No. 03-637

In the Supreme Court of the United States

NEWDUNN ASSOCIATES, LLP, ET AL., PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether wetlands that are connected to traditional navigable waters by intermittent surface water flows through ditches and streams are part of "the waters of the United States" within the meaning of the Clean Water Act, 33 U.S.C. 1362(7), where the ditches re-routed a pre-existing natural surface hydrologic connection between the wetlands and traditional navigable waters.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 344 F.3d 407. The opinion of the district court (Pet. App. 20a-56a) is reported at 195 F. Supp. 2d 751.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 2003. The petition for a writ of certiorari was filed on October 27, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States Army Corps of Engineers brought this civil enforcement action under the Federal Water Pollution Control Amendments of 1972 (Clean Water Act or CWA), 33 U.S.C. 1251 *et seq.*, alleging that

petitioners had violated the CWA by discharging dredged or fill material into "waters of the United States" without a permit. The district court ruled in favor of the petitioners, holding that the wetlands into which the discharges had been made were not part of "the waters of the United States" within the meaning of the CWA, and that petitioners' conduct therefore was not subject to federal regulatory authority. Pet. App. 20a-56a. The court of appeals reversed and remanded for further proceedings. *Id.* at 1a-19a.

1. Section 301 of the Clean Water Act prohibits the "discharge of any pollutant by any person," unless in compliance with the Act. 33 U.S.C. 1311(a). "Discharge of a pollutant" is defined to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12). The CWA defines the term "navigable waters" to mean "the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7).

This Court has recognized that Congress, in enacting the CWA, "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." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985); see *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 486 n.6 (1987) ("While the Act purports to regulate only 'navigable waters,' this term has been construed expansively to cover waters that are not navigable in the traditional sense.").[1] In *Riverside Bayview*,

[1] To avoid confusion between the term "navigable waters" as defined in the CWA and implementing regulations, see 33 U.S.C.

the Court upheld the assertion by the United States Army Corps of Engineers (Corps) of regulatory authority, under the CWA, over "all wetlands adjacent to other bodies of water over which the Corps has jurisdiction." 474 U.S. at 135.

In *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), this Court again construed the CWA term "waters of the United States." The Court in *SWANCC* held that use of "isolated" nonnavigable intrastate waters by migratory birds was not a sufficient basis for the exercise of federal regulatory jurisdiction under the CWA. The Court noted, and did not cast doubt upon, its prior holding in *Riverside Bayview* that the CWA's coverage extends beyond waters that are "navigable" in the traditional sense. See *id.* at 172. The Court stated, however, that "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." *Ibid.*

2. The CWA sets up two complementary permitting schemes. Section 404(a) authorizes the Secretary of the Army, acting through the Corps, or a State with an approved program, to issue a permit "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. 1344(a). Under

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1362 and 33 C.F.R. 328.3, and the traditional use of the term "navigable waters" to describe waters that are, have been, or could be used for interstate or foreign commerce, see 33 C.F.R. 328.3(a)(1), this brief will refer to the latter as "traditional navigable waters."

Section 402, any discharge of pollutants other than dredged or fill material must be authorized by a permit issued by the United States Environmental Protection Agency (EPA) (or a State with an approved program) under the National Pollutant Discharge Elimination System (NPDES). See 33 U.S.C. 1342. The Corps and EPA share responsibility for implementing and enforcing Section 404 of the CWA. See, *e.g.*, 33 U.S.C. 1344(b) and (c).

The Corps and EPA have promulgated identical regulatory definitions of the term "waters of the United States." See 33 C.F.R. 328.3(a) (Corps definition); 40 C.F.R. 230.3(s) (EPA definition). The definition, as it relates to this case, encompasses, *inter alia*, traditional navigable waters, which include tidal waters and waters susceptible to use in interstate commerce, see 33 C.F.R. 328.3(a)(1), 40 C.F.R. 230.3(s)(1); "tributaries" to traditional navigable waters, see 33 C.F.R. 328.3(a)(5), 40 C.F.R. 230.3(s)(5); and wetlands that are "adjacent" to traditional navigable waters or their tributaries, see 33 C.F.R. 328.3(a)(7), 40 C.F.R. 230.3(s)(7).

