No. 04-1034

In the Supreme Court of the United States

JOHN A. RAPANOS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether wetlands that are adjacent to, and have a surface hydrologic connection with, nonnavigable tributaries of traditional navigable waters are part of "the waters of the United States" within the meaning of the Clean Water Act (CWA), 33 U.S.C. 1362(7).

2. Whether application of the CWA to the wetlands at issue in this case is a permissible exercise of congressional authority under the Commerce Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A34) is reported at 376 F.3d 629. The opinion of the district court (Pet. App. B1-B36) is unreported. The district court's subsequent order amending its findings of fact and conclusion of law (J.A. 35-36) and the court's partial final judgment (J.A. 37-40) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 2004. A petition for rehearing was denied on November 2, 2004 (Pet. App. C1). The petition for a writ of certiorari was filed on January 28, 2005, and was granted on October 11, 2005. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended, Pub. L. No. 95-217, 91 Stat. 1566

(33 U.S.C. 1251 *et seq.*) (Clean Water Act or CWA) "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a).[1] One of the mechanisms adopted by Congress to achieve that purpose is a prohibition on the discharge of any pollutants, including dredged or fill material, into "navigable waters" except pursuant to a permit issued in accordance with the Act. 33 U.S.C. 1311(a), 1362(12)(A). The CWA defines the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). It defines the term "pollutant" to mean, *inter alia*, dredged spoil, rock, sand, and cellar dirt. 33 U.S.C. 1362(6). The CWA provides that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). While earlier versions of the 1972 legislation included the word "navigable" within that definitional provision, the Conference Committee deleted that word and expressed the intent to reject prior geographic limits on the scope of federal water-protection measures. Compare S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972), with H.R. Rep. No. 911, 92 Cong., 2d Sess. 356 (1972) (bill reported by the House Committee provided that "[t]he term 'navigable waters' means the navigable waters of the United States, including the territorial seas").

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[1] The 1972 legislation extensively amended the Federal Water Pollution Control Act (FWPCA), which was originally enacted in 1948. Further amendments to the FWPCA enacted in 1977 changed the popular name of the statute to the Clean Water Act. See Pub. L. No. 95-217, 91 Stat. 1566; 33 U.S.C. 1251 note. This brief will refer to the statute in its current form as the Clean Water Act or CWA; the brief will refer to earlier amendments as FWPCA Amendments.

The Clean Water Act establishes two complementary permitting programs through which appropriate federal or state officials may authorize discharges of pollutants from point sources into the waters of the United States. Section 404(a) of the CWA authorizes the Secretary of the Army, acting through the Army Corps of Engineers (Corps), to issue a permit "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a). Under Section 404(g), the authority to permit certain discharges of dredged or fill material may be assumed by state officials. 33 U.S.C. 1344(g); see pp. 5, 23, *infra*. Pursuant to Section 402 of the CWA, the discharge of pollutants other than dredged or fill material (*e.g.*, sewage, toxic chemicals, and medical waste) may be authorized by the Environmental Protection Agency (EPA), or by a State with an approved program, under the National Pollutant Discharge Elimination System (NPDES) program. 33 U.S.C. 1342.

2. The instant case involves the construction of the statutory term "the waters of the United States."

a. Regulations implementing the Corps' Section 404 permitting authority were first published in 1974. 39 Fed. Reg. 12,115. At that time, the Corps asserted regulatory jurisdiction over "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. 209.120(d)(1) (1974); see 33 C.F.R. 209.260(e)(1) (1974) (explaining that "[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor"). Some federal courts and the EPA concluded, however, that those initial regula-

tions reflected an unduly narrow view of the scope of the Corps' permitting authority under Section 404, and the Corps ultimately agreed. See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985) (*Riverside Bayview*); *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 183-184 & nn. 8-11 (2001) (*SWANCC*) (Stevens, J., dissenting).

After reconsidering the scope of the Act's geographic coverage, the Corps promulgated interim final regulations that provided for a phased-in implementation of its Section 404 permitting authority. 40 Fed. Reg. 31,320 (1975); see 33 C.F.R. 209.120(d)(2) and (e)(2) (1976). Phase I, which was immediately effective, included coastal waters and traditional inland navigable waters and their adjacent wetlands. 40 Fed. Reg. at 31,321, 31,324, 31,326. Phase II, which took effect on July 1, 1976, extended the Corps' jurisdiction to lakes and primary tributaries of Phase I waters, as well as wetlands adjacent to the lakes and primary tributaries. *Ibid.* Phase III, which took effect on July 1, 1977, extended the Corps' jurisdiction to all remaining areas encompassed by the regulations, including "intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters." *Id.* at 31,325; see 42 Fed. Reg. 37,124 (1977) (describing the three phases).

In 1977, Congress considered a legislative proposal that would have limited the class of waters subject to the Corps' permitting authority under Section 404 of the CWA. A bill passed by the House of Representatives provided that for purposes of Section 404, the Corps' permitting authority would be limited to navigable waters "and adjacent wetlands," with the term "navigable

waters" defined to mean waters that are navigable in fact or are capable of being made so by "reasonable improvement." 123 Cong. Rec. 10,420 (1977); see *id.* at 10,434 (passage of bill). A similar amendment was defeated in the Senate, however, see *id.* at 26,728, and the provision to redefine the term "navigable waters" for purposes of the Corps' permitting authority with respect to dredged and fill material was eliminated by the Conference Committee, see H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 97-105 (1977).

Although Congress declined to diminish the geographic scope of the Corps' regulatory jurisdiction, it amended Section 404 in significant respects. *Inter alia*, the 1977 FWPCA Amendments, Pub. L. No. 95-217, 91 Stat. 1566, established a mechanism by which a State may assume responsibility for administration of the Section 404 program with respect to "the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce * * * including wetlands adjacent thereto)." 33 U.S.C. 1344(g)(1). If the EPA Administrator approves a proposed state program, the Corps is directed to "suspend the issuance of permits * * * for activities with respect to which a permit may be issued pursuant to such State program." 33 U.S.C. 1344(h)(2)(A).[2] At all times relevant to this case, the

[2] Under a state-administered program, EPA and the Corps retain authority to forbid or impose conditions upon any proposed discharge permit. 33 U.S.C. 1344(h)(1)(D)-(F), 1344(j). EPA also retains enforcement authority to issue compliance orders and commence administrative, civil, and criminal actions to enforce the CWA. 33 U.S.C. 1344(n); 33 U.S.C. 1319.

State of Michigan has operated an approved program for administration of the Section 404 permitting regime for waters within its jurisdiction under Section 404(g). See 40 C.F.R. 233.70; Pet. App. A29.

b. For purposes of the Section 402 and 404 permitting programs, the current EPA and Corps regulations implementing the CWA include substantively equivalent definitions of the term "waters of the United States." The Corps defines that term to include:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (2) All interstate waters including interstate wetlands;
>
> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce * * * ;
>
> (4) All impoundments of waters otherwise defined as waters of the United States under the definition;
>
> (5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;
>
> (6) The territorial seas;
>
> (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

33 C.F.R. 328.3(a); see 40 C.F.R. 230.3(s) (EPA).[3]

The instant case, which involves discharges of fill material into wetlands adjacent to tributaries of traditional navigable waters, implicates two aspects of that regulatory definition. First, under 33 C.F.R. 328.3(a)(5), the term "waters of the United States" is defined to include all "tributaries" of traditional navigable waters, including tributaries that do not satisfy traditional standards of navigability. Second, under 33 C.F.R. 328.3(a)(7), the Corps' regulatory jurisdiction extends to "[w]etlands adjacent to" other covered waters, including those tributaries.[4]

c. In *Riverside Bayview*, and subsequently in *SWANCC*, this Court addressed the proper construction of the CWA terms "navigable waters" and "the waters of the United States." In *Riverside Bayview*, the Court framed the question before it as "whether the [CWA],

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[3] For simplicity, this brief will refer solely to 33 C.F.R. 328.3(a), the Corps' regulatory provisions implementing Section 404. To avoid confusion between the term "navigable waters" as defined in the CWA and implementing regulations, see 33 U.S.C. 1362 and 33 C.F.R. 328.3, and the use of the term "navigable waters" to describe waters that are, have been, or could be used for interstate or foreign commerce, see 33 C.F.R. 328.3(a)(1), this brief will refer to the latter as "traditional navigable waters."

[4] The regulations define the term "wetlands" 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. Wetlands generally include swamps, marshes, bogs, and similar areas." 33 C.F.R. 328.3(b). The term "adjacent" is defined to mean "bordering, contiguous, or neighboring," and the regulations state that "[w]etlands 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).

together with certain regulations promulgated under its authority by the [Corps], authorizes the Corps to require landowners to obtain permits from the Corps before discharging fill material into wetlands adjacent to navigable bodies of water and their tributaries." 474 U.S. at 123. The Court sustained the Corps' regulatory approach as a reasonable exercise of the authority conferred by the CWA. See *id.* at 131-135.

