No. 21-454

In the Supreme Court of the United States

MICHAEL SACKETT & CHANTELL SACKETT,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld the Environmental Protection Agency's determination that the wetlands on petitioners' property constitute "waters of the United States" under the Clean Water Act, 33 U.S.C. 1362(7), because the wetlands are adjacent to a tributary of a traditional navigable water.

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OPINIONS BELOW

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

JURISDICTION

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

STATEMENT

1. Congress enacted the Clean Water Act (CWA or Act), 33 U.S.C. 1251 *et seq.*, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a); see Pub. L. No. 92-

500, § 2, 86 Stat. 816. The CWA prohibits the "discharge of any pollutant by any person," except in compliance with the Act. 33 U.S.C. 1311(a). The term "pollutant" is defined to include "dredged spoil," "rock," and "sand," 33 U.S.C. 1362(6), and the term "discharge of a pollutant" is defined to mean "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. 1362(12). The term "navigable waters," in turn, is defined to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). Accordingly, depositing dredged materials (like sand and gravel) from a point source implicates the CWA only if the materials are discharged to "waters of the United States." *Ibid.*

The United States Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Corps) share responsibility for implementing and enforcing the CWA. See 33 U.S.C. 1344, 1361. The EPA and the Corps have adopted materially identical regulations defining the term "waters of the United States," 33 U.S.C. 1362(7). The regulations that were in effect at the time of the discharge at issue here defined that term to include "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce" (often referred to as traditional navigable waters), and all "[t]ributaries" of such waters. 33 C.F.R. 328.3(a)(1) and (5) (2008); see 40 C.F.R. 230.3(s)(1) and (5) (2008).

Those regulations also defined the term "waters of the United States" to include "[w]etlands adjacent to" traditional navigable waters or their tributaries. 33 C.F.R. 328.3(a)(7) (2008) (emphasis omitted); see 40 C.F.R. 230.3(s)(7) (2008). The regulations defined "wet-

lands" to mean "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. 328.3(b) (2008) (emphasis omitted); see 40 C.F.R. 230.3(t) (2008). The regulations further stated that "[t]he term *adjacent* means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" 33 C.F.R. 328.3(c) (2008).

When pollutants are discharged into "waters of the United States" in violation of the CWA, the Act and its implementing regulations establish several different enforcement mechanisms. In some circumstances, the EPA may issue an administrative compliance order to a violator "requiring such person to comply with" the Act. 33 U.S.C. 1319(a)(3). The EPA may also bring a civil enforcement action to enjoin a violation of the Act and to seek civil penalties. 33 U.S.C. 1319(a)(3), (b), and (d).

2. Petitioners own .63 acres of undeveloped property in Idaho near Priest Lake, which is "one of the largest lakes in Idaho." Pet. App. A8. The parcel is bounded by roads to the north and south. *Ibid.* On the other side of the south road is a line of houses fronting Priest Lake, which is about 300 feet from petitioners' property. *Ibid.* On the other side of the north road "lies the Kalispell Bay Fen, a large wetlands complex that drains into an unnamed tributary" of Kalispell Creek, which in turn feeds into Priest Lake. *Ibid.* The unnamed tributary is about 30 feet from petitioners' property. *Id.* at A33.

Petitioners purchased the property in 2004. Pet. App. A8. Eight years earlier, the Corps had determined that the property contains wetlands that qualify as "waters of the United States," 33 U.S.C. 1362(7), thus triggering the CWA's requirement to obtain a permit before dumping any fill material, such as gravel, onto the wetlands. Administrative Record 92-95. In 2007, without obtaining any permit under the CWA, petitioners trucked in approximately 1714 cubic yards of gravel and sand to fill the wetlands and prepare the site for building. C.A. E.R. 195; Pet. App. A8-A9.

In May 2007, the EPA and the Corps inspected petitioners' property in response to a complaint from a neighbor. C.A. E.R. 152. The inspection ultimately led the EPA to inform petitioners that the property contains wetlands covered by the CWA. See *id.* at 145. Petitioners hired their own wetlands consultant to inspect the site. *Id.* at 134-135. Petitioners' consultant told them that the "site is part of a wetland," that it "is not an isolated wetland" but rather "joins a wetland" across the road, and that petitioners should cease construction activity until consulting further with the Corps. *Id.* at 135.