3. In 1978, petitioner Newdunn Associates purchased 43 acres of land (the Newdunn Property) located in Newport News, Virginia. It is undisputed that, prior to petitioners' filling and excavation activities, the Newdunn Property included approximately 38 acres of "wetlands" as that term is defined in the Corps' regulations. Pet. App. 4a, 28a.

Historically, the wetlands on the Newdunn Property had a natural hydrologic connection to the west arm of Stony Run, a natural stream, which flows into the central arm of Stony Run, a traditional navigable water. The construction of Interstate 64 (I-64) rerouted that natural hydrologic connection. The flow of water from

the wetlands on the Newdunn Property was intercepted by a ditch on the east side of I-64 that was constructed in part through the wetlands. Pet. App. 4a, 30a-31a. As a result, water now flows intermittently from the Newdunn Property wetlands through approximately 1.4 miles of ditch paralleling I-64 before it reaches the west arm of Stony Run, a natural stream. From there the water flows approximately 0.2 miles (1000 feet) to the central arm of Stony Run, which becomes a traditional navigable water approximately 0.8 miles downstream. The central arm of Stony Run flows into the Warwick River, which flows to the James River, which flows into the Hampton Roads Harbor and the Chesapeake Bay. The evidence in this case includes photographs of silt-laden waters emanating from the now-filled wetlands on the Newdunn Property and merging with the clear waters of the west arm of Stony Run. See *id.* at 4a, 19a, 30a-32a.

In 1997, consultants hired by petitioner Newdunn Associates informed petitioner that most of the Newdunn Property consisted of wetlands. In December 1999, the Corps confirmed that determination and informed petitioner that, in the view of the Corps, the wetlands in question were part of "the waters of the United States" and were therefore subject to federal regulatory authority under the CWA. In May 2001, petitioner informed the Corps that, in light of this Court's intervening decision in *SWANCC*, petitioner believed that the Corps lacked regulatory authority over the wetlands at issue. The Corps re-evaluated its prior jurisdictional determination and reaffirmed its view that the Newdunn Property contained wetlands that are part of "the waters of the United States." Pet. App. 4a, 27a-28a.

Petitioners declined to pursue an administrative appeal of the Corps' jurisdictional determination and instead began to fill the wetlands the following month. Petitioners continued their filling activities despite the Corps' issuance of two cease-and-desist notices. On July 6, 2001, the government filed this suit, alleging that petitioners were in violation of Sections 301 and 404 of the Clean Water Act, 33 U.S.C. 1311, 1344, by discharging dredged or fill material into "the waters of the United States" without a permit. The government sought injunctive and remedial relief, as well as civil penalties. See Pet. App. 4a-5a, 21a-22a.

4. The district court granted judgment for the petitioners. Pet. App. 20a-56a. The court concluded that petitioners' unpermitted discharges of fill material into wetlands were not prohibited by the CWA because the wetlands on the Newdunn Property were not part of "the waters of the United States." The district court acknowledged the existence of a surface water connection from the wetlands on the Newdunn Property to traditional navigable waters in Stony Run, and ultimately to the Chesapeake Bay. See *id.* at 30a-31a. Relying on *SWANCC*, however, the court held that, because the wetlands were not contiguous with or adjacent to traditional navigable waters, the Corps' assertion of regulatory authority over petitioners' discharges exceeded the powers granted to the agency by Congress. See *id.* at 41a-44a, 46a-50a, 54a.

5. The court of appeals reversed the judgment of the district court and remanded for further proceedings. Pet. App. 1a-19a.

a. The court of appeals stated that, under *SWANCC*, the Corps' exercise of regulatory jurisdiction over "isolated ponds that had no hydrologic connection whatsoever to [traditional] navigable waters could

not stand." Pet. App. 15a. The court held, however, that the surface water connection between the wetlands on the Newdunn Property and traditional navigable waters provided a sufficient basis for the Corps' assertion of authority. *Id.* at 16a-17a. The court relied on its recent decision in *United States* v. *Deaton*, 332 F.3d 698 (4th Cir. 2003), petition for cert. pending, No. 03-701 (filed Nov. 10, 2003), which held that the Corps' regulation of "nonnavigable tributaries and their adjacent wetlands * * * is well within Congress's traditional power over navigable waters." Pet. App. 17a (quoting *Deaton*, 332 F.3d at 707). The court of appeals explained that "the Corps' unremarkable interpretation of the term 'waters of the United States' as including wetlands adjacent to tributaries of navigable waters is permissible under the CWA because pollutants added to any of these tributaries will inevitably find their way to the very waters that Congress has sought to protect." *Ibid.*