The Court in *Riverside Bayview* observed that Congress, by defining the term "navigable waters" to mean "the waters of the United States," had expressed its intent "to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." 474 U.S. at 133. After noting the Corps' scientific judgment that "wetlands adjacent to navigable waters do as a general matter play a key role in protecting and enhancing water quality," *ibid.*; see *id.* at 133-134, the Court held that,

> [i]n view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.

Id. at 134. The Court "conclude[d] that a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act." *Id.* at 135. At the same time, however, the Court declined "to address the question of the authority of the Corps to regulate discharges of fill material into

wetlands that are not adjacent to bodies of open water." *Id.* at 131-132 n.8.

In *SWANCC*, this Court faced an aspect of the question reserved in *Riverside Bayview*, and it rejected the Corps' construction of the term "waters of the United States" as encompassing "isolated," intrastate, nonnavigable ponds based solely on their use as habitat for migratory birds. 531 U.S. at 171-172. The Court quoted with apparent approval its prior holding that "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the "waters" of the United States.'" *Id.* at 167 (quoting *Riverside Bayview*, 474 U.S. at 134). The Court explained, however, that, if the use of isolated ponds by migratory birds were found by itself to be a sufficient basis for federal regulatory jurisdiction under the CWA, the word "navigable" in the statute would be rendered meaningless. *Id.* at 172. While recognizing that the term "navigable waters" as used in the CWA includes "at least some waters that would not be deemed 'navigable' under the classical understanding of that term," *id.* at 171 (quoting *Riverside Bayview*, 474 U.S. at 133), the Court stated that the word "navigable" must be given some content, see *id.* at 172 ("[I]t is one thing to give a word limited effect and quite another to give it no effect whatever."). The Court concluded that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Ibid.*

3. Petitioners own three parcels of land near Midland, Michigan. Those parcels are referred to as the Salzburg, Hines Road, and Pine River sites. See Pet.

App. A1-A2; *id.* at B2 n.1, B6, B34.[5] The Salzburg site consists of approximately 230 acres, the Hines Road site of approximately 275 acres, and the Pine River site of approximately 200 acres. J.A. 10; C.A. App. 875. Each site includes wetlands that border, and have a surface hydrologic connection to, nonnavigable tributaries of traditional navigable waters.

a. In December 1988, Mr. Rapanos requested that the Michigan Department of Natural Resources (MDNR) inspect the Salzburg site in order to discuss the feasibility of building a shopping center there. Pet. App. B15. MDNR advised Mr. Rapanos that there were likely regulated wetlands on the site, but that the land might still be suitable for development if Mr. Rapanos identified the wetlands on the property and either refrained from discharging pollutants into those areas or obtained a permit to fill them. See *ibid.*

Without applying for a permit, Mr. Rapanos directed the performance of extensive land-clearing, earth-moving, and construction work. *Id.* at B12, B14, B34. Those activities—which continued despite MDNR's issuance of a cease-and-desist letter in July 1989 and EPA's issuance of an administrative compliance order in May 1991 (*id.* at B15, B30)—included dumping sand into forested wetlands and spreading fresh spoils and sand on top of wetland vegetation. *Id.* at B12-B14. An MDNR employee who inspected the site in November 1989 testified

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[5] At all relevant times, petitioner John A. Rapanos owned the Salzburg site; petitioner Prodo, Inc. (whose president and sole shareholder is Mr. Rapanos) owned the Hines Road site; and petitioners Judith A. Nelkie Rapanos and Pine River Bluff Estates, Inc. (whose president and sole shareholder is Mrs. Rapanos) owned the Pine River site. Pet. App. B6, B34. Mr. Rapanos has also identified petitioner Rolling Meadows Hunt Club as owning the Hines Road site. *Id.* at B23.

that the volume of added sand was so great that the site "looked like nothing more than a beach, essentially no vegetation." *Id.* at B14. Between 1988 and 1997, Mr. Rapanos's fill activities resulted in the loss of 22 of the 28 acres of wetlands identified by the government at the Salzburg site. *Id.* at A5, B11, B14.

Surface water from wetlands at the Salzburg site flows into the Hoppler Drain, which drains into Hoppler Creek. Pet. App. A22. Hoppler Creek, in turn, "flows into the Kawkawlin River, which is navigable," and which "eventually flows into Saginaw Bay and Lake Huron." *United States* v. *Rapanos*, 339 F.3d 447, 449 (6th Cir. 2003) (*Rapanos I*), cert. denied, 541 U.S. 972 (2004).[6] The wetlands on the Salzburg site "have been described as between eleven and twenty miles from the nearest navigable-in-fact water." *Ibid.*

b. At the Hines Road site, Mr. Rapanos and petitioner Prodo, Inc., hired several contractors to perform construction and earthmoving work between 1991 and 1997 without obtaining a permit. Pet. App. B21-B23, B34. That work—which continued despite MDNR's issuance of a cease-and-desist letter in July 1992 and EPA's issuance of an administrative compliance order in September 1997—included the filling of wetlands with sand, spoils, and materials dredged from ditches

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[6] *Rapanos I*, *supra*, is one of several Sixth Circuit decisions arising out of a related criminal proceeding. In that proceeding, Mr. Rapanos was convicted of knowingly discharging pollutants into waters of the United States without a permit at the Salzburg site, in violation of 33 U.S.C. 1311(a) and 1319(c)(2)(A). Pet. App. B6; see *id.* at A4-A5 (setting forth history of the criminal case). Although the criminal and civil cases both involved the Salzburg site, the specific acres of wetlands at issue in the respective cases were different. See *id.* at A5 n.1, A22-A23 n.3, A32.

("sidecast"). *Id.* at A3; *id.* at B21, B23, B31. Those activities resulted in the loss of 17 of the 64 acres of wetlands at the Hines Road site. *Id.* at A5; *id.* at B20, B22-B23. Those wetlands have a surface hydrologic connection to the Rose Drain, which runs along the western side of the site and flows into the Tittabawassee River. *Id.* at A23; *id.* at B20. The Tittabawassee River is a traditional navigable water. See Gov't C.A. Br. 12.

c. At the Pine River site, Prodo, Inc., and several contractors performed construction work under the general direction of Mr. Rapanos between 1992 and 1997 without securing a permit. Pet. App. A3; *id.* at B26-B27, B34. That work—which continued despite MDNR's issuance of a cease-and-desist order in October 1992 and EPA's issuance of an administrative compliance order in September 1997 (*id.* at B28, B36)—included pushing sand into the wetlands. *Id.* at B27-B28. Those activities resulted in the loss of 15 of the 49 acres of wetlands at the Pine River site. *Id.* at A5; *id.* at B25-B26, B27. Those wetlands have a surface water connection to the Pine River, which lies in close proximity to the site. *Id.* at A23-A24; *id.* at B26. The Pine River, in turn, flows into Lake Huron. *Id.* at A23.

4. In February 1994, the government filed this civil suit in the United States District Court for the Eastern District of Michigan. Pet. App. A5; *id.* at B1. As subsequently amended, the government's complaint alleged, in relevant part, that petitioners had violated Section 301 of the CWA, 33 U.S.C. 1311, by discharging fill material into "waters of the United States" at the Salzburg, Hines Road, and Pine River sites without a permit. J.A. 13-16.

After a 13-day bench trial, the district court ruled in favor of the United States on the question of liability.

Pet. App. A5; *id.* at B1-B36; J.A. 37-40. The district court found that the demonstrated surface hydrologic connections between the wetlands at the Salzburg site and the Kawkawlin River, between the wetlands at the Hines Road site and the Tittabawassee River, and between the wetlands at the Pine River site and the Pine River, established that the sites contained wetlands that were "adjacent to waters of the United States" and therefore were encompassed by the Corps' regulations implementing the CWA. Pet. App. B33; see *id.* at B11, B20, B26 (discussing surface water connections between the subject wetlands and the pertinent rivers); 33 C.F.R. 328.3(a)(7).[7] In its factual findings, the court credited the testimony of the government's experts that petitioners' filling activities had impaired the wetlands' performance of such functions as water quality enhancement and flood control. See Pet. App. B12, B21, B26. The district court held that, by discharging pollutants into those wetlands without a Section 404(a) permit, petitioners had violated Section 301(a) of the CWA, 33 U.S.C. 1311(a). Pet. App. B34-B35. The court also held that petitioners had violated the CWA by failing to comply with administrative orders and information requests issued pursuant to Sections 308 and 309 of the Act, 33 U.S.C. 1318, 1319. Pet. App. B35-B36; J.A. 39.

5. The court of appeals affirmed. Pet. App. A1-A34. The court rejected petitioners' contention that the CWA

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[7] In the alternative, the district court held that the assertion of federal regulatory jurisdiction over the wetlands at the three sites was also warranted on the basis of the "Migratory Bird Rule." See Pet. App. A6 n.2, B33. On January 10, 2003, after the "Migratory Bird Rule" was declared invalid in *SWANCC* (see p. 9, *supra*), the district court amended its opinion to delete the reference to that alternative basis for CWA jurisdiction. *Id.* at A6 n.2; see J.A. 35.

term "waters of the United States" encompasses only those wetlands that directly abut traditional navigable waters. *Id.* at A20-A21. The court relied in part on its holding in *Rapanos I* that the "nexus between a navigable waterway and its nonnavigable tributaries * * * is sufficient to allow the Corps to determine reasonably that its jurisdiction over the whole tributary system of any navigable waterway is warranted." *Id.* at A17 (quoting *Rapanos I*, 339 F.3d at 452); see *id.* at A15-A17, A20. The court of appeals concluded that "[t]here is no 'direct abutment' requirement in order to invoke CWA jurisdiction"; rather, "[n]on-navigable waters must have a hydrological connection or some other 'significant nexus' to traditional navigable waters in order to invoke CWA jurisdiction." *Id.* at A21 (quoting *Rapanos I*, 339 F.3d at 452); see *id.* at A16.

