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# PRACTICING ENVIRONMENTAL LAW

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## CHAPTER 1

# INTRODUCTION

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[Insert on the bottom of page 21, before “This list of tools . . .”]

### Climate Policy Tools

Climate policy illustrates the diversity of legal tools that can be used to address environmental problems. Perhaps because the climate crisis poses such a broad and complex set of technical, economic, and political challenges, virtually every type of legal tool discussed above has been proposed or tried. Some citizens and local and state governments have filed tort suits against major greenhouse gas sources or the federal government, attempting to compel them to reduce emissions or pay damages for the harm caused by emissions. *See, e.g., infra* pages 83–85. Federal agencies provide information about climate impacts in their environmental assessments and environmental impact statements prepared pursuant to the National Environmental Policy Act. *See, e.g., infra* pages 723–34. Under the Clean Air Act, the U.S. Environmental Protection Agency imposes regulatory limits on greenhouse gas emissions from new major sources of greenhouse gas emissions and new motor vehicles. *See infra* pages 261–63. Broad legislation to create a tax on carbon emissions or a cap-and-trade tradeable permit system has been proposed, although none has been enacted at the federal level. *See, e.g.,* American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009).

The Biden administration came into office in 2021 with ambitious climate goals and a sense of urgency but without the votes in Congress for legislation that would regulate carbon emissions. With few other options to make significant progress, the administration adopted a series of executive branch initiatives to address climate across the government, including, for example, considering climate as an element of U.S. foreign policy and incorporating clean energy strategies into government procurement. *See* Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7619 (Jan. 27, 2021).

On the legislative front, the administration focused on using government funding to subsidize and incentivize a clean energy transition. Most significantly, the Inflation Reduction Act of 2022 includes items like tax credits for renewable energy and electric vehicles; grants, loans, and tax credits for clean manufacturing technologies; a green energy investment fund; environmental justice grants; and rebates

for efficient consumer appliances. *See* Inflation Reduction Act of 2022, Pub. L. No. 117–169, 136 Stat. 1818 (2022). The Act also imposes fees on methane pollution, a significant source of greenhouse gas emissions. *See id.* § 60113, 136 Stat. at 2073–76 (codified at 42 U.S.C. § 7436). Some analyses have found that the Act may reduce emissions by as much as forty-one percent below 2005 levels, which would make the legislation the most impactful climate policy yet adopted in the United States, by a significant margin. *See, e.g.*, MEGAN MAHAJAN ET AL., MODELING THE INFLATION REDUCTION ACT USING THE ENERGY POLICY SIMULATOR (Aug. 2022).

Despite the impacts they may have, most policy experts believe that government funding and tax incentives for specific activities are not the most effective or efficient tool for reducing carbon emissions, at least in theory. Comprehensive emissions regulations or a carbon tax would be better tools. But industries would rather be subsidized than regulated or taxed, so government funding and tax incentives may be more politically viable than prescriptive regulation, especially in a closely divided, highly partisan political environment. In that sense, the Inflation Reduction Act illustrates how lawmaking sometimes must retreat from theoretical ideals and pragmatically adapt to circumstances, including political realities, to make any progress.

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## CHAPTER 2

# BACKGROUND PRINCIPLES

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[Insert for page 106, before Problem 2.4]

### Recent Developments

Since the publication of the second edition of this casebook, critiques of both *Chevron* and *Auer* deference have led to changes in the doctrines governing judicial review of agencies' legal interpretations. These changes are still unfolding, and some of the case law remains in flux, but one major change now is settled. In *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2273 (2024), the Court unequivocally declared that "*Chevron* is overruled" and that courts should not give controlling weight to agency statutory interpretations but instead should exercise their own judgment in interpreting the law.

A key question now is what replaces *Chevron*. In *Loper Bright*, the Court repeatedly and approvingly cited *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which suggests that *Skidmore* deference lives on. *Skidmore* deference gives agency interpretations "the power to persuade," which might be somewhat like the authority that courts give to non-binding decisions from other jurisdictions. But *Skidmore* deference has never been clearly defined and appears quite flexible, and applications of *Skidmore* deference therefore may run the gamut from moderate deference to essentially no deference at all.

A second question is what happens to the thousands of decisions—including many environmental law decisions, some of which appear in this book—that followed *Chevron*. The answer, at least initially, appears to be that they are unaffected. If those decisions were decided at *Chevron* step one, *Loper Bright* should make no difference; the clear statutory language still should govern. And the *Loper Bright* court specifically said that "we do not call into question prior cases that relied on the *Chevron* framework. The holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology."

A third question is what this means for deference to agencies' interpretations of their own regulations. The *Loper Bright* Court did not reject *Auer* deference or overturn *Kisor v. Wilkie*, the most recent decision to uphold *Auer* deference. But the reasoning of *Loper Bright*, which repeatedly assails judicial deference to agency legal interpretations,

appears difficult to reconcile with the reasoning of *Kisor* (even if Justice Roberts did join the majority for both cases), and the composition of the Court has changed. We think, and we suspect most administrative law professors would agree, that the demise of *Kisor* and *Auer* is only a matter of time.

A final important question is whether these changes will really affect the resolutions of future challenges to agency decisions. Among administrative law scholars and administrative lawyers, this has been a matter of furious debate. Some argue that the shift is inconsequential; they argue that *Chevron* doctrine just offered an after-the-fact rationalization for decisions courts would have reached anyway. If that was true, then overruling *Chevron* just means that the same outcomes will be justified by somewhat different phrasing. Other scholars and attorneys argue that *Chevron* did sometimes make a difference and that the change therefore is significant. And some think that *Loper Bright* is significant partly because it is part of a larger cultural shift in the federal courts, with anti-agency and anti-regulatory ideologies increasingly driving decisions. That cultural shift is likely to influence outcomes, the argument goes, whether or not the specific doctrinal rules matter.

A related development—the rise of major questions doctrine—seems to be part of that increasingly anti-agency orientation. In two high-profile cases—*National Federation of Independent Business v. Department of Labor*, 595 U.S. 661 (2022), which addressed the Occupational Safety and Health Administration’s rules on COVID-19 vaccination and protective equipment in workplaces, and *West Virginia v. EPA*, 597 U.S. 697 (2022), which addressed EPA’s authority to respond to use section 111(d) of the Clean Air Act to respond to climate change—the Court offered its clearest articulations to date of major questions doctrine:

[I]n certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us “reluctant to read into ambiguous statutory text” the delegation claimed to be lurking there. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to “clear congressional authorization” for the power it claims.

*West Virginia*, 597 U.S. at 723. The Court has provided little guidance about what counts as an “extraordinary case” that would trigger the major questions doctrine, although it has referred several times to matters of “vast economic and political significance.” *See, e.g., id.* at 716 (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)). Where those conditions exist, the doctrine holds, a reviewing court should not allow novel agency action unless that action derives from a clear textual authorization. Ambiguity, in other words, does not favor the

agency, but actually counts against the agency when the agency proposes to do something bold and new.

This doctrinal move has its critics, including within the Court. In her dissent in *West Virginia*, Justice Kagan criticized the doctrine as a “get-out-of-text-free card[],” which the Court would be unlikely to apply in situations not involving “the bogeyman of environmental regulation.” *Id.* at 2630. Thus, in effect, she is alleging that the doctrine functions more to implement the policy preferences of the conservative majority than it does as a neutral tool of statutory interpretation. Justice Kagan’s dissent also noted that the basic presumption underlying the doctrine—that Congress does not want agencies to use broad statutory mandates to respond to new challenges—is at best undemonstrated and in some circumstances probably wrong. *Id.* at 756. Those critiques may yet shape the development of the doctrine, and by the time you are reading this, courts may have provided more clarity. But for now, the only clear lesson seems to be that major questions doctrine is here to stay, in some form, and that it will pose challenges for some new regulatory initiatives, especially those that differ from prior agency regulations.

Two other recent administrative-law cases also bear mentioning here. First, in *Securities and Exchange Commission v. Jarkesy*, 144 S. Ct. 2117 (2024), the Court held that an administrative enforcement proceeding against George Jarkesy, Jr., who the agency accused of securities fraud, could not proceed without violating the Seventh Amendment right to jury trials in suits at common law. The implications of the case for environmental enforcement are not entirely clear and will likely be resolved on a case-by-case basis. Nevertheless, it seems likely that some defendants will raise new constitutional objections to administrative enforcement proceedings, while others may prefer administrative enforcement to the cost and time associated with jury trials.

Second, in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, 144 S. Ct. 2440 (2024), the Supreme Court ruled that the Administrative Procedure Act’s statute of limitations begins to run when a party is harmed by an alleged APA violation, not when the agency action is finalized. The case does not create *carte blanche* to challenge all old environmental decisions; some environmental statutes have their own statutes of limitation. But where the APA’s statute of limitations does govern, some parties are likely to raise new challenges to old regulations—particularly if they anticipate that the federal courts will be more sympathetic to those challenges than they might have been in the past.

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## CHAPTER 3

# AIR POLLUTION

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[Insert for page 275, to replace the paragraph that begins “Environmental groups and states that supported the Clean Power Plan . . .”]

### **Clean Power Plan and Affordable Clean Energy Rule**

Environmental groups and states that supported the Clean Power Plan sued EPA to challenge the Affordable Clean Energy Rule. Opponents of the Clean Power Plan such as the State of West Virginia intervened to defend the Affordable Clean Energy Rule. In 2021, the D.C. Circuit ruled that the Affordable Clean Energy Rule violated the Clean Air Act, rejecting EPA’s theory that the Act precludes a “beyond the fenceline” approach to regulation under section 111(d). West Virginia and other supporters of the Affordable Clean Energy Rule petitioned for certiorari in the Supreme Court. The Supreme Court granted certiorari and issued a decision in June 2022 that reversed the D.C. Circuit and held that the Clean Power Plan, not the Affordable Clean Energy Rule, violated the Clean Air Act.

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### **West Virginia v. EPA**

142 S. Ct. 2587 (2022)

■ CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Clean Air Act authorizes the Environmental Protection Agency to regulate power plants by setting a “standard of performance” for their emission of certain pollutants into the air. 84 Stat. 1683, 42 U. S. C. § 7411(a)(1). That standard may be different for new and existing plants, but in each case it must reflect the “best system of emission reduction” that the Agency has determined to be “adequately demonstrated” for the particular category. §§ 7411(a)(1), (b)(1), (d). For existing plants, the States then implement that requirement by issuing rules restricting emissions from sources within their borders.

Since passage of the Act 50 years ago, EPA has exercised this authority by setting performance standards based on measures that would reduce

pollution by causing plants to operate more cleanly. In 2015, however, EPA issued a new rule concluding that the “best system of emission reduction” for existing coal-fired power plants included a requirement that such facilities reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources.

The question before us is whether this broader conception of EPA’s authority is within the power granted to it by the Clean Air Act. \* \* \*

### III

#### A

In devising emissions limits for power plants, EPA first “determines” the “best system of emission reduction” that—taking into account cost, health, and other factors—it finds “has been adequately demonstrated.” 42 U. S. C. § 7411(a)(1). The Agency then quantifies “the degree of emission limitation achievable” if that best system were applied to the covered source. *Ibid.*; see also 80 Fed. Reg. 64,719. The BSER, therefore, “is the central determination that the EPA must make in formulating [its emission] guidelines” under Section 111. *Id.*, at 64,723. The issue here is whether restructuring the Nation’s overall mix of electricity generation, to transition from 38% coal to 27% coal by 2030, can be the “best system of emission reduction” within the meaning of Section 111.

“It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). Where the statute at issue is one that confers authority upon an administrative agency, that inquiry must be “shaped, at least in some measure, by the nature of the question presented”—whether Congress in fact meant to confer the power the agency has asserted. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). In the ordinary case, that context has no great effect on the appropriate analysis. Nonetheless, our precedent teaches that there are “extraordinary cases” that call for a different approach—cases in which the “history and the breadth of the authority that [the agency] has asserted,” and the “economic and political significance” of that assertion, provide a “reason to hesitate before concluding that Congress” meant to confer such authority. *Id.*, at 159–160.

Such cases have arisen from all corners of the administrative state. In *Brown & Williamson*, for instance, the Food and Drug Administration claimed that its authority over “drugs” and “devices” included the power to regulate, and even ban, tobacco products. *Id.*, at 126–127. We rejected that “expansive construction of the statute,” concluding that “Congress could not have intended to delegate” such a sweeping and consequential authority “in so cryptic a fashion.” *Id.*, at 160. In *Alabama Assn. of Realtors v. Department of Health and Human Servs.*, 594 U. S. 758, 761



(2021) (per curiam), we concluded that the Centers for Disease Control and Prevention could not, under its authority to adopt measures “necessary to prevent the ... spread of” disease, institute a nationwide eviction moratorium in response to the COVID–19 pandemic. We found the statute’s language a “wafer-thin reed” on which to rest such a measure, given “the sheer scope of the CDC’s claimed authority,” its “unprecedented” nature, and the fact that Congress had failed to extend the moratorium after previously having done so. *Id.*, at 763 – 765.

Our decision in *Utility Air* addressed another question regarding EPA’s authority—namely, whether EPA could construe the term “air pollutant,” in a specific provision of the Clean Air Act, to cover greenhouse gases. 573 U.S. at 310. Despite its textual plausibility, we noted that the Agency’s interpretation would have given it permitting authority over millions of small sources, such as hotels and office buildings, that had never before been subject to such requirements. *Id.*, at 310, 324. We declined to uphold EPA’s claim of “unheralded” regulatory power over “a significant portion of the American economy.” *Id.*, at 324. In *Gonzales v. Oregon*, 546 U.S. 243 (2006), we confronted the Attorney General’s assertion that he could rescind the license of any physician who prescribed a controlled substance for assisted suicide, even in a State where such action was legal. The Attorney General argued that this came within his statutory power to revoke licenses where he found them “inconsistent with the public interest,” 21 U. S. C. § 823(f). We considered the “idea that Congress gave [him] such broad and unusual authority through an implicit delegation ... not sustainable.” 546 U.S. at 267. Similar considerations informed our recent decision invalidating the Occupational Safety and Health Administration’s mandate that “84 million Americans ... either obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense.” *National Federation of Independent Business v. Occupational Safety and Health Administration*, 595 U. S. 109, 112 (2022) (per curiam). We found it “telling that OSHA, in its half century of existence,” had never relied on its authority to regulate occupational hazards to impose such a remarkable measure. *Id.*, at 119.

