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 WATERKEEPER ALLIANCE, SAN FRANCISCO BAYKEEPER, BAYOU CITY WATERKEEPER, AND 47 OTHER WATERKEEPER ORGANIZATIONS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF WATERKEEPER ALLIANCE, SAN FRANCISCO BAYKEEPER, BAYOU CITY WATERKEEPER AND 47 OTHER WATERKEEPER ORGANIZATIONS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

The undersigned respectfully submit this amici curiae brief in support of respondents.[1]

INTERESTS OF AMICI CURIAE

Amici are not-for-profit environmental organizations that rely on the Clean Water Act in their collective work to protect rivers, streams, lakes, wetlands, and coastal waters, and to aid people and communities that depend on clean water for drinking, sustenance fishing, recreation, livelihoods, and survival. Amici's ability to protect these waters depends on a correct and broad understanding of the Clean Water Act.

Amicus Waterkeeper Alliance, Inc. consists of over 335 international Waterkeeper groups, including 164 U.S. Waterkeeper groups, all of their individual members and supporters, and the collective interests of more than 15,000 individual supporting members who live and work near waterways across the country.

Amici San Francisco Baykeeper and Bayou City Waterkeeper are two of these U.S. Waterkeeper groups, and they work to protect and restore the San

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[1] No counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief, and no person or entity, other than the amici curiae or their counsel, made a monetary contribution to the preparation or submission of this brief. All parties provided consent to the filing of this brief.

Francisco Bay and its watershed and Galveston Bay and its watershed respectively.

The following Waterkeeper groups also join this brief; each is a member of Waterkeeper Alliance, and each protects and restores important watersheds throughout the United States:

- Cahaba Riverkeeper, Birmingham, Alabama
- Coosa Riverkeeper, Mt Laurel, Alabama
- Hurricane Creekkeeper, Tuscaloosa, Alabama
- Cook Inletkeeper, Homer, Alaska
- Arkansas Ozark Waterkeeper, Fayetteville, Arkansas
- Humboldt Baykeeper, Arcata, California
- LA Waterkeeper, Santa Monica, California
- Orange County Coastkeeper, Costa Mesa, California
- Russian Riverkeeper, Healdsburg, California
- San Diego Coastkeeper, San Diego, California
- Animas Riverkeeper, Durango, Colorado
- Poudre Waterkeeper, Fort Collins, Colorado
- Anacostia Riverkeeper, Washington, District of Columbia
- Collier County Waterkeeper, Naples, Florida
- Miami Waterkeeper, Miami, Florida
- Suncoast Waterkeeper, Sarasota, Florida
- Tampa Bay Waterkeeper, St. Petersburg, Florida

- Suwannee Riverkeeper, Hahira, Georgia
- Snake River Waterkeeper, Boise, Idaho
- Atchafalaya Basinkeeper, Plaquemine, Louisiana
- Assateague Coastkeeper, Berlin, Maryland
- Baltimore Harbor Waterkeeper, Baltimore, Maryland
- Choptank Riverkeeper, Easton, Maryland
- Waterkeepers Chesapeake, Takoma Park, Maryland
- Yellow Dog Watershed Preserve, Big Bay, Michigan
- Upper Missouri Waterkeeper, Bozeman, Montana
- Hackensack Riverkeeper, Hackensack, New Jersey
- NY/NJ Baykeeper, Hazlet, New Jersey
- Peconic Baykeeper, Hampton Bays, New York
- Broad Riverkeeper, Lawndale, North Carolina
- Catawba Riverkeeper, McAdenville, North Carolina
- Green Riverkeeper, Hendersonville, North Carolina
- Lake Erie Waterkeeper, Toledo, Ohio
- Grand Riverkeeper, Miami, Oklahoma
- Tar Creekkeeper, Miami, Oklahoma
- Rogue Riverkeeper, Ashland, Oregon

- Willamette Riverkeeper, Portland, Oregon
- Lower Susquehanna Riverkeeper, Wrightsville, Pennsylvania
- Black-Sampit Riverkeeper, Conway, South Carolina
- Lumber Riverkeeper, Conway, South Carolina
- Waccamaw Riverkeeper, Conway, South Carolina
- San Antonio Bay Estuarine Waterkeeper, Seadrift, Texas
- Environmental Stewardship, a Waterkeeper Alliance Affiliate, Bastrop, Texas
- Lake Champlain Lakekeeper, Montpelier, Vermont
- Puget Soundkeeper, Seattle, Washington
- Twin Harbors Waterkeeper, Cosmopolis, Washington
- Milwaukee Riverkeeper, Milwaukee, Wisconsin

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court granted review to decide whether the Ninth Circuit set forth the correct test for determining whether adjacent wetlands are "waters of the United States" that qualify for protection under the Clean Water Act, 33 U.S.C. § 1362(7) (CWA). Yet petitioners and some of their amici propose answers to that question that would require the Court to decide a much broader issue and define the full scope of "waters of the United States" under the CWA.

The Court should decline that invitation. The CWA's definition of "waters" is complex, as this Court is well aware. There is no need in this case to reach out beyond the question presented, and there are good reasons to keep the holding limited to the category of wetlands at issue here: those adjacent to both a traditional navigable water and a jurisdictional non-navigable tributary to a traditional navigable water.

Our nation's waters form diverse aquatic ecosystems that can't be reduced to a one-size-fits-all test. The deepest lake in the United States has been found not to be a traditional "navigable" water in the sense urged by petitioners, and it has no known surface or subsurface connection to any other body of water. One of the biggest rivers in California regularly goes dry. About a fifth of New Mexico and a large portion of Idaho are within "closed basin" aquatic ecosystems of lakes, rivers, streams, and wetlands that have no direct surface connection to any traditional navigable waters. Texas's vast wetlands form critical barriers to catastrophic flooding that can impact commerce

throughout the nation, yet many of these wetlands have no surface connections to other waters.

All of these waters, and many others, are vital to both local communities and commerce in the nation as a whole. Yet they lack surface connections to traditional navigable waters, and thus might not qualify for CWA protection under the tests proposed by petitioners and their amici. This is why the objective of the CWA is not protection of traditional navigable waters, but rather protection of the nation's waters – that is, the aquatic ecosystems that comprise the "waters of the United States."

There is no need to decide anything beyond the wetlands at issue here. While petitioners frame this case as involving just three key precedents, this Court has examined the CWA in numerous cases over the last five decades, and has recognized several categories of waters as falling within the CWA's jurisdiction. Those other categories have never been called into question. This Court should address only the proper test for adjacent wetlands, and should affirm the Ninth Circuit's decision for all the reasons explained below and in the government's brief.

ARGUMENT

I. The CWA's Broad Objective Can Only Be Achieved by Protecting All of the Waters that Make Up Aquatic Ecosystems.

Congress passed the Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1251 et seq., commonly known as the CWA, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a); *Cnty. of Maui v.*

Haw. Wildlife Fund, 140 S. Ct. 1462, 1468 (2020). The CWA is not focused on the protection of navigation, but instead seeks to conserve waters "for the protection and propagation of fish and aquatic life and wildlife, recreational purposes, and the withdrawal of such waters for public water supply, agricultural, industrial, and other purposes." 33 U.S.C. § 1252(a).

