposed a rule returning to the pre-2015 definition of “waters of the United States” updated to reflect consideration of this Court’s decisions. 86 Fed. Reg. 69,372, 69,450 (Dec. 7, 2021).

B. EPA’s Protection of Wetlands and Intermittent Waterways that Have Significant Effects on Other Waters of the United States Is a National Success Story Demonstrating the Effectiveness of Congress’s Directive.

During their leadership of EPA, Administrators including *Amici* oversaw multiple agency programs that directly furthered Congress’s directive for comprehensive protection of the waters of the United States, including protection of wetlands and intermittent waterways on which the water quality of downstream waterways depend.¹⁶ These success stories created predictable, effective, and administrable programs consistent with the statutory directive.

These examples demonstrate that the agencies’ fact-based assessments to determine which wetlands and intermittent waterways are covered by the statute under the significant nexus analysis are appropriate and workable.

1. The “No Net Loss” of Wetlands Policy and General Permitting under the Statute

¹⁶ See, e.g., Bruce J. Peterson et al., *Control of Nitrogen Export from Watersheds by Headwater Streams*, 292 *Science* 86, 89 (Apr. 6, 2001).

EPA's "no net loss policy" was established during the tenure of President George H.W. Bush and Administrator William K. Reilly to facilitate the program the statute created for permitting discharges under 33 U.S.C. § 1344.¹⁷ The policy has ensured protections for wetlands most vital to other waters of the United States, while reducing regulatory burdens on landowners. The program "offset[s] unavoidable adverse impacts to existing aquatic resources, and for wetlands, . . . achieve[s] a goal of no overall net loss of values and functions."¹⁸

To reach "no net loss," EPA established criteria for evaluating wetlands with the highest impact on downstream waters of the United States for additional protections while opening up other wetlands for development.¹⁹ At the same time, Administrator Reilly promoted regulatory flexibility through mitigation measures in permitting by encouraging the restoration and rebuilding of new wetlands for each wetland that was filled or dredged through an EPA or Corps permit. This policy encouraged thoughtful development consistent with

¹⁷ Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines (Feb. 7, 1990), <https://nepis.epa.gov/Exe/ZyPDF.cgi/200053CW.PDF?Dockey=200053CW.pdf>.

¹⁸ *Id.* at 2.

¹⁹ Keith Schneider, *Bush Announces Proposal for Wetlands*, N.Y. Times (Aug. 10, 1991), at § 1, page 7.

environmental protections and also cut annual wetland losses by three-fourths.²⁰

President Bill Clinton and Administrator Carol M. Browner expanded the program toward a goal of attaining net increases of 100,000 wetland acres per year.²¹

Under President George W. Bush and Administrator Christine Todd Whitman, EPA “affirm[ed] its commitment to the goal of no net loss of the Nation’s wetlands,” citing the need “to begin increasing the overall functions and values of our wetlands” and establishing a new goal of net wetland gains.²²

This policy highlights the administrability of the Clean Water Act and its inclusion of waters of the United States beyond traditionally navigable water bodies through a common-sense approach over decades by *Amici*, other former Administrators, and the Corps. *Cf. Maui*, 140 S. Ct. at 1477 (confirming agency application of permitting provision to some but not all “discharges through groundwater for over 30 years,” and finding that there has been “no evidence of unmanageable expansion”).

²⁰ EPA, *Clean Water Action Plan: Restoring and Protecting the Nation’s Waters* (Feb. 14, 1998).

²¹ *Id.*

²² Dep’t of Army, et al., National Wetlands Mitigation Action Plan (Dec. 24, 2002), https://www.epa.gov/sites/default/files/2015-08/documents/national_wetlands_mitigation_action_plan_0.pdf.

This balancing of protections with administrative feasibility has been prevalent throughout the implementation of the statutory permitting program. Long before EPA's "no net loss policy," the Corps had issued a nationwide permit for dredging or filling of wetlands that have only minimal adverse environmental impacts. 42 Fed. Reg. 37,122, 37,122-28 (July 19, 1977) ("We are responding to the concern of uncertainty over the need to obtain a permit in these waters by issuing today a nationwide permit for discharges into most of these waters.").

In 2017, the Corps reported evaluating more than 85,000 permit requests annually, and authorizing 95% under a general permit determining that "the proposed activity is presumed to have a minor impact, individually and cumulatively," and allows "landowners to proceed without having to obtain individual permits in advance."²³ Through readily-available generalized permit conditions that impose minimal burdens on landowners, the Corps promotes regulatory certainty while protecting wetlands that have significant effects on downstream waterways. In particular, if "the common sense conditions, guidelines and management practices provided in these nationwide permits are followed, the concern for water quality, as it affects the production, movement and/or use for interstate commerce, ordinarily will be satisfied with respect to these discharges." 42 Fed. Reg. at 37,128.