All of these regulatory assertions had a colorable textual basis. And yet, in each case, given the various circumstances, “common sense as to the manner in which Congress [would have been] likely to delegate” such power to the agency at issue, *Brown & Williamson*, 529 U.S. at 133, made it very unlikely that Congress had actually done so. Extraordinary grants of regulatory authority are rarely accomplished through “modest words,” “vague terms,” or “subtle device[s].” *Whitman*, 531 U.S. at 468. Nor does Congress typically use oblique or elliptical language to empower an agency to make a “radical or fundamental change” to a statutory scheme. *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*,

512 U.S. 218, 229 (1994). Agencies have only those powers given to them by Congress, and “enabling legislation” is generally not an “open book to which the agency [may] add pages and change the plot line.” E. Gellhorn & P. Verkuil, *Controlling Chevron-Based Delegations*, 20 CARDOZO L. REV. 989, 1011 (1999). We presume that “Congress intends to make major policy decisions itself, not leave those decisions to agencies.” *United States Telecom Assn. v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us “reluctant to read into ambiguous statutory text” the delegation claimed to be lurking there. *Utility Air*, 573 U.S. at 324. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to “clear congressional authorization” for the power it claims. *Ibid.*

The dissent criticizes us for “announc[ing] the arrival” of this major questions doctrine, and argues that each of the decisions just cited simply followed our “ordinary method” of “normal statutory interpretation.” But in what the dissent calls the “key case” in this area, *Brown & Williamson*, the Court could not have been clearer: “In extraordinary cases ... there may be reason to hesitate” before accepting a reading of a statute that would, under more “ordinary” circumstances, be upheld. 529 U.S. at 159. Or, as we put it more recently, we “typically greet” assertions of “extravagant statutory power over the national economy” with “skepticism.” *Utility Air*, 573 U.S. at 324. The dissent attempts to fit the analysis in these cases within routine statutory interpretation, but the bottom line—a requirement of “clear congressional authorization,” *ibid.*—confirms that the approach under the major questions doctrine is distinct.

As for the major questions doctrine “label[ ],” it took hold because it refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted. Scholars and jurists have recognized the common threads between those decisions. So have we. See *Utility Air*, 573 U.S. at 324 (citing *Brown & Williamson* and *MCI*); *King v. Burwell*, 576 U.S. 473, 486 (2015) (citing *Utility Air*, *Brown & Williamson*, and *Gonzales*).

## B

Under our precedents, this is a major questions case. In arguing that Section 111(d) empowers it to substantially restructure the American energy market, EPA “claim[ed] to discover in a long-extant statute an unheralded power” representing a “transformative expansion in [its]

regulatory authority.” *Utility Air*, 573 U.S. at 324. It located that newfound power in the vague language of an “ancillary provision[ ]” of the Act, *Whitman*, 531 U.S. at 468, one that was designed to function as a gap filler and had rarely been used in the preceding decades. And the Agency’s discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself. *Brown & Williamson*, 529 U.S. at 159–160; *Gonzales*, 546 U.S. at 267–268; *Alabama Assn.*, 594 U.S., at 760, 766. Given these circumstances, there is every reason to “hesitate before concluding that Congress” meant to confer on EPA the authority it claims under Section 111(d). *Brown & Williamson*, 529 U.S. at 159–160.

Prior to 2015, EPA had always set emissions limits under Section 111 based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly. *See, e.g.*, 41 Fed. Reg. 48,706 (requiring “degree of control achievable through the application of fiber mist eliminators”). It had never devised a cap by looking to a “system” that would reduce pollution simply by “shifting” polluting activity “from dirtier to cleaner sources.” 80 Fed. Reg. 64,726; *see id.*, at 64,738 (“[O]ur traditional interpretation ... has allowed regulated entities to produce as much of a particular good as they desire provided that they do so through an appropriately clean (or low-emitting) process.”). And as Justice Frankfurter has noted, “just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.” *FTC v. Bunte Brothers, Inc.*, 312 U.S. 349, 352 (1941).

The Government quibbles with this description of the history of Section 111(d), pointing to one rule that it says relied upon a cap-and-trade mechanism to reduce emissions. *See* 70 Fed. Reg. 28,616 (2005) (Mercury Rule). The legality of that choice was controversial at the time and was never addressed by a court. *See New Jersey v. EPA*, 517 F.3d 574 (CA DC 2008) (vacating on other grounds). Even assuming the Rule was valid, though, it still does not help the Government. In that regulation, EPA set the actual “emission cap”—i.e., the limit on emissions that sources would be required to meet—“based on the level of [mercury] emissions reductions that w[ould] be achievable by” the use of “technologies [that could be] installed and operational on a nationwide basis” in the relevant timeframe—namely, wet scrubbers. 70 Fed. Reg. 28,620–28,621. In other words, EPA set the cap based on the application of particular controls, and regulated sources could have complied by installing them. By contrast, and by design, there is no control a coal plant operator can deploy to attain the emissions limits established by the Clean Power Plan. The Mercury Rule, therefore, is no precedent for the Clean Power

Plan. To the contrary, it was one more entry in an unbroken list of prior Section 111 rules that devised the enforceable emissions limit by determining the best control mechanisms available for the source.<sup>1</sup>

This consistent understanding of “system[s] of emission reduction” tracked the seemingly universal view, as stated by EPA in its inaugural Section 111(d) rulemaking, that “Congress intended a technology-based approach” to regulation in that Section. 40 Fed. Reg. 53,343 (1975); *see id.*, at 53,341 (“degree of control to be reflected in EPA’s emission guidelines” will be based on “application of best adequately demonstrated control technology”). A technology-based standard, recall, is one that focuses on improving the emissions performance of individual sources. EPA “commonly referred to” the “level of control” required as a “best demonstrated technology (BDT)” standard, 73 Fed. Reg. 34,073, and consistently applied it as such. *E.g.*, 61 Fed. Reg. 9907 (declaring “BDT” to be “a well-designed and well-operated gas collection system and ... a control device capable of reducing [harmful gases] in the collected gas by 98 weight-percent.”).

Indeed, EPA nodded to this history in the Clean Power Plan itself, describing the sort of “systems of emission reduction” it had always before selected—“efficiency improvements, fuel-switching,” and “add-on controls”—as “more traditional air pollution control measures.” 80 Fed. Reg. 64,784. The Agency noted that it had “considered” such measures as potential systems of emission reduction for carbon dioxide, *ibid.*, including a measure it ultimately adopted as a “component” of the BSER, namely, heat rate improvements. *Id.*, at 64,727.

But, the Agency explained, in order to “control[ ] CO<sub>2</sub> from affected [plants] at levels ... necessary to mitigate the dangers presented by climate change,” it could not base the emissions limit on “measures that improve efficiency at the power plants.” *Id.*, at 64,728. “The quantity of emissions reductions resulting from the application of these measures” would have been “too small.” *Id.*, at 64,727. Instead, to attain the necessary “critical CO<sub>2</sub> reductions,” EPA adopted what it called a “broader, forward-thinking approach to the design” of Section 111 regulations. *Id.*, at 64,703. Rather than focus on improving the performance of individual sources, it would “improve the overall power system by lowering the carbon intensity of power generation.” *Ibid.* (emphasis added). And it would do that by forcing a shift throughout the power grid from one type of energy source to another. In the words of the then-EPA Administrator, the rule was “not about pollution control” so much as it was “an investment opportunity” for States, especially “investments in renewables and clean energy.” Oversight Hearing on EPA’s Proposed Carbon Pollution Standards for Existing Power Plants before the Senate Committee on Environment and Public Works, 113th Cong., 2d Sess., p. 33 (2014).

This view of EPA's authority was not only unprecedented; it also effected a "fundamental revision of the statute, changing it from [one sort of] scheme of ... regulation" into an entirely different kind. *MCI*, 512 U.S. at 231. Under the Agency's prior view of Section 111, its role was limited to ensuring the efficient pollution performance of each individual regulated source. Under that paradigm, if a source was already operating at that level, there was nothing more for EPA to do. Under its newly "discover[ed]" authority, *Utility Air*, 573 U.S. at 324, however, EPA can demand much greater reductions in emissions based on a very different kind of policy judgment: that it would be "best" if coal made up a much smaller share of national electricity generation. And on this view of EPA's authority, it could go further, perhaps forcing coal plants to "shift" away virtually all of their generation—i.e., to cease making power altogether. \* \* \*

### C

Given these circumstances, our precedent counsels skepticism toward EPA's claim that Section 111 empowers it to devise carbon emissions caps based on a generation shifting approach. To overcome that skepticism, the Government must—under the major questions doctrine—point to "clear congressional authorization" to regulate in that manner. *Utility Air*, 573 U.S. at 324.

All the Government can offer, however, is the Agency's authority to establish emissions caps at a level reflecting "the application of the best system of emission reduction ... adequately demonstrated." 42 U. S. C. § 7411(a)(1). As a matter of "definitional possibilities," *FCC v. AT&T Inc.*, 562 U.S. 397, 407 (2011), generation shifting can be described as a "system"—"an aggregation or assemblage of objects united by some form of regular interaction"—capable of reducing emissions. But of course almost anything could constitute such a "system"; shorn of all context, the word is an empty vessel. Such a vague statutory grant is not close to the sort of clear authorization required by our precedents. \* \* \*

Capping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible "solution to the crisis of the day." *New York v. United States*, 505 U.S. 144, 187 (1992). But it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body. The judgment of the Court of Appeals for the District of Columbia Circuit is reversed, and the cases are remanded for further proceedings consistent with this opinion.

*It is so ordered.*

[Eds.: Justice Gorsuch’s concurring opinion, which explained his view of the major questions doctrine, is omitted.]

Justice KAGAN, with whom Justice BREYER and Justice SOTOMAYOR join, dissenting.

Today, the Court strips the Environmental Protection Agency (EPA) of the power Congress gave it to respond to “the most pressing environmental challenge of our time.” *Massachusetts v. EPA*, 549 U.S. 497, 505 (2007).

Climate change’s causes and dangers are no longer subject to serious doubt. Modern science is “unequivocal that human influence”—in particular, the emission of greenhouse gases like carbon dioxide—“has warmed the atmosphere, ocean and land.” Intergovernmental Panel on Climate Change, Sixth Assessment Report, The Physical Science Basis: Headline Statements 1 (2021). The Earth is now warmer than at any time “in the history of modern civilization,” with the six warmest years on record all occurring in the last decade. U. S. Global Change Research Program, Fourth National Climate Assessment, Vol. I, p. 10 (2017). The rise in temperatures brings with it “increases in heat-related deaths,” “coastal inundation and erosion,” “more frequent and intense hurricanes, floods, and other extreme weather events,” “drought,” “destruction of ecosystems,” and “potentially significant disruptions of food production.” *American Elec. Power Co. v. Connecticut*, 564 U.S. 410, 417 (2011) (internal quotation marks omitted). If the current rate of emissions continues, children born this year could live to see parts of the Eastern seaboard swallowed by the ocean. Rising waters, scorching heat, and other severe weather conditions could force “mass migration events[,] political crises, civil unrest,” and “even state failure.” Dept. of Defense, Climate Risk Analysis 8 (2021). And by the end of this century, climate change could be the cause of “4.6 million excess yearly deaths.” See R. Bressler, The Mortality Cost of Carbon, 12 *Nature Communications* 4467, p. 5 (2021).

Congress charged EPA with addressing those potentially catastrophic harms, including through regulation of fossil-fuel-fired power plants. Section 111 of the Clean Air Act directs EPA to regulate stationary sources of any substance that “causes, or contributes significantly to, air pollution” and that “may reasonably be anticipated to endanger public health or welfare.” 42 U. S. C. § 7411(b)(1)(A). Carbon dioxide and other greenhouse gases fit that description. See *American Elec. Power*, 564 U.S. at 416–417; *Massachusetts*, 549 U.S. at 528–532. EPA thus serves as the Nation’s “primary regulator of greenhouse gas emissions.” *American Elec. Power*, 564 U.S. at 428. And among the most significant of the entities it regulates are fossil-fuel-fired (mainly coal- and natural-gas-fired) power plants. Today, those electricity-producing plants are

responsible for about one quarter of the Nation's greenhouse gas emissions. *See* EPA, Sources of Greenhouse Gas Emissions (Apr. 14, 2022), <https://www.epa.gov/ghgemissions/sources-greenhousegas-emissions>. Curbing that output is a necessary part of any effective approach for addressing climate change.

To carry out its Section 111 responsibility, EPA issued the Clean Power Plan in 2015. The premise of the Plan—which no one really disputes—was that operational improvements at the individual-plant level would either “lead to only small emission reductions” or would cost far more than a readily available regulatory alternative. 80 Fed. Reg. 64,727–64,728 (2015). That alternative—which fossil-fuel-fired plants were “already using to reduce their [carbon dioxide] emissions” in “a cost effective manner”—is called generation shifting. *Id.*, at 64,728, 64,769. As the Court explains, the term refers to ways of shifting electricity generation from higher emitting sources to lower emitting ones—more specifically, from coal-fired to natural-gas-fired sources, and from both to renewable sources like solar and wind. A power company (like the many supporting EPA here) might divert its own resources to a cleaner source, or might participate in a cap-and-trade system with other companies to achieve the same emissions-reduction goals.

This Court has obstructed EPA's effort from the beginning. Right after the Obama administration issued the Clean Power Plan, the Court stayed its implementation. That action was unprecedented: Never before had the Court stayed a regulation then under review in the lower courts. The effect of the Court's order, followed by the Trump administration's repeal of the rule, was that the Clean Power Plan never went into effect. The ensuing years, though, proved the Plan's moderation. Market forces alone caused the power industry to meet the Plan's nationwide emissions target—through exactly the kinds of generation shifting the Plan contemplated. *See* 84 Fed. Reg. 32,561–32,562 (2019). So by the time yet another President took office, the Plan had become, as a practical matter, obsolete. For that reason, the Biden administration announced that, instead of putting the Plan into effect, it would commence a new rulemaking. Yet this Court determined to pronounce on the legality of the old rule anyway. The Court may be right that doing so does not violate Article III mootness rules (which are notoriously strict). But the Court's docket is discretionary, and because no one is now subject to the Clean Power Plan's terms, there was no reason to reach out to decide this case. The Court today issues what is really an advisory opinion on the proper scope of the new rule EPA is considering. That new rule will be subject anyway to immediate, pre-enforcement judicial review. But this Court could not wait—even to see what the new rule says—to constrain EPA's efforts to address climate change.