This Court has long recognized the CWA as "an all-encompassing program of water pollution regulation" that "applies to all point sources[,] virtually all bodies of water," and "virtually all surface water in the country." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 486, 492 (1987) (internal quotations omitted); *see also, e.g.*, S. Rep. No. 92-414, at 95 (1972) ("to establish a comprehensive long-range policy for the elimination of water pollution"). Congress intended the CWA to achieve these objectives by regulating pollution at its source. *Cnty. of Maui*, 140 S. Ct. at 1473 (citing *EPA v. Cal. ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 202-04 (1976)).

The "broad objective" of the CWA requires "[p]rotection of aquatic ecosystems, [which] demand[s] broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'" *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33 (1985) (quoting S. Rep. No. 92-414, at 77). Congress took a "broad, systemic view of the goal of maintaining and improving water quality." *Id.* at 132.

As this Court noted, "'[w]e cannot, in these circumstances, conclude that Congress has given authority inadequate to achieve with reasonable effectiveness

the purposes for which it has acted.'" *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 132 (1977) (quoting *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 777 (1968)). The CWA broadly protects entire aquatic ecosystems, and this Court should not limit the Act's jurisdiction[2] in a manner that interferes with that objective.

A. The structure and text of the CWA extend jurisdiction to the constitutional limits of Congress' authority.

In addition to its central objective of restoring and maintaining the "chemical, physical, and biological integrity of the Nation's waters," the CWA sets a national goal that "discharge of pollutants into the navigable waters be eliminated," and an interim goal of improving water quality that "provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." 33 U.S.C. § 1251(a)(1), (2).

The CWA broadly defines "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7); *see also Riverside Bayview,* 474 U.S. at 132-33 ("Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution . . . ."). The CWA's "definition of 'navigable waters' as 'the waters

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[2] The agencies charged with interpreting the CWA and the cases applying the Act have traditionally discussed the CWA's "jurisdiction," and referred to waters covered by the CWA as "jurisdictional" waters. This brief follows that convention, but references to the CWA's jurisdiction should not be taken to suggest limits on the federal courts' subject-matter jurisdiction. *See, e.g.*, *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510-11 (2006).

of the United States' makes clear that the term 'navigable' as used in the Act is of limited import." *Riverside Bayview,* 474 U.S. at 133; *see also Ouellette*, 479 U.S. at 486 n.6. The phrase "waters of the United States" gives meaning to the phrase "navigable waters" under the CWA—not the other way around.

The Court has, in two recent decisions, recognized that the CWA's broad objective must be considered in interpreting the term "waters of the United States." *See Cnty. of Maui*, 140 S. Ct. at 1476; *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 624 (2018). The broad scope of the CWA is apparent in the text of the Act; the Act's breadth is vital to achieving the statute's objective and goals, as well as to its effectiveness in regulating pollution.

For example, water quality standards are required to be established under the CWA for both *interstate and intrastate waters* "to protect the public health or welfare, enhance the quality of water and serve the purposes" of the CWA. 33 U.S.C. § 1313(a), (c)(2)(A). Each state is required to "identify *those waters within its boundaries*" that are polluted and not meeting water quality standards and must take steps to implement the applicable water quality standards. 33 U.S.C. § 1313(d) (emphasis added). The CWA also grants the U.S. Environmental Protection Agency (EPA) Administrator authority to investigate "the condition of *any waters in any State or States*," and "the discharges of any sewage, industrial wastes, or substance which may adversely affect such waters." 33 U.S.C. § 1252(a) (emphasis added).

This Court has confirmed the breadth of CWA jurisdiction over "lakes, rivers, streams, and other

bodies of water," including "intrastate waters" and wetlands adjacent to "other bodies of water." *Riverside Bayview*, 474 U.S. at 123, 131-35; *see Ouellette*, 479 U.S. at 486 n.6; *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 704 (1994) (confirming CWA "requires each State, subject to federal approval, to institute comprehensive water quality standards establishing water quality goals for *all intrastate waters*") (emphasis added).

The CWA's coverage of interstate waters is so broad and comprehensive that it eliminated alternative remedies in interstate pollution cases. *See City of Milwaukee v. Illinois & Michigan,* 451 U.S. 304, 331-32 (1981) (CWA displaced federal common law); *Ouellette*, 479 U.S. at 494 (CWA preempted downstream state's common law); *Arkansas v. Oklahoma*, 503 U.S. 91, 98-100 (1992) (a downstream state's remedy is to enforce its water quality standard against an upstream state through the CWA's permitting process). The CWA therefore changed the mechanism for addressing this interstate pollution from what it had been for the century preceding the CWA's passage. *See, e.g.*, *Am. Farm Bureau Fed'n v. EPA*, 792 F.3d 281, 304 (3d Cir. 2015).

While, as discussed below, the Court has expressed some limits on the CWA's broad statement of jurisdiction, it has only done so in narrow contexts and has not set out any jurisdictional limitations for most categories of waters. The text and structure of the CWA, and case law interpreting it, mandate a broad understanding of CWA jurisdiction.

B. The legislative history of the CWA supports a broad reading of CWA jurisdiction that extends to the limits of the Constitution.

United States statutes have protected navigable waters and their tributaries since at least 1899,[3] and interstate waters and their tributaries since 1948.[4] But Congress' Commerce Clause authority to control pollution is not limited to traditional tests of navigability, and Congress did not intend the CWA to be so limited. *See, e.g.*, *Riverside Bayview,* 474 U.S. at 132-33. Instead, Congress intended to expand the jurisdictional scope of the CWA and to regulate broadly in order to eliminate water pollution and to restore and protect entire "aquatic ecosystems" by protecting their component parts as "waters of the United States." *Id.* (citing S. Rep. No. 92-414). Indeed, the CWA expressly protects water quality in both *intrastate* and *interstate* waters, not just in downstream traditional navigable waters. *See* 33 U.S.C. § 1313(a)(3)(A).

The Conference Report accompanying the CWA explains that Congress intended that the term "navigable waters" be given "the broadest possible constitutional interpretation." S. Conf. Rep. No. 92-1236, at

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[3] *See* Rivers and Harbors Appropriation Act of 1899, also later known as the Refuse Act, 33 U.S.C. § 407 (making it unlawful to discharge refuse "into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water"); *see also United States v. Standard Oil Co.*, 384 U.S. 224, 229-30 (1966).

[4] *See* Water Pollution Control Act, Pub. L. No. 80-845, 62 Stat. 1155 (June 30, 1948); *id.* §§ 2(a), 2(d)(1), 2(d)(4), (5).

144 (1972). The CWA "defines the term 'navigable waters' broadly for water quality purposes. *It means all 'the waters of the United States' in a geographical sense*. It does not mean 'navigable waters of the United States' in the technical sense as we sometimes see in some laws. . . . [T]his new definition clearly encompasses *all water bodies, including main streams and their tributaries, for water quality purposes*." 118 Cong. Rec. 33756-57 (1972) (emphasis added). And "[n]o Congressman's remarks on the [CWA] were complete without reference to the 'comprehensive' nature of the [legislation]." *City of Milwaukee,* 451 U.S. at 318.

