No. 11-597

In the Supreme Court of the United States

ARKANSAS GAME & FISH COMMISSION, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The Court of Federal Claims found that during several years in the 1990s, temporary and irregular changes in water releases from a flood-control dam operated by the United States Army Corps of Engineers marginally increased the number of days on which part of petitioner's wetland property—which is located 115 miles downstream of the dam and has long been subject to regular natural flooding—was inundated. The question presented is as follows:

Whether the Corps' releases of water effected a Fifth Amendment taking of petitioner's property.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 637 F.3d 1366. The opinions on denial of rehearing en banc (Pet. App. 165a-179a) are reported at 648 F.3d 1377. The opinion of the Court of Federal Claims (Pet. App. 38a-161a) is reported at 87 Fed. Cl. 594.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 2011. A petition for rehearing was denied on August 11, 2011 (Pet. App. 162a-164a). The petition for a writ of certiorari was filed on November 9, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Black River flows south from Missouri into Arkansas. Pet. App. 3a, 46a. In its pre-dammed state, the River regularly flooded lands along its banks. *Id.* at 59a-60a. The United States Army Corps of Engineers (Corps) constructed Clearwater Dam in Missouri in the 1940s to control flood waters from the River. *Id.* at 3a-4a, 46a. The Corps releases waters from Clearwater Lake behind the Dam into the River to serve a variety of interests, but the Corps cannot operate the Dam to completely eliminate downstream flooding. *Id.* at 3a-4a, 46a.

Petitioner owns and manages the Dave Donaldson Black River Wildlife Management Area (WMA), a region in Arkansas about 115 miles downriver from the Dam that spans 23,000 acres on both banks of the River. Pet. App. 2a-3a. The WMA has long been subject to regular flooding, both before and after the Dam was constructed. *Id.* at 7a, 14a-15a, 59a-60a, 106a. In addition, petitioner has created several "Green Tree Reservoirs" in the WMA, which it intentionally floods each year to facilitate duck hunting. Pet. 4; Pet. App. 44a. The WMA also serves as a timber resource. *Id.* at 3a, 42a-43a.

In 1953, the Corps adopted the Clearwater Lake Water Control Manual. Pet. App. 4a. Among other things, the Manual provided for "normal regulation" water releases from the Lake to the River below the Dam. These releases were keyed to the stage of the River (*i.e.*, the River's depth) at the Poplar Bluff gauge, which is in Missouri, about 32 miles downriver from the Dam. *Id.* at 5a, 46a. In particular, the Manual set maximum water release levels so that the River would measure no more than 10.5 feet at Poplar Bluff during the growing season and no more than 11.5 feet during the non-growing season. *Id.* at 5a. These maximum release levels "allowed

for the quick release of water during the growing season, so flooding occurred in short-term waves rather than over extended periods." *Ibid.*

The Manual also provided for deviations from the normal regulation releases for emergencies, unplanned minor deviations, and planned deviations requested for agriculture, recreational, and other purposes. Pet. App. 5a. Planned deviations were "for specific activities that required deviations only for limited periods of time, such as the harvesting of crops, canoe races, and fish spawning." *Id.* at 6a. The Corps approved a number of different deviations between 1993 and 1999. The deviations were not uniform: they applied at different times of the year, they provided for different water releases (as measured by the River's stage at the Poplar Bluff gauge), and they were in response to different requests. *Id.* at 6a-13a. For example, farmers along the River who needed more time to harvest crops before their lands flooded requested deviations. *Id.* at 6a. A working group of interested parties, including farming interests, also requested deviations that attempted to balance the various interests. *Id.* at 6a-9a. Although the deviations provided for releases that corresponded to the River's stage at Poplar Bluff, releases would also increase if Clearwater Lake reached certain levels. *Id.* at 11a.