The court of appeals further held that the government had demonstrated the requisite connection between the relevant wetlands and traditional navigable waters. Pet. App. A21-A25. Based on its examination of the pertinent evidence and the district court's factual findings, the court of appeals sustained the district court's determination that "there were hydrological connections between all three sites and corresponding adjacent tributaries of navigable waters." *Id.* at A24. The court explained that "[t]he testimony and evidence in the record support the district court's findings. Its conclusions of fact are entitled to substantial deference and they are not 'clearly erroneous.'" *Id.* at A25.

SUMMARY OF ARGUMENT

I. The Corps and EPA have acted reasonably in defining the CWA term "the waters of the United States"

to include wetlands adjacent to tributaries of traditional navigable waters.

A. The connection between traditional navigable waters and their tributaries is significant in practical terms, because pollution of the tributary has the potential to degrade the quality of the traditional navigable waters downstream. The text of Section 404(g)(1) clearly reflects Congress's understanding that "the waters of the United States" encompass at least some waters in addition to traditional navigable waters and their adjacent wetlands. Tributaries, whether or not they themselves are navigable, are the most obvious candidate for the CWA's broader coverage. Even before 1972, moreover, Congress had addressed the danger that pollution of tributaries may impair the quality of traditional navigable waters downstream, and it is implausible to suppose that Congress's landmark 1972 legislation actually reduced the FWPCA's geographic scope. And while petitioners suggest that some tributaries may have such an attenuated connection to traditional navigable waters that federal protection of those tributaries would be unwarranted, petitioners offer no administrable or scientifically supported standard by which any such tributaries could be identified.

B. If tributaries of traditional navigable waters are covered by the CWA, then wetlands adjacent to those tributaries are covered as well. This Court held in *Riverside Bayview* that the Corps may exercise regulatory jurisdiction over all wetlands adjacent to other water bodies as to which the Corps possesses regulatory authority. Indeed, although that case involved pollution of wetlands adjacent to a "navigable waterway," 474 U.S. at 131, the Corps framed the question presented as implicating the Corps' authority over "wetlands adjacent

to navigable bodies of water *and their tributaries*," *id.* at 123 (emphasis added). The Court's subsequent decision in *SWANCC* addressed a distinct question expressly reserved in *Riverside Bayview* and does not cast doubt on the conclusion that wetlands adjacent to tributaries are properly included within "the waters of the United States."

II. As applied to petitioners' filling activities in this case, the CWA's ban on unauthorized pollutant discharges is a permissible exercise of Congress's power to regulate (a) the channels of interstate commerce and (b) activities that substantially affect interstate commerce.

A. Congress's power to regulate the channels of interstate commerce includes the power to keep traditional navigable waters free from pollution. Congress may pursue that objective by regulating conduct, such as upstream pollutant discharges into nonnavigable tributaries or their adjacent wetlands, that occurs outside traditional navigable waters but has the potential to affect conditions within the channels of commerce. So long as the inclusion of such tributaries and wetlands within the Corps' jurisdiction is a reasonable means of protecting the physical, chemical, and biological integrity of traditional navigable waters, the constitutionality of the Act does not depend on the directness of the link to traditional navigable waters in a particular case.

B. In the aggregate, pollutant discharges into wetlands adjacent to tributaries can be expected to have substantial impacts on interstate commerce, including but not limited to the deleterious effects of such discharges on the traditional navigable waters downstream. Congress's decision not to exclude such wetlands from the Corps' jurisdiction is particularly reasonable because jurisdiction to evaluate does not automatically

translate into substantive regulation. The Act's permitting provisions allow for a particularized assessment of the likely environmental consequences of a proposed discharge. The CWA does not intrude unduly on state regulatory functions, particularly when, as in this case, state officials have assumed responsibility for implementation of the relevant CWA permitting program.

ARGUMENT

I. THE CORPS AND EPA HAVE REASONABLY DEFINED THE CWA TERM "THE WATERS OF THE UNITED STATES" TO INCLUDE WETLANDS ADJACENT TO TRIBUTARIES OF TRADITIONAL NAVIGABLE WATERS

"An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985) (*Riverside Bayview*) (citing, *inter alia*, *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-845 (1984)). The question in this case is whether the Corps and EPA have reasonably defined the CWA term "the waters of the United States" to include wetlands adjacent to tributaries of traditional navigable waters.

Resolution of that question turns on the validity of two paragraphs of the pertinent regulatory definition. First, paragraph (5) of the regulation defines the term "waters of the United States" to include "[t]ributaries of," *inter alia*, traditional navigable waters. 33 C.F.R. 328.3(a)(5); see 33 C.F.R. 328.3(a)(1); p. 6, *supra*. Second, paragraph (7) defines the term to include "[w]etlands adjacent to" the waters identified in the prior paragraphs of the regulatory definition, which include

the tributaries encompassed by paragraph (5). 33 C.F.R. 328.3(a)(7).

Petitioners contend that the only wetlands included within "the waters of the United States" under the CWA are wetlands adjacent to traditional navigable waters. Petitioners do not make clear, however, *which* aspect of the Corps' regulatory definition they believe to be invalid. In particular, it is unclear whether petitioners contend that tributaries that are not themselves navigable are categorically excluded from the coverage of the CWA (*i.e.*, that paragraph (5) of the regulation is invalid), or whether they argue instead that, even if at least some such tributaries are covered, the wetlands adjacent to them are not (*i.e.*, that paragraph (7) is invalid as applied to some or all tributaries).

Whatever the precise nature of petitioners' challenge, both aspects of the regulatory definition are valid. With respect to paragraph (5), the text, history, and purposes of the CWA amply support the expert agencies' decision to define the term "waters of the United States" to include all tributaries of traditional navigable waters. Indeed, the coverage of such tributary waters would appear to be more obvious than the coverage of adjacent wetlands upheld in *Riverside Bayview*. With respect to paragraph (7), this Court in *Riverside Bayview* squarely held that the Corps may exercise Clean Water Act jurisdiction over wetlands adjacent to other "waters of the United States," and that holding is likewise consistent with the text, history, and purposes of the CWA. Petitioners' statutory challenge therefore should be rejected.

A. The Corps And EPA Have Reasonably Defined The CWA Term "The Waters Of The United States" To Include All Tributaries Of Traditional Navigable Waters

1. The term "the waters of the United States" appears in the CWA as the definition of the phrase "navigable waters." 33 U.S.C. 1362(7). In *Riverside Bayview*, the Court observed that "the Act's definition of 'navigable waters' as 'the waters of the United States' makes it clear that the term 'navigable' as used in the Act is of limited import." 474 U.S. at 133. In *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), however, the Court subsequently made clear that the word "navigable" cannot be treated as pure surplusage. See *id.* at 172 ("[I]t is one thing to give a word limited effect and quite another to give it no effect whatever."). Rather, the Court explained, "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Ibid.* While recognizing that the CWA's coverage extends to categories of waters that do not satisfy traditional tests of navigability, the Court in *SWANCC* suggested that coverage of such waters generally depends upon the existence of a "significant nexus" to traditional navigable waters. See *id.* at 167.

As a practical, common-sense matter, a "significant nexus" clearly exists between traditional navigable waters and their tributaries. Effective regulation of the traditional navigable waters would hardly be possible if pollution of tributaries fell outside the jurisdiction of those responsible for maintaining water quality downstream. As Congress and this Court have recognized,

"[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." *Riverside Bayview*, 474 U.S. at 133 (quoting S. Rep. No. 414, 92d Cong., 1st Sess. 77 (1971)). Indeed, the next sentence of the Senate Report quoted in *Riverside Bayview* stated: "Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, *and their tributaries*." S. Rep. No. 414 at 77 (emphasis added). Because "[a]ny pollutant or fill material that degrades water quality in a tributary of navigable waters has the potential to move downstream and degrade the quality of the navigable waters themselves," *United States* v. *Deaton*, 332 F.3d 698, 707 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004), a traditional navigable water and its tributary are linked by precisely the sort of nexus that makes pollution of the tributary an appropriate subject of congressional concern.