In one of the first decisions interpreting the CWA, the court explained how Congress has broad authority to control pollution, noting "water pollution has a serious effect on interstate commerce and . . . Congress has the power to regulate activities such as dredging and filling which cause such pollution. . . . Congress and the courts have become aware of the lethal effect pollution has on all organisms. Weakening any of the life support systems bodes disaster for the rest of the interrelated life forms." *United States v. Holland*, 373 F. Supp. 665, 673 (M.D. Fla. 1974).

The EPA and the House Committee on Government Operations agreed with the decision in *Holland. See* Letter from Russell Train, EPA Administrator, to General Gribble (June 19, 1974), *in Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Senate Comm. on Pub. Works*, 94th Cong., 2d Sess. 349 (1976) (EPA expressing that "the *Holland* decision provides a necessary step for the preservation of our limited wetland resources," and that "the [*Holland*] court properly

interpreted the jurisdiction granted under the [CWA] and Congressional power to make such a grant.").

Soon after, the House Committee on Government Operations concluded that the Corps should adopt the broader view of the term waters of the United States taken by the EPA and by the court in *Holland*. *See* H.R. Rep. No. 93-1396, at 23-27 (1974). The Committee urged the Corps to adopt a new definition that "complies with the congressional mandate that this term be given the broadest possible constitutional interpretation." *Id.* at 27 (internal quotation marks omitted).

As this Court explained, "[i]n adopting this definition of 'navigable waters,' 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." *Riverside Bayview,* 474 U.S. at 133.

Congress did not premise this expansion of jurisdiction on how waters were connected to traditional navigable or interstate waters. To the contrary, Congress intended to repudiate the traditional navigability tests and limitations on federal authority, and to instead use the full authority of the federal government under the Commerce Clause to regulate water pollution in "virtually all surface water in the country." *Ouellette*, 479 U.S. at 486; *see, e.g.*, *New York v. United States*, 505 U.S. 144, 167 (1992) (citing *Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc.*, 452

U.S. 264, 288 (1981); *Arkansas v. Oklahoma*, 503 U.S. at 101).

Even after the CWA was passed in 1972, legislative history confirms Congress' understanding of an expansive scope for the CWA. While Congress considered narrowing the scope of the CWA in 1977, congressional "efforts to narrow the definition of 'waters' were abandoned," and Congress "'retain[ed] the comprehensive jurisdiction over the Nation's waters exercised in the 1972 Federal Water Pollution Control Act.'" *Riverside Bayview,* 474 U.S. at 136-137 (citation omitted).

As Senator Baker explained, "[c]ontinuation of the comprehensive coverage of this program is essential for the protection of the aquatic environment. The once seemingly separable types of aquatic systems are, we now know, interrelated and interdependent. We cannot expect to preserve the remaining qualities of our water resources without providing appropriate protection for the entire resource." 123 Cong. Rec. 26718 (1977).

II. *SWANCC* and *Rapanos* Are Narrow Decisions that Should Not Be Expanded to Other Types of Waters.

Petitioners and their amici continue to focus primarily on *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (*SWANCC*) and *Rapanos v. United States*, 547 U.S. 715 (2006). But these cases provide only narrow holdings that should not be transposed onto other categories of waters and do not overrule previous Supreme Court precedent confirming the exceptional breadth of the CWA. *See, e.g.*, *Rapanos*, 547 U.S. at 731 ("We need

not decide the precise extent to which the qualifiers 'navigable' and 'of the United States' restrict the coverage of the Act.") (Scalia, J., plurality opinion). Because the instant dispute over petitioners' property can and should be decided under *Riverside Bayview* and *Rapanos,* such expansion is not even at issue here.

The *SWANCC* Court held only "that 33 CFR § 328.3(a)(3) (1999), as clarified and applied to petitioner's balefill site pursuant to the 'Migratory Bird Rule,' 51 Fed. Reg. 41217 (1986), exceeds the authority granted to respondents under § 404(a) of the CWA." 531 U.S. at 174. The *SWANCC* decision was particularly fact specific as to the petitioner's abandoned sand and gravel pit; it related solely to CWA Section 404 jurisdiction under the Migratory Bird Rule and did not address CWA jurisdiction over any other categories of waters. *SWANCC* has no application to this case.

Rapanos addressed an analogous jurisdictional issue, and is certainly relevant to CWA jurisdiction over the wetlands on petitioner's property, but not in the way petitioners suggest. *Rapanos* was narrow; the issue presented was the extent of CWA jurisdiction over wetlands adjacent to non-navigable tributaries to traditional navigable waters. 547 U.S. at 786-87. The Court did not limit CWA jurisdiction over any other category of water and did not overrule any of the Supreme Court precedent confirming the breadth of CWA jurisdiction over the nation's waters discussed above.

The wetland on the Sacketts' property is jurisdictional under *Rapanos* for all the reasons explained in

respondents' brief. This is also consistent with the Court's holding in *Riverside Bayview* and the regulatory definition at 33 C.F.R. § 328.3 (2008) based on the wetlands' direct adjacency to a jurisdictional tributary to Priest Lake and to Priest Lake itself.[5] Because this dispute can be decided under the existing tests, there is no cause to either overturn EPA's decision or to lay out a new test that applies to this category of wetlands.

More broadly, though, the issue of what test applies to any *other* category of "waters" is not, and need not be, before the Court. The Court should not endorse attempts by other litigants here to expand their interpretations of *SWANCC* and *Rapanos* to other waters or to create some new test that sweeps more broadly than is necessary to resolve the narrow dispute over petitioners' wetlands. As discussed below, narrowing CWA jurisdiction as suggested by these litigants would have serious economic, public health, and water quality consequences.

III. Any Test Based Solely on Connections to Traditional Navigable Waters Would Exclude Iconic and Important Waters of the United States.

Eliminating federal jurisdiction over certain categories of waters and leaving regulation of those

[5] The district court also found that EPA's alternative basis for jurisdiction, adjacency, and likely direct subsurface flow into Priest Lake 300 feet away, was also not arbitrary and capricious and was also sufficient for CWA jurisdiction purposes. *Sackett v. EPA*, No. 2:08-cv-00185-EJL, 2019 WL 13026870, at *9-10 (D. Idaho Mar. 31, 2019). However, the Ninth Circuit did not rely on or discuss this alternative jurisdictional basis.

categories solely to the states would doom the CWA's objective and goals to failure. Congress passed the CWA because the states had been unable to adequately control water pollution—with burning rivers, massive fish kills, declining shellfish populations, and closed beaches capturing public attention.[6] These incidents made clear the need for the CWA to protect national interests. *See, e.g.*, *EPA v. Cal. ex rel.*, 426 U.S. at 202-09; *Am. Farm Bureau Fed'n*, 792 F.3d at 309.

A jurisdictional test adequate to protect one category of waters will not adequately protect all other categories of the nation's waters. The waters of the United States appear in countless forms with varying interconnections and functions in aquatic ecosystems. Pollution or destruction of each type of waters will present differing types of adverse impacts on interstate commerce.