b. The court of appeals also relied on *Deaton* to uphold the Corps' treatment of the I-64 ditch as a "tributary." Pet. App. 17a-18a. The court explained that it had previously deferred in *Deaton* to the Corps' decision to define "tributary" to include the "entire tributary system," including man-made roadside ditches. *Id.* at 17a. The court observed that the core justification for federal protection under the CWA of nonnavigable tributaries and adjacent wetlands—*i.e.*, that discharges into such waters will "have a substantial effect on water quality in navigable waters"—applies with equal force to man-made as to natural waterways. *Ibid.* The court of appeals credited the Corps' explanation that the "discharge of a pollutant into a waterway generally has the same effect downstream whether the waterway is natural or manmade," and that "the CWA's chief goal

would be subverted" if the court concluded "that the I-64 ditch is not a 'tributary' solely because it is man-made." *Id.* at 17a-18a (citation omitted).

c. Applying its legal analysis to the facts of this case, the court of appeals examined the surface water connection between the wetlands on the Newdunn Property and traditional navigable waters. Pet. App. 18a-19a. The court found it "undisputed that water flows intermittently from wetlands on the Newdunn Property through a series of natural and manmade waterways, crossing under I-64, draining into the west arm of Stony Run, and eventually finding its way 2.4 miles later to traditional navigable waters." *Id.* at 18a. The court concluded that "[b]ecause there exists a sufficient nexus between the Newdunn Wetlands and navigable waters-in-fact, the Corps' jurisdiction in this case is amply supported by the Act and the Corps' regulations under the Act." *Id.* at 19a. The court of appeals reversed the judgment of the district court and remanded the Corps' enforcement action to the district court for further proceedings. *Ibid.*

ARGUMENT

The interlocutory decision of the court of appeals is correct and does not squarely conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. As a threshold matter, this Court's review is unwarranted because of the interlocutory posture of the case. The court of appeals reversed the district court's determination that the wetlands on the Newdunn Property lay outside the Corps' regulatory authority under the CWA. The court of appeals did not finally resolve the Corps' enforcement action, however; rather, it remanded for further proceedings in the dis-

trict court. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction," even where the court of appeals has resolved the merits of the case and only the "determination of an appropriate remedy" remains. *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for writ of certiorari); see *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari "because the Court of Appeals remanded the case," making it "not yet ripe for review by this Court").

2. The court of appeals' judgment and legal analysis are correct.

a. Under established constitutional principles, Congress's "power over [traditional] navigable waters also carries with it the authority to regulate nonnavigable waters when that regulation is necessary to achieve Congressional goals in protecting navigable waters." *Deaton*, 332 F.3d at 707. The Corps' delineation of its own regulatory authority under the CWA has long been premised on the fact that, because "[w]ater moves in hydrologic cycles," pollution of waters that do not themselves meet traditional tests of navigability "will affect the water quality of the other waters within that aquatic system." *Riverside Bayview*, 474 U.S. at 134 (quoting 42 Fed. Reg. 37,128 (1977)); see *Deaton*, 332 F.3d at 707 ("[T]he principle that Congress has the authority to regulate discharges into nonnavigable tributaries in order to protect navigable waters has long been applied to the Clean Water Act."); *id.* at 712 (accepting, as reasonable and supported by the evidence, the Corps' contention that "discharges into nonnavigable tributaries and adjacent wetlands have a

substantial effect on water quality in [traditional] navigable waters"). Exclusion of nonnavigable tributaries and their adjacent wetlands from the coverage of the CWA would subvert Congress's efforts to ensure that the quality of traditional navigable waters is adequately protected. To prevent that result, the Corps and EPA have reasonably defined the term "waters of the United States" to include wetlands adjacent to tributaries that flow into traditional navigable waters.

b. This Court's decision in *SWANCC* does not cast doubt on the propriety of that regulatory determination. To the contrary, the Court in *SWANCC* quoted with apparent approval its prior holding that "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the "waters" of the United States.'" 531 U.S. at 167 (quoting *Riverside Bayview*, 474 U.S. at 134). And while the Court in *SWANCC* rejected the Corps' construction of the term "waters of the United States" as encompassing isolated ponds used as habitat for migratory birds, *id.* at 171-172, its reasoning does not cast doubt on the propriety of the Corps' assertion of regulatory authority here.