The practical rationale for construing the term "waters of the United States" to encompass all tributaries of traditional navigable waters is strengthened by the fact that the term defines the scope of regulatory jurisdiction to be exercised under other provisions of the CWA. See, *e.g.*, 33 U.S.C. 1342 (pollutant discharge permits); 33 U.S.C. 1321 (oil-spill prevention and clean-up); 33 U.S.C. 1313 (water quality standards). If the statutory phrase were read to exclude nonnavigable tributaries, then discharges of such materials as sewage, toxic chemicals, and medical waste into those tributaries would not be subject to the CWA's permitting requirements, no matter how clear the link between the nonnavigable tributary and the traditional navigable water or how strong the evidence that such discharges would impair the quality of traditional navigable waters

downstream.[8] The Nation's largest rivers and lakes would thus be left highly vulnerable to degradation through upstream pollutant discharges, including discharges that occur in States other than those in which harmful effects are ultimately felt. See, *e.g.*, Lance Wood, *Don't Be Misled: CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands*, 34 Envtl. L. Rptr. (Envtl. L. Inst.) 10,187, 10,192-10,193 & n.32 (2004) (explaining that fewer than 1% of the stream-miles within the Missouri River watershed are traditional navigable waters); cf. *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 325-326 (1981) (explaining that the CWA provides a variety of mechanisms by which a State whose waters may be affected by a pollutant discharge in another State can participate in the permitting process).[9]

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[8] Section 301(a) of the CWA provides that, "[e]xcept as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of *any* pollutant by any person shall be unlawful." 33 U.S.C. 1311(a) (emphasis added). The CWA defines the term "discharge of a pollutant" to include "any addition of *any* pollutant to navigable waters from any point source." 33 U.S.C. 1362(12) (emphasis added). Although Section 404 of the CWA, 33 U.S.C. 1344, establishes a permitting regime that is applicable only to dredged or fill material, the statutory prohibition on unpermitted discharges of such materials, like the ban on unpermitted discharges of the pollutants falling within EPA's regulatory jurisdiction, is imposed by Section 301(a). Petitioners do not contend that the definition of "waters of the United States" should vary depending on the nature of the pollutant involved, and there is no textual basis for drawing such a distinction.

[9] The rejected 1977 House bill and parallel Senate amendment (see pp. 4-5, *supra*) would have narrowed the definition of navigable waters only with respect to the Corps' permitting authority over discharges of dredged and fill material under Section 404. "[T]he House bill would have left intact the existing definition of 'navigable waters' for purposes

A blanket exclusion of nonnavigable tributaries from the Clean Water Act's coverage would be particularly unwarranted because the CWA permitting process affords a flexible, case-specific mechanism for assessing the likely impacts of a particular proposed discharge into such waters. The decision of the Corps and EPA to include tributaries of traditional navigable waters (and their adjacent wetlands) within the regulatory definition of "waters of the United States" does not mean that pollutant discharges into such tributaries are automatically prohibited. It simply means that the responsible agency will scrutinize and attempt to mitigate the likely impacts of a proposed discharge on the public interest (including the protection of traditional navigable waters) before deciding whether the project may go forward.[10]

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of § 301 of the Act, which generally prohibits discharges of pollutants into navigable waters." *Riverside Bayview*, 474 U.S. at 137-138. Senator Bentsen emphasized that the proposed Senate amendment "deals with section 404 * * * which regulates dredging and filling activities * * *. Section 404 does not speak to toxic discharges, * * * and we do not propose to change the law and permit any relaxation of our efforts to clamp down on the dumping of sewage or 'toxic spoil' or any other toxic discharges in even the smallest creek in this Nation." 123 Cong. Rec. 26,712 (1977).

[10] The Court in *Riverside Bayview* explained:

> [I]t may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps' decision to define all adjacent wetlands as "waters." * * * That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment—or where its importance is outweighed by other values—the Corps may always allow development of the wetland

2. Section 404(g)(1) of the CWA underscores the validity of the decision of the Corps and EPA to include tributaries within the regulatory definition of "waters of the United States." Pursuant to the 1977 FWPCA Amendments (see p. 5, *supra*), the CWA provides a mechanism by which States can assume partial responsibility for administering the Section 404 program:

> (1) The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into *the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce * * * including wetlands adjacent thereto)* within its jurisdiction may submit to the Administrator [of EPA] a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact.

33 U.S.C. 1344(g)(1) (emphasis added).

Section 404(g)(1) clearly reflects Congress's understanding that the CWA's coverage extends to at least some waters beyond traditional navigable waters and their adjacent wetlands.[11] And given Section 404(g)(1)'s

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for other uses simply by issuing a permit.

474 U.S. at 135 n.9. Similarly with respect to tributaries of traditional navigable waters, the appropriate permitting agency (either the Corps, the EPA, or a state agency that has assumed responsibility for administering the relevant program) retains authority to allow proposed discharges in appropriate circumstances.

[11] The term "navigable waters" has traditionally been used to refer to "waters that were *or had been* navigable in fact or which could reasonably be so made." *SWANCC*, 531 U.S. at 172 (emphasis added); see

unmistakable implication that *some* additional waters are appropriate subjects of federal jurisdiction, nonnavigable tributaries of traditional navigable waters are *the most obvious candidates for coverage*. Of all the "other" waters to which Section 404(g)(1) might be thought to refer, tributaries have the closest nexus to traditional navigable waters.

This Court's decision in *SWANCC* reinforces that conclusion. In *SWANCC*, the Court held that Section 404(g) does not support an inference that "isolated" ponds lacking any hydrologic connection to traditional navigable waters are encompassed by the CWA terms "navigable waters" and "waters of the United States." See 531 U.S. at 171. While recognizing that "Congress intended the phrase 'navigable waters' to include 'at least some waters that would not be deemed "navigable" under the classical understanding of that term,'" the Court observed that Section 404(g) "gives no intimation of what those waters might be." *Ibid.* (quoting *Riverside Bayview*, 474 U.S. at 133). But the same decision that warned against depriving the word "navigable" of all meaning did not suggest that the statutory phrase "other than" was superfluous. While the Court in *SWANCC* did not read Section 404(g) to reflect a congressional understanding that the CWA reaches "iso-

33 C.F.R. 328.3(a)(1). Section 404(g)(1) refers to waters that are susceptible to use for interstate or foreign commerce or that could be made so by "reasonable improvement." 33 U.S.C. 1344(g)(1). Thus, if the CWA's coverage were limited to traditional navigable waters and their adjacent wetlands, States could assume responsibility for administration of the Section 404 program only with respect to waters that previously were navigable in fact but that are no longer suitable for navigation and cannot reasonably be so made. It cannot plausibly be supposed that Congress had that very limited category of waters in mind when it enacted Section 404(g).

lated" intrastate ponds, the Court offered the alternative hypothesis that "Congress simply wanted to include all waters adjacent to 'navigable waters,' *such as nonnavigable tributaries and streams*." *Ibid.* (emphasis added). The decision in *SWANCC* therefore cannot reasonably be construed to disapprove the Corps' inclusion of nonnavigable tributaries within its regulatory definition of "waters of the United States."

3. Even before it enacted the 1972 FWPCA Amendments, Congress had recognized, and had acted to address, the danger that pollution of tributaries may impair the quality of traditional navigable waters downstream. Prior to those Amendments, the FWPCA established procedures for abatement of "[t]he pollution of interstate or navigable waters in or adjacent to any State or States (*whether the matter causing or contributing to such pollution is discharged directly into such waters or reaches such waters after discharge into a tributary of such waters*)." 33 U.S.C. 1160(a) (1970) (emphasis added). Under specified circumstances, the Attorney General was authorized to bring suit on behalf of the United States "to secure abatement of the pollution." 33 U.S.C. 1160(g) (1970); see *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 102-103 (1972) (describing abatement procedures). Indeed, the regulation of tributaries as part and parcel of a federal effort to protect traditional navigable waters has been a feature of federal law for over 100 years.[12]

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[12] Since its enactment as Section 13 of the Rivers and Harbors Appropriation Act of 1899 (RHA), ch. 425, § 13, 30 Stat. 1152, the Refuse Act of 1899 has prohibited the discharge of refuse matter "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." 33 U.S.C. 407. In 1970, President Nixon signed an

Thus, limiting the CWA term "waters of the United States" to traditional navigable waters and their adjacent wetlands would not, as petitioners suggest (Br. 16-17), simply preserve pre-1972 limits on the geographic scope of federal water-pollution laws. Rather, if the current statutory language were construed in that narrow manner, the effect of the 1972 FWPCA Amendments would be to *curtail* significantly the ability of federal officials to address the danger that pollutant discharges into tributaries may degrade the quality of traditional navigable waters downstream. It is implausible to suppose that Congress intended the 1972 Amendments to have that effect.

Enactment of the 1972 FWPCA Amendments reflected Congress's determination that "the national effort to abate and control water pollution has been inadequate in every vital aspect," and that "the restoration of the natural chemical, physical, and biological integrity of the Nation's waters is essential." S. Rep. No. 414, 92d

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Executive Order directing the Corps (in consultation with the Federal Water Pollution Control Administration) to implement a permit program under Section 13 of the RHA "to regulate the discharge of pollutants and other refuse matter into the navigable waters of the United States or their tributaries and the placing of such matter upon their banks." Exec. Order No. 11,574, 35 Fed. Reg. 19,627. The Corps initiated the Refuse Act Permit Program the following year, see 36 Fed. Reg. 6565 (1971), and that program served as the forerunner to the NPDES permitting program established by the 1972 FWPCA Amendments. See 33 U.S.C. 1342(a)(4) and (5). In explaining its inclusion of "tributaries" within the regulatory definition of "waters of the United States" under the 1972 FWPCA Amendments, the Corps observed that "[t]he Federal government's authority to regulate activities on the rivers and streams that feed into navigable waters of the United States * * * has been historically recognized," and it referred specifically to Section 13 of the RHA. 42 Fed. Reg. 37,127 (1977).