The EPA and the Corps first promulgated regulations defining waters of the United States in the mid-1970s. *See, e.g.*, 40 C.F.R. § 122.2 (2015); 33 C.F.R. § 328.3 (2015) (1970s Regulatory Definition). That definition is currently in effect and was the definition when the EPA made the jurisdictional determination for the wetland on petitioners' property. It asserts jurisdiction over traditionally navigable waters, interstate waters, tributaries to those (and other) jurisdictional waters, wetlands adjacent to other

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[6] N. William Hines, *History of the 1972 Clean Water Act: The Story Behind How the 1972 Act Became the Capstone on a Decade of Extraordinary Environmental Reform*, 4 Geo. Wash. J. Energy & Envtl. L. 80 (Summer 2013), *available at* https://gwjeel.com/wp-content/uploads/2013/10/4-2-hines.pdf.

jurisdictional waters, and any "other waters," the use, degradation, or destruction of which could affect interstate or foreign commerce. *See, e.g.*, 40 C.F.R. § 122.2 (2015); 33 C.F.R. § 328.3 (2015). The 1970s Regulatory Definition has not been overturned by this Court's numerous cases addressing CWA jurisdiction through application of the definition. *See, e.g., Riverside Bayview*, 474 U.S. at 131, 135.

Rather than attempt a single rule that addresses jurisdiction over all categories of waters based on, for example, their surface connection to other jurisdictional waters or significant nexus to traditional navigable waters, the 1970s Regulatory Definition appropriately recognizes that there are numerous distinct categories of waters that are jurisdictional for distinct reasons.

As explained below, many vital waters of national importance could suddenly become non-jurisdictional and lose their long-standing CWA protections under the tests proposed by petitioners and their amici here.[7] Such a result would be contrary to the CWA and preclude achievement of the Act's objective.

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[7] For example, petitioners assert that the CWA only protects narrowly defined interstate traditionally navigable waters and intrastate navigable waters "forming segments of an interstate channel of commerce." *See* Petr's. Br. 22-24, 43-44. Under this unfounded theory, only wetlands with a "continuous surface-water connection" to this narrow class of waters can be protected by the CWA. *Id*.

A. Crater Lake

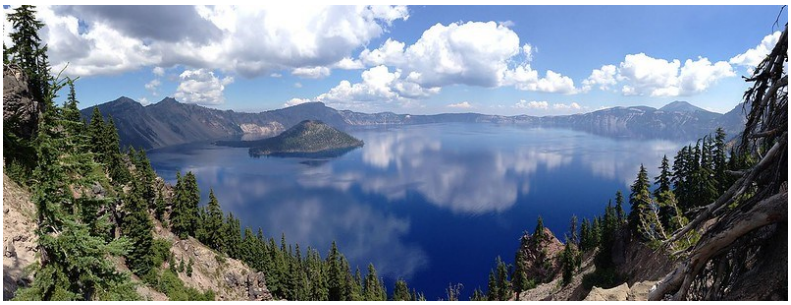

Figure 1: Panoramic View of Crater Lake in Crater Lake National Park, Oregon[8]

To see the difficulty in basing a CWA test on traditional notions of navigability, the Court need look no further than Crater Lake, the deepest lake in the United States and one of the clearest and cleanest lakes in the world.[9]

The lake rests in a collapsed volcano at the heart of Crater Lake National Park. More than half a million people visit it each year, fishing, swimming, and spending tourist dollars around the lake.[10]

Yet Crater Lake would fail many of the tests proffered in this case. It is fed by snowmelt and rainfall,

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[8] Epmatsw, *Panorama Photo of Crater Lake, Oregon, USA* (Aug. 2, 2013), *available at* https://commons.wikimedia.org/wiki/File:Crater_Lake_Panorama,_Aug_2013.jpg.

[9] U.S. Dep't of Interior Nat'l Park Serv., *Final General Mgmt. Plan/Envtl. Impact Statement, Crater Lake Nat'l Park* 3-4 (May 2005), *available at* http://npshistory.com/publications/crla/gmp-eis-2005.pdf (Crater Lake EIS).

[10] Nat'l Park Serv., Crater Lake, *Frequently Asked Questions*, https://www.nps.gov/crla/faqs.htm (last visited June 13, 2022).

and water leaves by evaporation and seepage through porous volcanic rock.[11] There are no known surface or subsurface connections to any other waterway,[12] and the lake has been deemed not navigable under the traditional definition in at least two contexts.[13] Yet, like so many other bodies of water, Crater Lake is a dynamic part of a far broader aquatic ecosystem. About *2 million* gallons of water seep from the lake *every hour*, even though no one has been able to trace directly where this water goes.[14]

It is currently protected under the CWA as an Outstanding Resource Water,[15] but if CWA jurisdiction

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[11] *Id.*

[12] *Id.*; Crater Lake EIS, *supra* n.9, at 3 ("There are no inlets or outlets to the lake").

[13] *See* U.S. Coast Guard, *Navigability Determinations for the Thirteenth District* 5, *available at* https://www.pacificarea.uscg.mil/Portals/8/District_13/dpw/docs/Navigability_Determination_for_the_13th_Coast_Guard_District.pdf?ver=2017-06-20-135946-777 ("Crater Lake, OR . . . Located entirely within Crater Lake National Park. While not navigable, entire lake is 'water subject to the jurisdiction of the U.S.'"); U.S. Army Corps of Eng'rs, Portland District, *Navigable Waters Lists* (Oct. 1993), *available at* https://www.nwp.usace.army.mil/Portals/24/docs/regulatory/jurisdiction/Navigable_US_Waters_Oregon_1993.pdf (Crater Lake is not included on the list).

[14] U.S. Dep't of the Interior, *12 Things You Didn't Know About Crater Lake Nat'l Park* (May 21, 2018), https://www.doi.gov/blog/12-things-you-didnt-know-about-crater-lake-national-park (No. 12).

[15] Letter from Daniel Opalski, U.S. EPA Region 10 Director, to Justin Green, Water Quality Administrator, Or. Dept. Envtl. Quality (March 12, 2021), *available at* https://www.epa.gov/sites/default/files/2021-03/documents/wqs-oregon-orw-3-12-2021.pdf.

were limited to only waters that possess surface connections to a traditional navigable water, Crater Lake and countless other lakes might lose CWA protection.

Any definition of "waters" that depends on traditional notions of navigability, or that is based on erroneous assumptions about how all waters flow to the sea, will exclude waters of significant national importance from federal protection.