The Court in *SWANCC* explained that, if the use of isolated ponds by migratory birds were found to be a sufficient basis for federal regulatory jurisdiction under the CWA, the word "navigable" in the statute would be rendered superfluous. 531 U.S. at 172. While recognizing that the term "navigable waters" as used in the CWA includes "at least some waters that would not be deemed 'navigable' under the classical understanding of that term," *id.* at 171 (quoting *Riverside Bayview*, 474 U.S. at 133), the Court stressed that the word "navigable" must be given some substantive content,

see *id.* at 172 ("[I]t is one thing to give a word limited effect and quite another to give it no effect whatever."). The Court concluded that "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Ibid.*

Unlike the Corps' prior effort to regulate "isolated" waters based on their use as habitat for migratory birds, the regulation of petitioners' filling activities rests squarely on the agency's longstanding authority to protect traditional navigable waters. "Any pollutant or fill material that degrades water quality in a tributary of navigable waters has the potential to move downstream and degrade the quality of the navigable waters themselves." *Deaton*, 332 F.3d at 707. Construing the CWA term "waters of the United States" to encompass wetlands adjacent to tributaries that flow into traditional navigable waters thus gives independent content to the term "navigable," and accords with the established understanding of congressional power to regulate and protect traditional navigable waters. See *id.* at 707, 709-710; *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 525-526 (1941) (Congress may authorize flood control projects on intrastate nonnavigable tributaries in order to prevent flooding in traditional navigable rivers); see also *United States* v. *Rapanos*, 339 F.3d 447, 450-453 (6th Cir. 2003) (upholding CWA jurisdiction over wetlands that flow through a man-made ditch and nonnavigable natural tributary to reach traditional navigable waters 11 to 20 miles downstream), petition for cert. pending, No. 03-929 (filed Dec. 22, 2003); *Headwaters, Inc.* v. *Talent Irrigation Dist.*, 243 F.3d 526, 533-534 (9th Cir. 2001)

(upholding CWA jurisdiction over nonnavigable irrigation canals that receive water from, and divert water to, natural streams and lakes).

c. Concededly, not every discharge of fill material into "the waters of the United States" (as the Corps and EPA have defined the term) can be expected to have deleterious effects on the quality of traditional navigable waters. That fact, however, does not cast doubt on the propriety of the agencies' adjacent wetlands regulations. As the Court in *Riverside Bayview* explained:

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

474 U.S. at 135 n.9. Thus, inclusion of petitioners' wetlands within the regulatory definition of "waters of the United States" does not mean that filling of such wetlands is necessarily prohibited. It simply means that the Corps will analyze (and attempt to mitigate) the likely impacts of proposed discharges on federal interests before deciding whether a particular project may go forward. By filling the wetlands on the Newdunn Property without seeking a Section 404 permit,

petitioners prevented the Corps from making that determination.

3. Contrary to petitioners' contention (Pet. 7-10), the Fourth Circuit's decision in this case does not squarely conflict with any decision of another court of appeals.

a. Petitioners' reliance (Pet. 7-10) on *Rice* v. *Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), is misplaced. *Rice* addressed the question whether the Oil Pollution Act of 1990 (OPA), 33 U.S.C. 2701 *et seq.*, imposed liability on parties who discharged oil onto dry ground, where that oil was alleged to have migrated into various types of waters. Like the Clean Water Act, the OPA regulates discharges into "navigable waters," defined as "the waters of the United States." 33 U.S.C. 2701(21); see 33 U.S.C. 2702(a). The term is generally understood to have the same meaning under both statutes. See *Rice*, 250 F.3d at 267-268.