This case concerns deviations in 1993 through 1998.[1] See Pet. App. 11a-13a (chart summarizing deviations). In particular:

- In 1993, farmers along the River requested that the Corps slow water releases to provide them more time to harvest their crops. Pet. App. 6a. The Corps approved a two-and-a-half month deviation from normal regulation releases, from September 29 to December 15. *Ibid.* That deviation set the maximum stage of the River at Poplar Bluff to 6 feet, as compared to the normal regulation stage of 11.5 feet. *Ibid.*
- In 1994, the Corps approved temporary deviations from April through November, in response to a proposal from a group of public and private entities that was working to build a consensus on permanent revisions to the Manual. Pet. App. 7a-8a. That deviation set the maximum stage at 11.5 feet for the first two weeks of April, then at 8 feet for the next month, and then at 6 feet from mid-May through November. *Id.* at 8a.
- In 1995, the Corps approved deviations that mirrored those in 1994. Pet. App. 8a.

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[1] The Corps also approved deviations in 1999 and 2000, but they did not affect the River's level because of drought conditions. Pet. 3; Pet. App. 15a, 61a, 75a. The Corps approved a deviation from December 1, 1998, to December 31, 1999, setting four feet as the maximum river stage at Poplar Bluff from mid-May though November, with that level increasing if the Lake filled to a certain volume. Pet. App. 9a. The Corps later approved the continuation of this deviation through December 1, 2000. That was the final deviation approved by the Corps. *Id.* at 10a.

- In 1996, the Corps approved new deviations, with target stages of 6 feet in June and 5 feet from July through November. Pet. App. 8a-9a.
- In 1997, the Corps approved a short deviation from June 3 to July 5 to prevent possible flooding. Pet. App. 9a.
- In 1998, the Corps approved a deviation from June 11 to November 30 in response to a request from agricultural interests. Pet. App. 9a.

The Corps also considered whether to permanently amend the Manual to change the normal regulation water release patterns. It participated in working groups of interested parties (including petitioner) weighing various options. Pet. App. 6a-10a. Although the working groups proposed some of the temporary deviations described above, they did not reach a consensus on permanent changes. *Id.* at 6a-9a. The Corps ultimately decided against any permanent changes to the Manual release patterns, after it had prepared an Environmental Assessment pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* Pet. App. 9a-10a.

2. In 2005, petitioner sued the United States, claiming that the deviations in 1993 through 2000 increased growing-season flooding on the WMA and constituted a taking of petitioner's property under the Fifth Amendment. Pet. App. 13a. The flooding allegedly caused many trees to weaken and then die or decline during a 1999-2000 drought. Pet. 5; Pet. App. 13a, 15a. In response, the United States argued that petitioner's forest lands were already subject to regular growing-season flooding; that the releases had very little impact on the amount of flooding; that any increase in flooding did not

harm petitioner's trees; and that any increased flooding did not rise to the level of a taking. Pet. App. 13a-14a, 86a-87a.

Following a bench trial, the Court of Federal Claims found the United States liable for a taking of a temporary flowage easement over the WMA and awarded petitioner approximately $5.8 million in compensation for dead timber, declining timber, and restoration costs, plus interest. Pet. App. 38a-161a.

3. The court of appeals reversed. Pet. App. 1a-37a. The panel majority concluded that petitioner had failed as a matter of law to establish a taking of its property. The court's legal analysis focused on the longstanding distinction between government-caused flooding that constitutes only a tort and flooding that rises to the level of a taking. The court explained that tortious flooding results in "[a]n injury that is only 'in its nature indirect and consequential,'" *id.* at 18a (quoting *Sanguinetti* v. *United States*, 264 U.S. 146, 150 (1924)); by contrast, flooding that rises to the level of a taking consists of overflows that "'constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property,'" *ibid.* (quoting *Sanguinetti*, 264 U.S. at 149 (emphases omitted)). "[A]n invasion is permanent" under this Court's cases, the court of appeals explained, "when there is a 'permanent condition of continual overflow' or 'a permanent liability to intermittent but inevitably recurring overflows.'" *Id.* at 18a-19a (quoting *United States* v. *Cress*, 243 U.S. 316, 328 (1917)).

Here, the court of appeals concluded, any increased flooding in the WMA was an "inherently temporary condition" resulting from the Corps' "ad hoc or temporary" releases. Pet. App. 21a, 23a. The court stressed that

"all of the deviations from 1993 to 2000 were approved only as temporary or interim deviations. The multiple interim plans differed. Even where deviations were the same in consecutive years, such as in 1994 and 1995, the Corps had to approve an extension of the interim deviation plan for the second year." *Id.* at 24a. The court concluded that, because the deviations here "were plainly temporary * * * [and] cannot be characterized as inevitably recurring," they cannot constitute a taking and "at most created tort liability." *Id.* at 27a-28a.[2]

Judge Newman dissented. She would have held that the flooding constituted a taking because it was not of a "short duration" and it caused significant damage. Pet. App. 29a-37a.