²³ Laura Gatz, Cong. Research Service, *Wetlands: An Overview of Issues* (Updated Jan. 5, 2017), RL33483 at 7.

At its core, the “no net loss” policy and the Corps’ general permitting scheme embodies the government’s broad and workable authority provided by the Clean Water Act to protect wetlands while minimizing regulatory burdens. Without Clean Water Act protections for wetlands and intermittent waterways that have downstream impacts on other waters of the United States, this common sense partnership between government and landowners would not have materialized.

2. Coordination Between EPA and the Corps Pursuant to Section 1344(c) Permitting For Dredged or Fill Material

The Clean Water Act provides that the Corps leads administration of the wetlands permit program under 33 U.S.C. § 1344 for dredging or filling material into waters of the United States at certain specified sites, but that EPA retains authority under 33 U.S.C. § 1344(c) to prohibit specification of an area as a site if discharge there would have an “unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas . . . , wildlife, or recreational areas.” This allocation of environmental oversight authority in the statute is animated by the statute’s focus on resource protection and ecological integrity and the agency’s fact-based significant nexus analysis for protection of the Nation’s waters. While rare, use of that Congressionally created authority demonstrates the effectiveness of the statutory scheme.

During the tenure of Administrator Reilly, EPA invoked the Section 1344(c) authority with regard to a permit for the discharge of fill material related to the Two Forks Dam and Reservoir project in Colorado. The project would have filled in wetlands and riparian habitats and flooded a gold medal trout fishery.²⁴

A federal district court rejected a challenge to that action. *Alameda Water & Sanitation Dist. v. Reilly*, 930 F. Supp. 486, 493 (D. Colo. 1996). In doing so, the court acknowledged EPA's findings that the project "would inundate a diverse riverine and wetland/upland complex with extremely high fisheries, wildlife and recreational values and a conclusion that construction and operation of the dam would have unacceptable adverse effects on fishery, wildlife and recreation areas." *Id.* at 489 (internal quotation marks omitted). It also noted EPA's conclusion that the wetlands and other "resources which would be lost were so valuable that the project's impacts, even factoring in the proposed mitigation, were unacceptable." *Id.* at 490.

This example illustrates the importance of EPA's expertise and focus on hydrologic connectivity and why Congress vested the agency with extraordinary

²⁴ EPA, *Recommended Determination to Prohibit Construction of Two Forks Dam and Reservoir Pursuant to Section 404(c) of the Clean Water Act*, (Mar. 1990), at 1-2, <https://www.epa.gov/sites/default/files/2015-05/documents/twoforksrd.pdf>.

final decision-making authority over dredge and fill permits.²⁵

3. Protection of the Intermittent Waterway of the Los Angeles River

The Los Angeles River “ordinarily carries only a trickle of water and often looks more like a dry roadway than a river. . . . Yet it periodically releases water volumes so powerful and destructive that it has been encased in concrete and steel over a length of some 50 miles.” *Rapanos*, 547 at 769-70 (Kennedy, J., concurring in the judgment).

Riverbeds or streambeds like the Los Angeles River that temporarily dry up are often “used by aquatic organisms that are specially adapted to wet and dry conditions”²⁶ Consequently, such temporary dry waterways still “can affect nutrient dynamics of downstream waters due to microbial activity, increased oxygen availability, and inputs of terrestrial sources of organic matter and nutrients.”²⁷ EPA has found they “provide the same ecological and hydrological functions as perennial streams by

²⁵ See also Administrative Authority to Construe [33 U.S.C. § 1344] Section 404 of the Federal Water Pollution Control Act, 43 Op. Att’y Gen. 197, 197-202 (1979).

²⁶ EPA, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Jan. 2015), at 2-30.

²⁷ *Id.*

moving water, nutrients, and sediment throughout the watershed.”²⁸

EPA has long recognized that such intermittent waterways may be waters of the United States within the meaning of the statute. For example, during the tenure of Administrator Lisa P. Jackson, the Los Angeles River was protected from discharges of pollutants as a traditional navigable water.²⁹ In addition, the agency recognized the need for “the wetlands and creeks that contribute to the River’s health” to “have the protections of our nation’s clean water laws.”³⁰

The decision to designate the Los Angeles River part of the waters of the United States involved extensive collaboration between federal, state, and local officials, making evidenced-based, scientific, and case-specific judgments. EPA detailed its consideration of “a number of factors, including the ability of the Los Angeles River under current conditions of flow and depth to support navigation by watercraft; the history of navigation by watercraft on the river; the current commercial and recreational uses of the river; and plans for future development

²⁸ EPA, *The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest* (Nov. 2008).