The court in *Rice* rejected each of three suggested bases for the imposition of OPA liability. First, the Fifth Circuit addressed the question whether the OPA regulated "discharges of oil that contaminate the groundwater," and it held that "subsurface waters are not 'waters of the United States' under the OPA." 250 F.3d at 270. Second, the court in *Rice* addressed the plaintiffs' contention that "surface waters on the [property] are directly threatened by [the defendant's] discharges into the groundwater." *Ibid.* The court found that all discharges were onto dry land and that there was no evidence of any discharge directly into surface water. *Ibid.* The court further concluded that, even if the discharges could be shown to have seeped into the surface waters on the ranch, the record was insufficient to support a determination that those waters were part of "the waters of the United States." The court explained that the record in the case contained "no

detailed information about how often the creek runs, about how much water flows through it when it runs, *or about whether the creek ever flows directly (above ground) into the Canadian River*." *Id.* at 270-271 (emphasis added). Absent proof of a surface connection between the creek in question and any traditional navigable water, the court was unable to conclude that the creek was "sufficiently linked to an open body of navigable water as to qualify for protection under the OPA." *Id.* at 271. Third, the court in *Rice* addressed the question whether "discharges into groundwater that migrate into protected surface waters" are covered by the OPA. *Ibid.* The court held that the OPA does not apply to "discharges onto land, with seepage into groundwater, that have only an indirect, remote, and attenuated connection with an identifiable body of 'navigable waters.'" *Id.* at 272.

Thus, the Fifth Circuit's decision in *Rice* was premised on the absence of any demonstrated surface water connection between the allegedly contaminated seasonal creek and any traditional navigable water. The decision therefore does not conflict with the Fourth Circuit's ruling in the instant case, which upheld the exercise of federal regulatory authority under the CWA based on the presence of such a connection. Petitioners rely in part (see Pet. 8) on the *Rice* court's statement that "it appears that a body of water is subject to regulation under the CWA if the body of water is actually navigable or is adjacent to an open body of navigable water." 250 F.3d at 269. Petitioners appear (see Pet. 8) to construe that language to mean that a surface water connection to traditional navigable waters provides an insufficient basis for federal regulatory authority under the OPA and CWA if that connection is too "indirect" or "attenuated." But since

the Fifth Circuit in *Rice* found that the plaintiffs had failed to prove the existence of *any* surface water connection between the water bodies in question and traditional navigable waters, the court's ambiguous dictum is insufficient to establish a square circuit conflict warranting this Court's review.

b. For similar reasons, the Fifth Circuit's recent decision in *In re Needham*, No. 02-30217, 2003 WL 22953383 (Dec. 16, 2003), issued after the filing of the certiorari petition in the instant case, does not squarely conflict with the Fourth Circuit's decision here. *Needham*, like *Rice*, involved a suit under the OPA. See *id.* at *1. The oil at issue in *Needham* "was originally discharged into [a] drainage ditch at Thibodeaux Well," and from there "spilled into Bayou Cutoff, and then into Bayou Folse. Bayou Folse flows directly into the Company Canal, an industrial waterway that eventually flows into the Gulf of Mexico." *Ibid.* The Fifth Circuit held that the defendants' conduct was covered by the OPA. *Id.* at *4-*5. The court stated that "the proper inquiry is whether Bayou Folse, the site of the farthest traverse of the spill, is navigable-in-fact or adjacent to an open body of navigable water." *Id.* at *4. The Fifth Circuit found that "Bayou Folse is adjacent to an open body of navigable water, namely the Company Canal," *ibid.*; and it concluded on that basis that "the Thibodeaux Well oil spill implicated navigable waters and triggered federal regulatory jurisdiction pursuant to the OPA," *id.* at *5.

In the course of its analysis, the Fifth Circuit appeared to disapprove the results reached by the Fourth and Sixth Circuits in *Deaton* and *Rapanos*, and it stated that "[t]he CWA and the OPA are not so broad as to permit the federal government to impose regulations over 'tributaries' that are neither themselves navigable

nor truly adjacent to navigable waters." *Needham*, 2003 WL 22953383, at *3. That statement was dictum, however, in light of the *Needham* court's determination that the oil spill actually involved in that case was covered by the OPA. And while the *Needham* court stated that "both the regulatory and plain meaning of 'adjacent' mandate a significant measure of proximity," *id.* at *5 n.12, and that "the term 'adjacent' cannot include every possible source of water that eventually flows into a navigable-in-fact waterway," *id.* at *5, the court did not offer a precise rule for determining when a nonnavigable tributary is "adjacent" to a traditional navigable water. Thus, even assuming that the Fifth Circuit decides to follow the *Needham* dictum in a future case where the issue is actually presented, it is unclear to what extent the approaches taken by the Fourth and Fifth Circuits would lead to different results in concrete factual settings.