The limits the majority now puts on EPA's authority fly in the face of the statute Congress wrote. The majority says it is simply "not plausible" that Congress enabled EPA to regulate power plants' emissions through generation shifting. But that is just what Congress did when it broadly authorized EPA in Section 111 to select the "best system of emission reduction" for power plants. § 7411(a)(1). The "best system" full stop—no ifs, ands, or buts of any kind relevant here. The parties do not dispute that generation shifting is indeed the "best system"—the most effective and efficient way to reduce power plants' carbon dioxide emissions. And no other provision in the Clean Air Act suggests that Congress meant to foreclose EPA from selecting that system; to the contrary, the Plan's regulatory approach fits hand-in-glove with the rest of the statute. The majority's decision rests on one claim alone: that generation shifting is just too new and too big a deal for Congress to have authorized it in Section 111's general terms. But that is wrong. A key reason Congress makes broad delegations like Section 111 is so an agency can respond, appropriately and commensurately, to new and big problems. Congress knows what it doesn't and can't know when it drafts a statute; and Congress therefore gives an expert agency the power to address issues—even significant ones—as and when they arise. That is what Congress did in enacting Section 111. The majority today overrides that legislative choice. In so doing, it deprives EPA of the power needed—and the power granted—to curb the emission of greenhouse gases. \* \* \*

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EPA's climate change initiatives, like the Clean Air Act generally, create a complex web of interrelated parts. Understanding that complex web is important to developing a strategy for this capstone problem. What is the relationship between Clean Air Act section 111(d) and Clean Air Act section 108(a), which authorizes EPA to list criteria air pollutants? How does the Supreme Court's disapproval of the Clean Power Plan and its reading of section 111(d) in *West Virginia v. EPA* affect the question whether EPA should list greenhouse gases as a criteria air pollutant under section 108(a)—as a matter of policy or as a legal matter? Is there also an effect in the other direction—if EPA were to list greenhouse gases as criteria air pollutants under section 108(a), might that affect regulation under section 111(d)? How do these questions factor into your overall analysis of whether the Organization for Environmental Litigation should petition EPA to list greenhouse gases as a criteria air pollutant?

Meanwhile, EPA has moved forward with new regulations for new and existing fossil fuel-fired power plants under section 111. See New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating



Units, Emission Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units, and Repeal of the Affordable Clean Energy Rule, 89 Fed. Reg. 39,798 (May 9, 2024). EPA based the new standards on technologies such as carbon capture and sequestration/storage, hydrogen co-firing, and natural gas co-firing. Some of these technologies, such as natural gas co-firing, are well established, while others, most notably carbon capture and sequestration, are still in development. Like most performance standards, different emissions limits apply to different categories of sources, which here are based on factors such as the type of source, whether the source is new or existing, the projected remaining life of the source, and the size of the source. The standards for new power plants apply immediately, whereas the standards for existing power plants will be phased in over time starting in 2030 to allow states to develop their plans and to allow the technologies to continue to mature. EPA projects that, in combination with tax credits from the Inflation Reduction Act and other policies, its new rule will help reduce emissions from electric power generation by seventy-five percent by 2035 and eighty-three percent by 2040. *See* EPA, Fact Sheet: Carbon Pollution Standards for Fossil Fuel-Fired Power Plants Final Rule Standards and Regulatory Impact Analysis.

Attorneys general from twenty-seven states and electric utility, mining and coal industry trade groups immediately sued EPA in May 2024 to challenge the new power plant rules. *See, e.g.,* West Virginia v. EPA, D.C. Cir. No. 24-1120. In mid-July 2024, the court of appeals denied the petitioners' motion to enjoin the new rule pending judicial review. The petitioners then filed an emergency appeal to the Supreme Court; that request is still pending as of August 1, 2024. *See* West Virginia v. EPA, U.S. No. 24A95. If Donald Trump is elected President in 2024, then his EPA will almost certainly move to repeal EPA's 2024 rule. But that would require a new rulemaking, which would take time and face litigation from states and groups supporting climate regulation.

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## CHAPTER 4

# WATER POLLUTION

[Insert to replace pages 292–315]

### IV. SCOPE OF THE CLEAN WATER ACT

#### A. WATERS OF THE UNITED STATES

The Clean Water Act, as its name suggests, addresses water quality; it does not purport to be a land use statute. But activities on land affect water quality. Indeed, two leading watershed scientists have asserted that “[t]he primary reason why so many rivers and streams are still being degraded today is poor land stewardship.” Margaret A. Palmer & J. David Allan, *Restoring Rivers*, 22 *ISSUES IN SCI. & TECH.* 40, 42 (2006). And the boundaries between land and water are not always clear. Wetlands, for example, may not have crisp edges, and many areas are wet during some parts of the year and dry during others. Streams and rivers change in size as precipitation waxes and wanes, and some streams flow only for a short period after a large precipitation event. The shifting boundaries and complex relationships between land and water raise a legal question: how much of the landscape does the Clean Water Act govern?

For practicing lawyers and property owners, this question is very important. If a wetland is subject to Clean Water Act jurisdiction, a developer cannot fill it without a permit, and obtaining that permit will require time and money. It may also require adjusting the project. If an intermittent stream is subject to Clean Water Act jurisdiction, industrial facilities cannot discharge effluent into it without a permit. That permit also could be difficult to obtain, and compliance might require treating or even eliminating the discharge. On the other hand, if these activities are not subject to Clean Water Act jurisdiction, and if no state law fills the void, water quality in the wetland or intermittent stream, and in downstream waterways, could suffer, harming the environment and the economic interests of downstream water users.<sup>1</sup> Businesses, regulators, consultants, and lawyers therefore invest a lot of effort into determining the geographic extent of Clean Water Act jurisdiction. Indeed, these efforts have led to one of environmental law’s most prominent and protracted controversies.

Water quality lawyers spend much of their time negotiating, writing, and interpreting the terms of permits. That may sound rote, and sometimes it is. But permits can be structured in innovative and creative ways, and they can also be quite complicated. That complexity and those opportunities for innovation can make a permit-focused legal practice much more interesting than one might initially suspect.

The problems and materials below explore the somewhat ambiguous and evolving law applicable to the boundary between land and water. These materials appear in a somewhat different format from the materials in other problems in the book. The materials will begin with a discussion problem, and the problem materials start with statutory language and end with *Sackett v. United States*, a recent United States Supreme Court decision. In between, we’ll provide you with a summary of the decades-

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<sup>1</sup> As you will see from the *County of Maui* case, which is excerpted later in this chapter, pouring effluent into an intermittent stream still would require Clean Water Act permitting if the act of pouring that effluent is the “functional equivalent” of discharging it directly into waters subject to Clean Water Act jurisdiction.

long saga leading up to *Sackett*. We're providing this history, rather than just the latest case, because it raises questions about alternative paths along which the law could have evolved. The history also may help you make sense of cases that appear in this book's chapters on environmental impact assessment and biodiversity protection. Many of those cases were decided when Clean Water Act jurisdiction was broader than it is today.

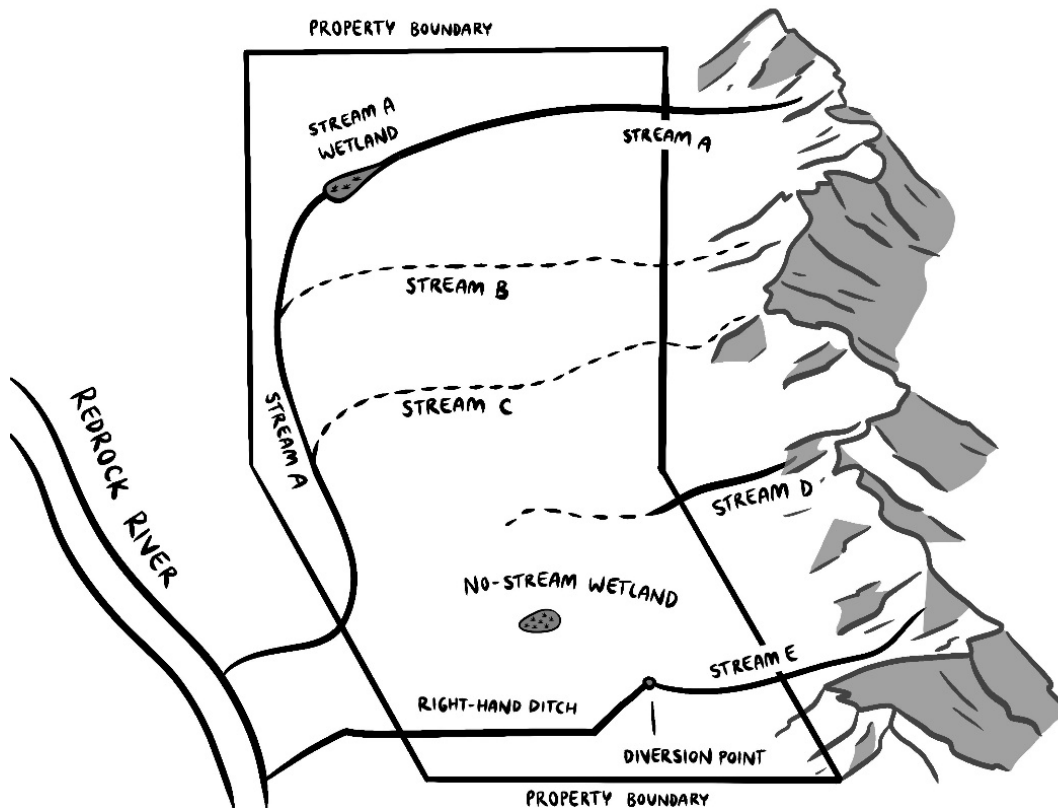
#### **PROBLEM 4.1: ARE THOSE STREAMS AND WETLANDS JURISDICTIONAL?**

Five years ago, a real estate development company bought a 25,000-acre parcel of land somewhere in the Southwest. The land, which is undeveloped, is located at the edge of a mountain range, and it stretches from sagebrush plains at the lower elevations up through chaparral and pine forests. The company plans to develop the land into a resort community, with houses spaced across much of the landscape.

Before it builds, the company may need Clean Water Act permits. As a first step toward permitting, the company is trying to determine where on its property the Clean Water Act applies and where it does not. The company hired a stream and wetland consultant, and she has prepared an inventory of water resources on the property, focusing most closely on areas where the company might like to build. Her key findings are:

- Five stream drainages flow out of the mountains and through the property. For purposes of simplicity, we'll call them Streams A, B, C, D, and E.
- Stream A is the largest and steadiest stream, and water from Streams B, C, and D flows—sometimes—into Stream A. Stream A almost always has surface flow from the mountains, through the property, and all the way to the Redrock River, which it reaches after leaving the property (the Redrock River is a navigable-in-fact waterway, meaning that you can travel along it by boat). During wet periods, those flows are heavy, and during dry seasons, Stream A diminishes to barely a trickle. Floating a boat down Stream A would be impossible except during heavy flow periods, when instead it would be suicidal, and no one has ever tried.
- For several months in a typical year, Stream B has surface flow from the property boundary all the way to Stream A. But once temperatures warm, the water table drops and Stream B dries up along most of its length, except during isolated periods of heavier flow after summer thunderstorms.
- Stream C carries less water than Streams A and B. Throughout the length of its path through the property, it has a clear streambed, but it only contains surface flow for short periods after heavy snowmelt and after heavier rainstorms. During those short periods, Stream C discharges surface water directly into Stream A.

- Stream D contains steady surface flows where it enters the property. A half mile farther, it enters an area with very coarse, permeable sand and gravel, and there its flow disappears into the ground, except during very wet periods. Those flows do not resurface, though the aquifer that is replenished by Stream D's waters contributes water to Stream A. Only during and shortly after heavy precipitation events does Stream D have surface flow all the way to Stream A. Those events are rare enough that Stream D doesn't normally have a discernible streambed or banks downhill of the zone where it normally disappears into the



subsurface.

- Where Stream E enters the property, a rancher once constructed a diversion ditch, known as Right Hand Ditch, which diverts all the water flowing in Stream E. The ditch carries surface flows throughout the year, and it eventually intersects with the Redrock River. Except during exceptionally wet periods, no water flows through Stream E's former course below the diversion, and the former stream has no discernible bed or banks.
- In addition to the streams, the property contains two wetland areas. One wetland area—called the Stream A Wetland—is formed where Stream A flows through a flat area. During periods of high flow, water drains from the stream into the wetland, and in drier seasons, water flows from the wetland back into the stream. The other wetland area—we'll call it the No-Stream Wetland—is in a depression and does not have a surface connection to any of the streams. Both wetlands contain water year-round.
- The consultant concludes that all the streams and wetlands except Stream E are connected to Stream A through subsurface groundwater flow. Stream E is connected to the Redrock River through subsurface groundwater flow. Those

groundwater flow connections are continuous. Only during exceptionally dry conditions does groundwater from the streams cease recharging Stream A and the Redrock River.

- The consultant also tells you that she has reviewed multiple studies on the ecological and hydrologic significance of small streams and wetlands in the Southwest, as well as EPA's synthesis reviews of those studies. The studies find that small streams and wetlands, including intermittent and ephemeral streams and wetlands without surface connections to permanent streams and rivers, have a significant collective influence on downstream water quality. Among other functions, they reduce downstream flooding, operate as both conveyances and sinks for pollutants, mitigate water-temperature extremes, and provide habitat and migration pathways for aquatic species. You do not have data showing whether each individual stream on the property performs these functions, but the consultant tells you it is reasonable to infer that the streams and wetlands play at least some of these roles.



Two photographs of the same ephemeral stream, both taken at the same location near Tucson, Arizona. From EPA, *The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest* 25 (2008).