Cong., 1st Sess. 7 (1971). "Congress' intent in enacting the Amendments was clearly to establish an all-encompassing program of water pollution regulation." *City of Milwaukee* v. *Illinois*, 451 U.S. at 318. In particular, by defining the term "navigable waters" to mean "the waters of the United States," "Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes." *Riverside Bayview*, 474 U.S. at 133. To construe that jurisdictional language as excluding tributaries would be to conclude that Congress's effort to *broaden* the scope of federal protection for the Nation's water resources actually narrowed the scope of that protection.[13]

[13] Although this Court had previously allowed the State of Illinois to assert a federal common-law cause of action to abate the pollution of interstate waters (see *Illinois* v. *City of Milwaukee*, 406 U.S. at 102-108), the Court subsequently construed the 1972 FWPCA Amendments to preclude such a suit, on the ground that Congress "has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." *City of Milwaukee* v. *Illinois*, 451 U.S. at 317. In so holding, the Court noted that the sewage overflows that formed the basis of the State's complaint in that case ran "directly into Lake Michigan *or tributaries leading into Lake Michigan*," *id.* at 309 (emphasis added), and it stated without qualification that the overflows "are point source discharges and, under the Act, are prohibited unless subject to a duly issued permit," *id.* at 320. The Court thus held that "[t]here is no 'interstice' here to be filled by federal common law," *id.* at 323, a holding that necessarily incorporates the view that overflows into tributaries of traditional navigable waters are covered by the CWA. Similarly, in *International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987), the Court held that the CWA precludes a State in which harms resulting from water pollution are felt from applying its own law of nuisance to a suit arising out of pollutant discharges in another State. See *id.* at 491-497. In describing the CWA's "all-encompassing" and "comprehensive" nature, the Court stated that "[t]he Act applies to all point sources and virtually all bodies of water." *Id.* at 492. If the CWA's permitting requirements applied only to dis-

4. Petitioners suggest (Br. 19) that, even if "the waters of the United States" include *some* nonnavigable tributaries, the term cannot reasonably be construed to encompass "the entire tributary system of any [traditional] navigable water." That argument is misconceived and would lead to practical confusion.

a. The Court in *SWANCC* held that Congress's use of the term "navigable waters" in the CWA "has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." 531 U.S. at 172. Tributaries have a common-sense and readily understood nexus to that traditional core federal function. But once it is accepted that some nonnavigable waters come within the CWA (as is clearly established by, *inter alia*, Section 404(g)), neither the statutory term "navigable waters," nor the accompanying definitional phrase "the waters of the United States," provides a textual basis for distinguishing among different *non*navigable tributaries. As the Fourth Circuit has explained, this Court's decision in *SWANCC*

> emphasizes that the CWA is based on Congress's power over navigable waters, suggesting that covered non-navigable waters are those with some connection to navigable ones. But we cannot tell from the Act the extent to which nonnavigable tributaries

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charges into traditional navigable waters and their adjacent wetlands, federal officials would lack power to protect nonnavigable tributaries even from pollutant discharges that impair the quality of traditional navigable waters in other States; yet the federal common-law cause of action that was previously available to protect the interests of the State in which that harm is felt would be precluded by reason of the CWA's "comprehensive" character.

> are covered. The statutory term "waters of the United States" is sufficiently ambiguous to constitute an implied delegation of authority to the Corps; this authority permits the Corps to determine which waters are to be covered within the range suggested by *SWANCC*.

Deaton, 332 F.3d at 709-710 (citation omitted).

b. Even if the CWA's broad jurisdictional language did not discourage judicial efforts to distinguish among different nonnavigable tributaries, petitioners offer nothing more than the bare intuition that some tributaries are more closely connected than others to the traditional navigable waters into which they ultimately flow. Petitioners make no effort to articulate an objective standard for identifying those tributaries whose connection to traditional navigable waters is so "remote, tenuous, or intermittent" (Br. 19) as to require their exclusion from the CWA permitting requirements. Nor have petitioners brought forward the sort of scientific evidence that would be necessary to demonstrate that there are classes of tributaries whose degradation through pollutant discharges is unlikely to affect traditional navigable waters downstream, let alone demonstrated that the relevant test could be better applied by a court in determining the scope of federal regulatory jurisdiction than by an agency deciding whether to exercise that jurisdiction. Having failed to offer and to support an administrable alternative standard, petitioners are in a poor position to question the responsible agencies' assertion of permitting authority over pollutant discharges into all tributaries of traditional navigable waters.[14]

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[14] The available scientific evidence indicates that upstream pollutant discharges may affect downstream water quality even very large dis-

c. The mere inclusion of nonnavigable tributaries in the "waters of the United States" does not mean that the Corps and EPA must prohibit all pollutant discharges into such tributaries, or even that they must impose significant conditions upon permits issued for such discharges. Rather, that regulatory interpretation means only that discharges into those tributaries require a CWA permit. In defining the term "the waters of the United States," the Corps and EPA have sought to ensure that categories of waters having potentially significant connections to traditional navigable waters are not destroyed or degraded without a prior assessment of their ecological importance and the likely impacts of the proposed activity.

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tances away. Nutrient loads from the upper reaches of the Susquehanna River, for example, collect in the Chesapeake Bay more than 400 miles downstream. See Chesapeake Bay Program Ofc., U.S. Envt'l Protection Agency (USEPA), Region III, *Setting and Allocating the Chesapeake Bay Basin Nutrient and Sediment Loads: The Collaborative Process, Technical Tools and Innovative Approaches* 48, 50-51, 94 (Dec. 2003) <http://www.chesapeakebay.net/caploads.htm>; Susquehanna River Basin Comm'n, *Susquehanna River Basin: Everyone Lives in a Watershed* (1998) <http://www.srbc.net/docs/ EveryoneLives .pdf> (The Susquehanna River flows 444 miles from its headwaters to the Chesapeake Bay). Similarly, oxygen-depletion in the Gulf of Mexico has been linked to pollutant discharges and wetland destruction in the upper reaches of the Mississippi River watershed, including Illinois, Iowa, Minnesota, Missouri, and Wisconsin. See, *e.g.*, William J. Mitsch et al., *Reducing Nitrogen Loading to the Gulf of Mexico from the Mississippi River Basin: Strategies to Counter a Persistent Ecological Problem*, 51 BioScience 373, 375-376, 381 (2001); Nancy N. Rabalais et al., *Beyond Science into Policy: Gulf of Mexico Hypoxia and the Mississippi River*, 52 BioScience 129, 135, 140 (2002); Mississippi River Basin and Gulf of Mexico Hypoxia, Upper Mississippi <http://www.epa.gov/msbasin/subbasins/ upper/index.htm>.

It makes sense in casting the jurisdictional net to use readily understood terms to capture waters with a potential effect on the core jurisdiction of the federal agencies. The more nuanced and fact-specific question of which tributaries (and which discharges) are environmentally significant is best left for the next step of the analysis. While neither the directness nor the substantiality of a tributary's connection to traditional navigable waters is relevant to the *jurisdictional* inquiry, the Corps and EPA may take those considerations into account in deciding whether and on what terms a permit will be granted, to the extent that those factors bear on the practical consequences of a proposed discharge. Compare *Riverside Bayview*, 474 U.S. at 135 n.9; p. 22 & note 10, *supra*.[15]

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[15] The Corps' regulations provide a mechanism by which a party who wishes to know whether a discharge of dredged or fill material at a particular site would require a CWA permit may seek a "jurisdictional determination" from the agency. See 33 C.F.R. 320.1(a)(6), 325.9, 331.2. For instance, such a jurisdictional determination may address whether a particular site contains wetlands and, if so, whether those wetlands are adjacent to a traditional navigable water or its tributary. In making a jurisdictional determination, however, the Corps considers *only* whether the site of the proposed discharge falls within the regulatory definition of "waters of the United States"; it does not consider the numerous other factors that would be relevant to the ultimate permitting decision. The environmental effects of a particular discharge into a tributary depend not only on the physical characteristics of the tributary and its connection to traditional navigable waters downstream, but also on the nature of the discharge (*e.g.*, the type and volume of pollutant involved) and of other activities in the surrounding area. It is neither practically feasible nor consistent with the text of the CWA (see note 8, *supra*) to consider that broad range of factors in making the threshold determination whether a particular discharge is into "the waters of the United States" and therefore requires a CWA permit. The responsible agency may consider those factors, however,

B. The Corps And EPA Have Reasonably Defined The CWA Term "The Waters Of The United States" To Include "Wetlands Adjacent To" All Other Covered Waters, Including Tributaries Of Traditional Navigable Waters

The Corps' regulatory definition of the term "waters of the United States" encompasses "[w]etlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section." 33 C.F.R. 328.3(a)(7). Thus, if tributaries are themselves properly included within the "waters of the United States," Section 328.3(a)(7) makes clear that wetlands adjacent to those tributaries are covered as well. In *Riverside Bayview*, this Court unanimously sustained the Corps' application of a substantively identical regulatory provision. Compare 33 C.F.R. 323.2(a)(7) (1985). Essentially for the reasons stated by the Court in that decision, the Corps' application of the current regulatory language to petitioners' activities is likewise valid.