4. The court of appeals denied rehearing en banc. Pet. App. 162a-179a. Concurring in the denial of rehearing, Judge Dyk (who had authored the panel majority opinion), joined by Judges Gajarsa and Linn, explained that the Corps "made a series of ad hoc and independent decisions to deviate from the normal release rates at a dam in Missouri, which sometimes caused intermittent flooding on the plaintiff's property." *Id.* at 167a-168a. "Each interim plan differed from the next, as the Corps and interested parties tried different ideas and attempted to come to an agreement." *Id.* at 168a. Judge Dyk further explained that the panel majority's decision was based on the factual circumstances here, and rejected the notion that it had created a blanket rule based on the label affixed to the government policy. *Id.* at 168a-169a.

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[2] The court of appeals did not comment further on a tort theory of recovery, presumably because petitioner had brought no such claim and the Court of Federal Claims' jurisdiction does not extend to cases "sounding in tort," 28 U.S.C. 1491(a)(1).

Judge Moore, joined by Judges Newman, O'Malley, and Reyna, dissented from the denial of rehearing en banc and expressed her view that the panel had permitted "the government's 'temporary' label for the release rate deviations to control the disposition of this case," yet doing so "elevates form over substance and leads to untenable results with enormous future consequences." Pet. App. 171a. While Judge Moore would have held that a "one time or incidental event" is properly characterized as a tort, in her view any "injury, substantial over time, [that] is a continuing or recurring one and the predictable consequence of the Government's conduct" should be treated as a taking. *Ibid.*

Judge Newman also issued an opinion dissenting from the denial of rehearing en banc, in which she reiterated her view that the flooding effected a taking because of its duration and the damage it caused. Pet. App. 177a-179a.

ARGUMENT

The court of appeals' decision is correct and faithfully analyzes the Corps' temporary and ad hoc water releases under this Court's longstanding principles distinguishing between mere temporary flooding episodes and the sort of continuous or inevitably recurring flooding that rises to the level of a taking. Petitioner does not suggest the decision below conflicts with any decision of another court of appeals or a state court of last resort. Petitioner's assertion (Pet. 20) that the court of appeals adopted a rigid "one-factor rule for flooding" cases both misreads the court's opinion and exaggerates the practical effect of the decision below. And in any event, a central evidentiary dispute that the court of appeals left unresolved makes this case a particularly unattractive vehicle: below, the government advanced

serious challenges to the Court of Federal Claims' approach to expert testimony on the actual effect of the Corps' deviations in its operation of the Dam on flooding in the WMA, more than 100 miles downriver. Further review is not warranted.

1. a. The decision of the court of appeals is correct. In *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court summarized its flooding cases and explained that the "permanence" of the government action distinguishes between flooding that is a taking and flooding that causes non-taking damage. *Id.* at 435 n.12. The Court has "consistently distinguished between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, or government action outside the owner's property that cause consequential damages within, on the other. A taking has always been found only in the former situation" *Id.* at 428 (citing cases). *Loretto* quotes *Sanguinetti* v. *United States*, 264 U.S. 146 (1924), as controlling in the flooding context: "to be a taking, flooding must 'constitute an actual, permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property.'" 458 U.S. at 428 (quoting 264 U.S. at 149).

Under this test, permanence is established by either a "permanent condition of continual overflow" or "a permanent liability to intermittent but inevitably recurring overflows." *United States* v. *Cress*, 243 U.S. 316, 328 (1917). The former type of permanent flooding is typified by inundation of lands as a river or reservoir rises behind a newly constructed dam. See, *e.g.*, *United States* v. *Dickinson*, 331 U.S. 745, 746-747 (1947) (construction of a dam raised the river level, "permanently flood[ing]" some of the claimant's land). That type of

permanent flooding is not at issue here because it is undisputed that floods in the WMA always receded. The latter type of flooding is typified by construction that alters a waterway or land in a way that overflows or precipitation are consistently channeled onto servient property. See, *e.g.*, *Cress*, 243 U.S. at 318 (district court found "by reason of the erection of [a] lock and dam," the claimant's property became "subject to frequent overflows of water from the river, so as to depreciate it one-half of its value"); *Ridge Line, Inc.* v. *United States*, 346 F.3d 1346, 1350-1352 (Fed. Cir. 2003) (use of impervious surfaces construction of Postal Service facility that caused storm water runoff, forcing shopping center operator to construct large water detention facilities, could rise to the level of a taking). The court of appeals considered that type of flooding in this case.