In November 2007, the EPA issued an administrative compliance order to petitioners "formally concluding [that petitioners'] property contains wetlands subject to CWA regulations." Pet. App. B2. In particular, the EPA found that the property contains covered wetlands that are "adjacent to" navigable waters. *Id.* at D5-D6 (amended order). The EPA also found that petitioners had violated the CWA by discharging fill material into the wetlands on their property without a permit. *Id.* at D6-D7. The EPA directed petitioners to remove the fill material and restore the wetlands. *Id.* at D7-D8. The

order initially required removal of the fill material by April 2008, but the EPA extended the compliance schedule in an amended order issued in May 2008. *Id.* at B2-B3; see *id.* at D2, D8.

3. In 2008, petitioners brought this action under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, to challenge the EPA's initial administrative compliance order. Pet. App. A9. Petitioners contended that the order was "premised on an erroneous assertion of jurisdiction under the CWA." *Ibid.* The district court concluded that the CWA precludes pre-enforcement judicial review of administrative compliance orders, and it accordingly dismissed petitioners' complaint. 2008 WL 3286801, at *2. The court of appeals affirmed. 622 F.3d 1139, 1147.

This Court granted a petition for a writ of certiorari to address, *inter alia*, whether petitioners could obtain pre-enforcement APA review of the administrative compliance order. 564 U.S. 1052, 1052. The Court held that the compliance order was subject to APA review. 566 U.S. 120, 131. The Court therefore reversed the judgment of the court of appeals and remanded for further proceedings. *Ibid.*

4. On remand, petitioners revised their complaint to challenge the amended compliance order that the EPA had issued in 2008. Supp. Compl. ¶¶ 34-35. Petitioners again contended that their property does not contain "waters of the United States" and therefore is not subject to the CWA's requirements. *Id.* ¶¶ 48-49.

The district court granted summary judgment to the EPA. Pet. App. B1-B32. The court first found that substantial evidence supported the EPA's determination that petitioners' property contains "wetlands." *Id.* at

B18-B21. In particular, the court found that the property "was originally part of a large wetland complex called the Kalispell Bay Fen," which remains "mainly undisturbed" across the road on the northern side of the property. *Id.* at B20. The court further found that, although petitioners' property had been divided from the Kalispell Bay Fen by a road and had been "mostly filled and removed of vegetation," the "hydrology of the site was consistent with wetlands" in those areas that had not been filled. *Id.* at B20-B21; see *id.* at B21 (discussing additional evidence of "wetland soils," "shallow subsurface flow between" petitioners' property and the Kalispell Bay Fen, and wetland vegetation in the surrounding area).

The district court also upheld the EPA's determination that the wetlands on petitioners' property are "water[s] of the United States" because they are "adjacent to a traditional navigable body of water; namely, Priest Lake." Pet. App. B21. The court explained that Priest Lake "has been and is used in interstate commerce" and is therefore a "'traditional navigable water,'" encompassed within the definition of "'waters of the United States'" in the implementing regulations. *Id.* at B22.[1] The court also found that the record "supports the EPA's conclusion that [petitioners'] land is adjacent to Priest Lake." *Ibid.* The court observed that the wetlands on petitioners' property are connected by a "shallow subsurface" flow to Priest Lake; the wetlands are separated from Priest Lake by man-made barriers, without

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[1] In 2015, the EPA and the Corps revised the regulations defining "waters of the United States." See 80 Fed. Reg. 37,054 (June 28, 2015) (Clean Water Rule). The district court applied the agencies' pre-2015 regulations, which were in effect at the time of petitioners' discharge. See Pet. App. B17 n.3.

which "water would flow from the property directly into Priest Lake"; and the wetlands are "reasonably close" to Priest Lake, which is "only 300 feet" away. *Id.* at B23-B24. The court also found, in the alternative, that the EPA had correctly determined that the wetlands on petitioners' property are subject to the CWA because they are adjacent to an unnamed tributary, located across the road to the north of the property, which flows into Kalispell Creek and, in turn, into Priest Lake. *Id.* at B25-B30.