The company would like to put roads, power lines, and buildings throughout much of the property, and doing so may necessitate filling in parts of all of the streams and wetlands. But the development is being closely watched by environmental advocates, who are concerned about the scale of its impacts. They are particularly worried about impacts on Stream A and on the Redrock River. That leads to three questions:

- A. Imagine that you work as outside environmental counsel for the company, and it asks you which aquatic features are subject to Clean Water Act jurisdiction. Applying current law, what would you say?
- B. Your client's representative tells you he anticipates needing permits for all the aquatic features, because "EPA regulates pretty much everything, even if it's just a puddle." When you press him, he says he's basing the statement on what other developers have told him about their past experiences. Is he right about the present, and might he be right about the past? In other words, under pre-*Sackett* legal regimes, would all these aquatic features have been jurisdictional waters?
- C. Imagine instead that you represent an environmental group, and the group has decided to advocate for state legislation requiring permits for discharges of pollutants or fill material into "waters of the State." How should the legislation define the "waters of the State"? Which of the Redrock River tributaries would

you want the definition to cover? What language would accomplish your objective? You can assume that your state is politically centrist.

In researching this problem, you would quickly learn that “jurisdictional determinations”—that is, determinations about whether a particular waterway falls within federal jurisdiction—require consideration of four sources of law:

- Congress cannot exceed its authority under the Constitution. Questions about the scope of that authority have featured prominently in litigation over the scope of the Clean Water Act.
- Regulatory agencies like EPA and the Army Corps of Engineers cannot exceed the authority Congress vested in them, and also cannot stretch their authority beyond constitutional boundaries. For that reason, the meaning of the Clean Water Act’s language has also been centrally important to litigation.
- EPA and the Army Corps of Engineers have issued regulations implementing the Clean Water Act. “Jurisdictional determinations” for individual sites must be consistent with those regulations, at least to the extent the regulations are consistent with court decisions interpreting the Clean Water Act.
- Supreme Court cases also have been crucially important in determining the geographic scope of Clean Water Act jurisdiction. As you will see, those court cases have negated much of the role of agency regulations.

The most important constitutional provision for jurisdictional determinations is the Commerce Clause, which appears below:

**United States Constitution, art. I, § 8, cl.3**

The Congress shall have Power \* \* \* [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

In combination, several provisions of the Clean Water Act prohibit the discharge of pollutants into “navigable waters” unless that discharge occurs in compliance with a permit. The Clean Water Act also prohibits the discharge of fill materials into “navigable waters” except in compliance with a permit. The Clean Water Act’s definition of “navigable waters” appears below.

**CWA § 502, 33 U.S.C. § 1362. Definitions**

(7) The term “navigable waters” means the waters of the United States, including the territorial seas.

From that text, extraordinary amounts of case law, rulemaking initiatives, and controversy have emerged. The discussion below summarizes some of the key legal events.

### **1970s Litigation, Rulemakings, and Legislative Amendments**

Shortly after Congress enacted the Federal Water Pollution Control Act, disagreement emerged about the geographic scope of its coverage. The Army Corps, which holds primary responsibility for issuing section 404 permits under the Act, interpreted the

statute to cover only discharges to waters that meet a traditional federal test for navigability. See *Permits for Activities in Navigable Waters or Ocean Waters*, 39 Fed. Reg. 12,115, 12,119 (Apr. 3, 1974). Under that interpretation, the Clean Water Act would only have covered waters that were navigable for purposes of commerce or capable of being made so navigable. EPA, in contrast, interpreted the statute to cover non-navigable waters as well.

A federal district court sided with EPA, choosing a broader interpretation of jurisdiction. See *Nat. Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D. D.C. 1975). Subsequently, the Corps acquiesced to EPA's and the court's interpretation, and in 1975, it published interim final regulations extending Clean Water Act jurisdiction "to include not only actually navigable waters but also tributaries of such waters, interstate waters and their tributaries, and nonnavigable intrastate waters whose use or misuse could affect interstate commerce." *United States v. Riverside Bayview Homes*, 474 U.S. 121, 123 (1985) (summarizing the earlier litigation). In 1977, the Corps finalized the regulations, making some minor adjustments to the definition of wetlands. *Id.* at 124.

Also in 1977, Congress amended the statute (those amendments also officially renamed the law "the Clean Water Act"). During debates over the scope of the law's coverage, Congress considered limiting jurisdiction to navigable-in-fact waters, but it did not do so. See Sam Kalen, *Commerce to Conservation: The Call for a National Water policy and the Evolution of Federal Jurisdiction over Wetlands*, 69 N.D. L. REV. 873 (1993).

### **United States v. Riverside Bayview Homes, 474 U.S. 121 (1985)**

Challenges to the scope of Clean Water Act jurisdiction first reached the United States Supreme Court in *United States v. Riverside Bayview Homes*. The case arose when the Army Corps sought to stop a developer from filling portions of "80 acres of low-lying, marshy land near the shores of Lake St. Clair in Macomb County, Michigan." 474 U.S. at 124. The developer argued that it did not need the Corps' approval because the wetlands were not "waters of the United States" under the Clean Water Act. A unanimous Supreme Court agreed with the Army Corps. The Court noted that the Clean Water Act presents the implementing agencies with a difficult line-drawing problem, but it nevertheless held that the question before it was "an easy one." *Id.* at 129. Citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984); see *supra* pages 105–06, it held that the Army Corps' interpretation of an ambiguous statutory provision was reasonable. In a key passage, the Court wrote:

On a purely linguistic level, it may appear unreasonable to classify "lands," wet or otherwise, as "waters." Such a simplistic response, however, does justice neither to the problem faced by the Corps in defining the scope of its authority under § 404(a) nor to the realities of the problem of water pollution that the Clean Water Act was intended to combat. In 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 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.

Faced with such a problem of defining the bounds of its regulatory authority, an agency may appropriately look to the legislative history and underlying policies of its statutory grants of authority. Neither of these sources provides unambiguous guidance for the Corps in this case, but together they do support the reasonableness of the Corps' approach of defining adjacent wetlands as "waters" within the meaning of § 404(a). Section 404 originated as part of the Federal Water Pollution Control Act Amendments of 1972, which constituted a comprehensive legislative attempt "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101, 33 U.S.C. § 1251. This objective incorporated a broad, systemic view of the goal of maintaining and improving water quality: as the House Report on the legislation put it, "the word 'integrity' ... refers to a condition in which the natural structure and function of ecosystems is [are] maintained." H.R. Rep. No. 92-911, p. 76 (1972). Protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for "[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 92-414, p. 77 (1972).

In keeping with these views, Congress chose to define the waters covered by the Act broadly. Although the Act prohibits discharges into "navigable waters," see CWA §§ 301(a), 404(a), 502(12), 33 U.S.C. §§ 1311(a), 1344(a), 1362(12), 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. In adopting this definition of "navigable waters," Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed "navigable" under the classical understanding of that term. See S. Conf. Rep. No. 92-1236, p. 144 (1972); 118 Cong. Rec. 33756-33757 (1972) (statement of Rep. Dingell).

474 U.S. at 132-33.

## 1986 Rulemaking

In the late 1970s and into the 1980s, the scope of jurisdiction was less controversial than one might have imagined, largely because the Army Corps did little to regulate fills of smaller jurisdictional waters. *See* Dave Owen, *Little Streams and Legal Transformations*, 2017 UTAH L. REV. 1, 20-22. But over time, the Corps began requiring permitting for smaller streams and wetlands, and the stakes for jurisdictional determinations rose, as did the need for clearer standards. In 1986, during the Reagan administration, EPA and the Army Corps responded by enacting regulations providing more specific standards for jurisdiction. Those regulations included what was widely known as "the migratory bird rule," which held that if migratory birds would use an aquatic feature, it was jurisdictional. *See* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986). Because migratory birds use—indeed, depend on—many small, isolated, and/or temporary aquatic features, the rule led to the most expansive jurisdictional standards the agencies have ever implemented.

## **Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001)**

Questions about the geographic scope of Clean Water Act coverage next reached the Court in 2001. The Solid Waste Agency of Northern Cook County (SWANCC) sought to



construct a landfill on an old gravel pit site, and construction would have required filling in ponds that had formed in the old mining pits. These ponds generally lacked surface connections to other waterways, but they were large enough for migratory waterfowl to use. The Army Corps asserted that it had jurisdiction over the wetlands. SWANCC disagreed, and ultimately brought its disagreement to the Supreme Court.

In a 5–4 decision, the Court sided with SWANCC. In a key passage, it wrote the following:

We thus decline respondents' invitation to take what they see as the next ineluctable step after *Riverside Bayview Homes*: holding that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under § 404(a)'s definition of “navigable waters” because they serve as habitat for migratory birds. As counsel for respondents conceded at oral argument, such a ruling would assume that “the use of the word navigable in the statute ... does not have any independent significance.” Tr. of Oral Arg. 28. We cannot agree that Congress' separate definitional use of the phrase “waters of the United States” constitutes a basis for reading the term “navigable waters” out of the statute. We said in *Riverside Bayview Homes* that the word “navigable” in the statute was of “limited import” 474 U.S., at 133, and went on to hold that § 404(a) extended to nonnavigable wetlands adjacent to open waters. But it is one thing to give a word limited effect and quite another to give it no effect whatever. The 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. See, e.g., *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407–408 (1940).

Respondents—relying upon all of the arguments addressed above—contend that, at the very least, it must be said that Congress did not address the precise question of § 404(a)'s scope with regard to nonnavigable, isolated, intrastate waters, and that, therefore, we should give deference to the “Migratory Bird Rule.” See, e.g., *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). We find § 404(a) to be clear, but even were we to agree with respondents, we would not extend *Chevron* deference here.

Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988). This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. See *ibid.* This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power. See *United States v. Bass*, 404 U.S. 336, 349 (1971) (“[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance”). Thus, “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” *DeBartolo, supra*, at 575.

Twice in the past six years we have reaffirmed the proposition that the grant of authority to Congress under the Commerce Clause, though broad, is not

unlimited. See *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). Respondents argue that the “Migratory Bird Rule” falls within Congress’ power to regulate intrastate activities that “substantially affect” interstate commerce. They note that the protection of migratory birds is a “national interest of very nearly the first magnitude,” *Missouri v. Holland*, 252 U.S. 416, 435 (1920), and that, as the Court of Appeals found, millions of people spend over a billion dollars annually on recreational pursuits relating to migratory birds. These arguments raise significant constitutional questions. For example, we would have to evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce. This is not clear, for although the Corps has claimed jurisdiction over petitioner’s land because it contains water areas used as habitat by migratory birds, respondents now, *post litem motam*, focus upon the fact that the regulated activity is petitioner’s municipal landfill, which is “plainly of a commercial nature.” But this is a far cry, indeed, from the “navigable waters” and “waters of the United States” to which the statute by its terms extends.

These are significant constitutional questions raised by respondents’ application of their regulations, and yet we find nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit such as we have here. Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the “Migratory Bird Rule” would result in a significant impingement of the States’ traditional and primary power over land and water use. See, e.g., *Hess v. Port Authority Trans–Hudson Corporation*, 513 U.S. 30, 44 (1994) (“[R]egulation of land use [is] a function traditionally performed by local governments”). Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose to “recognize, preserve, and protect the primary responsibilities and rights of States ... to plan the development and use ... of land and water resources ....” 33 U.S.C. § 1251(b). We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents’ interpretation, and therefore reject the request for administrative deference.

531 U.S. at 171–74.

### **Rapanos v. United States, 547 U.S. 715 (2006)**

Five years after *SWANCC*, the Supreme Court again considered the meaning of “waters of the United States.” *Rapanos v. United States* arose after John Rapanos filled streams and wetlands on his Michigan property, where he hoped to construct a shopping mall. Rapanos did not seek or receive a section 404 permit—in fact, he allegedly threatened to “destroy” the environmental consultant who told Rapanos he would need one, 549 U.S. at 762 (Kennedy, J. concurring)—and the federal government brought criminal charges against him. Rapanos’ defense was that Clean Water Act jurisdiction did not extend to his property.

The case produced four opinions, none of which garnered a majority of the Justices. Justice Scalia delivered the opinion of the Court, in which Justices Thomas, Alito, and Roberts joined. The opinion opened with a scathing description of Corps’ and EPA’s regulatory program:

The burden of federal regulation on those who would deposit fill material in locations denominated “waters of the United States” is not trivial. In deciding whether to grant or deny a permit, the U.S. Army Corps of Engineers (Corps)

exercises the discretion of an enlightened despot, relying on such factors as “economics,” “aesthetics,” “recreation,” and “in general, the needs and welfare of the people,” 33 C.F.R. § 320.4(a) (2004). \* \* \*

The enforcement proceedings against Mr. Rapanos are a small part of the immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the governing statute—during the past five Presidential administrations. In the last three decades, the Corps and the Environmental Protection Agency (EPA) have interpreted their jurisdiction over “the waters of the United States” to cover 270-to-300 million acres of swampy lands in the United States—including half of Alaska and an area the size of California in the lower 48 States. And that was just the beginning. The Corps has also asserted jurisdiction over virtually any parcel of land containing a channel or conduit—whether man-made or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally or intermittently flow. On this view, the federally regulated “waters of the United States” include storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year, and lands that are covered by floodwaters once every 100 years. Because they include the land containing storm sewers and desert washes, the statutory “waters of the United States” engulf entire cities and immense arid wastelands. In fact, the entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface, containing water ephemerally wherever the rain falls. Any plot of land containing such a channel may potentially be regulated as a “water of the United States.”

547 U.S. at 721–22.

Justice Scalia then explained what he thought the legal standard for “waters of the United States” should be, and why.

We need not decide the precise extent to which the qualifiers “navigable” and “of the United States” restrict the coverage of the Act. Whatever the scope of these qualifiers, the CWA authorizes federal jurisdiction only over “waters.” 33 U.S.C. § 1362(7). The only natural definition of the term “waters,” our prior and subsequent judicial constructions of it, clear evidence from other provisions of the statute, and this Court’s canons of construction all confirm that “the waters of the United States” in § 1362(7) cannot bear the expansive meaning that the Corps would give it.