B. New Mexico's Closed Basins

Figure 2: Mimbres River, Aldo Leopold Wilderness, within a closed basin in New Mexico[16]

A narrow interpretation of CWA jurisdiction could also eliminate CWA protections for "closed basin" water systems, which have no surface connection to traditional navigable waters. Roughly 20% of New Mexico lies within these closed basins, including part of

[16]Anthony Zuefeldt, Flickr (Oct. 9, 2014), https://www.flickr.com/photos/121467282@N02/17372918332.

the Mescalero Apache Reservation,[17] and they provide water for aquatic habitat, irrigation, recreation, and drinking in areas with scarce water resources.[18]

These closed basins are home to portions of two National Wilderness Areas that contain CWA designated Outstanding National Resource Waters.[19] New Mexico's closed basins also intersect federal lands and many areas of national importance, such as the White Sands National Park, Lake Holloman, Organ Mountains Desert Peaks National Monument, and several national forests.[20]

The closed basins contain diverse waters, including 84 miles of perennial streams, 3,900 miles of intermittent waters, and 4,000 playa wetlands.[21] These waters are vital to the health and welfare of the

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[17] Waterkeeper Alliance et al., *Comments on U.S. EPA, Revised Definition of Waters of the United States* Vol. 8, Ex. 16 (Feb. 8, 2022), *available at* https://www.regulations.gov/comment/EPA-HQ-OW-2021-0602-0307 (Waterkeeper Comments) (Waterkeeper Alliance Maps of New Mexico Closed Basins).

[18] *Id.* at Vol. 8, Ex. 20, at 3 (New Mexico Department of Game and Fish Letter to EPA with Comments on EPA's Advance Notice of Proposed Rulemaking on the Clean Water Act Definition of Waters of the United States (Apr. 15, 2003)).

[19] U.S. EPA, *New Mexico Standards for Interstate and Intrastate Surface Waters* § 20.6.4 (July 24, 2020), *available at* https://www.epa.gov/sites/default/files/2014-12/documents/nmwqs.pdf.

[20] Waterkeeper Comments, *supra* n.17, at Vol. 8, Ex. 16 (Waterkeeper Alliance, Maps of New Mexico Closed Basins).

[21] Waterkeeper Comments, *supra* n.17, at Vol. 8, Ex. 17, at 3 (Written Testimony of Ron Curry, Secretary of the New Mexico Environment Department, before the U.S. House of Representatives Transportation and Infrastructure Committee Regarding the Clean Water Restoration Act (H.R. 2421) (July 17, 2007)).

people and wildlife that reside within those basins, New Mexico's economic development, and the many out-of-state visitors that enjoy their unique recreational opportunities.[22]

These basins are important aquatic ecosystems and provide vital resources to communities and tribes who rely on drinking water from the closed basins' water sources, some of whom drink directly from the closed basin rivers.[23] These closed basins also have many other links to interstate and foreign commerce, including irrigating crops sold in interstate and foreign commerce, providing mineral resources dependent on good water quality (such as salt), and creating recreational and other opportunities for interstate and foreign travelers.[24]

Waters within these closed basins are subject to pollutant discharges from many sources, including the Freeport-McMoRan (formerly Phelps Dodge) Santa Rita copper mine, federal facilities, and municipal wastewater treatment plants.[25] The loss of CWA protections would be particularly devastating in New Mexico because it is one of just three states that lack delegated CWA authority from the EPA to regulate pollution discharges into rivers, streams, and lakes,

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[22] Waterkeeper Comments, *supra* n.17, at Vol. 8, Ex. 19, at 3-6 (Memo from Gov. Bill Richardson to EPA Regarding 33 C.F.R. § 328.3 (Mar. 5, 2003)).

[23] *Id.*

[24] *See id.*

[25] *Id.*; *see also id.* at Vol. 8 Ex. 16 (Waterkeeper Alliance Maps of New Mexico Closed Basins); *id.* at Vol. 10, Ex. 22 (New Mexico Surface Water Coverage for New Mexico Under the Navigable Waters Protection Rule).

and there is thus no state permitting program to control pollution discharges.[26] Any interpretation of CWA jurisdiction that excludes these closed basins would cause great harm to these waterways that are of significant importance to the federal government, the state, several tribes, local communities, and large numbers of interstate and foreign visitors.

C. Idaho's Snake River Closed Basins

In east-central Idaho's Snake River Basin, about 3,318,400 acres of the watershed is considered a closed basin because the waterways are only connected to the Snake River via subsurface connections.[27]

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[26] *See* James C. Kenny, N.M. Envtl. Dep't Cabinet Sec'y, *Comment on EPA Proposed Rulemaking* 13 (Apr. 21, 2019), *available at* https://www.regulations.gov/comment/EPA-HQ-OW-2018-0149-4964; *see also* U.S. EPA, *New Mexico NPDES Permits*, https://www.epa.gov/npdes-permits/new-mexico-npdes-permits (last updated Apr. 20, 2022); U.S. EPA, *NPDES Permits Around the Nation*, https://www.epa.gov/npdes-permits (last updated Mar. 30, 2022).

[27] *See* Waterkeeper Comments, *supra* n.17, at Vol. 1, Ex. 1, at 331 (Waterkeeper Alliance Letter to EPA Regarding Revised Definition of Waters of U.S. (Apr. 15, 2019)).

Figure 3: Big Lost River, Idaho[28]

Figure 4: Endangered Bull Trout, Little Lost River Basin[29]

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[28] A. Hedrick, BLM Idaho, Flickr *Lost River Valley, W. of Mackay, Idaho* (Aug. 23, 2012), https://tinyurl.com/4y7hf62p.

[29] Bart Gammett, USFWS Pacific Region, Flickr, *Bull Trout Timber Creek—Little Lost River* (Jan. 27, 2011), https://

This closed basin includes the drainages of five watersheds that play an important economic and ecological role already being harmed by pollution.[30] There are 1,029 named rivers and streams, as well as countless lakes, reservoirs, and wetlands[31] that provide valuable aquatic resources in the closed basins. For example, the Big Lost River and Medicine Lodge Creek provide habitat for rainbow trout, brook trout, and cutthroat trout, and Little Lost Creek includes critical habitat for bull trout, listed as threatened under the federal Endangered Species Act.[32]

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www.flickr.com/photos/usfwspacific/5393233881/in/photolist-9dzJx4.

[30] See Waterkeeper Comments, *supra* n.17, at Vol. 10, Ex. 24 (Waterkeeper Alliance Maps of Idaho Closed Basins, Impaired Waters Map with layers from the EPA's Facility Registry Service NPDES Sites, U.S. Geological Survey National Hydrography Dataset, U.S. Fish and Wildlife Service Federally Protected Species and Critical Habitat Data, and State of Idaho 303(d) Listed Streams Data); Idaho Dep't of Envtl. Quality, *Idaho's 2018/2020 Integrated Report: Appendix A* 20 (Oct. 2020), *available at* https://www2.deq.idaho.gov/admin/LEIA/api/document/download/14890.

[31] See Waterkeeper Comments, *supra* n.17, at Ex. 24 (Waterkeeper Alliance Maps of Idaho Closed Basins, Impaired Waters Map); Nw. Power & Conservation Counsel, *Upper Snake Province Assessment* 1-9, 1-11, 1-14–1-16, 1-21 (May 28, 2004), *available at* https://www.nwcouncil.org/sites/default/files/1IntroOverview.pdf (*Upper Snake Province Assessment*).