5. The court of appeals affirmed. Pet. App. A1-A36.

a. The court of appeals held that the case was not moot even though the EPA had withdrawn the amended compliance order while the appeal was pending. Pet. App. A12-A20. While noting the EPA's announcement that it did not intend "to enforce the amended compliance order or issue a similar one in the future," the court stated that the "EPA could potentially change positions under new leadership." *Id.* at A14. The EPA had argued that petitioners' challenge to the withdrawn order was moot because any hypothetical assertion of CWA jurisdiction for a future discharge on petitioners' property would be governed by a "new definition of 'waters of the United States' [that the EPA and the Corps had] adopted in 2020." *Id.* at A20; see 85 Fed. Reg. 22,250 (Apr. 21, 2020) (Navigable Waters Protection Rule). The court rejected that theory and did not otherwise take account of the 2020 rulemaking in addressing petitioners' challenge. Pet. App. A20; see *id.* at A32.

b. On the merits, petitioners contended that the EPA's now-withdrawn administrative compliance order was contrary to the CWA's definition of "navigable waters," 33 U.S.C. 1362(7), as interpreted by a plurality of this Court in *Rapanos* v. *United States*, 547 U.S. 715

(2006). See Pet. App. A20. In *Rapanos*, the Court considered whether wetlands near "ditches or man-made drains that eventually empty into traditional navigable waters" may be treated as "waters of the United States" under the CWA. 547 U.S. at 729 (plurality opinion). The case did not produce a majority opinion. Writing for himself and three other Members of the Court, Justice Scalia concluded that the "phrase 'the waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" *Id.* at 739 (brackets, citation, and ellipsis omitted). The plurality also concluded that wetlands are "covered by the Act" based on their adjacency to other waters only if the wetlands have "a continuous surface connection to bodies that are 'waters of the United States' in their own right." *Id.* at 742.

Justice Kennedy filed a concurring opinion in which no other Justice joined. He took the view that wetlands are covered by the Act if they "possess a 'significant nexus' to" traditional navigable waters. *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring in the judgment) (citation omitted); see *id.* at 780 (stating 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'"). Four dissenting Justices would have held that wetlands may be treated as covered waters if they satisfy "either the plurality's or Justice Kennedy's test." *Id.* at 810 (Stevens, J., dissenting).

In the present case, the court of appeals determined that, under Ninth Circuit precedent, waters satisfying the "significant nexus" test articulated in Justice Kennedy's *Rapanos* concurrence may be treated as covered waters. Pet. App. A22-A31; see *Northern Cal. River Watch* v. *City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007) (citing *Marks* v. *United States*, 430 U.S. 188, 193 (1977)), cert. denied, 552 U.S. 1180 (2008). The court of appeals found the proper disposition of this case "clear" under that approach. Pet. App. A33. The court explained that "[t]he record plainly supports EPA's conclusion that the wetlands on [petitioners'] property are adjacent to a jurisdictional tributary and that, together with the similarly situated Kalispell Bay Fen, they have a significant nexus to Priest Lake, a traditional navigable water." *Ibid.*

The court of appeals emphasized that the wetlands on petitioners' property are only 30 feet from the unnamed tributary to Kalispell Creek, which feeds into Priest Lake, and that they are separated from the tributary only by an "artificial barrier[]" (a road), which does "not defeat adjacency." Pet. App. A33 (citing 33 C.F.R. 328.3(c) (2008) ("Wetlands separated from other waters of the United States by man-made dikes or barriers * * * and the like are 'adjacent wetlands.'")); see *id.* at A37-A39 (reproducing color photographs of the waters on petitioners' property). The court noted that "[o]fficials from the site visit also observed that the tributary is 'relatively permanent' based on U.S. Geological Survey mapping as well as its flow, channel size, and form." *Id.* at A34. With respect to the "significant nexus" requirement in Justice Kennedy's *Rapanos* concurrence, the court found that the EPA had appropriately analyzed the wetlands on petitioners' property

and the Kalispell Bay Fen together, and that "[t]he record further supports EPA's conclusion that these wetlands, in combination, significantly affect the integrity of Priest Lake." *Id.* at A35. The court noted that the evidence before the EPA showed that the wetlands "provide important ecological and water quality benefits" to Priest Lake and are "especially important in maintaining the high quality of Priest Lake's water, fish, and wildlife." *Ibid.*

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or another court of appeals. Petitioners contend (Pet. 17-29) that further review is warranted to resolve a purported circuit conflict concerning the proper application of the plurality and concurring opinions in *Rapanos* v. *United States*, 547 U.S. 715 (2006). But every court of appeals to resolve the question has determined, consistent with the decision below, that *at least* those wetlands satisfying the "significant nexus" test set forth in Justice Kennedy's *Rapanos* concurrence may be treated as "waters of the United States" under the CWA, 33 U.S.C. 1362(7).