The Corps’ expansive approach might be arguable if the CWA defined “navigable waters” as “water of the United States.” But “the waters of the United States” is something else. The use of the definite article (“the”) and the plural number (“waters”) shows plainly that § 1362(7) does not refer to water in general. In this form, “the waters” refers more narrowly to water “[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes,” or “the flowing or moving masses, as of waves or floods, making up such streams or bodies.” Webster’s New International Dictionary 2882 (2d ed. 1954) (hereinafter Webster’s Second). On this definition, “the waters of the United States” include

only relatively permanent, standing or flowing bodies of water.<sup>5</sup> The definition refers to water as found in “streams,” “oceans,” “rivers,” “lakes,” and “bodies” of water “forming geographical features.” *Ibid.* All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows. Even the least substantial of the definition’s terms, namely, “streams,” connotes a continuous flow of water in a permanent channel—especially when used in company with other terms such as “rivers,” “lakes,” and “oceans.” None of these terms encompasses transitory puddles or ephemeral flows of water.

The restriction of “the waters of the United States” to exclude channels containing merely intermittent or ephemeral flow also accords with the commonsense understanding of the term. In applying the definition to “ephemeral streams,” “wet meadows,” storm sewers and culverts, “directional sheet flow during storm events,” drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term “waters of the United States” beyond parody. The plain language of the statute simply does not authorize this “Land Is Waters” approach to federal jurisdiction.

\* \* \* As we noted in *SWANCC*, the traditional term “navigable waters”—even though defined as “the waters of the United States”—carries *some* of its original substance: “[I]t is one thing to give a word limited effect and quite another to give it no effect whatever.” 531 U.S., at 172. That limited effect includes, at bare minimum, the ordinary presence of water. \* \* \*

Even if the phrase “the waters of the United States” were ambiguous as applied to intermittent flows, our own canons of construction would establish that the Corps’ interpretation of the statute is impermissible. As we noted in *SWANCC*, the Government’s expansive interpretation would “result in a significant impingement of the States’ traditional and primary power over land and water use.” 531 U.S., at 174. Regulation of land use, as through the issuance of the development permits sought by petitioners in both of these cases, is a quintessential state and local power. See *FERC v. Mississippi*, 456 U.S. 742, 767–768, n. 30 (1982); *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44 (1994). The extensive federal jurisdiction urged by the Government would authorize the Corps to function as a *de facto* regulator of immense stretches of intrastate land—an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board. See 33 C.F.R. § 320.4(a)(1) (2004). We ordinarily expect a “clear and manifest” statement from Congress to authorize an unprecedented intrusion into traditional state authority. See *BFP v. Resolution Trust Corporation*, 511 U.S. 531, 544 (1994). The phrase “the waters of the United States” hardly qualifies.

Likewise, just as we noted in *SWANCC*, the Corps’ interpretation stretches the outer limits of Congress’s commerce power and raises difficult questions about

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<sup>5</sup> By describing “waters” as “relatively permanent,” we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months—such as the 290-day, continuously flowing stream postulated by Justice STEVENS’ dissent (hereinafter the dissent), *post*, at 2259–2260. Common sense and common usage distinguish between a wash and seasonal river.

the ultimate scope of that power. See 531 U.S., at 173. (In developing the current regulations, the Corps consciously sought to extend its authority to the farthest reaches of the commerce power. See 42 Fed. Reg. 37127 (1977).) Even if the term “the waters of the United States” were ambiguous as applied to channels that sometimes host ephemeral flows of water (which it is not), we would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity. See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

In sum, on its only plausible interpretation, the phrase “the waters of the United States” includes only those relatively permanent, standing or continuously flowing bodies of water “forming geographic features” that are described in ordinary parlance as “streams[,] . . . oceans, rivers, [and] lakes.” See Webster’s Second 2882. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Corps’ expansive interpretation of the “the waters of the United States” is thus not “based on a permissible construction of the statute.” *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

\* \* \* Therefore, *only* those wetlands with a continuous surface connection to bodies that are “waters of the United States” in their own right, so that there is no clear demarcation between “waters” and wetlands, are “adjacent to” such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to “waters of the United States” do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a “significant nexus” in *SWANCC*. 531 U.S., at 167. Thus, establishing that wetlands such as those at the Rapanos \* \* \* site[] are covered by the Act requires two findings: first, that the adjacent channel contains a “wate[r] of the United States,” (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the “water” ends and the “wetland” begins.

547 U.S. at 731–42.

Justice Kennedy concurred only in the judgment. In his concurring opinion—which no other Justice joined—he criticized Justice Scalia’s opinion for its disdainful tone toward water-quality protection and for what Justice Kennedy saw as a lack of fealty to the statute’s text and purposes. He instead argued that jurisdiction should be determined by asking whether protection of the aquatic feature at issue had a “significant nexus” to water quality in navigable-in-fact waterways. This significant nexus, Justice Kennedy wrote, could be established either alone or in combination with other similarly situated aquatic features.

Justice Stevens, joined by the other three liberal Justices (Souter, Ginsburg, and Breyer), dissented. He argued that the phrase “waters of the United States” was ambiguous, that the Corps’ and EPA’s interpretation of that phrase was reasonable, and that the test therefore should be upheld under *Chevron*. At the end of his opinion, he also noted that any aquatic feature that was jurisdictional under either the Scalia test or the Kennedy test would have at least five Justices supporting jurisdiction, and he therefore asserted that EPA, the Army Corps, and lower courts should find jurisdiction whether either test was satisfied.

Finally, Justice Roberts wrote a brief concurrence criticizing the agencies for not responding to *SWANCC* with a new rulemaking.

For several years after *SWANCC*, the agencies and lower courts generally followed Justice Stevens' prescription, finding jurisdiction whether either the Scalia or Kennedy test was met. *See, e.g., United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006). In practice, however, Justice Kennedy's significant-nexus test, which typically reached more broadly, turned out to be the more important one. *See, e.g., N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 1000 (9th Cir. 2007) (applying Justice Kennedy's significant-nexus test to find that a pond adjacent to a river fell within the definition of "waters of the United States").

## 2015, 2020, and 2022 Rulemakings and Associated Litigation

For nine years after *Rapanos*, and for fifteen years after *SWANCC*, the Reagan-era regulations remained on the books, limited by Supreme Court decisions but with their text unchanged. But during the Obama administration's second term, EPA and the Army Corps crafted new regulations. *See Clean Water Rule: Definitions of Waters of the United States*, 80 Fed. Reg. 37,054 (June 29, 2015). The goal of this rulemaking effort was to answer Justice Roberts' call for greater clarity. The practical consequence, instead, was years of litigation.

The 2015 regulations were built around Justice Kennedy's significant-nexus standard. The announcement of that standard had spurred aquatic scientists to study relationships between small streams and wetlands and navigable-in-fact waterways, and the resulting literature showed that small tributaries and wetlands—even streams and wetlands that lacked permanent flow and continuous surface connections to larger waterways—played major roles in supporting water quality more generally. *See U.S. EPA, CONNECTIVITY OF STREAMS AND WETLANDS TO DOWNSTREAM WATERS: A REVIEW AND SYNTHESIS OF THE SCIENTIFIC EVIDENCE* (2015). Because of those connections, the 2015 regulations would have treated intermittent and ephemeral tributaries of navigable-in-fact waterways as jurisdictional if the tributary had a discernable bed and banks. For wetlands without continuous surface connections, the 2015 regulations tried to establish categorical treatments. Some categories of wetlands, like prairie potholes, were treated as categorically jurisdictional. Others, like wetlands outside the floodplain of and more than 4,000 feet from other jurisdictional waters were categorically non-jurisdictional. Others would still be assessed on a case-by-case basis.

The 2015 regulations largely codified and standardized existing practices, but for regulated entities that were frustrated with existing practices and thought they had won greater limits from *SWANCC* and *Rapanos*, that codification was a source of outrage. Reactions were swift. Members of Congress castigated the new regulations, as did then-candidate Donald Trump, and court challenges arose across the country, leading to conflicting results. Soon after the Trump administration took office, it sought changes. It first sought to simply repeal the 2015 regulations, thus returning to the pre-2015 status quo. After that simple repeal was successfully challenged on procedural grounds, the Trump administration turned its focus to a replacement rule, which it finalized in 2020. *See The Navigable Waters Protection Rule: Definition of "Waters of the United States,"* 85 Fed. Reg. 22,250 (Apr. 21, 2020). The 2020 rule would have eliminated jurisdiction for ephemeral streams but maintained it for intermittent streams, and it would have narrowed coverage for wetlands. That 2020 rule also led to courtroom challenges, again with disparate results.

Joe Biden's election led to more rulemakings and litigation. The Biden administration announced that it would not defend the Trump administration's rule, and it instead began working on its own replacement, which was published in early 2023. See Revised Definition of "Waters of the United States", 88 Fed. Reg. 3004 (Jan. 18, 2023). That rule was designed to return to the pre-2015 status quo, essentially updating the 1986 rules to reflect the limits imposed by *SWANCC* and *Rapanos*. Following Justice Stevens, it also clarified that the Army Corps and EPA would treat the significant-nexus test and the continuous-surface-connection test as alternative bases for jurisdiction. States and industry groups again sued, and they quickly obtained injunctions against implementation of the new rule, with those injunctions covering about half of the states. But all that litigation faded in importance in May 2023, when the Supreme Court decided *Sackett v. Environmental Protection Agency*.

**Sackett v. Environmental Protection Agency**  
143 S. Ct. 1322 (2023)

■ JUSTICE ALITO delivered the Opinion of the Court

This case concerns a nagging question about the outer reaches of the Clean Water Act (CWA), the principal federal law regulating water pollution in the United States.<sup>1</sup> By all accounts, the Act has been a great success. Before its enactment in 1972, many of the Nation's rivers, lakes, and streams were severely polluted, and existing federal legislation had proved to be inadequate. Today, many formerly fetid bodies of water are safe for the use and enjoyment of the people of this country.

There is, however, an unfortunate footnote to this success story: the outer boundaries of the Act's geographical reach have been uncertain from the start. The Act applies to "the waters of the United States," but what does that phrase mean? Does the term encompass any backyard that is soggy enough for some minimum period of time? Does it reach "mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, [or] playa lakes?" How about ditches, swimming pools, and puddles?

For more than a half century, the agencies responsible for enforcing the Act have wrestled with the problem and adopted varying interpretations. On three prior occasions, this Court has tried to clarify the meaning of "the waters of the United States." But the problem persists. When we last addressed the question 17 years ago, we were unable to agree on an opinion of the Court.<sup>3</sup> Today, we return to the problem and attempt to identify with greater clarity what the Act means by "the waters of the United States."

I

A

\* \* \* The CWA is a potent weapon. It imposes what have been described as "crushing" consequences "even for inadvertent violations." *Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 602 (2016) (KENNEDY, J., concurring). Property owners who negligently discharge "pollutants" into covered waters may face severe criminal penalties including imprisonment. § 1319(c). These penalties increase for knowing violations. *Ibid.* On the civil side, the CWA imposes over \$60,000 in fines per day for each violation. See Note following 28 U.S.C. § 2461; 33 U.S.C. § 1319(d); 88 Fed. Reg. 989 (2023) (to be codified in 40 C.F.R. § 19.4). And due to the Act's 5-year statute of limitations, 28 U.S.C. § 2462, and expansive interpretations of the term "violation," these civil penalties can be nearly as crushing as their criminal counterparts, see, e.g., *Borden Ranch Partnership v. United States Army Corps of Engineers*, 261 F.3d 810, 813, 818 (C.A.9 2001) (upholding Agency

decision to count each of 348 passes of a plow by a farmer through “jurisdictional” soil on his farm as a separate violation), *aff’d* by an equally divided Court, 537 U.S. 99, 123 S.Ct. 599 (2002) (*per curiam*).

The Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) jointly enforce the CWA. The EPA is tasked with policing violations after the fact, either by issuing orders demanding compliance or by bringing civil actions. § 1319(a). The Act also authorizes private plaintiffs to sue to enforce its requirements. § 1365(a). On the front end, both agencies are empowered to issue permits exempting activity that would otherwise be unlawful under the Act. Relevant here, the Corps controls permits for the discharge of dredged or fill material into covered waters. See § 1344(a). The costs of obtaining such a permit are “significant,” and both agencies have admitted that “the permitting process can be arduous, expensive, and long.” *Hawkes Co.*, 578 U.S., at 594–595, 601. Success is also far from guaranteed, as the Corps has asserted discretion to grant or deny permits based on a long, nonexclusive list of factors that ends with a catchall mandate to consider “in general, the needs and welfare of the people.” 33 C.F.R. § 320.4(a)(1) (2022).

Due to the CWA’s capacious definition of “pollutant,” its low *mens rea*, and its severe penalties, regulated parties have focused particular attention on the Act’s geographic scope. While its predecessor encompassed “interstate or navigable waters,” 33 U.S.C. § 1160(a) (1970 ed.), the CWA prohibits the discharge of pollutants into only “navigable waters,” which it defines as “the waters of the United States, including the territorial seas,” 33 U.S.C. §§ 1311(a), 1362(7), (12)(A) (2018 ed.). The meaning of this definition is the persistent problem that we must address.

## B

Michael and Chantell Sackett have spent well over a decade navigating the CWA, and their voyage has been bumpy and costly. In 2004, they purchased a small lot near Priest Lake, in Bonner County, Idaho. In preparation for building a modest home, they began backfilling their property with dirt and rocks. A few months later, the EPA sent the Sacketts a compliance order informing them that their backfilling violated the CWA because their property contained protected wetlands. The EPA demanded that the Sacketts immediately “‘undertake activities to restore the Site’” pursuant to a “‘Restoration Work Plan’” that it provided. *Sackett v. EPA*, 566 U.S. 120, 125 (2012). The order threatened the Sacketts with penalties of over \$40,000 per day if they did not comply.