It should also be noted that the Fifth Circuit in *Needham* sustained the application of the OPA to the defendants' conduct based on the ultimate downstream presence of oil in Bayou Folse. See 2003 WL 22953383, at *4-*5; p. 15, *supra*. The court did not examine whether the drainage ditch (the site of the original discharge) or Bayou Cutoff (the body of water into which the ditch directly flowed) was itself "adjacent" (as the court understood that term) to any traditional navigable water. Rather, the court framed the relevant question as "whether Bayou Folse, the site of the farthest traverse of the spill," satisfied the court's adjacency requirement. *Needham*, 2003 WL 22953383, at *4.

Thus, in cases where it can be shown that an oil discharge has actual downstream effects, the Fifth Circuit (correctly) regards the OPA as applicable even if the

first water body into which oil is discharged does not meet the court's standard for being "actually navigable or * * * adjacent to an open body of navigable water." *Rice*, 250 F.3d at 269. The Fifth Circuit may also decide, in an appropriate future case, that an upstream discharge is covered by the OPA where the downstream effects of an oil discharge are potential rather than actual (*e.g.*, where remedial measures prevent discharged oil from reaching waters that the Fifth Circuit regards as "adjacent" to traditional navigable waters). The Fifth Circuit's willingness to consider the downstream effects of an oil discharge in determining the applicability of the OPA further diminishes the current practical significance of that court's dictum expressing apparent disagreement with the regulatory approach adopted by the government and sustained by the Fourth Circuit in this case.

4. There is no merit to petitioners' contention (Pet. 13-14) that the I-64 ditch cannot be a "tributary" because the Clean Water Act includes "ditch" in the definition of "point source." See 33 U.S.C. 1362(14). The fact that some ditches are "point sources" provides no support for a categorical rule that a surface water connection to traditional navigable waters that includes a man-made ditch should be ignored in determining whether the site of a pollutant discharge is part of "the waters of the United States." Ditches like the one involved in this case, which carries water between the wetlands on the Newdunn Property and the west arm of Stony Run, fall comfortably within standard dictionary definitions of the regulatory term "tributary." See *Deaton*, 332 F.3d at 710. And, as the court of appeals recognized (Pet. App. 18a), "the CWA's chief goal would be subverted" if the ditch at issue here were found to break the surface connection between the

wetlands and traditional navigable waters, since "[t]he discharge of a pollutant into a waterway generally has the same effect downstream whether the waterway is natural or manmade." *Id.* at 17a-18a. The CWA definition of "point source" also includes the more general term "channel," see 33 U.S.C. 1362(14); but there is no basis for concluding that water within any manmade "channel" is categorically excluded from "the waters of the United States," and such a rule of construction would plainly disserve the purposes of the Act.

5. Petitioners contend (Pet. 15-18) that the court of appeals' decision is inconsistent in various respects with the Corps' own regulations and policy guidance. Those factbound claims lack merit and do not warrant this Court's review.

a. Petitioners contend (Pet. 15) that the court of appeals erred in upholding the Corps' exercise of regulatory jurisdiction over the wetlands on the Newdunn Property without determining that the I-64 ditch has an "ordinary high water mark" (OHWM).[2] Petitioners did not make that argument in the court of appeals, and further review is unwarranted for that reason alone. In addition, the regulatory provision on which petitioners rely pertains to *lateral* (*i.e.*, shoreward) jurisdiction. See 33 C.F.R. 328.4(c); 51 Fed. Reg. 41,217 (1986). Although Corps guidance recognizes the utility of the OHWM for determining upstream jurisdiction as well, see 51 Fed. Reg. at 41,217, neither the regulation nor the guidance establishes the presence of an OHWM as

[2] The term "ordinary high water mark" is defined as a line on the shore established by fluctuations of water as evidenced by various physical characteristics set forth at 33 C.F.R. 328.3(e). The existence of an OHWM generally indicates that water moves through the watercourse with some regularity.