Petitioners therefore do not identify any conflict warranting this Court's review. Further review is also unwarranted at this time because the EPA and the Corps have issued for comment a proposed revision to the regulations defining "waters of the United States." See Corps & EPA, *Pre-Publication Notice, Proposed Rule, Revised Definition of "Waters of the United States,"* (Nov. 18, 2021), https://go.usa.gov/xeNBV (2021

Notice).[2] Addressing that same statutory language during the agencies' rulemaking would be premature.

The narrow question presented here concerns the legal standards used to determine whether particular wetlands may be treated as covered waters based on their proximity to and interconnectedness with tributaries of traditional navigable waters. The case does not implicate any issue about wetlands located near ephemeral waters, ditches, or temporary channels. Compare *Rapanos*, 547 U.S. at 753-757 (plurality opinion), with *id.* at 767-776 (Kennedy, J., concurring in the judgment).

In addition, the EPA has withdrawn the administrative compliance order that was the original subject of petitioners' challenge, and the agency has disclaimed any intent to revive that order. If petitioners discharge additional pollutants into the wetlands on their property in the future, any controversy about CWA jurisdiction will presumably be governed by the revised definition of "waters of the United States" that emerges from the agencies' current rulemaking. Petitioners ask the Court to impose a categorical limit on the agencies' authority before either the forthcoming rule or the administrative record underlying it has been finalized. But even if clarification by this Court ultimately becomes warranted, it should occur after the agencies have completed their work. The petition for a writ of certiorari should be denied.

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[2] The proposed rule was signed by the Administrator of the EPA and the Acting Assistant Secretary of the Army (Civil Works) on November 18, 2021, and is forthcoming in the *Federal Register*. See 2021 Notice 1. The document cited here is a pre-publication version available on the EPA's website.

1. The court of appeals correctly held that the EPA's administrative compliance order rests on a permissible understanding of the CWA. Pet. App. A32-A36. In that compliance order, the EPA determined that petitioners' property contains covered wetlands, which are adjacent to an unnamed tributary of a traditional navigable water, Priest Lake.

a. This Court has addressed the scope of the statutory term "waters of the United States" on three principal occasions. First, in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the Court unanimously held that the Corps may "exercise [CWA] jurisdiction over wetlands adjacent to but not regularly flooded by rivers, streams, and other hydrographic features more conventionally identifiable as 'waters,'" *id.* at 131. The Court observed that "the transition from water to solid ground is not necessarily or even typically an abrupt one," and that "between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall short of being dry land." *Id.* at 132. After reviewing the text, purpose, and history of the CWA, see *id.* at 132-134, the Court concluded that the Corps, based on its "technical expertise," may reasonably determine that certain "adjacent wetlands are inseparably bound up with the 'waters' of the United States," *id.* at 134.

Second, in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Court held that use of "isolated" nonnavigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. *Id.* at 166-174. The Court noted, and did not cast doubt

upon, its prior holding in *Riverside Bayview Homes* that the CWA's coverage extends beyond waters that are "navigable" in the traditional sense. See *id.* at 172. The Court also observed that its reading of the CWA in *Riverside Bayview Homes* had been informed by "the significant nexus between the wetlands and 'navigable waters.'" *Id.* at 167.

Third, in *Rapanos* v. *United States*, *supra*, the Court considered whether wetlands near "ditches or man-made drains that eventually empty into traditional navigable waters" may be treated as "waters of the United States" under the CWA. 547 U.S. at 729 (plurality opinion). As previously explained, that case did not produce a majority opinion. A four-Justice plurality interpreted the term "waters of the United States" to encompass "relatively permanent, standing or continuously flowing bodies of water," *id.* at 739, that are connected to traditional navigable waters, *id.* at 742, as well as wetlands with a "continuous surface connection" to traditional navigable waters or their tributaries, *ibid.* Justice Kennedy interpreted the term to encompass wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759 (opinion concurring in the judgment) (quoting *SWANCC*, 531 U.S. at 167); see *id.* at 779-780. And four dissenting Justices would have held that the term "waters of the United States" includes all tributaries and wetlands that satisfy *either* the plurality's standard *or* Justice Kennedy's. See *id.* at 810 & n.14 (Stevens, J., dissenting).