At the time, the EPA interpreted “the waters of the United States” to include “[a]ll ... waters” that “could affect interstate or foreign commerce,” as well as “[w]etlands adjacent” to those waters. 40 C.F.R. §§ 230.3(s)(3), (7) (2008). “[A]djacent” was defined to mean not just “bordering” or “contiguous,” but also “neighboring.” § 230.3(b). Agency guidance instructed officials to assert jurisdiction over wetlands “adjacent” to non-navigable tributaries when those wetlands had “a significant nexus to a traditional navigable water.” A “significant nexus” was said to exist when “‘wetlands, either alone or in combination with *similarly situated lands* in the region, *significantly affect* the chemical, physical, and biological integrity’” of those waters. 2007 Guidance 8 (emphasis added). In looking for evidence of a “significant nexus,” field agents were told to consider a wide range of open-ended hydrological and ecological factors. See *id.*, at 7.

According to the EPA, the “wetlands” on the Sacketts’ lot are “adjacent to” (in the sense that they are in the same neighborhood as) what it described as an “unnamed tributary” on the other side of a 30-foot road. That tributary feeds into a non-navigable creek, which, in turn, feeds into Priest Lake, an intrastate body of water that the EPA



designated as traditionally navigable. To establish a significant nexus, the EPA lumped the Sacketts’ lot together with the Kalispell Bay Fen, a large nearby wetland complex that the Agency regarded as “similarly situated.” According to the EPA, these properties, taken together, “significantly affect” the ecology of Priest Lake. Therefore, the EPA concluded, the Sacketts had illegally dumped soil and gravel onto “the waters of the United States.”

The Sacketts filed suit under the Administrative Procedure Act, 5 U.S.C. § 702 *et seq.*, alleging that the EPA lacked jurisdiction because any wetlands on their property were not “waters of the United States.” \* \* \*

We granted certiorari to decide the proper test for determining whether wetlands are “waters of the United States.” 595 U. S. — (2022).

### III

\* \* \*

### A

We start, as we always do, with the text of the CWA. *Bartenwerfer v. Buckley*, 598 U.S. 69, 74 (2023). As noted, the Act applies to “navigable waters,” which had a well-established meaning at the time of the CWA’s enactment. But the CWA complicates matters by proceeding to define “navigable waters” as “the waters of the United States,” § 1362(7), which was decidedly not a well-known term of art. This frustrating drafting choice has led to decades of litigation, but we must try to make sense of the terms Congress chose to adopt. And for the reasons explained below, we conclude that the *Rapanos* plurality was correct: the CWA’s use of “waters” encompasses “only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic[al] features’ that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes.’ ” 547 U.S., at 739 (quoting Webster’s New International Dictionary 2882 (2d ed. 1954) (Webster’s Second); original alterations omitted).

This reading follows from the CWA’s deliberate use of the plural term “waters.” See 547 U.S., at 732–733. That term typically refers to bodies of water like those listed above. See, *e.g.*, Webster’s Second 2882; Black’s Law Dictionary 1426 (5th ed. 1979) (“especially in the plural, [water] may designate a body of water, such as a river, a lake, or an ocean, or an aggregate of such bodies of water, as in the phrases ‘foreign waters,’ ‘waters of the United States,’ and the like” (emphasis added)); Random House Dictionary of the English Language 2146 (2d ed. 1987) (Random House Dictionary) (defining “waters” as “a. flowing water, or water moving in waves: The river’s mighty waters. b. the sea or seas bordering a particular country or continent or located in a particular part of the world” (emphasis deleted)). This meaning is hard to reconcile with classifying “‘lands,’ wet or otherwise, as “waters.” ’ ” *Rapanos*, 547 U.S., at 740 (plurality opinion) (quoting *Riverside Bayview*, 474 U.S., at 132).

This reading also helps to align the meaning of “the waters of the United States” with the term it is defining: “navigable waters.” See *Bond v. United States*, 572 U.S. 844, 861 (2014) (“In settling on a fair reading of a statute, it is not unusual to consider the ordinary meaning of a defined term, particularly when there is dissonance between that ordinary meaning and the reach of the definition”). Although we have acknowledged that the CWA extends to more than traditional navigable waters, we have refused to read “navigable” out of the statute, holding that it at least shows that Congress was focused on “its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.” *SWANCC*, 531 U.S., at 172; see also *Appalachian Electric*, 311 U.S., at 406–407; *The Daniel Ball*, 10 Wall. at 563. At a

minimum, then, the use of “navigable” signals that the definition principally refers to bodies of navigable water like rivers, lakes, and oceans. See *Rapanos*, 547 U.S., at 734 (plurality opinion).

More broadly, this reading accords with how Congress has employed the term “waters” elsewhere in the CWA and in other laws. The CWA repeatedly uses “waters” in contexts that confirm the term refers to bodies of open water. See 33 U.S.C. § 1267(i)(2)(D) (“the waters of the Chesapeake Bay”); § 1268(a)(3)(I) (“the open waters of each of the Great Lakes”); § 1324(d)(4)(B)(ii) (“lakes and other surface waters”); § 1330(g)(4)(C)(vii) (“estuarine waters”); § 1343(c)(1) (“the waters of the territorial seas, the contiguous zone, and the oceans”); §§ 1346(a)(1), 1375a(a) (“coastal recreation waters”); § 1370 (state “boundary waters”). The use of “waters” elsewhere in the U. S. Code likewise correlates to rivers, lakes, and oceans.

Statutory history points in the same direction. The CWA’s predecessor statute covered “interstate or navigable waters” and defined “interstate waters” as “all *rivers, lakes, and other waters* that flow across or form a part of State boundaries.” 33 U.S.C. §§ 1160(a), 1173(e) (1970 ed.) (emphasis added); see also Rivers and Harbors Act of 1899, 30 Stat. 1151 (codified, as amended, at 33 U.S.C. § 403) (prohibiting unauthorized obstructions “to the navigable capacity of any of the waters of the United States”).

This Court has understood the CWA’s use of “waters” in the same way. Even as *Riverside Bayview* grappled with whether adjacent wetlands could fall within the CWA’s coverage, it acknowledged that wetlands are not included in “traditional notions of ‘waters.’” 474 U.S., at 133. It explained that the term conventionally refers to “hydrographic features” like “rivers” and “streams.” *Id.*, at 131. *SWANCC* went even further, repeatedly describing the “waters” covered by the Act as “open water” and suggesting that “the waters of the United States” principally refers to traditional navigable waters. 531 U.S., at 168–169, 172. That our CWA decisions operated under this assumption is unsurprising. Ever since *Gibbons v. Ogden*, 9 Wheat. 1 (1824), this Court has used “waters of the United States” to refer to similar bodies of water, almost always in relation to ships. *Id.*, at 218 (discussing a vessel’s “conduct in the waters of the United States”).<sup>14</sup>

The EPA argues that “waters” is “naturally read to encompass wetlands” because the “presence of water is ‘universally regarded as the most basic feature of wetlands.’” But that reading proves too much. Consider puddles, which are also defined by the ordinary presence of water even though few would describe them as “waters.” This argument is also tough to square with *SWANCC*, which held that the Act does not cover isolated ponds, see 531 U.S., at 171, or *Riverside Bayview*, which would have had no need to focus so extensively on the adjacency of wetlands to covered waters if the EPA’s reading were correct, see 474 U.S., at 131–135, and n. 8. Finally, it is also instructive that the CWA expressly “protect[s] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution” and “to plan the development and use ... of land and water resources.” § 1251(b). It is hard to see how the States’ role in regulating water resources would remain “primary” if the EPA had jurisdiction over anything defined by the presence of water. See *County of Maui v. Hawaii Wildlife Fund*, 590 U. S. —, — (2020); *Rapanos*, 547 U.S., at 737 (plurality opinion).

## B

Although the ordinary meaning of “waters” in § 1362(7) might seem to exclude all wetlands, we do not view that provision in isolation. The meaning of a word “may only become evident when placed in context,” *FDA v. Brown & Williamson Tobacco Corp.*,

529 U.S. 120, 132 (2000), and statutory context shows that some wetlands qualify as “waters of the United States.”

In 1977, Congress amended the CWA and added § 1344(g)(1), which authorizes States to apply to the EPA for permission to administer programs to issue permits for the discharge of dredged or fill material into some bodies of water. In simplified terms, the provision specifies that state permitting programs may regulate discharges into (1) any waters of the United States, (2) except for traditional navigable waters, (3) “including wetlands adjacent thereto.”

When this convoluted formulation is parsed, it tells us that at least some wetlands must qualify as “waters of the United States.” The provision begins with a broad category, “the waters of the United States,” which we may call category A. The provision provides that States may permit discharges into these waters, but it then qualifies that States cannot permit discharges into a subcategory of A: traditional navigable waters (category B). Finally, it states that a third category (category C), consisting of wetlands “adjacent” to traditional navigable waters, is “includ[ed]” within B. Thus, States may permit discharges into A minus B, which includes C. If C (adjacent wetlands) were not part of A (“the waters of the United States”) and therefore subject to regulation under the CWA, there would be no point in excluding them from that category. See *Riverside Bayview*, 474 U.S., at 138, n. 11 (recognizing that § 1344(g) “at least suggest[s] strongly that the term ‘waters’ as used in the Act does not necessarily exclude ‘wetlands’ ”); *Rapanos*, 547 U.S., at 768 (opinion of KENNEDY, J.). Thus, § 1344(g)(1) presumes that certain wetlands constitute “waters of the United States.”

But what wetlands does the CWA regulate? Section 1344(g)(1) cannot answer that question alone because it is not the operative provision that defines the Act’s reach. See *Riverside Bayview*, 474 U.S., at 138, n. 11. Instead, we must harmonize the reference to adjacent wetlands in § 1344(g)(1) with “the waters of the United States,” § 1362(7), which is the actual term we are tasked with interpreting. The formulation discussed above tells us how: because the adjacent wetlands in § 1344(g)(1) are “includ[ed]” within “the waters of the United States,” these wetlands must qualify as “waters of the United States” in their own right. In other words, they must be indistinguishably part of a body of water that itself constitutes “waters” under the CWA. See *supra*, at —.

This understanding is consistent with § 1344(g)(1)’s use of “adjacent.” Dictionaries tell us that the term “adjacent” may mean either “contiguous” or “near.” Random House Dictionary 25; see Webster’s Third New International Dictionary 26 (1976); see also Oxford American Dictionary & Thesaurus 16 (2d ed. 2009) (listing “adjoining” and “neighboring” as synonyms of “adjacent”). But “construing statutory language is not merely an exercise in ascertaining ‘the outer limits of a word’s definitional possibilities,’ ” *FCC v. AT&T Inc.*, 562 U.S. 397, 407 (2011) (alterations omitted), and here, “only one ... meanin[g] produces a substantive effect that is compatible with the rest of the law,” *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988). Wetlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby.

In addition, it would be odd indeed if Congress had tucked an important expansion to the reach of the CWA into convoluted language in a relatively obscure provision concerning state permitting programs. We have often remarked that Congress does not “hide elephants in mouseholes” by “alter[ing] the fundamental details of a regulatory scheme in vague terms or ancillary provisions.” *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001). We cannot agree with such an implausible interpretation here.

If § 1344(g)(1) were read to mean that the CWA applies to wetlands that are not indistinguishably part of otherwise covered “waters of the United States,” see *supra*, at —, it would effectively amend and substantially broaden § 1362(7) to define “navigable waters” as “waters of the United States *and adjacent wetlands*.” But § 1344(g)(1)’s use of the term “including” makes clear that it does not purport to do—and in fact, does not do—any such thing. See *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662–664, and n. 8 (2007) (recognizing that implied amendments require “‘clear and manifest’” evidence of congressional intent). It merely reflects Congress’s assumption that certain “adjacent” wetlands are *part of* “waters of the United States.”

This is the thrust of observations in decisions going all the way back to *Riverside Bayview*. In that case, we deferred to the Corps’ decision to regulate wetlands actually abutting a navigable waterway, but we recognized “the inherent difficulties of defining precise bounds to regulable waters.” 474 U.S., at 134; see also *id.*, at 132 (noting that “the transition from water to solid ground is not necessarily or even typically an abrupt one” due to semi-aquatic features like shallows and swamps). In such a situation, we concluded, the Corps could reasonably determine that wetlands “adjoining bodies of water” were part of those waters. *Id.*, at 135, and n. 9; see also *SWANCC*, 531 U.S., at 167 (recognizing that *Riverside Bayview* “held that the Corps had ... jurisdiction over wetlands that actually abutted on a navigable waterway”).

In *Rapanos*, the plurality spelled out clearly when adjacent wetlands are part of covered waters. It explained that “waters” may fairly be read to include only those wetlands that are “as a practical matter indistinguishable from waters of the United States,” such that it is “difficult to determine where the ‘water’ ends and the ‘wetland’ begins.” 547 U.S., at 742, 755 (emphasis deleted). That occurs when wetlands have “a continuous surface connection to bodies that are ‘waters of the United States’ in their own right, so that there is no clear demarcation between ‘waters’ and wetlands.” *Id.*, at 742; cf. 33 U.S.C. § 2802(5) (defining “coastal waters” to include wetlands “having unimpaired connection with the open sea up to the head of tidal influence”). We agree with this formulation of when wetlands are part of “the waters of the United States.” We also acknowledge that temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells.

In sum, we hold that the CWA extends to only those wetlands that are “as a practical matter indistinguishable from waters of the United States.” *Rapanos*, 547 U.S., at 755 (plurality opinion) (emphasis deleted). This requires the party asserting jurisdiction over adjacent wetlands to establish “first, that the adjacent [body of water constitutes] ... ‘water[s] of the United States,’ (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.” *Id.*, at 742.

#### IV

The EPA resists this reading of § 1362(7) and instead asks us to defer to its understanding of the CWA’s jurisdictional reach, as set out in its most recent rule defining “the waters of the United States.” See 88 Fed. Reg. 3004. This rule, as noted, provides that “adjacent wetlands are covered by the Act if they ‘possess a “significant nexus” to’ traditional navigable waters.” And according to the EPA, wetlands are “adjacent” when they are “neighboring” to covered waters, even if they are separated from those waters by dry land.

For reasons already explained, this interpretation is inconsistent with the text and structure of the CWA. Beyond that, it clashes with “background principles of construction” that apply to the interpretation of the relevant statutory provisions. *Bond*, 572 U.S., at 857. Under those presumptions, the EPA must provide clear evidence that it is authorized to regulate in the manner it proposes.