1. The Court in *Riverside Bayview* framed the question before it in terms that cover this case—*viz.*, "[w]hether the [CWA], together with certain regulations promulgated under its authority by the Army Corps of Engineers, authorizes the Corps to require landowners to obtain permits from the Corps before discharging fill material into wetlands adjacent to navigable bodies of water *and their tributaries*." 474 U.S. at 123 (emphasis added; citation omitted). In its analysis of that question, the Court repeatedly acknowledged the Corps' assertion of CWA jurisdiction over wetlands adjacent to tributaries. *Ibid.*; see *id.* at 129 ("The regulation extends the

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in determining whether and under what conditions a permit will be granted.

Corps' authority under § 404 to all wetlands adjacent to navigable or interstate waters *and their tributaries*.") (emphasis added); see also *id.* at 124 ("the Corps construed the Act to cover all 'freshwater wetlands' that were adjacent to *other covered waters*") (emphasis added). The Court "conclude[d] that a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act." *Id.* at 135. Thus, the *Riverside Bayview* Court's descriptions both of the question presented and of the Court's holding squarely encompass the CWA's application to wetlands adjacent to nonnavigable tributaries of traditional navigable waters.[16]

Although the Court in *Riverside Bayview* described the specific wetlands at issue in that case as being adjacent to a "navigable waterway" (474 U.S. at 131, 135), the Court's reasoning did not turn on whether that waterway satisfied traditional standards of navigability. Rather, in explaining why the Corps' exercise of regulatory jurisdiction over adjacent wetlands was permissible, the Court observed that,

> [i]n determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid

[16] The Court further observed that, in the congressional debates that produced the 1977 FWPCA Amendments, "even those who thought that the Corps' existing authority under § 404 was too broad recognized * * * that whatever jurisdiction the Corps would retain over discharges of fill material after passage of the 1977 legislation should extend to discharges into wetlands adjacent to *any waters over which the Corps retained jurisdiction*." 474 U.S. at 138 (emphasis added).

> ground is not necessarily or even typically an abrupt one. Rather, 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 far short of being dry land. Where on this continuum to find the limit of "waters" is far from obvious.

Id. at 132. The Court noted the Corps' determination that pollution of wetland portions of an aquatic system generally "will affect the water quality of the other waters within that aquatic system," *id.* at 134 (quoting 42 Fed. Reg. 37,128 (1977)), and it sustained as reasonable "the Corps' conclusion that adjacent wetlands are inseparably bound up with the 'waters' of the United States—based as it is on the Corps' and EPA's technical expertise," *ibid.*

Those rationales are equally applicable here. In exercising regulatory authority over pollutant discharges into tributaries of traditional navigable waters, the Corps and EPA "must necessarily choose some point at which water ends and land begins." 474 U.S. at 132. And, as with wetlands adjacent to traditional navigable waters, the pollution of wetlands adjacent to tributaries can be expected to degrade the larger aquatic system of which those wetlands are an integral part, such that regulation of the covered waters without regulating the wetlands makes little sense.[17] Because the quality of the

[17] The harm caused by discharges of dredged or fill material into wetlands includes, but is not limited to, the release of sediment downstream, which can affect the water quality, and ultimately the navigability, of traditional navigable waters. In addition, the *filling* of wetlands generally reduces or destroys their capacity to perform a variety of essential hydrological and ecological functions, such as filtering and absorbing pollutants from runoff and storing flood waters. See

tributaries is a legitimate subject of federal concern under the CWA (see pp. 19-31, *supra*), the Court's reasoning in *Riverside Bayview* fully supports the decision of the Corps and EPA to apply the Act's permitting requirements to discharges into wetlands adjacent to such tributaries.

2. In contending that the CWA covers only those wetlands that physically abut traditional navigable waters, petitioners invoke (Br. 13-14) this Court's statement in *SWANCC* that the Corps' permitting authority under the Act does not "extend[] to ponds that are *not* adjacent to open water." 531 U.S. at 168. Petitioners' reliance (Br. 12-16) on *SWANCC* is misplaced because they are wrong to equate (Br. 14) "open water" with traditional navigable waters. The Court's reference in *SWANCC* to ponds "that are *not* adjacent to open water," 531 U.S. at 168, accurately described the case before it and was drawn from a footnote in *Riverside Bayview* in which the Court had reserved "the question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water, see 33 C.F.R. §§ 323.2(a)(2) and (3) (1985)." *Riverside Bayview*, 474 U.S. at 131-132 n.8 (quoted in part in *SWANCC*, 531 U.S. at 167-168). When that footnote is read in context, it is unmistakably clear that the Court in *Riverside Bayview* was reserving only the question whether the Corps could permissibly exercise

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Riverside Bayview, 474 U.S. at 134-135. Based on expert testimony credited by the district court in this case, the court found that petitioners' filling of the wetlands at each of the three sites resulted in just such harm. Pet. App. B12 (lost functions of wetlands at the Salzburg site included water quality enhancement and flood control); *id.* at B21, B26 (same findings regarding Hines Road and Pine River wetlands).

regulatory authority over wetlands that are isolated from any other covered waters.[18]

The issue here, by contrast, was decided, not reserved, by the Court in *Riverside Bayview*. As explained above (pp. 32-33, *supra*), the Court in *Riverside Bayview* repeatedly acknowledged that the Corps' regulation encompasses wetlands adjacent to nonnavigable tributaries, and it expressly held without qualification that the Corps' regulatory "definition of 'waters of the United States' [as] encompassing all wetlands adjacent to *other bodies of water over which the Corps has jurisdiction* is a permissible interpretation of the Act." *Id.* at 135 (emphasis added). Moreover, although that case involved wetlands adjacent to a "navigable waterway" (*id.* at 131), nothing in the Court's *ratio decidendi* turned on that fact. The Court found its conclusion to be supported by the text and policies of the CWA, see *id.* at 131-135, and by the legislative history of the 1977 FWPCA Amendments, which reflected a congressional consensus that "whatever jurisdiction the Corps would retain over discharges of fill material after passage of the 1977 legislation should extend to discharges into wetlands adjacent to any waters over which the Corps retained jurisdiction," *id.* at 138; see note 16, *supra*. Because nonnavigable tributaries of traditional naviga-

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[18] The pertinent footnote in *Riverside Bayview* cited only 33 C.F.R. 323.2(a)(2) and (3) (1985), which have since been re-codified at 33 C.F.R. 328.3(a)(2) and (3). Those are the subsections of the regulatory definition of "waters of the United States" that cover interstate and isolated intrastate wetlands, respectively. If the Court's reference to "wetlands that are not adjacent to bodies of open water" had been intended to include wetlands adjacent to nonnavigable tributaries, the Court would presumably have cited 33 C.F.R. 323.2(a)(5) and (7) (1985), the subsections that addressed tributaries and wetlands adjacent to tributaries.

ble waters are themselves properly included within "the waters of the United States," the Court's decision in *Riverside Bayview* controls this case.

In rejecting the Corps' attempted exercise of regulatory authority over "ponds that are *not* adjacent to open water" (531 U.S. at 168), the Court in *SWANCC* declined to uphold an assertion of jurisdiction that went beyond the scope of CWA coverage that it had previously sustained in *Riverside Bayview* (see *id.* at 167-168), but the Court did not cast doubt on what it had previously decided. To the contrary, the Court in *SWANCC* referred with apparent approval to its prior holding that "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the "waters" of the United States.'" *Id.* at 167 (quoting *Riverside Bayview*, 474 U.S. at 134). The Court's confirmation of that principle in *SWANCC* reinforces the conclusion that, if nonnavigable tributaries of traditional navigable waters are themselves properly included among "the waters of the United States" for purposes of the CWA's permitting provisions, the wetlands adjacent to those tributaries are covered by the Act as well.[19]

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[19] Petitioners rely in part (Br. 13, 20) on 33 U.S.C. 1251(b), which recognizes "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." Even when the term "waters of the United States" is understood to encompass nonnavigable tributaries and their adjacent wetlands, however, States play an important role in pollution control both under, and independent of, the CWA. In particular, the States have primary responsibility for developing water quality standards and implementation plans for the waters within their boundaries. See 33 U.S.C. 1313(a), (c), and (e). The States also have the principal role in addressing nonpoint sources of pollution such as storm runoff and agricultural return flows. See, *e.g.*, 33 U.S.C. 1288(b)(2)(F) (procedures to reduce agricultural nonpoint sources of

II. CONGRESS'S GRANT OF FEDERAL REGULATORY JURISDICTION OVER WETLANDS ADJACENT TO TRIBUTARIES OF TRADITIONAL NAVIGABLE WATERS IS A PERMISSIBLE EXERCISE OF CONGRESSIONAL POWER UNDER THE COMMERCE CLAUSE

This Court's decisions have identified "three broad categories of activity that Congress may regulate under its commerce power." *United States* v. *Lopez*, 514 U.S. 549, 558 (1995).