Since *Rapanos*, every court of appeals that has squarely resolved the question has held that the CWA may be applied to at least those waters that satisfy the standard set forth in Justice Kennedy's concurring

opinion, and this Court has repeatedly declined to review those decisions. See *United States* v. *Donovan*, 661 F.3d 174, 183-184 (3d Cir. 2011), cert. denied, 566 U.S. 990 (2012); *United States* v. *Bailey*, 571 F.3d 791, 799 (8th Cir. 2009); *United States* v. *Robison*, 505 F.3d 1208, 1221-1222 (11th Cir. 2007), cert. denied, 555 U.S. 1045 (2008); *Northern Cal. River Watch* v. *City of Healdsburg*, 496 F.3d 993, 999 (9th Cir. 2007), cert. denied, 552 U.S. 1180 (2008); *United States* v. *Johnson*, 467 F.3d 56, 64-66 (1st Cir. 2006), cert. denied, 552 U.S. 948 (2007); *United States* v. *Gerke Excavating, Inc.*, 464 F.3d 723, 724-725 (7th Cir. 2006) (per curiam), cert. denied, 552 U.S. 810 (2007); cf. *United States* v. *Cundiff*, 555 F.3d 200, 210-213 (6th Cir.) (declining to decide which opinion in *Rapanos* controls because "jurisdiction [was] proper * * * under both Justice Kennedy's and the plurality's tests"), cert. denied, 558 U.S. 818 (2009); *United States* v. *Lucas*, 516 F.3d 316, 327 (5th Cir.) (similar), cert. denied, 555 U.S. 822 (2008).

The "significant nexus" standard applied in those decisions gives effect to the language of the CWA and its animating purposes. See *Rapanos*, 547 U.S. at 767-769 (Kennedy, J., concurring in the judgment). Petitioners urge (Pet. 29) that the CWA should instead be construed to cover only those wetlands that have a "continuous surface water connection" to other covered waters. On that approach, the agencies would lack authority to protect wetlands separated from a navigable river by a small dune or other natural barrier, even if overwhelming scientific evidence showed that the wetlands significantly affect the river's "chemical, physical, and biological integrity." 33 U.S.C. 1251(a).

Petitioners' narrow understanding of adjacency is inconsistent with the longstanding views of the Corps

and the EPA. The agencies' regulatory definition of "waters of the United States," and of "adjacent wetlands" in particular, has changed over time. See pp. 17-19, *infra*. But the various iterations of that definition have consistently encompassed at least some wetlands that lack a continuous surface connection to other covered waters. See, *e.g.*, 33 C.F.R. 323.2(d) (1978) ("Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'"); 33 C.F.R. 328.3(c) (1987) (same); 33 C.F.R. 328.3(c)(1) (2016) ("The term *adjacent* * * * includ[es] waters separated by constructed dikes or barriers, natural river berms, beach dunes, and the like."); 33 C.F.R. 328.3(c)(1)(iii) and (iv) (2020) (defining the term "adjacent wetlands" to include, *inter alia*, wetlands that "[a]re physically separated from a [covered] water * * * only by a natural berm, bank, dune, or similar natural feature," as well as wetlands "physically separated from a [covered] water * * * only by an artificial dike, barrier, or similar artificial structure so long as" specified criteria are satisfied) (emphasis omitted).

b. The court of appeals correctly upheld the EPA's determination that the wetlands on petitioner's property are covered waters. Pet. App. A33. Those wetlands are located only 30 feet from a "relatively permanent" unnamed tributary of Kalispell Creek, which in turn feeds into Priest Lake, a traditional navigable water. *Id.* at A33-A34. Although the wetlands are separated from that tributary by a road, the presence of that man-made barrier does not "defeat adjacency" under the applicable regulations. *Id.* at A33; see 33 C.F.R. 328.3(c) (2008) ("Wetlands separated from other waters of the United States by man-made dikes or barriers

* * * and the like are 'adjacent wetlands.'"); see also Pet. App. B20 (district court's finding that petitioners' property "was originally part of a large wetland complex called the Kalispell Bay Fen," before being divided from the other wetlands by a road); pp. 9-10, *supra*; cf. *Rapanos*, 547 U.S. at 775 (Kennedy, J., concurring in the judgment) (explaining that "filling in wetlands separated from another water by a berm can mean that floodwater, impurities, or runoff that would have been stored or contained in the wetlands will instead flow out to major waterways").