The record here established, without contradiction, that the Corps' deviations were each conceived and implemented as temporary, and varied in their timing and reasons: "[A]ll of the deviations from 1993 to 2000 were approved only as temporary or interim deviations. The multiple interim plans differed. Even where deviations were the same in consecutive years, such as in 1994 and 1995, the Corps had to approve an extension of the interim deviation plan for the second year." Pet. App. 24a. In turn, the court of appeals correctly concluded that because the deviations were "inherently temporary," any flooding they caused could not be "inevitably recurring" in the way this Court's precedents demand. *Id.* at 25a.

That result is dictated by *Sanguinetti* itself. There, the Court found no taking where plaintiff's agricultural land was subjected to increased flooding for several years due to a government canal unintentionally de-

signed with insufficient capacity. *Sanguinetti*, 264 U.S. at 146-150. The state of affairs in *Sanguinetti* resulted in several years of flooding, but it was too temporary in nature to amount to a taking and did not "constitute an actual, permanent invasion of the land." *Id.* at 149. The court of appeals reached the same conclusion on similar facts here: the ad hoc operational changes did not effect the requisite "permanent invasion" of petitioner's land. Indeed, the nature of the flooding and the varied deviations here were more temporary and ad hoc than the government action in *Sanguinetti*, where a government-built structure caused flooding for several years.

b. Petitioner contends (Pet. 3, 10, 16) that the court of appeals' opinion articulates a per se rule that government action that causes flooding but is labeled "temporary" can never constitute a taking. As an initial matter, even if that accurately characterized the court of appeals' opinion, it would not call for this Court's review, because "[t]his Court * * * reviews judgments, not statements in opinions." *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956). And in any event, the court of appeals did not profess to create a per se rule. Rather, the court detailed the facts of the case at length, and its analysis recognized and appropriately emphasized that the particular deviations here were—in substance, not merely in name—"temporary" and "ad hoc." Pet. App. 6a, 10a-11a, 21a, 23a.[3]

Judge Dyk, the author of the panel majority opinion, made clear in his opinion concurring in the denial of re-

[3] Petitioner's preferred label—that the Corps imposed a "regime" (Pet. 1, 3)—is incorrect. The record establishes that the Corps made distinct decisions to approve deviations for different time periods, releasing different amounts of water, in response to different requests. Pet. App. 6a-13a.

hearing that the court had not established a per se rule. "[T]he panel majority did not create a blanket rule under which any flood-causing policy that is labeled temporary by the government will allow the United States to avoid takings liability." Pet. App. 168a. Rather, the decision was based on the facts of this case:

> [I]t is clear that this was a situation in which there was genuine uncertainty about the nature of the policies from year to year as the Corps responded to individualized concerns and individualized circumstances over (in the aggregate) a short period of time. The government's actions and the surrounding context demonstrate that the policies were temporary and not inevitably recurring.

Id. at 169a.

Nor is petitioner correct in asserting (Pet. 10; see Pet. App. 171a) that the panel simply deferred to the government's label for the Corps' action. It was the substance of the decisions surrounding each of the irregular deviations, not an arbitrary label, that established their temporary and ad hoc nature. Nothing in the record suggests the deviations were anything but temporary; the Water Control Manual provided for such temporary deviations, and the Corps approved deviations that were limited in duration, varied in the concerns they were devised to address, and varied from year-to-year as to the time period during which the deviation would be allowed. *Id.* at 6a-13a. Moreover, the Corps considered and rejected permanent changes to the water release protocol, underscoring that the deviations it did approve were limited in duration. *Id.* at 9a-10a.