[32] *See* Waterkeeper Comments, *supra* n.17, at Vol. 7, Ex. 15, at 84 (Waterkeeper Alliance Fact Sheet for the Snake River Basin); U.S. Fish & Wildlife Serv., ECOS Environmental Conservation Online System, *Bull Trout*, https://ecos.fws.gov/ecp/species/8212 (last visited June 14, 2022); Idaho Fish & Game Idaho Fishing Planner, *Big Lost River*, https://idfg.idaho.gov/ifwis/

Rivers and streams that flow on the surface in this closed basin eventually percolate into the volcanic Snake River Plain Aquifer, then emerge and flow into the Snake River.[33] The EPA has determined that portions of the Big Lost River and Mud Lake within the closed basin are jurisdictional based on navigability.[34] Yet many others are jurisdictional based on the "other waters" category because their degradation could harm interstate or foreign commerce (cropland irrigation and recreational fisheries that attract anglers from throughout the United States).[35] Several CWA Section 402 permits currently control pollution discharges into the closed basin and many streams within the closed basin are listed on Idaho's CWA Section 303(d) List of Impaired Waters.[36]

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fishingplanner/water/1128381437946 (last visited June 14, 2022); Idaho Fish & Game Idaho Fishing Planner, *Medicine Lodge Creek*, https://idfg.idaho.gov/ifwis/fishingplanner/water/1124550440922 (last visited June 14, 2022); Idaho Fish & Game Idaho Fishing Planner, *Little Lost River*, https://idfg.idaho.gov/ifwis/fishingplanner/water/1129730437665 (last visited June 14, 2022).

[33] *See* Waterkeeper Comments, *supra* n.17, at Vol. 7, Ex. 15, at 82 (Waterkeeper Alliance Fact Sheet for the Snake River Basin); *Upper Snake Province Assessment*, *supra* n.31, at 1-7; 1-10–1-11.

[34] Earthjustice et al., *Reckless Abandon: How the Bush Administration Is Exposing America's Waters to Harm* 12-13 (Aug. 2004), *available at* https://www.nwf.org/Educational-Resources/Reports/2004/08-12-2004-Reckless-Abandon.

[35] *Id.*

[36] Waterkeeper Comments, *supra* n.17, at Vol. 10, Ex. 24 (Waterkeeper Alliance Maps of Idaho Closed Basins, Upper Snake Closed Basin EPA FRS NPDES Permits and Upper Snake

If the CWA were misinterpreted to only protect waters with surface connections to traditional navigable waters, it could eliminate CWA protections for waters considered non-navigable, including the Little Lost River and much of the Big Lost River.[37] This loss of protections would leave these, and other, rivers subject to water pollution not subject to any federal minimum standards and would thus harm the uses these rivers support.

Closed Basin 303d Impaired Waters in Red); Idaho Dep't of Envtl. Quality, *Idaho's 2018/2020 Integrated Report*, *supra* n.30, at 20.

[37] *See, e.g.*, Ariel Wittenberg, *The River Disappears, but the Pollution Doesn't*, E&E News (July 16, 2019 12:59 PM), https://www.eenews.net/articles/the-river-disappears-but-the-pollution-doesnt/#:~:text=First%20in%20a%20series.,desert%20here%20and%20simply%20ends ("Mackay Reservoir on the Big Lost River is navigable, so any constant or intermittent flows of the Big Lost or its tributaries upstream from the reservoir have always been and would continue to be regulated under the new rule. But water downstream from the reservoir does not have a surface water connection to 'navigable' waters, meaning the rest of the Big Lost River would not be regulated.").

D. Lower Galveston Bay Watershed

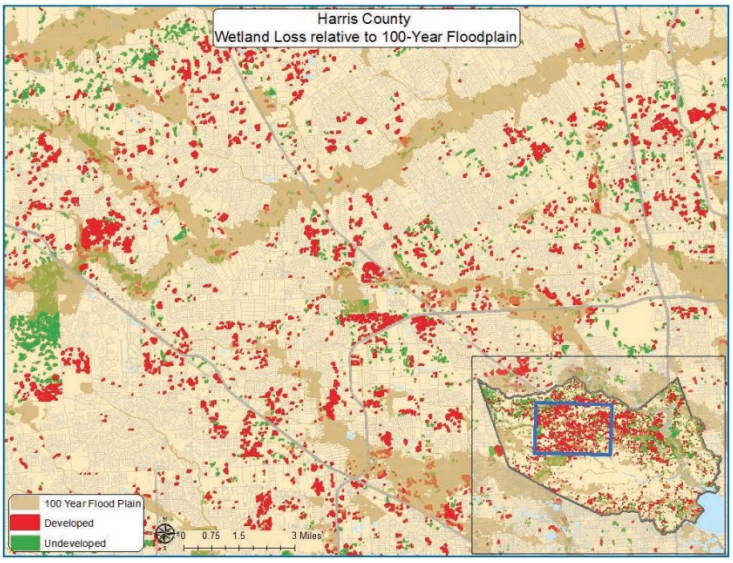

Figure 5: Harris County wetland loss relative to FEMA 100-year floodplain. Red areas are NWI wetlands that have been lost to development. Green areas are undeveloped. 100-year floodplain data is in brown.

Figure 6: Bayou Vista near Galveston Bay (Photo Credit: Dan Thibodeaux)

Figure 7: Wetland at Sheldon Lake State Park (Photo Credit: Bayou City Waterkeeper)

The roughly 4,000 square-mile Lower Galveston Bay watershed, encompassing the greater Houston, Texas region, is an ecologically diverse area with abundant water in the form of rivers, creeks, bayous, coastal marshes, estuaries, wetlands, bays, and the Gulf of Mexico.

The freshwater wetlands in this ecosystem "are a critical part of the aquatic integrity of [the] regional bayous and bays."[38] Texas coastal prairie wetlands

[38] John S. Jacob, Texas A&M Univ. AgriLife Ext., Texas Coastal Watershed Program, *Upper Texas Gulf Coast Pothole Wetlands* 3 (March 2011), *available at* https://cdn-ext.agnet.tamu.edu/wp-content/uploads/2019/03/ESP391-upper-texas-gulf-coast-pothole-wetlands-new-research-shows-significant-

were formed thousands of years ago by ancient rivers and bayous and are found along the Gulf of Mexico from western Louisiana to south Texas.[39] These wetlands are "the headwaters for virtually all of the water bodies feeding into Galveston Bay"[40] and serve a range of important, valuable functions.[41]

These wetlands provide numerous benefits, but most notably they prevent flooding by absorbing storm water and buffering against surges.[42] The greater Houston region has repeatedly experienced floods and storm surges, including 2017's Hurricane Harvey that caused more than 100 deaths and $125 billion in damage.[43] The region's long-term resilience

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and-profound-hydrologic-connections-to-galveston-bay-and-other-area-waters.pdf.

[39] U.S. EPA & U.S. Dep't of the Army, *Technical Support Document for the Clean Water Rule: Definition of Waters of the United States* 348 (May 27, 2015), *available at* https://www.regulations.gov/document/EPA-HQ-OW-2011-0880-20869 (2015 TSD).