The court of appeals also correctly upheld, as supported by the record, the EPA's determination that the wetlands on petitioners' property have a "significant nexus" to Priest Lake, a traditional navigable water. Pet. App. A34-A36. Justice Kennedy concluded that wetlands have such a nexus when they, "either alone or in combination with other similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters." *Rapanos*, 547 U.S. at 780 (opinion concurring in the judgment). Here, the court of appeals found ample evidence that the wetlands on petitioners' property are similarly situated to the Kalispell Bay Fen across the road and that, together, those wetlands "significantly affect the integrity of Priest Lake." Pet. App. A35. In this Court, petitioners do not challenge those findings and do not dispute that their property contains covered waters under the "significant nexus" test set forth in Justice Kennedy's concurring opinion.

2. a. Petitioners contend that the lower courts are "split as to the fundamental question of what *Rapanos*" requires. Pet. 17; see Pet. 17-20. As explained above,

however, the courts of appeals that have squarely resolved the question have all held that the EPA and the Corps may assert CWA jurisdiction over wetlands that satisfy the "significant nexus" test in Justice Kennedy's concurring opinion. See pp. 13-14, *supra*. The only disagreement or uncertainty that petitioners identify concerns whether the test set forth in the *Rapanos* plurality opinion provides an *additional* basis for asserting regulatory authority over particular waters, even in circumstances where Justice Kennedy's test is not satisfied. Because petitioners do not dispute that Justice Kennedy's test is satisfied here, resolution of that disagreement would have no impact on the outcome of this case.

b. Petitioners contend (Pet. 21-23) that the sequence of agency rulemakings since this Court decided *Rapanos* suggests a need for the Court to revisit that decision. In fact, those agency rulemakings are a reason to deny review, not to grant it.

Since the Court decided *Rapanos*, the EPA and the Corps have addressed the scope of the CWA term "waters of the United States" in three significant notice-and-comment rulemakings. See 80 Fed. Reg. 37,054 (June 29, 2015) (Clean Water Rule); 84 Fed. Reg. 56,626 (Oct. 22, 2019) (Recodification Rule); 85 Fed. Reg. at 22,250 (Navigable Waters Protection Rule). The Clean Water Rule defined "waters of the United States" to include wetlands adjacent to tributaries of traditional navigable waters, while adding a new definition of "tributary" and significantly revising the definition of "adjacent." 80 Fed. Reg. at 37,114-37,115 (emphases omitted). The Recodification Rule repealed the Clean Water Rule and restored the pre-2015 regulatory regime. 84

Fed. Reg. at 56,659-56,660. The Navigable Waters Protection Rule defined "waters of the United States" to include wetlands adjacent to tributaries of traditional navigable waters, subject to revised definitions of "tributary" and "adjacent wetland." 85 Fed. Reg. at 22,338-22,339 (emphases omitted). That rule, like its predecessors but unlike the approach that petitioners advocate, treated as "adjacent" some wetlands lacking a continuous surface connection to other covered waters, including some wetlands separated from covered waters by a road or other artificial barrier. *Id.* at 22,309; see *id.* at 22,312; p. 15, *supra*.

As petitioners observe (Pet. 22-23), the Clean Water Rule and the Navigable Waters Protection Rule were the subject of various stays and nationwide injunctions.[3] For present purposes, however, the salient point is that the expert agencies that administer the CWA have been taking steps to define the "outer bound to the reach of their authority." *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring); see *ibid.* (observing that federal agencies exercising delegated statutory authority "are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer," and that the CWA in particular gives the EPA and the Corps "plenty of room to operate"). The Act requires the agencies to make complex, policy-laden judgments about the extent to which wetlands should be treated as "the waters of the United States." 33 U.S.C. 1362(7).

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[3] No court of appeals ever definitively addressed the merits of either rule. A divided panel of the Sixth Circuit granted a nationwide stay of the Clean Water Rule, but this Court reversed that judgment after concluding that the rule was not subject to direct review in the courts of appeals. See *National Ass'n of Mfrs.* v. *Department of Def.*, 138 S. Ct. 617, 627, 634 (2018).