To be sure, the court of appeals did not find it necessary in the circumstances of the case to address other

factors that may inform whether the government has taken a flowage easement, such as whether the flooding was substantial, predictable, or destroyed the land's usefulness. See, *e.g.*, *Sanguinetti*, 264 U.S. at 150 (assessing extent of flooding); *United States* v. *Lynah*, 188 U.S. 445, 470 (1903) ("Where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment."); *Pumpelly* v. *Green Bay & Miss. Canal Co.*, 80 U.S. 166, 181 (1871) ("[W]here real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking."); *Ridge Line*, 346 F.3d at 1355. But that does not show that the court of appeals erred in concluding that the varied deviations here were too ephemeral—all lasting less than a year and differing in timing, water release levels, and the concerns they were meant to address—to constitute a taking. Rather, it simply illustrates what this Court has long held: mere episodes of temporary flooding are not a taking.

2. The decision below follows this Court's precedents and does not reflect a division of authority in lower courts.

a. The court of appeals quoted and applied this Court's caselaw addressing flood-based takings claims, appropriately focusing on the requirement—repeated throughout the Court's cases—that a degree of "permanence" is required to find a flood-caused taking. See pp. 9-11, *supra*. Petitioner nonetheless argues that the court of appeals' decision is inconsistent with the Court's takings precedents outside the context of flooding.

i. Petitioner argues (Pet. 13-17) that the decision below is inconsistent with so-called temporary takings doctrine. That is incorrect for three distinct reasons. First, recognizing that a government action must pass a threshold of permanence or duration is not inconsistent with this Court's recognition of temporary takings in the regulatory context and elsewhere. Although that threshold for a temporary taking is, of course, lower than for a permanent taking, that does not render irrelevant the contemplated duration of the government's interference with property. To the contrary, considering "permanence" in that sense is particularly appropriate in the flooding context, where flood waters frequently come and go, as this Court has long recognized. See, *e.g.*, *Loretto*, 458 U.S. at 428; *Sanguinetti*, 264 U.S. at 149.

Second, contrary to petitioner's contention (Pet. 11-12), the court of appeals did not rule out the possibility that the government could be found to have temporarily taken a flowage easement. See Pet. App. 168a-169a. Rather, the court found that had not occurred on the particular facts here. There are at least two ways in which a property owner might establish a temporary taking of a flowage easement. First, the government could undertake what was contemplated as a permanent action, but then later reverse course. Cf. *First English Evangelical Lutheran Church* v. *County of L.A.*, 482 U.S. 304, 318-319 (1987) (holding that abandonment or reversal of government action does not remedy a taking). Second, the government could engage in a series of nominally temporary identical actions (such as a decade-long series of identical deviations) that in substance can only be fairly viewed as an indefinite—and thus effectively permanent—action leading to "inevitably recurring" flooding. See Pet. App. 169a. Neither oc-

curred here, but the court of appeals' opinion forecloses neither theory in a proper case.

Third, the temporary takings cases on which petitioner relies (Pet. 13-14) cannot overcome this Court's consistent takings precedents addressing issues peculiar to flooding, because none of those decisions addressed flooding. For example, in *United States* v. *Causby*, 328 U.S. 256 (1946), the Court found that low-altitude government flights over a chicken farm imposed a servitude and remanded the case to determine if the easement was temporary or permanent. *Id.* at 258. *Causby* involved the direct invasion of plaintiff's property by government instrumentalities, rather than the indirect effects of waters passing through a dam more than a hundred miles upriver. That indirectness, typical of flooding cases but especially evident here, triggers a more heightened scrutiny of the permanence of the government action. See, *e.g.*, *Loretto*, 458 U.S. at 428. Although *Causby* stands for the proposition that the government can in some circumstances take a temporary easement, it does not address the duration or degree of permanence necessary for such an easement; in *Causby*, the number of temporary and ad hoc authorizations of flights over the plaintiff's farm that might have effected a taking was beside the point because all agreed there were "frequent and regular flights of army and navy aircraft over respondents' land." 328 U.S. at 258.