> First, Congress may regulate the use of the channels of interstate commerce. * * * Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. * * * Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation

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pollution); 33 U.S.C. 1329 (nonpoint source management programs). In addition, States may assume responsibility for administration of the NPDES program, see 33 U.S.C. 1342(b), and for partial administration of the Section 404 permitting program for discharges of dredged and fill material, see 33 U.S.C. 1344(g); pp. 5, 23, *supra*, and Section 1251(b) itself expresses "the policy of Congress that the States * * * implement the permit programs under sections 1342 and 1344 of" Title 33, see 33 U.S.C. 1251(b). State officials are also authorized to review, and to impose water quality standards in connection with, applications for a federal license or permit to conduct activities that may result in discharges into the State's waters. See 33 U.S.C. 1341. Moreover, after *SWANCC*, States alone have jurisdiction over intrastate "isolated" waters lacking a significant nexus to traditional navigable waters. Exclusion of nonnavigable tributaries and/or their adjacent wetlands from the Act's coverage is therefore unnecessary to preserve the "primary" role of the States in preventing and addressing water pollution.

> to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.

Id. at 558-559 (citations omitted); see *United States* v. *Morrison*, 529 U.S. 598, 608-609 (2000). There is no substantial ground for disputing the conclusion that application of the CWA's permitting requirements to the wetlands at issue in this case is a permissible exercise of congressional authority under the first and third categories identified in *Lopez*.[20]

A. Application Of The CWA To Petitioners' Wetlands Is Plainly A Permissible Exercise Of Congressional Power To Regulate The Channels Of Interstate Commerce

1. As the Fourth Circuit recently explained, Congress's "power over navigable waters is an aspect of the authority to regulate the channels of interstate commerce." *Deaton*, 332 F.3d at 706; see, *e.g.*, *Kaiser Aetna* v. *United States*, 444 U.S. 164, 173 (1979) ("It has long been settled that Congress has extensive authority over this Nation's waters under the Commerce Clause" as "channels of interstate commerce."); *United States* v.

[20] The precise nature of petitioners' Commerce Clause argument is unclear. The petition for a writ of certiorari includes an express constitutional challenge as a separate question presented, as well as an extended argument that the CWA would be unconstitutional if construed to cover wetlands of the sort at issue here. See Pet. i, 14-26. But because petitioners did not raise any Commerce Clause challenge before the court of appeals panel, and the panel did not address any constitutional question, no such challenge is properly preserved for review by this Court. See Br. in Opp. 20 & n.7; *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993). In their brief on the merits (at 23-24), petitioners offer only an abbreviated argument that principles of constitutional avoidance furnish an additional reason for construing the CWA not to encompass their pollutant discharges. Petitioners do not unambiguously contend that the CWA would be unconstitutional if interpreted to cover their conduct.

Ballinger, 312 F.3d 1264, 1269 (11th Cir. 2002). Congress's power over the channels of commerce is not limited to the enactment of legislation that is intended to facilitate or promote commercial activity (or, in the case of navigable waters, navigation). Rather, under established constitutional principles, Congress may act to keep the channels of commerce free from injurious uses. See, *e.g.*, *Lopez*, 514 U.S. at 558; *Caminetti* v. *United States*, 242 U.S. 470, 491 (1917); *The Lottery Case* (*Champion* v. *Ames*), 188 U.S. 321 (1903). Measures reasonably designed to prevent the degradation of traditional navigable waters fit comfortably within that grant of authority.

Indeed, if congressional power in this area were limited to the prevention and removal of threats to navigation, the CWA might raise significant constitutional concerns even as applied to discharges directly into traditional navigable waters. The Act expresses Congress's objectives of, *inter alia*, "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. 1251(a), and attaining "water quality which 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)(2).[21]

[21] The CWA also directs the Corps, in evaluating permit applications, to consider guidelines developed by EPA in conjunction with the Corps. See 33 U.S.C. 1344(b). In formulating those guidelines, EPA must take into account the effect of discharges on "fish, shellfish, [and] wildlife," 33 U.S.C. 1343(c)(1)(A); "changes in marine ecosystem diversity, productivity, and stability," 33 U.S.C. 1343(c)(1)(B); and "esthetic, recreation, and economic values," 33 U.S.C. 1343(c)(1)(C). See *Riverside Bayview*, 474 U.S. at 132 (characterizing the CWA's purpose as the "[p]rotection of aquatic ecosystems"). In addition, EPA may veto or restrict the use of any site for the disposal of dredged or fill material when it determines that a discharge "will have an unacceptable adverse

Thus, while pollution of traditional navigable waters can undoubtedly have the effect of impeding navigation, Congress in enacting the CWA sought to achieve a range of objectives much broader than the prevention of such impediments. Petitioners do not contend, however, and this Court's decisions do not suggest, that Congress exceeded its authority simply by regulating pollutant discharges in pursuit of ends unrelated to navigation.

2. Congress's power to regulate the channels of commerce "carries with it the authority to regulate nonnavigable waters when that regulation is necessary to achieve Congressional goals in protecting navigable waters." *Deaton*, 332 F.3d at 707; see, *e.g.*, *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 525-526 (1941) (Congress may authorize flood control

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effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." 33 U.S.C. 1344(c).

The statutory provisions described in the preceding paragraph do not suggest that the decision whether (or on what conditions) to grant a CWA permit should be based solely on the anticipated ultimate effects of the proposed discharge on traditional navigable waters. Rather, the statutory criteria that govern permitting decisions under the CWA literally encompass the projected effects of a proposed discharge on nonnavigable tributaries themselves. Thus, while under *SWANCC* the CWA's coverage is generally limited to waters having a significant nexus to traditional navigable waters, the Act appears to contemplate a permitting regime under which the purity of nonnavigable tributaries (once they are found to be covered) will be treated as an end in itself, rather than simply as a means of protecting the traditional navigable waters downstream. This case, however, turns on the scope of the federal agencies' regulatory jurisdiction, not on their exercise of that jurisdiction, because petitioners discharged pollutants into their wetlands without seeking a CWA permit. The case therefore does not present any question concerning the range of factors that the responsible agency may or should consider in acting on a permit application.

projects on intrastate nonnavigable tributaries in order to prevent flooding in traditional navigable rivers). Indeed, the authority to regulate tributaries as well as the traditional navigable waters themselves is consistent even with the 19th Century Congress's conception of its Commerce Clause power. See note 12, *supra*. As the Sixth Circuit explained shortly after the enactment of the 1972 FWPCA Amendments:

> It would, of course, make a mockery of [Congress's] powers if its authority to control pollution was limited to the bed of the navigable stream itself. The tributaries which join to form the river could then be used as open sewers as far as federal regulation was concerned. The navigable part of the river could become a mere conduit for upstream waste.

United States v. *Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1326 (1974).

That the first *Lopez* category may encompass regulation of conduct occurring outside the channels of commerce in order to facilitate regulation of the channels is confirmed by this Court's recent decision in *Pierce County* v. *Guillen*, 537 U.S. 129 (2003). In *Guillen*, the Court upheld two federal statutory provisions that established a privilege against disclosure of information compiled or collected by States in their performance of certain road safety studies that were themselves mandated by federal law. See *id.* at 146-147. The Court explained:

> Congress could reasonably believe that adopting [the privilege] would result in more diligent efforts to collect the relevant information, more candid discussions of hazardous locations, better informed decisionmaking, and, ultimately, greater safety on

> our Nation's roads. Consequently, both [statutory provisions] can be viewed as legislation aimed at improving safety in the channels of commerce and increasing protection for the instrumentalities of interstate commerce. As such, they fall within Congress' Commerce Clause power.

Id. at 147.

The federal statutory provisions at issue in *Guillen* did not directly regulate the "channels of commerce" themselves, but rather addressed the attempted acquisition by private parties of information held in state governmental files. See 537 U.S. at 136-139. The Court's analysis in *Guillen* thus confirms that the first category of permissible Commerce Clause legislation identified in *Lopez*—*i.e.*, regulation of the "channels of commerce"—encompasses regulation of conduct that occurs outside those "channels" but that can reasonably be expected to have an ultimate impact on conditions within them.[22]

The Court in *Riverside Bayview* squarely held that the Corps and EPA may assert regulatory authority over at least *some* wetlands and other waters that do not themselves meet traditional tests of navigability, based on their connections to traditional navigable waters. See 474 U.S. at 133. And while *Riverside Bayview* did not involve a Commerce Clause challenge to the Corps' regulation, petitioners do not question Congress's constitutional authority to regulate pollutant discharges into

[22] Moreover, to whatever extent the authority to regulate the channels of interstate commerce does not include the authority to perfect those regulations by regulating conduct outside the channels, the Necessary and Proper Clause would presumably fill that gap. See *Gonzales* v. *Raich*, 125 S. Ct. 2195, 2216-2218 (2005) (Scalia, J., concurring in the judgment).

wetlands that directly abut traditional navigable waters; indeed, petitioners urged the court of appeals to adopt a "direct abutment" jurisdictional rule as a matter of statutory interpretation. See Pet. 6-7; Pet. App. A20-A21. Once it is accepted that Congress can protect intrastate waters (including wetlands) that do not themselves satisfy traditional standards of navigability, based on the danger that discharges into those waters may impair the quality of traditional navigable waters downstream, there is no principled reason to conclude that the scope of Congress's constitutional authority turns on whether the link to traditional navigable waters in a particular case is "direct" or "indirect."