[40] John S. Jacob et al., Texas A&M Univ. AgriLife Ext., *Houston-Area Freshwater Wetland Loss, 1992–2010* 2, 10 (May 2014), *available at* https://tcwp.tamu.edu/files/2015/06/WetlandLossPub.pdf (*Houston Wetland Loss*) ("Four types of natural freshwater wetlands occur in the study area: barrier island interior wetlands, coastal flatwoods wetlands, prairie pothole wetlands, and riverine forested wetlands.").

[41] *See, e.g.*, *id.* at 1 (Wetlands functions "includ[e] detaining stormwater, controlling erosion, storing and cleansing water, and providing places for recreation for people and habitat for wildlife.").

[42] *Id.* at 12-13.

[43] Univ. of Houston, Hobby School of Public Affairs, *The Impact of Hurricane Harvey*, https://uh.edu/hobby/harvey/ (last

to major storms depends in large part on the protection of existing freshwater wetlands.

Freshwater wetlands are also critical for filtering polluted surface water before it makes its way into Houston's drinking water supplies and Galveston Bay, which provides places for paddling, fishing, and birdwatching and creates billions of dollars of benefits for the region's communities.[44]

For example, much of the surface runoff entering Galveston Bay first passes through Texas coastal prairie wetlands, which reduce incoming inorganic nitrogen pollution by around 98% and inorganic phosphorus pollution by 92%[45] and are essential to avoiding nutrient pollution and toxic algal blooms that plague other waters across the country.[46]

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visited June 15, 2022); Eric S. Blake & David A. Zelinsky, National Hurricane Center, *Tropical Cyclone Report: Hurricane Harvey* 9 (May 9, 2018), *available at* https://www.nhc.noaa.gov/data/tcr/AL092017_Harvey.pdf (Hurricane Harvey is tied with Hurricane Katrina as the nation's costliest storm.).

[44] *Houston Wetland Loss*, *supra* n.40, at 12-13.

[45] Margaret G. Forbes et al., *Nutrient Transformation & Retention by Coastal Prairie Wetlands, Upper Gulf Coast, Texas*, 32 Wetlands 705, 710 (May 17, 2012), *available at* https://doi.org/10.1007/s13157-012-0302-z.

[46] Galveston Bay Found., *Galveston Bay Report Card: Water Quality*, https://www.galvbaygrade.org/water-quality/ (last visited June 14, 2022); U.S. EPA, Mississippi River/Gulf of Mexico Hypoxia Task Force, *Hypoxia 101*, https://www.epa.gov/ms-htf/hypoxia-101 (last updated June 9, 2022); *see also* 2015 TSD, *supra* n.39, at 348-49 (confirming that Texas coastal prairie wetlands can filter pollutants and store precipitation with the potential to decrease flooding).

Many of these wetlands do not directly abut, nor do they have continuous surface connections to, another jurisdictional water, and so they would not qualify as "waters of the United States" under the test proposed by petitioners and some of their amici. Yet scientific research demonstrates that these "geographically isolated" waters are not hydrologically isolated, but have extensive, regular hydrological connectivity with nearby jurisdictional waters that account for a "substantial percentage of the water budget" for the receiving water.[47] These wetlands have significant effects on downstream jurisdictional waters, including Galveston Bay.[48]

Ensuring that Texas freshwater wetlands are protected by the CWA is especially important to the protection of the Lower Galveston Bay watershed because Texas does not have any laws in place to prevent or mitigate harm from wetland development. This has already caused the loss of as much as 29% of natural freshwater wetlands in some areas over an 18-year period.[49]

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[47] *See* Bradford P. Wilcox et al., *Evidence of Surface Connectivity for Texas Gulf Coast Depressional Wetlands*, 31 Wetlands 451, 457 (Mar. 18, 2011), *available at* https://agrilifecdn.tamu.edu/urbannature/files/2012/06/2011Wilcox Wetlands1.pdf; U.S. EPA, *ORD Report: Connectivity of Streams and Wetlands to Downstream Water*s 6-6–6-8 (Jan. 2015), *available at* https://www.regulations.gov/document/EPA-HQ-OW-2011-0880-20858.

[48] *Id*.

[49] *Houston Wetland Loss*, *supra* n.40, at Summary, 8 (The greatest loss of Texas coastal wetlands has occurred in Harris County with "more than double that of the [seven neighboring]

Continuing losses "will very likely have grave implications for the long-term health of the Galveston Bay System," which will lose its "principal means of cleaning the polluted runoff that enters the bay."[50] These losses will also increase Houston's flood risk—the wetlands that have already been lost would have been able to handle nearly four billion gallons of storm water, and every new loss increases the risk for future flooding.[51] Any reading of the CWA that eliminates jurisdiction over some or all of these freshwater wetlands would harm the greater Houston region, its seven million residents, and the surrounding environment and would prevent realization of the CWA's objective and goals.

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counties combined."); Geotechnology Research Institute et al., *Galveston Bay Wetland Mitigation Assessment & Local Government Capacity Building* 12 (Aug. 2014), *available at* https://harcresearch.org/wp-content/uploads/2021/02/GALVESTON-BAY-WETLAND-MITIGATION-ASSESSMENT-REPORT-1.pdf.

[50] *Houston Wetland Loss*, *supra* n.40, at Summary.

[51] *Id.* at 12.

E. San Francisco Bay Watershed

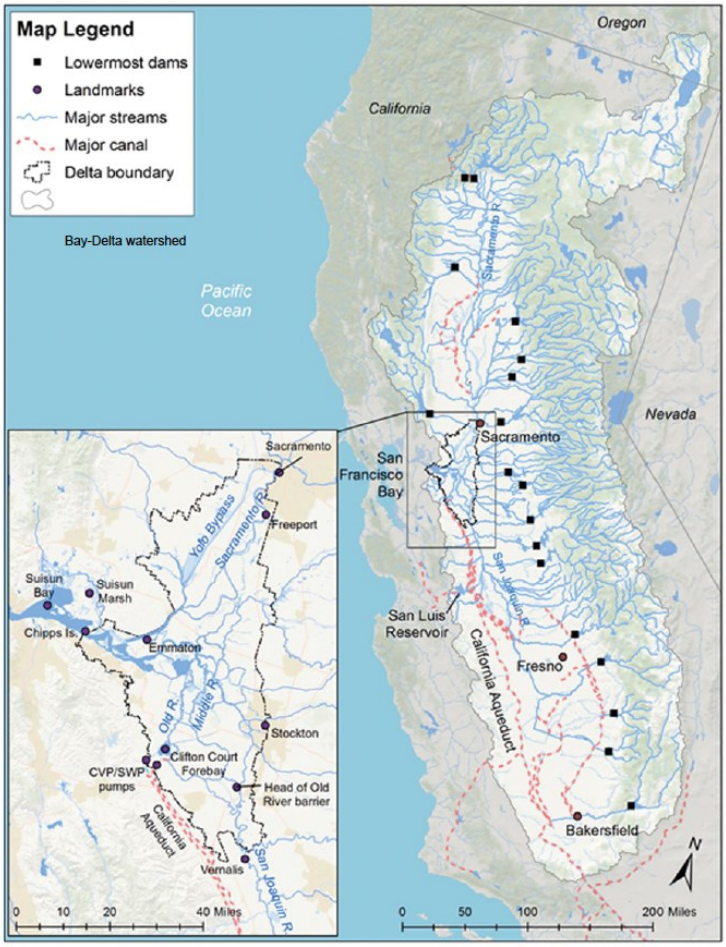

Figure 8: Map of the San Francisco Bay Watershed, and the San Francisco Bay-Delta (inset) [52]

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[52] Gregory J. Reis et al., *Clarifying Effects of Environmental Protections on Freshwater Flows to—and Water Exports from—the San Francisco Bay Estuary*, San Francisco Estuary & Watershed Science, March 2019, at 5, *available at* https://escholarship.org/uc/item/8mh3r97j.