In effect, petitioner is asking this Court to discard its long line of precedents refusing to recognize a taking when the government's temporary actions cause a passing flood or floods. Cf. Pet. App. 23a ("[Petitioner's] entire theory is contrary to governing law."). That is apparent from the logical implication of petitioner's position, which is that if a temporary flood results from a

single deviation—or, for that matter, from any other short-term government decision—then the government has effected a temporary taking of the flooded property. Even if that result could be reconciled with the Court's cases from other strands of takings doctrine, it is incompatible with cases like *Sanguinetti* that refuse to find a taking as a result of every government-caused flood.

ii. Petitioner also argues (Pet. 1, 15-16) that the court of appeals erred because it did not balance various factors before holding that no taking occurred. But no decision of this Court requires the balancing in all cases of the permanence of the governmental action against other possible considerations, such as the substantiality of the flooding or the consequential damage to the property owner. Rather, the rule from *Sanguinetti* is that the governmental action can be a taking only if it "constitute[s] an actual, permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property." 264 U.S. at 149. That test demands at least some threshold quantum of permanence to the governmental action, and if it is absent (as it was here), then a court should decline to find a taking.

b. Significantly, petitioner does not contend there is any division of authority in lower courts over takings doctrine as applied to flooding. Petitioner implies that no split is to be expected in light of the "Federal Circuit's exclusive jurisdiction," Pet. 22 n.2; see Pet. 12 n.1, but that misconceives the breath of circumstances in which flooding cases may arise. Any number of activities by state and local authorities—such as management of reservoirs and operation of sewage systems—could cause flooding and, potentially, effect a taking. A takings claim arising in that context would ordinarily be heard in the first instance in state court because "tak-

ings claims [against state and local governments] are not ripe [for litigation under the Federal Constitution] until a State fails 'to provide adequate compensation for the taking.'" *San Remo Hotel, L.P.* v. *City & County of S.F.*, 545 U.S. 323, 327 (2005) (quoting *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 195 (1985)). Such cases, in the unlikely event they were decided on the merits in federal court at all (see *id.* at 346), would be heard on appeal to the regional courts of appeals. Yet petitioner does not contend the Federal Circuit's decision here conflicts with the decision of another court of appeals or a state court of last resort.

3. Petitioner, joined by its amici, expresses concern that under the court of appeals' decision, "the government may temporarily manipulate flooding regimes to * * * cause substantial, foreseeable damage to others without ever paying just compensation," by "refus[ing] to make a decision on how it will act even one year from now." Pet. 21. That concern is exaggerated, in both a legal and a practical sense.

From a legal standpoint, as the author of the panel majority opinion pointed out, a series of nominally temporary but substantively identical deviations "might properly be viewed as permanent or 'inevitably recurring,'" and thus support a takings claim. Pet. App. 169a (Dyk, J., concurring in denial of rehearing en banc). Here, "there was genuine uncertainty about the nature of the policies from year as the Corps responded to individualized concerns." *Ibid.* That limited holding would not immunize the government from liability for the sort of scheme petitioner seems to hypothesize.

From a practical standpoint, the "temporary" decisions that petitioner and its amici criticize are the excep-

tion, and they do not threaten to become the rule, for reasons wholly separate from takings law. The procedural requirements of various environmental laws tend to cause the Corps (and other governmental actors) to make deliberate long-term decisions about how water flows will be regulated; any flooding that results from such long-term decisions would likely be regarded as "permanent" and thus could be a compensable taking under appropriate circumstances. For example, the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, requires the Corps to prepare an Environmental Impact Statement for every major action that will significantly affect the quality of the environment, see 42 U.S.C. 4332(C). Similarly, the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*, may require the preparation of a Biological Assessment by the Corps and a Biological Opinion by the Fish and Wildlife Service (including, potentially, a Reasonable and Prudent Alternative that allows the Corps to implement its action without jeopardizing an endangered species), see 16 U.S.C. 1536. See generally *In re Operation of the Mo. River Sys. Litig.*, 421 F.3d 618 (8th Cir. 2005) (discussing ESA and NEPA requirements related to Corps' operation of flood control and irrigation project), cert. denied, 547 U.S. 1097 (2006). Those procedures necessarily require the Corps to articulate with some particularity how it proposes to operate a project so that the Corps and other agencies can evaluate the effects of its proposed course of action. That process in turn lends a relative permanence to most significant decisions affecting water project management.