B. Application Of The CWA To Wetlands Adjacent To Tributaries Is Plainly A Permissible Exercise Of Congressional Power To Regulate A Class Of Activities That Substantially Affect Interstate Commerce

1. Petitioners contend (Br. 32) that an insufficient nexus to interstate commerce exists in this case because the government neither alleged nor proved "that the discharges at [petitioners'] sites actually reached a traditional navigable waterway." The absence of case-specific proof of harm, however, is simply beside the point. Under established constitutional principles, "Congress * * * may decide that the aggregate effect of all of the individual instances of discharge, like the discharge[s] by the [petitioners], justifies regulating each of them." *Deaton*, 332 F.3d at 707; see *United States* v. *Gerke Excavating, Inc.*, 412 F.3d 804, 806 (7th Cir. 2005), petition for cert. pending, No. 05-623 (filed Nov. 11, 2005). Such legislation will be sustained so long as the reviewing court finds that a "rational basis exist[s] for concluding

that a regulated activity" substantially affects interstate commerce. *Lopez*, 514 U.S. at 557.[23]

In *Gonzales* v. *Raich*, 125 S. Ct. 2195 (2005), the Court considered and rejected the plaintiffs' claim that the federal "prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress' authority under the Commerce Clause." *Id.* at 2204-2205. The Court held that "Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the" applicable federal scheme. *Id.* at 2209. The

[23] In determining whether particular Acts of Congress reflect valid exercises of the power to regulate "classes of activities" that "substantially affect" interstate commerce, this Court has attached significant weight to whether the regulated conduct was "economic" in character. See *Lopez*, 514 U.S. at 561; *Morrison*, 529 U.S. at 610-611; *Raich*, 125 S. Ct. at 2210-2211. Petitioners' own filling of the wetlands on their properties clearly constituted "economic" activity, since the filling was intended to make the areas suitable for large-scale development. See, *e.g.*, Pet. App. B15 (noting that Mr. Rapanos had inquired into the possibility of building a shopping center at the Salzburg site); cf. *Salinas* v. *United States*, 522 U.S. 52, 60-61 (1997) (holding that federal statute criminalizing acceptance of bribes by state officials employed by agencies receiving federal funds is constitutional as applied to conduct that threatens the integrity of the relevant federal program, and affirming the defendant's conviction on that basis, without addressing the constitutionality of other potential applications of the statute). And while dredged or fill material may occasionally be discharged into "the waters of the United States" for non-economic reasons, the commercial character of petitioners' own conduct is typical of the vast majority of such discharges. See *SWANCC*, 531 U.S. at 193 (Stevens, J., dissenting) ("There can be no doubt that, unlike the class of activities Congress was attempting to regulate in [*Morrison* and *Lopez*], * * * the discharge of fill material into the Nation's waters is almost always undertaken for economic reasons.").

Court found the plaintiffs' reliance on *Lopez* and *Morrison* to be misplaced, observing that the Commerce Clause challenges in those cases were "markedly different" from the plaintiffs' as-applied attack on the federal marijuana laws. *Ibid.* The Court explained that the plaintiffs in *Raich* had

> ask[ed] [the Court] to excise individual applications of a concededly valid statutory scheme. In contrast, in both *Lopez* and *Morrison*, the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety. This distinction is pivotal for we have often reiterated that where the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class.

Ibid. (brackets and internal quotation marks omitted).

To the extent that petitioners attack the constitutionality of the CWA (see note 20, *supra*), their claim is far more analogous to the as-applied challenge that the Court rejected in *Raich* than to the facial challenges that were sustained in *Lopez* and *Morrison*. Petitioners do not question the general authority of Congress to regulate pollutant discharges into "the waters of the United States." Rather, they argue only that the CWA is unconstitutional (or at least raises substantial constitutional concerns) as applied to wetlands adjacent to tributaries. In light of the potential for the discharge of pollutants into such wetlands to degrade the quality of the adjacent tributaries and the traditional navigable waters themselves, Congress could reasonably conclude that exclusion of such wetlands from the CWA's cover-

age "would leave a gaping hole" (*Raich*, 125 S. Ct. at 2209) in the statutory scheme.[24]

2. Petitioners' demand for case-specific proof of harm to a navigable waterway, as a constitutional prerequisite to the Corps' assertion of regulatory authority under the CWA, is also inconsistent with this Court's analysis in *Riverside Bayview*. The Court in that case noted the possibility that the term "waters of the United States," as defined in the Corps' regulations, "may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways." 474 U.S. at 135 n.9. The Court found that prospect to be "of little moment," however, because the Corps in such circumstances may allow development to go forward simply by issuing a permit. *Ibid.*

Although the Court in *Riverside Bayview* was not confronted with a Commerce Clause challenge to the Corps' regulation, that aspect of its analysis sheds sig-

[24] Quite apart from their potential effect on traditional navigable waters downstream, moreover, pollutant discharges into nonnavigable tributaries and their adjacent wetlands can be expected to have substantial aggregate effects on interstate commerce. Even before it reaches traditional navigable waters, the water flowing within tributaries has potentially significant economic value for such uses as "public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes." 33 U.S.C. 1313(c)(2)(A) (establishing criteria for state water quality standards); see 33 U.S.C. 1344(c) (similar criteria for discharge permits under Section 404). Pollution of the tributaries or adjacent wetlands will often diminish or destroy that value. Although the Court in *SWANCC* viewed the CWA as focused on pollutant discharges that potentially implicate the distinct federal interest in the protection of traditional navigable waters, the additional economic impacts of the covered discharges are properly considered in the constitutional analysis of whether a substantial effect on interstate commerce may reasonably be thought to exist.

nificant light on the constitutional question presented here. Congress's authority to prevent pollutant discharges that will actually degrade the quality of traditional navigable waters necessarily includes the power to devise reasonable procedures for determining, before a particular discharge occurs, whether the discharge is likely to have that effect. The Section 404 permitting process serves in part to assist the Corps in making that determination; it allows the Corps to examine actions with potential environmental consequences and to impose permit conditions that ameliorate any actual effect.[25] The regulatory regime would be severely undermined if the Corps were required to prove a likelihood of harm to traditional navigable waters in each case before the Section 404 requirements could be triggered.

3. Petitioners contend (Br. 28-31) that, if the CWA is construed to cover the discharges at issue here, the Act would intrude unduly upon state authority over water resources and land-use regulation. That contention lacks merit. Even with respect to waters encompassed by the regulatory definition of "waters of the United States," the only activity that requires a CWA permit is the discharge of a pollutant (including dredged spoil, sand, and rock) from a point source into those waters.[26]

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[25] As noted (see note 21, *supra*), the Corps' authority to impose permit conditions is not strictly limited to conditions that ameliorate a project's effects on traditional navigable waters. This case, however, involves only the question of the Corps' jurisdiction, not a challenge to the conditions imposed on a particular permit.

[26] Moreover, once the Corps or EPA has issued its final decision on a CWA permit application, that decision is subject to judicial review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq*. Thus, even with respect to development activities that involve pollutant discharges into "the waters of the United States," petitioners' suggestion

Other functions and activities relating to land use remain in the hands of the local authorities. In addition, the CWA provides States the opportunity to assume responsibility for the administration of the Section 402 and 404 permitting programs. See pp. 5, 23, *supra*. Because the State of Michigan has an approved permitting program covering the waters at issue here, state rather than federal regulators would have initially acted on any permit application that petitioners submitted. Petitioners' claim of unconstitutional intrusion on state regulatory authority is therefore particularly unavailing under the circumstances of this case.

In any event, the federal government possesses longstanding authority to protect the quality of traditional navigable waters by regulating upstream pollutant discharges. See pp. 41-42, *supra*. As cases like *Riverside Bayview* make clear, the exercise of that authority may as a practical matter affect activities (*e.g.*, residential housing development, see *Riverside Bayview*, 474 U.S. at 124) that are also subject to extensive state regulation. See *Deaton*, 332 F.3d at 707 ("The power to protect navigable waters is part of the commerce power given to Congress by the Constitution, and this power exists alongside the states' traditional police powers."). So long as the assertion of federal regulatory authority in this case was an otherwise permissible use of the power to protect traditional navigable waters, the requirement that petitioners seek a CWA permit for their fill activities does not impermissibly encroach on state and local land-use planning. See *id*. at 707-708.

(Br. 29) that the CWA gives federal regulators "actual veto power" over those projects is considerably overstated.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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