the sole criterion for determining the upstream limits of a tributary. In any event, the Corps offered uncontradicted expert testimony that the I-64 ditch had an OHWM along its entire length, and petitioners' own expert acknowledged that the uppermost portion of the ditch had an OHWM. See Tr. 168-169, 236-237, 249, 393-394.

b. Petitioners contend (Pet. 15-16) that the Corps' regulations have consistently distinguished man-made ditches from natural tributaries. The regulatory guidance on which they rely, however, states only that "[n]on-tidal drainage and irrigation ditches *excavated on dry land*" are generally not considered to be part of "the waters of the United States." 51 Fed. Reg. at 41,217 (emphasis added); see 65 Fed. Reg. 12,823-12,824 (2000) (providing further clarification of when the Corps will treat water in drainage ditches as part of "the waters of the United States" for purposes of the CWA). Even with respect to that category of ditches, the Corps has expressly "reserve[d] the right on a case-by-case basis to determine that a particular waterbody * * * is a water of the United States." 51 Fed. Reg. at 41,217. In any event, the proper treatment of "ditches excavated on dry land" (*ibid.*) is not at issue in this case, since the I-64 ditch was excavated in part through the wetlands complex in which the wetlands on the Newdunn Property were historically contained, and it reroutes a pre-existing natural surface hydrological connection between the wetlands and traditional navigable waters. Because a man-made ditch is as capable as a natural waterway of carrying pollutants from an upstream body of water to traditional navigable waters downstream, the Corps and EPA have reasonably declined for these purposes to distinguish between the two. See Pet. App. 17a-18a; pp. 17-18, *supra*.

c. Petitioners contend (Pet. 17-18) that the Corps has historically treated wetlands (like those at issue here) that are above a tributary system's "headwaters" in the same manner as the "isolated" waters that the Court in *SWANCC* held were outside the coverage of the CWA. It is true that the Corps has sometimes issued "nationwide permits" in lieu of individual permits for activities that affected a defined, limited amount of acreage (most recently three acres) of either (1) isolated waters (prior to *SWANCC*) or (2) wetlands and other waters in a tributary system that are located above that system's headwaters.[3] See 65 Fed. Reg. 12,818-12,819 (2000). But the Corps' previous decision to treat the two categories of waters similarly in that particular respect does not logically suggest that CWA regulation of the two categories of waters must stand or fall together. Petitioners cite no case that has construed *SWANCC* (which involved only isolated waters) to foreclose the exercise of federal regulatory authority over wetlands above the headwaters of a tributary system where such wetlands are hydrologically connected to the tributary.

6. Petitioners argue (Pet. 19-23) that this Court should grant certiorari in order to rectify purported inconsistencies between various Corps administrative determinations concerning the scope of the agency's regulatory authority under the CWA. The stray language quoted by petitioners, culled from a handful of administrative decisions involving complex and varying factual settings, wholly fails to suggest a pattern of arbitrary conduct, much less to establish that the

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[3] For purposes of the nationwide permits, "headwaters" are defined generally as watercourses with an annual average flow less than five cubic feet per second. 33 C.F.R. 330.2(d).

Corps' jurisdictional determination in the instant case was arbitrary or contrary to law. Once the Corps has issued its final decision on a permit application, its administrative determinations are subject to judicial review under the Administrative Procedure Act, and such review is more than adequate to correct any demonstrated instance of arbitrary decisionmaking.

7. Petitioners contend that the CWA "does not authorize the Corps to exercise general land use regulation." Pet. 23; see Pet. 23-24. That statement is true enough; but the Corps does possess longstanding authority to protect the quality of traditional navigable waters by regulating upstream pollutant discharges. See pp. 11-12, *supra*. As cases like *Riverside Bayview* make clear, the Corps' exercise of that authority may as a practical matter affect activities (*e.g.*, residential housing development, see *Riverside Bayview*, 474 U.S. at 124) that are also subject to extensive state regulation. See *Deaton*, 332 F.3d at 707 ("The power to protect navigable waters is part of the commerce power given to Congress by the Constitution, and this power exists alongside the states' traditional police powers."). So long as the Corps' assertion of regulatory authority in this case was an otherwise permissible use of the federal power to protect traditional navigable waters, the requirement that petitioners seek a federal permit for their fill activities does not impermissibly encroach on state and local land-use planning. See *id.* at 707-708.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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