4. Finally, even if this Court were inclined to disagree with the court of appeals' analytical approach, this would be a poor vehicle for addressing the question pre-

sented because of the presence of a fundamental threshold evidentiary issue about the actual extent of marginal flooding created by the Corps' deviations.

a. All agree that the WMA is subject to natural flooding at various times of the year (see, *e.g.*, Pet. App. 7a, 14a-15a, 59a-60a, 106a), so a central factual issue at trial was whether and to what extent the Corps' deviations at the Dam caused a marginal increase in the number of days each year that the affected parts of the WMA were inundated, relative to the situation that would have obtained had the Corps' adhered to the normal regulation flows provided in the Manual. That is a challenging question to answer because the deviations and normal regulation flows were not specified in terms of days of inundation in the WMA nor even in terms of stage of the River at the WMA, but instead in terms of stage of the River at the Poplar Bluff gauge, some 83 miles upriver of the WMA. Although deviations as measured at Poplar Bluff at one time of the year could, depending on precipitation levels and subsequent water releases, affect whether parts of the WMA experienced extended inundation weeks or months later, considerable analysis is needed to determine if such an effect was *de minimis* or substantial.

The Court of Federal Claims' analysis of that factual issue was fundamentally flawed. That court relied on petitioner's expert witnesses, whose opinions focused on comparisons between historical measurements of the River's stage in the vicinity of the WMA in 1981-1992 (before the deviations) and measurements in 1993-2000 (during the deviations). See Pet. App. 61a-62a. Such a limited analysis fails to control for other variables affecting the River, such as precipitation levels, which can vary greatly year-to-year. See Gov't C.A. Br. 31. Worse

yet, simply inventorying the number of days the River is above a certain stage (as petitioner's experts did) does not answer the question of when the relevant areas of the WMA were inundated, because riparian land takes time to drain after a river crests, so a small number of evenly spaced high-water days can leave land continuously inundated in a way that a cluster of high-water days will not. See *id.* at 33.

The correct approach would be to ask what would have happened to the River's stage near the WMA had the deviations not occurred (while keeping other things from the 1993-2000 period constant), and then to translate river stages into duration of inundation. The government offered expert testimony on the first step through a computer simulation of what would have happened in 1993-2000 absent the deviations. See Pet. App. 62a-63a; Gov't C.A. Br. 34-35. Then for the second step, the government adopted petitioner's assumptions about drainage time in the WMA to translate the simulated river stages into duration of inundation. See Pet. App. 111a-112a; Gov't C.A. Br. 34-35. The governments' experts' conclusion was that "there would have been significant periods of timber inundation even in the absence of the Corps' deviations." Pet. App. 112a (quotation marks omitted); see Gov't C.A. Br. 35 & n.6.

The Court of Federal Claims nonetheless accepted petitioner's experts' testimony. The court concluded that the "River experienced more high water during the growing seasons from 1993 to 1999, *i.e.*, the period of [deviations], than it experienced during previous time periods." Pet. App. 107a. But even if true, that comparison is irrelevant to whether (or to what extent) the Corps' deviations caused the high water. By contrast, the government's experts' computer model spoke to that

key question, yet the Court of Federal Claims rejected that testimony without offering a sound reason for doing so. The court's apparent rationale for rejecting the model—that it "should [not] be employed to displace actual observations" of high water in the WMA in the 1990s, *id.* at 113a—misunderstands that the very purpose of the model was to supply a scientifically grounded prediction for what could not be observed, *i.e.*, river stages in the 1990s in the absence of the Corps' deviations.

b. The government raised the foregoing issue on appeal, see Gov't C.A. Br. 31-37, but the Federal Circuit did not resolve it, concluding that even accepting the Court of Federal Claims' findings about the effects of the Corps' deviations, those deviations did not rise to the level of a taking. This Court should not undertake a review of whether the court of appeals' decision was insufficiently attentive to the extent and duration of marginal inundation without first addressing the soundness of the Court of Federal Claims' findings on the subject. Petitioner proposes that this Court sidestep any such problem by not actually deciding the case, but instead simply "instruct[ing] the Federal Circuit to consider all the facts and apply [a] complex balancing test." Pet. 23. But that is tantamount to an admission that this case does not lend itself to rendering a definitive decision. A far better vehicle for considering the legal issue petitioner would present would be a case in which the cause and effect of the government's release of water were clear and close at hand—and not, as here, disputed and separated by 115 miles of river.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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