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First, this Court “require[s] Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.” *United States Forest Service v. Cowpasture River Preservation Assn.*, 590 U. S. —, — — — (2020); see also *Bond*, 572 U.S., at 858. Regulation of land and water use lies at the core of traditional state authority. See, e.g., *SWANCC*, 531 U.S., at 174 (citing *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44; *Tarrant Regional Water Dist. v. Herrmann*, 569 U.S. 614, 631 (2013)). An overly broad interpretation of the CWA’s reach would impinge on this authority. The area covered by wetlands alone is vast—greater than the combined surface area of California and Texas. And the scope of the conception of “the waters of the United States” is truly staggering when this vast territory is supplemented by all the additional area, some of which is generally dry, over which the Agency asserts jurisdiction. Particularly given the CWA’s express policy to “preserve” the States’ “primary” authority over land and water use, § 1251(b), this Court has required a clear statement from Congress when determining the scope of “the waters of the United States.” *SWANCC*, 531 U.S., at 174; accord, *Rapanos*, 547 U.S., at 738 (plurality opinion).

\* \* \* Second, the EPA’s interpretation gives rise to serious vagueness concerns in light of the CWA’s criminal penalties. Due process requires Congress to define penal statutes “ ‘with sufficient definiteness that ordinary people can understand what conduct is prohibited’ ” and “ ‘in a manner that does not encourage arbitrary and discriminatory enforcement.’ ” *McDonnell v. United States*, 579 U.S. 550, 576 (2016) (quoting *Skilling v. United States*, 561 U.S. 358, 402–403 (2010)). Yet the meaning of “waters of the United States” under the EPA’s interpretation remains “hopelessly indeterminate.” *Sackett*, 566 U.S., at 133, 132 S.Ct. 1367 (ALITO, J., concurring); accord, *Hawkes Co.*, 578 U.S., at 602 (opinion of KENNEDY, J.).

\* \* \*

Under these two background principles, the judicial task when interpreting “the waters of the United States” is to ascertain whether clear congressional authorization exists for the EPA’s claimed power. The EPA’s interpretation falls far short of that standard. \* \* \*

## VI

In sum, we hold that the CWA extends to only those “wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right,” so that they are “indistinguishable” from those waters. *Rapanos*, 547 U.S., at 742, 755 (plurality opinion) (emphasis deleted); see *supra*, at ——. This holding compels reversal here. The wetlands on the Sacketts’ property are distinguishable from any possibly covered waters.

■ Justice THOMAS, with whom Justice GORSUCH joins, concurring.

[Eds: Justice Thomas added a lengthy concurring opinion arguing that EPA and the Army Corps had expanded jurisdiction beyond the statutory focus on navigable-in-fact waters and had done so without constitutional authority. Just the concluding paragraph appears below.]

The Court's opinion today curbs a serious expansion of federal authority that has simultaneously degraded States' authority and diverted the Federal Government from its important role as guarantor of the Nation's great commercial water highways into something resembling "a local zoning board." *Rapanos*, 547 U.S., at 738 (plurality opinion). But, wetlands are just the beginning of the problems raised by the agencies' assertion of jurisdiction in this case. Despite our clear guidance in *SWANCC* that the CWA extends only to the limits of Congress' traditional jurisdiction over navigable waters, the EPA and the Corps have continued to treat the statute as if it were based on New Deal era conceptions of Congress' commerce power. But, while not all environmental statutes are so textually limited, Congress chose to tether federal jurisdiction under the CWA to its traditional authority over navigable waters. The EPA and the Corps must respect that decision.

Justice KAGAN, with whom Justice SOTOMAYOR and Justice JACKSON join, concurring in the judgment.

Like Justice KAVANAUGH, "I would stick to the text." *Post*, at — (opinion concurring in judgment). As he explains in the principal concurrence, our normal method of construing statutes identifies which wetlands the Clean Water Act covers—and the answer provided exceeds what the Court says today. Because the Act covers "the waters of the United States," and those waters "includ[e]" all wetlands "adjacent" to other covered waters, the Act extends to those "adjacent" wetlands. 33 U.S.C. §§ 1362(7), 1344(g)(1). And in ordinary language, one thing is adjacent to another not only when it is touching, but also when it is nearby. See *post*, at — — — (quoting multiple dictionaries). So, for example, one house is adjacent to another even when a stretch of grass and a picket fence separate the two. As applied here, that means—as the EPA and Army Corps have recognized for almost half a century—that a wetland comes within the Act if (i) it is "contiguous to or bordering a covered water, or (ii) if [it] is separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like." *Post*, at — (emphasis in original). In excluding all the wetlands in category (ii), the majority's "'continuous surface connection' test disregards the ordinary meaning of 'adjacent.'" *Post*, at —. The majority thus alters—more precisely, narrows the scope of—the statute Congress drafted.

And make no mistake: Congress wrote the statute it meant to. The Clean Water Act was a landmark piece of environmental legislation, designed to address a problem of "crisis proportions." R. Adler, J. Landman, & D. Cameron, *The Clean Water Act: 20 Years Later* 5 (1993). How bad was water pollution in 1972, when the Act passed? Just a few years earlier, Ohio's Cuyahoga River had "burst into flames, fueled by oil and other industrial wastes." *Ibid.* And that was merely one of many alarms. Rivers, lakes, and creeks across the country were unfit for swimming. Drinking water was full of hazardous chemicals. Fish were dying in record numbers (over 40 million in 1969); and those caught were often too contaminated to eat (with mercury and DDT far above safe levels). See *id.*, at 5–6. So Congress embarked on what this Court once understood as a "total restructuring and complete rewriting" of existing water pollution law. *Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (internal quotation marks omitted). The new Act established "a self-consciously comprehensive" and "all-encompassing program of water pollution regulation." *Id.*, at 318–319. Or said a bit differently, the Act created a program broad enough to achieve the codified objective of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." § 1251(a). If you've lately swum in a lake, happily drunk a glass of water straight from the tap, or sat down to a good fish dinner, you can appreciate what the law has accomplished.

Vital to the Clean Water Act's project is the protection of wetlands—both those contiguous to covered waters and others nearby. As this Court (again, formerly) recognized, wetlands “serve to filter and purify water draining into adjacent bodies of water, and to slow the flow of surface runoff into lakes, rivers, and streams.” *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985) (citation omitted). Wetlands thus “function as integral parts of the aquatic environment”—protecting neighboring water if themselves healthy, imperiling neighboring water if instead degraded. *Id.*, at 135. At the same time, wetlands play a crucial part in flood control (if anything, more needed now than when the statute was enacted). And wetlands perform those functions, as Justice KAVANAUGH explains, not only when they are touching a covered water but also when they are separated from it by a natural or artificial barrier—say, a berm or dune or dike or levee. See *post*, at ——— (giving examples). Those barriers, as he says, “do not block all water flow,” and in fact are usually evidence of a significant connection between the wetland and the water. *Ibid.* Small wonder, then, that the Act—as written, rather than as read today—covers wetlands with that kind of connection. Congress chose just the word needed to meet the Act's objective. A wetland is protected when it is “adjacent” to a covered water—not merely when it is “adjoining” or “contiguous” or “touching,” or (in the majority's favorite made-up locution) has a “continuous surface connection.” See, e.g., *ante*, at ———.

Today's majority, though, believes Congress went too far. In the majority's view, the Act imposes unjustifiably “crushing consequences” for violations of its terms. *Ante*, at ———. And many of those violations, it thinks, are of no real concern, arising from “mundane” land-use conduct “like moving dirt.” *Ante*, at ———. Congress, the majority scolds, has unleashed the EPA to regulate “swimming pools[ ] and puddles,” wreaking untold havoc on “a staggering array of landowners.” *Ante*, at ———, ———. Surely something has to be done; and who else to do it but this Court? It must rescue property owners from Congress's too-ambitious program of pollution control.

So the majority shelves the usual rules of interpretation—reading the text, determining what the words used there mean, and applying that ordinary understanding even if it conflicts with judges' policy preferences. The majority's first pass through the statute is, as Justice KAVANAUGH says, “unorthodox.” *Post*, at ———. “A minus B, which includes C”? *Ante*, at ———. The majority could use every letter of the alphabet, and graduate to quadratic equations, and still not solve its essential problem. As the majority concedes, the statute “tells us that at least some wetlands must qualify as ‘waters of the United States.’” *Ante*, at ——— – ———. More, the statute tells us what those “some wetlands” are: the “adjacent” ones. And again, as Justice KAVANAUGH shows, “adjacent” does not mean adjoining. See *post*, at ——— – ———; *supra*, at ——— – ———. So the majority proceeds to its back-up plan. It relies as well on a judicially manufactured clear-statement rule. When Congress (so says the majority) exercises power “over private property”—particularly, over “land and water use”—it must adopt “exceedingly clear language.” *Ante*, at ——— (internal quotation marks omitted). There is, in other words, a thumb on the scale for property owners—no matter that the Act (*i.e.*, the one Congress enacted) is all about stopping property owners from polluting. See *supra*, at ———.

Even assuming that thumb's existence, the majority still would be wrong. As Justice KAVANAUGH notes, clear-statement rules operate (when they operate) to resolve problems of ambiguity and vagueness. See *post*, at ———; see also *Bond v. United States*, 572 U.S. 844, 859 (2014); *United States v. Bass*, 404 U.S. 336, 347 (1971). And no such problems are evident here. One last time: “Adjacent” means neighboring, whether or not touching; so, for example, a wetland is adjacent to water on the other side of a sand dune. That congressional judgment is as clear as clear can be—which is to say, as clear

as language gets. And so a clear-statement rule must leave it alone. The majority concludes otherwise because it is using its thumb not to resolve ambiguity or clarify vagueness, but instead to “correct” breadth. Those paying attention have seen this move before—actually, just last Term. In another case of environmental regulation (involving clean air), the Court invoked another clear-statement rule (the so-called major questions doctrine) to diminish another plainly expansive term (“system of emission reduction”). See *West Virginia v. EPA*, 597 U. S. — (2022). “[C]ontra the majority,” I said then, “a broad term is not the same thing as a ‘vague’ one.” *Id.*, at — (dissenting opinion). And a court must treat the two differently. A court may, on occasion, apply a clear-statement rule to deal with statutory vagueness or ambiguity. But a court may not rewrite Congress’s plain instructions because they go further than preferred. That is what the majority does today in finding that the Clean Water Act excludes many wetlands (clearly) “adjacent” to covered waters.

And still more fundamentally, why ever have a thumb on the scale against the Clean Water Act’s protections? The majority first invokes federalism. See *ante*, at — — —. But as Justice KAVANAUGH observes, “the Federal Government has long regulated the waters of the United States, including adjacent wetlands.” *Post*, at —. The majority next raises the specter of criminal penalties for “indeterminate” conduct. See *ante*, at — — —. But there is no peculiar indeterminacy in saying—as regulators have said for nearly a half century—that a wetland is covered *both* when it touches a covered water *and* when it is separated by only a dike, berm, dune, or similar barrier. (That standard is in fact more definite than a host of criminal laws I could name.) Today’s pop-up clear-statement rule is explicable only as a reflexive response to Congress’s enactment of an ambitious scheme of environmental regulation. It is an effort to cabin the anti-pollution actions Congress thought appropriate. See *ante*, at — (complaining about Congress’s protection of “vast” and “staggering” “additional area”). And that, too, recalls last Term, when I remarked on special canons “magically appearing as get-out-of-text-free cards” to stop the EPA from taking the measures Congress told it to. See *West Virginia*, 597 U. S., at — (dissenting opinion). There, the majority’s non-textualism barred the EPA from addressing climate change by curbing power plant emissions in the most effective way. Here, that method prevents the EPA from keeping our country’s waters clean by regulating adjacent wetlands. The vice in both instances is the same: the Court’s appointment of itself as the national decision-maker on environmental policy.

So I’ll conclude, sadly, by repeating what I wrote last year, with the replacement of only a single word. “[T]he Court substitutes its own ideas about policymaking for Congress’s. The Court will not allow the Clean [Water] Act to work as Congress instructed. The Court, rather than Congress, will decide how much regulation is too much.” *Id.*, at — —. Because that is not how I think our Government should work—more, because it is not how the Constitution thinks our Government should work—I respectfully concur in the judgment only.

■ Justice KAVANAUGH, with whom Justice SOTOMAYOR, Justice KAGAN, and Justice JACKSON join, concurring in the judgment.

\* \* \* I agree with the Court’s reversal of the Ninth Circuit. In particular, I agree with the Court’s decision not to adopt the “significant nexus” test for determining whether a wetland is covered under the Act. And I agree with the Court’s bottom-line judgment that the wetlands on the Sacketts’ property are not covered by the Act and are therefore not subject to permitting requirements.



I write separately because I respectfully disagree with the Court's new test for assessing when wetlands are covered by the Clean Water Act. The Court concludes that wetlands are covered by the Act only when the wetlands have a "continuous surface connection" to waters of the United States—that is, when the wetlands are "adjoining" covered waters. *Ante*, at —, — (internal quotation marks omitted). In my view, the Court's "continuous surface connection" test departs from the statutory text, from 45 years of consistent agency practice, and from this Court's precedents. The Court's test narrows the Clean Water Act's coverage of "adjacent" wetlands to mean only "adjoining" wetlands. But "adjacent" and "adjoining" have distinct meanings: Adjoining wetlands are contiguous to or bordering a covered water, whereas adjacent wetlands include both (i) those wetlands contiguous to or bordering a covered water, *and* (ii) wetlands separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like. By narrowing the Act's coverage of wetlands to only adjoining wetlands, the Court's new test will leave some long-regulated adjacent wetlands no longer covered by the Clean Water Act, with significant repercussions for water quality and flood control throughout the United States. Therefore, I respectfully concur only in the Court's judgment.

\* \* \* The difference between "adjacent" and "adjoining" in this context is not merely semantic or academic. The Court's rewriting of "adjacent" to mean "adjoining" will matter a great deal in the real world. In particular, the Court's new and overly narrow test may leave long-regulated and long-accepted-to-be-regulable wetlands suddenly beyond the scope of the agencies' regulatory authority, with negative consequences for waters of the United States. For example, the Mississippi River features an extensive levee system to prevent flooding. Under the Court's "continuous surface connection" test, the presence of those levees (the equivalent of a dike) would seemingly preclude Clean Water Act coverage of adjacent wetlands on the other side of the levees, even though the adjacent wetlands are often an important part of the flood-control project. Likewise, federal protection of the Chesapeake Bay might be less effective if fill can be dumped into wetlands that are adjacent to (but not adjoining) the bay and its covered tributaries. Those are just two of many examples of how the Court's overly narrow view of the Clean Water Act will have concrete impact.