Those decisions can be controversial and are subject to the vagaries of litigation. But, contrary to petitioners' suggestion, the agencies' past experience does not indicate that they are incapable of adopting durable rules in this area.

Currently, the agencies are applying the pre-2015 regulatory regime, after the Navigable Waters Protection Rule was vacated and remanded to the agencies. See *Navajo Nation* v. *Regan*, No. 20-cv-602, 2021 WL 4430466, at *5 (D.N.M. Sept. 27, 2021); *Pascua Yaqui Tribe* v. *EPA*, No. 20-cv-266, 2021 WL 3855977, at *6 (D. Ariz. Aug. 30, 2021), appeal docketed, No. 21-16791 (9th Cir. Oct. 26, 2021) . On June 9, 2021, while this case was pending before the court of appeals, the agencies announced their intent to initiate a new rulemaking process to define "waters of the United States." See 86 Fed. Reg. 41,911 (Aug. 4, 2021); cf. Pet. App. A7 n.1 (discussing related prior announcement).

On November 18, 2021, the agencies signed a proposed rule to define the CWA term "waters of the United States," which will be published in the *Federal Register* for public comment. See 2021 Notice 1. In the proposed rule, the agencies are exercising the authority conferred by Congress to amend the regulatory definition of that term in light of the CWA's text and purposes and the relevant precedents of this Court. See *id.* at 7-10. The proposed rule draws on the agencies' experience and expertise after more than 30 years of implementing their prior regulations, and it reflects the agencies' current assessment of the best available scientific evidence concerning the functions that upstream waters serve in protecting the quality of downstream foundational waters.

After the agencies consider public comments on the proposed rule and promulgate a new regulatory definition of "waters of the United States," the Court will be in a better position to evaluate the extent and significance of any dispute about the application of the CWA to wetlands like these—*i.e.*, wetlands that are only a short distance from a tributary of a traditional navigable water, but that are separated from the tributary by an artificial barrier. The Court will also have the benefit of the administrative record, including the comments received from members of the public, that the agencies develop in the rulemaking process. That regulatory process should be allowed to play out before this Court revisits the scope of the agencies' authority under the CWA. Indeed, given this Court's prior denials of certiorari on substantially the same question (see pp. 13-14, *supra*), it would be especially anomalous for the Court to grant review now at the outset of the agencies' new rulemaking.

c. Petitioners suggest (Pet. 24-28) that the Court should intervene now to reduce the costs of CWA compliance. That suggestion is unfounded. At no expense to them, property owners may obtain a jurisdictional determination from the Corps. See U.S. Army Corps of Eng'rs, *Regulatory Guidance Letter No. 16-01*, at 1-2 (Oct. 2016); see also *United States Army Corps of Eng'rs* v. *Hawkes Co.*, 578 U.S. 590, 597-602 (2016) (holding that an approved jurisdictional determination from the Corps is final agency action reviewable in district court under the APA). That some property owners choose to "hire expert consultants" (Pet. 25) to contest a finding with which they disagree does not negate the value of the agencies' own determinations—which, again, are available to property owners for free. In

2007, petitioners hired their own consultant, who advised them that their property contains wetlands and that they should cease construction pending further discussions with the Corps. See p. 4, *supra*. Petitioners also overstate (Pet. 4) the costs of obtaining a permit under the CWA. Many property owners may avail themselves of general, nationwide permits covering broad categories of authorized activities, in lieu of obtaining a site-specific individualized permit. See, *e.g.*, Gov't Br. at 46-50, *Hawkes*, *supra* (No. 15-290) (overview of permitting options and costs).

3. This case would be an unsuitable vehicle in which to provide substantial guidance concerning the scope of the CWA term "waters of the United States." The parties' dispute is limited to the narrow question whether a barrier between a wetland and a CWA-covered tributary categorically precludes CWA coverage of the wetland; petitioners face no significant risk of any renewed agency enforcement effort concerning the discharge that occurred in 2007; and any future controversy between the parties will likely be governed by different regulations and implicate a different administrative record.

a. The "waters of the United States" issue in this case is narrow. The lower courts upheld the agency's findings that petitioners' property contains wetlands; that the tract across the road north of petitioners' property contains a larger complex of wetlands, the Kalispell Bay Fen; that an unnamed tributary on that property feeds into Kalispell Creek and, in turn, into Priest Lake; and that Priest Lake is a traditional navigable water. See Pet. App. A33-A36, B25-B30. The court of appeals cited evidence that the unnamed tributary "is 'relatively permanent' based on U.S. Geological Survey mapping

as well as its flow, channel size, and form." *Id.* at A34. The tributary itself thus satisfies the *other* principal requirement articulated by the *Rapanos* plurality, *i.e.*, that the water body to which the wetland is claimed to be adjacent must be a "relatively permanent body of water connected to traditional navigable waters." 547 U.S. at 742. Petitioners do not contest those findings in this Court.