Figure 9: Photo of San Joaquin River, June 8, 2022, with no flow (Photo Credit: SF Baykeeper).

Figure 10: Guadalupe River at Foxworthy Rd. Overpass in San Jose, April 12, 2021 (left), and May 26, 2022 (right) with and without flow (Photo Credit: SF Baykeeper).

The two largest rivers in California, the Sacramento and the San Joaquin, drain 40% of the state via the San Francisco Bay-Delta, where these fresh waters meet the Pacific Ocean.[53] The resulting ecosystems provide a home for species that exist nowhere else in the world, as well as a diverse array of fish and wildlife, *see* Cal. Wat. Code § 85002, and are used for recreation, fishing, and religious practices. These lands also provide drinking water for over 25 million Californians and irrigation water for hundreds of thousands of acres of farmland.[54]

Because of California's limited wet season, half of the rivers, creeks, and streams are intermittent and so do not run year round, and another third are ephemeral, lacking connection to groundwater and only flowing during or after precipitation.[55] Nearly

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[53] *See* Cal. State Water Res. Control Bd., *Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem* 25 (Aug. 3, 2010), *available at* https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflow/docs/final_rpt080310.pdf; Cal. State Water Res. Control Bd., *Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary* 1 (Dec. 13, 2006), *available at* https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/wq_control_plans/2006wqcp/docs/2006_plan_final.pdf (2006 Bay-Delta Plan); *see also* U.S. EPA, *San Francisco Bay Delta: About the Watershed*, https://www.epa.gov/sfbay-delta/about-watershed#about (last updated June 13, 2022).

[54] 2006 Bay-Delta Plan, *supra* n.53, at 1; *see also* Cal. State Water Res. Control Bd., *Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem*, *supra* n.53, at 25.

[55] Lainie Levick et al., *The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest*, U.S. EPA, Nov. 2008, at 5-6,

85% of the streambeds that surround the San Francisco Bay and Delta lack year-round water.[56] And that figure is increasing with climate change.

More broadly, between two-thirds and 95% of the streams in the Southwestern U.S. do not contain visible flows year-round.[57] And in California, even the second biggest river in the state, and a host of other rivers, often are dry during the State's dry season. *See* Figure 9, *supra* (photo of San Joaquin River).

Requiring consistent visible flows or connections to traditional navigable waters for CWA jurisdiction could remove protection for most of these waters and their interconnected wetlands. Such requirements could cause waters to fall in and out of jurisdiction depending on whether there was flow when the application or decision was made, leading to unpredictable jurisdictional determinations that leave downstream waters unprotected.

These streams and their associated wetlands are vital to downstream waters and ecosystems, providing the same functions as perennial waters: moving water, nutrients, and soil. The CWA's objective and goals cannot be achieved in the San Francisco Bay, the Delta, or its watershed without protecting these

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available at https://www.epa.gov/sites/default/files/2015-03/documents/ephemeral_streams_report_final_508-kepner.pdf; *see also* San Francisco Baykeeper, *Map of Intermittent and Ephemeral Streams in the Bay Area*, *available at* https://waterkeeper.org/wp-content/uploads/2019/11/Bay_Area_WOTUS-FINAL.png.

[56] San Francisco Baykeeper, *Map of Intermittent and Ephemeral Streams in the Bay Area*, *supra* n.55.

[57] *See* Levick, *supra*, n.55, at 5 (Figure 3).

important headwaters, which requires proper recognition of broad jurisdiction over waters.

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States remain insufficiently equipped to control water pollution in the absence of the CWA's authorities, standards, and resources. When the EPA sought to slash its CWA jurisdiction in 2020, *see* 85 Fed. Reg. 22250 (April 21, 2020), new development projects caused a sharp increase in unregulated discharges to waters.[58] While this jurisdictional rule was temporarily in place, these projects "proceeded in newly non-jurisdictional waters in states and on tribal lands that do not and sometimes cannot, regulate waters beyond those covered by the" CWA.[59] Indeed, some states weakened their regulations governing clean water,

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[58] *See, e.g.*, Memorandum from U.S. EPA & U.S. Dep't of the Army on Review of U.S. Army Corps of Eng'rs ORM2 Permit and Jurisdictional Determination Data to Assess Effects of the Navigable Waters Protection Rule, at 2-4 (June 8, 2021), *available at* https://www.epa.gov/sites/default/files/2021-06/documents/3_final_memorandum_for_record_on_review_of_data_web_508c.pdf ("The Corps' ORM2 database contains AJDs that evaluated 40,211 individual aquatic resources or water features under the NWPR between June 22, 2020 and April 15, 2020; of these individual aquatic resources, approximately 76% were found to be non-jurisdictional by the Corps. . . . The agencies are aware that projects are proceeding in newly non-jurisdictional waters in states and tribal lands where regulation of waters beyond those covered by the CWA are not authorized, and, based on available information, will therefore result in discharges without any regulation or mitigation from federal or state agencies.").

[59] U.S. EPA & U.S. Dep't of the Army, *Technical Support Document for the Proposed, Revised Definition of Waters of the United States Rule* 117 (Nov. 18, 2021), *available at* https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-0081.

starting a race to the bottom that the CWA was designed to avoid.[60] The resultant harm to waters across the nation undercuts arguments that the states will step in and fill the regulatory gap if federal CWA jurisdiction over certain waters is eliminated.

Any reduction in CWA jurisdiction will have real and immediate consequences on the nation's waters and will preclude achievement of the CWA's water quality and aquatic ecosystem protection objective and goals. While the CWA has been effective in controlling pollution in many respects, significant pollution persists and is even increasing in many of the nation's waters. The EPA's most recent national summary data shows water pollution continues to impair at least 588,173 miles of rivers and streams; 13,208,917 acres of lakes, ponds, and reservoirs; 44,625 square miles of bays and estuaries; 3,329 miles of coastal shoreline; and 672,924 acres of wetlands.[61] Limitation of CWA jurisdiction will exacerbate these problems and, as discussed above, leave many nationally important and iconic waters without protection against pollution and destruction.

CONCLUSION

For the reasons stated above, amici respectfully ask this Court to affirm the Ninth Circuit's decision.

Respectfully submitted,

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[60] *Id.* at 118.

[61] Waterkeeper Comments, *supra* n.17, at Vol. 1, Ex. 2, at 2 (U.S. EPA National Summary of State Information).

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