As those examples reveal, there is a good reason why Congress covered not only adjoining wetlands but also adjacent wetlands. Because of the movement of water between adjacent wetlands and other waters, pollutants in wetlands often end up in adjacent rivers, lakes, and other waters. Natural barriers such as berms and dunes do not block all water flow and are in fact evidence of a regular connection between a water and a wetland. 85 Fed. Reg. 22307; 88 Fed. Reg. 3095, 3118. Similarly, artificial barriers such as dikes and levees typically do not block all water flow, 85 Fed. Reg. 22312; 88 Fed. Reg. 3076, and those artificial structures were often built to control the surface water connection between the wetland and the water. 85 Fed. Reg. 22315; 88 Fed. Reg. 3118. The scientific evidence overwhelmingly demonstrates that wetlands separated from covered waters by those kinds of berms or barriers, for example, still play an important role in protecting neighboring and downstream waters, including by filtering pollutants, storing water, and providing flood control. See 88 Fed. Reg. 3118; 33 C.F.R. § 320.4(b)(2) (2022); see also *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985). In short, those adjacent wetlands may affect downstream water quality and flood control in many of the same ways that adjoining wetlands can.

The Court's erroneous test not only will create real-world consequences for the waters of the United States, but also is sufficiently novel and vague (at least as a single standalone test) that it may create regulatory uncertainty for the Federal Government,

the States, and regulated parties. As the Federal Government suggests, the continuous surface connection test raises “a host of thorny questions” and will lead to “potentially arbitrary results.” For example, how difficult does it have to be to discern the boundary between a water and a wetland for the wetland to be covered by the Clean Water Act? How does that test apply to the many kinds of wetlands that typically do not have a surface water connection to a covered water year-round—for example, wetlands and waters that are connected for much of the year but not in the summer when they dry up to some extent? How “temporary” do “interruptions in surface connection” have to be for wetlands to still be covered? *Ante*, at 1340 – 1341. How does the test operate in areas where storms, floods, and erosion frequently shift or breach natural river berms? Can a continuous surface connection be established by a ditch, swale, pipe, or culvert? See 88 Fed. Reg. 3095. The Court covers wetlands separated from a water by an artificial barrier constructed *illegally*, see *ante*, at 1341, n. 16, but why not also include barriers authorized by the Army Corps at a time when it would not have known that the barrier would cut off federal authority? The list goes on.

Put simply, the Court’s atextual test—rewriting “adjacent” to mean “adjoining”—will produce real-world consequences for the waters of the United States and will generate regulatory uncertainty. I would stick to the text. There can be no debate, in my respectful view, that the key statutory term is “adjacent” and that adjacent wetlands is a broader category than adjoining wetlands. To be faithful to the statutory text, we cannot interpret “adjacent” wetlands to be the same thing as “adjoining” wetlands.

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## NOTES

1. In the opening pages of *Sackett*, Justice Alito paints an ominous picture of the implications of Clean Water Act jurisdiction. In its *Sackett* brief, here is how the United States summarized program costs:

The vast majority of Section 404 authorizations occur under the Corps’ streamlined general permits, rather than site-specific permits. See Corps, *Regulatory Impact Analysis for 2021 Reissuance and Modification of Nationwide Permits* 10 (Jan. 3, 2021). Many general permits allow project proponents to discharge pollutants without submitting any application to the Corps. *Id.* at 9. Even for those general permits that require advance notice to the agency, the average processing time for applications is less than two months. *Id.* at 11. The Corps estimates that the total Section 404 permitting cost for a typical project covered by a nationwide permit requiring advance notice varies from about \$4400 to \$14,700. *Id.* at 25.

Brief for Respondents, *Sackett v. EPA*, at 38. Individual permits, which you will read about later in this chapter, apply to larger stream and wetland fills and typically involve more time and money.

2. At one point in its *Sackett* opinion, the Court remarks that “It is hard to see how the States’ role in regulating water resources would remain “primary” if the EPA had jurisdiction over anything defined by the presence of water.” As you continue through this chapter, you may wish to consider whether that statement is accurate. Does the Clean Water Act displace state authority to manage and protect water resources? Does it provide a framework for, and support to, state exercises of that authority? Does it do both?

3. State water quality statutes may have different scope than the federal Clean Water Act. Among other things, state statutes are not limited to the scope of federal

regulatory authority under the Commerce Clause. Pennsylvania's Clean Streams Law, 35 P.S. §§ 691.1–691.1001, for example, prohibits unauthorized discharges of “sewage,” “industrial waste,” or “pollution” into “waters of the Commonwealth,” which it defines as “any and all rivers, streams, creeks, rivulets, impoundments, ditches, water courses, storm sewers, lakes, dammed water, ponds, springs and all other bodies or channels of conveyance of surface and underground water, or parts thereof, whether natural or artificial, within or on the boundaries of this Commonwealth.” 35 P.S. § 691.1. Would the ephemeral streams and isolated wetland discussed in Problem 4.1, if located in Pennsylvania, constitute “waters of the Commonwealth”? To what extent would the reasoning of the *Rapanos* plurality, concurring, and dissenting opinions apply to interpreting the Clean Streams Law?

## CHAPTER 8

# ENVIRONMENTAL IMPACT ANALYSIS

\* \* \*

[Insert for page 665, immediately before the heading “NEPA Processes”]

### 2023 NEPA Amendments

The Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, 137 Stat. 10 (2023), which at least temporarily ended a congressional impasse over the federal government’s debt ceiling, included numerous provisions that were of interest to individual members of Congress and that were intended gain those members’ support for the act. Among these provisions were several amendments to NEPA. Bipartisan support for some changes to NEPA has been growing in recent years, based on the perception among many lawmakers that NEPA reviews have slowed down important infrastructure projects, including projects such as pipelines and electricity transmission lines that will be important to meeting future energy needs. The amendments to NEPA in the Fiscal Responsibility Act appear substantial but, in the end, do not change the statute very much. Most of the amendments appear aimed at codifying existing agency practices and judicial interpretations rather than forcing major changes. The statutory changes included the following:

- An agency need only assess environmental effects that are “reasonably foreseeable.” 42 U.S.C. § 4332(C)(i), (ii). This is consistent with existing NEPA regulations and case law. *See, e.g.*, 40 C.F.R. § 1508.8; *Indian River Cnty. v. U.S. Dep’t of Transp.*, 945 F.3d 515, 533 (D.C. Cir. 2019); *see also infra* page 725 (discussing reasonably foreseeable effects).
- An agency need only analyze alternatives that “are technically and economically feasible, and meet the purpose and need of the proposal.” 42 U.S.C. § 4332(C)(iii). This, too, is consistent with existing NEPA case law. *See, e.g.*, *League of Wilderness Defs. –Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1069 (9th Cir. 2012) (purpose and need); *Tongass Conservation Society v. Cheney*, 924 F.2d 1137, 1140–42 (D.C. Cir. 1991) (feasible alternatives); *see also infra* pages 700-22 (discussing alternatives).
- Agencies are not required to prepare an EIS or an EA if the agency is not proposing to take final action as defined in the Administrative Procedure Act, if the proposed agency action falls within a categorical exclusion, if the environmental review would conflict with the requirements of another federal law, or if the agency lacks authority to take environmental factors into consideration. 42 U.S.C. § 4336(a). Much of this is consistent with existing NEPA regulations and case law. *See, e.g.*, *Dep’t of Transp. v. Public Citizen*, 541 U.S. 752, 770 (2004) (holding that NEPA does not require environmental reviews when an agency lacks statutory authority to alter its action based on environmental factors); *Flint Ridge Dev. v. Scenic Rivers Ass’n of Okla.*, 426 U.S. 776, 788 (1976) (holding that NEPA does not require environmental reviews when there is a “clear and unavoidable conflict” between the statutory language of NEPA and another statute); 40 C.F.R. § 1501.4 (providing for categorical exclusions from NEPA review); *see also infra* page 669 (discussing what counts

as a federal action that requires NEPA review), page 670 (discussing situations in which agencies lack authority to take environmental factors into consideration).

- Agencies should prepare an EIS for proposed actions that have a reasonably foreseeable significant effect on the quality of the human environment and an EA for proposed actions that do not have a reasonably foreseeable significant effect on the quality of the human environment but are not covered by an applicable categorical exclusion. 42 U.S.C. § 4336(b). This is consistent with longstanding NEPA regulations, 40 C.F.R. § 1501.5; see also casebook page 666 (discussing EAs and categorical exclusions), although the amendments expand the ability of agencies to use categorical exclusions by allowing them to adopt categorical exclusions listed in another’s agency’s NEPA procedures, 42 U.S.C. § 4336c.
- Agencies are not required to undertake additional scientific or technical research unless it is “essential to a reasoned choice among alternatives” and not unreasonably costly in terms of time or funds. 42 U.S.C. § 4336(b)(3). This is similar to language in prior NEPA regulations. 40 C.F.R. § 1502.22 (2019).
- To facilitate timely and unified agency reviews in actions involving more than one federal agency, agencies must designate a lead agency. 42 U.S.C. § 4336a(a). This is consistent with longstanding NEPA regulations. 40 C.F.R. § 1501.7.
- EISs and EAs are subject to page limits—75 pages for EAs, 150 pages for EISs, and 300 pages for EISs for projects “of extraordinary complexity.” 42 U.S.C. § 4336a(e). But the page limits do not apply to appendices and supporting documents, which is likely to limit their effect as agencies will just shift more analysis to appendices. Similar page limits were added to the NEPA regulations in 2020. 40 C.F.R. §§ 1501.5(g), 1502.7 (2020).
- EISs and EAs are subject to deadlines—one year for EAs, two years for EISs—with an ability to extend for “so much additional time as is necessary,” and project sponsors may petition in federal court for an order directing the agency to act. 42 U.S.C. § 4336a(g). Existing NEPA regulations included these time limits, but they did not include a procedure for petitioning a court. 40 C.F.R. § 1501.10(b) (2020). Depending on how rigorously courts hold agencies to the prescribed deadlines, this could significantly affect agency NEPA practice, as many NEPA reviews take considerably longer than the statutory deadlines.
- When an agency prepares an EA or EIS for a program or policy—known as a “programmatic” document, the agency may rely on that programmatic analysis in a subsequent environmental review. 42 U.S.C. § 4336b. This is known as “tiering” and has long been part of NEPA regulations. 40 C.F.R. § 1501.11 (2019); *see also* casebook page 726 (discussing tiering).

## Revised Regulations

On his first day in office, President Biden directed federal agencies to begin reviewing regulations issued by the Trump Administration, including CEQ’s 2020 revisions to NEPA. Executive Order 13990, 86 Fed. Reg. 7037 (2021). Some environmental advocates called on CEQ to simply repeal the rule in its entirety and return to the prior regulations, which had largely been promulgated in 1978. Other environmental advocates saw a need for reform, and the renewable energy industry urged CEQ to retain many elements of the new regulations and make further reforms,

contending that building America's clean energy economy required streamlining NEPA and other aspects of federal permitting processes.

Shortly after the President's directive, CEQ announced that it would comprehensively review its NEPA regulations through a phased approach. At the same time, the Biden Administration took steps across the government to speed up federal permitting processes for renewable energy, electric transmission, semi-conductor manufacturing, and infrastructure and secured more than \$1 billion in new funding for federal agencies for environmental reviews and permitting. *See, e.g.,* Department of Energy, *Coordination of Federal Authorizations for Electric Transmission Facilities*, 89 Fed. Reg. 35,312 (2024); *The Biden-Harris Permitting Action Plan to Rebuild America's Infrastructure, Accelerate the Clean Energy Transition, Revitalize Communities, and Create Jobs* (May 11, 2022), available at <https://www.whitehouse.gov/wp-content/uploads/2022/05/Biden-Harris-Permitting-Action-Plan.pdf>.

In 2022, CEQ completed the first phase of its review of the NEPA regulations, largely restoring the substance of three key provisions that had been substantially amended in 2020. 87 Fed. Reg. 23,453 (2022). In May 2024, after enactment of the Fiscal Responsibility Act's amendments to NEPA, CEQ completed its second phase, which made changes throughout the NEPA regulations to implement the new statutory provisions, repeal some aspects of the Trump Administration's regulations, retain or refine others, and make other reforms. 89 Fed. Reg. 35,442 (2024). These changes include:

- Identifying new types of categorical exclusions and new mechanisms agencies can use to establish them. 40 CFR § 1501.4(c).
- Establishing a process for agencies to use the new statutory provisions enabling them to adopt other agencies' categorical exclusions. 40 CFR § 1501.4(d).
- Incorporating principles from caselaw, guidance documents, and agency practice to require agencies to consider climate change and environmental justice. *E.g.* 40 CFR § 1502.16(a).
- Specifying that only adverse effects can require the preparation of an environmental impact statement. 40 CFR § 1508.1(mm)
- Directing agencies to establish a Chief Engagement Office to oversee implementation of requirements to engage with communities, other stakeholders, and the public in the environmental review process. 40 CFR § 1507.2(a).
- Requiring agencies to adopt monitoring and compliance plans for mitigation measures when those measures are relied upon to determine that a proposed action's reasonably foreseeable effects are less than they otherwise would be. 40 CFR § 1505.3(c).

By announcing that it would comprehensively review its NEPA regulations, CEQ secured agreement from most of the plaintiffs challenging the Trump Administration's regulations to stay their cases. The case of the plaintiffs that did not agree to a stay was dismissed on ripeness grounds. *Wild Virginia v. CEQ*, 56 F.4th 281 (2022). Less than a month after the 2024 rule was finalized, a new round of litigation began, so uncertainty over the regulations implementing NEPA will continue. Meanwhile, as this supplement is being written, Congress is considering additional legislation to reform the Federal permitting process. *See* S. 4753, *Energy Permitting Reform Act of 2024*, available at <https://www.congress.gov/bill/118th-congress/senate-bill/4753>.