²⁹ See Administrator Lisa P. Jackson, Remarks at Compton Creek Declaring the Los Angeles River Traditional Navigable Waters, As Prepared (July 7, 2010).

³⁰ *Id.*

and use of the river which may affect its potential for commercial navigation.”³¹ The analysis was supported by evidence and statistics compiled by the United States Geological Survey, the Los Angeles County Department of Public Works (LADPW), and the City of Los Angeles, in addition to historical record evidence, evidence submitted from the public and even the experience of kayakers and canoeists who navigated almost the entire 51-mile length of the river during the dry-season of a drought year.³²

In part because of those protections, the Los Angeles river has made great strides towards revitalization. In the years following its designation, the Los Angeles River was included in the Urban Waters Federal Partnership—a collaboration of 13 different federal agencies to improve the Nation’s waters—which included ecosystem restoration studies and the development of river-based recreational opportunities.³³ EPA has continued working to restore the Los Angeles River to its natural state,³⁴ and the federal government commitment is

³¹ Letter from Jared Blumenfeld, EPA Region 9 Administrator, Special Case Letter to District Engineer Colonel Mark Toy (July 6, 2010).

³² United States Environmental Protection Agency Region IX, *Special Case Evaluation Regarding Status Of The Los Angeles River, California, As A Traditional Navigable Water* (July 1, 2010).

³³ Urban Waters Federal Partnership, *Partnership in Action, Los Angeles River Watershed* (May 2013), at 17-19.

³⁴ EPA, *Urban Waters Federal Partnership Works to Restore and Increase Access to the Los Angeles River* (Apr. 2014),

evidenced by the recent \$28 million investment made in the watershed as part of the Bipartisan Infrastructure Law.³⁵

The Clean Water Act’s protection for intermittent waterways like the Los Angeles River would be undermined, however, by Petitioners’ focus on continuous surface connections. Unduly focusing on the permanence of waterways would lead to the odd result where, “the merest trickle, if continuous, would count as a ‘water’ subject to federal regulation, while torrents thundering at irregular intervals through otherwise dry channels would not.” *Rapanos*, 547 U.S. at 769 (Kennedy, J., concurring in the judgment).

Such intermittent waterways will become more common as droughts throughout the western United States continue on their current trajectory.³⁶ Recent studies have “revealed widespread and primarily

<https://www.epa.gov/sites/default/files/2014-05/documents/uw-factsheet-losangeles2014.pdf>; *see also* EPA, Urban Waters Partnership, Accomplishments: Los Angeles Urban Waters Location (listing accomplishments along Los Angeles River), <https://www.epa.gov/urbanwaterspartners/accomplishments-los-angeles-urban-waters-location>.

³⁵ Mayor Garcetti Celebrates \$8 Million in Funding for the L.A. River Restoration Project (Jan. 19, 2022), <https://www.lamayor.org/mayor-garcetti-celebrates-8-million-funding-la-river-restoration-project>.

³⁶ EPA, A Closer Look: Temperature and Drought in the Southwest (noting that “since 1990. . . the Southwest has seen some of the most persistent droughts on record”) <https://www.epa.gov/climate-indicators/southwest>.

drying trends in stream intermittency” across the continental United States.³⁷ Petitioners’ approach thus risks depriving the Los Angeles River, other parts of the American West, and other intermittent waterways of Clean Water Act protection.

II. ADOPTING PETITIONERS’ PROPOSAL WOULD SIGNIFICANTLY UNDERMINE EPA’S IMPLEMENTATION OF THE CLEAN WATER ACT.

A. Petitioners purport to provide “a clear and definitive articulation of the Act’s scope,” but their proposal would mean that the statute would protect only wetlands that (1) have a continuous surface-water connection to some other water and (2) only if that water is a traditional navigable water or an intrastate navigable water. Pet. Br. 5-6.

That two-step checklist has no footing in the statutory text and is far afield from the longstanding understanding of the statute by courts and agencies, as demonstrated by their approach to its implementation. “The 1972 Amendments to the Federal Water Pollution Control Act were not merely another law ‘touching interstate waters,’” but instead “a total restructuring and complete rewriting of the existing water pollution legislation.” *City of Milwaukee*, 451 U.S. at 317 (internal quotation marks omitted).

³⁷ Samuel C Zipper et al., *Pervasive Changes in Stream Intermittency across the United States*, 16 Environ. Res. Lett. 084033 (2021), <https://iopscience.iop.org/article/10.1088/1748-9326/ac14ec>.