Accordingly, the statutory question presented here is whether the wetlands' proximity to the unnamed tributary and their significant nexus to Priest Lake provide sufficient bases for treating them as "waters of the United States," or whether instead the wetlands' separation from the tributary by 30 feet and a road categorically precludes CWA coverage. The case does not present any question about wetlands near "merely intermittent or ephemeral flow[s]," such as channels that drain into navigable waters only during heavy rainfall. *Rapanos*, 547 U.S. at 733-734 (plurality opinion). And the agencies' statutory authority to regulate wetlands "adjacent" to traditional navigable waters has been clear since this Court's decision in *Riverside Bayview Homes*, 474 U.S. at 134. The only question here concerns the precise legal standard that governs determinations concerning adjacency in circumstances like these. This case accordingly provides no opportunity for the Court to clarify more broadly the outer bounds of the CWA term "waters of the United States."

b. This suit originated as an APA challenge to an EPA compliance order that was premised on petitioners' discharge of gravel and sand in 2007. In rejecting that challenge on the merits, the court of appeals applied the version of the agencies' "waters of the United

States" rule that was in effect when the discharge occurred. See Pet. App. A6-A7, A33-A34. The court concluded that, under the regulation in effect at that time, "there was nothing arbitrary about EPA's determination that [petitioners'] wetlands were adjacent to a jurisdictional tributary, and thus fell into the relevant regulatory definition of 'waters of the United States.'" *Id.* at A33 (citation omitted). The court also held that the CWA, construed in accordance with Justice Kennedy's concurring opinion in *Rapanos*, did not foreclose the agencies' regulatory approach. See *id.* at A22-A31.

During the pendency of petitioners' appeal, however, the EPA voluntarily withdrew the administrative compliance order at issue. Pet. App. A11-A12. The EPA also informed petitioners that it does not intend to issue any similar order in the future. *Id.* at A12. Given the passage of time since petitioners' 2007 pollutant discharge, EPA's withdrawal of the prior compliance order, and the agency's representation that it does not intend to issue a similar order in the future, it is highly unlikely that the agency will undertake renewed enforcement activity premised on petitioners' earlier conduct. To be sure, a party's voluntary cessation of conduct challenged in litigation does not ordinarily moot a case unless the party "show[s] that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013) (citation omitted). But even accepting the court of appeals' conclusion that this demanding mootness standard is not satisfied here, see Pet. App. A12-A15, the improbability of future enforcement action premised on the 2007 discharge bears substantially on the Court's discretionary decision whether to grant review.

c. The court of appeals also noted that the EPA's withdrawal of the compliance order did not assure petitioners that they could "resum[e] construction" in the future without fear of legal liability. Pet. App. A16. Although the nature and extent of such potential future discharges are uncertain, it is possible that a future dispute between petitioners and the EPA may arise concerning the status of the wetlands on petitioners' property. But both the speculative nature of any such future controversy, and the pendency of the agencies' new rulemaking, make this case an especially poor candidate for the Court's review.

Any dispute about a future discharge on petitioners' property is likely to be governed by the revised regulations that emerge from the current rulemaking process. The precise content of those regulations has not yet been determined, however, and it will depend in part on the administrative record (including public comments) amassed during the rulemaking. Cf. 85 Fed. Reg. at 22,307 (explaining that, in promulgating the Navigable Waters Protection Rule, the agencies had "modified the test" for adjacency previously set forth in the proposed rule, based on "consideration of the public comments received"). If the Court grants review now, it will be forced to decide whether the CWA term "waters of the United States" unambiguously excludes the wetlands on petitioners' property, see Pet. App. A20, at a time when neither the forthcoming agency rule nor the administrative record underlying it has been finalized. That mode of proceeding would invert the usual order of operations, whereby judicial review occurs *after* the agency has completed its work. Further review therefore is not warranted at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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