Far from effectuating the text of the statute, Petitioners' proposal ignores that Congress explicitly defined "navigable waters" for purposes of the statute to mean *all* "waters of the United States," not only those with a continuous connection or that are traditionally navigable. 33 U.S.C. § 1362(7). Petitioners insert words that Congress purposefully wrote out of the federal statute on water pollution control in 1972. In contrast to earlier versions such as the Federal Water Pollution Control Act of 1948 that were focused on the factors invoked by Petitioners—navigability and a continuous channel of interstate commerce—the 1972 Amendments specifically included the broader definition of "navigable waters." Indeed, Congress used the term "interstate waters" in a different provision of the Clean Water Act to refer to prior water quality standards. 33 U.S.C. § 1313. And the reference to "waters of the United States" also contrasts directly with other statutes that are explicitly limited to the "*navigable* waters of the United States." *See, e.g.*, 16 U.S.C. § 817 (permitting requirements for dams on "any of the navigable waters of the United States"); 14 U.S.C. § 527 (authority to control vessels "in the navigable waters of the United States").

B. Petitioners' approach would upend long-settled expectations among thousands of entities that have engaged in the permitting system for decades as discussed above. Pet. Br. 5. And it would do so without eliminating the need for case-by-case agency determinations. Rather than provide the claimed "rule that requires only ordinary visual observation and thus one that any layman can readily and accurately employ," Pet. Br. 8, Petitioners would trade

an objective, scientific inquiry firmly within the wheelhouse of EPA and the Corps (the significant nexus determination of hydrological connections between waterbodies), for a subjective, cartography assignment.

Petitioners' proposal presents flaws similar to EPA's 2019 NWPR. As EPA noted, the NWPR introduced "new implementation uncertainties, including its own case-specific typical year analysis for most categories of jurisdictional waters." 86 Fed. Reg. 69,372, 69,405 (Dec. 7, 2021). In particular, wetlands could meet the "adjacency test" for protection as waters of the United States only "if they [had] a surface water connection with other jurisdictional waters once in a typical year." 86 Fed. Reg. at 69,410. But, "[i]dentifying the presence of a surface water connection in a typical year can be difficult and sometimes impossible, as such connections are often not apparent from visual field observation alone." *Id.* In dry regions, or during dry season, site visits are unlikely to capture a continuous surface connection, nor are aerial photographs, which are often taken just once per year or once every other year. *Id.* Contrary to Petitioners' theory, "ordinary visual observation" would be plainly insufficient for EPA to accurately determine the presence of a continuous surface connection, much less "any layman," Pet. Br. 8; *see also* 86 Fed. Reg. at 69,410 ("Given the insufficiency of visual field observations to assess the presence of a surface water connection . . . agency staff must often expend substantial time and resources" to make jurisdictional determinations.).

The administrative difficulties of Petitioners' proposal would likely only get worse because the notion of a "typical year" is ever changing. For instance, in Houston, there have been five 500 year flood events in the past 6-7 years.³⁸ Similarly, in the western United States, historic droughts are limiting connections between historically intertwined water bodies.³⁹ The increasing prevalence of formerly extraordinary climate and weather patterns makes it difficult, if not impossible, to accurately gauge "typical years."

Petitioners' proposed test, requiring a continuous surface connection to a traditionally or intrastate navigable water is nowhere to be found in the statutory text and would run contrary to Congress's fundamental objective to "restore and maintain the

³⁸ David Groves, *How the Trump Administration Eased Destruction of the Nation's Wetlands and Streams*, 51 *Env'tl. L. Rep. (ELI)* 10194, 10194-95 (2021) ("Setting aside that in a rapidly changing climate—where Houston, Texas, has experienced five 500-year flood events in the past six years—the concept of a 'typical year' seems impracticable, many [Corps] staff are now interpreting this new definition of adjacency to mean that a wetland must lie within the 10-year floodplain of a jurisdictional stream to be considered jurisdictional.").

³⁹ Jonathan T. Overpeck & Bradley Udall, *Climate Change and the Aridification of North America*, 117 *PNAS* 11856, 11856-58 (2020) (noting a "shift in the hydrologic paradigm" with rising temperatures and decreased flows in the Colorado River and Rio Grande; Columbia River; rivers along the Sierra Nevada in California; the northern Rocky Mountains and in the largest river basin in the United States, the Missouri).

chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

Beth S. Brinkmann
Counsel of Record
Gary S. Guzy
Thomas Brugato
Eric Chung
Martin Levy
COVINGTON & BURLING LLP
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000
bbrinkmann@cov.com

June 17, 2022

*Counsel for Amici
Curiae Former EPA
Administrators*