

Hearing of the House Committee on Transportation and Infrastructure Subcommittee on Water Resources and Environment

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I. Introduction

Last year was the 50th anniversary of the passage of the Federal Water Pollution Control Act, which we now refer to as the Clean Water Act. That anniversary was an occasion to celebrate the act’s extraordinary achievements — achievements we also ought to be celebrating here today.

Around the nation, rivers that once were open sewers now are treasured community resources, even as this nation has experienced sustained economic growth.¹ It is not hard to understand why popular support for water quality protections remains so strong.²

But protecting these achievements, and fulfilling the Clean Water Act’s promise, will require continued support from this Congress, as well as continued implementation efforts by the United States Army Corps of Engineers (Army Corps) and the U.S. Environmental Protection Agency (EPA).

Protecting water quality remains a work in progress. Thousands of waterways remain impaired, imposing huge costs on the nation. We are much better off than we were in 1972, but we are still far from making our waters fishable and swimmable.³

For reasons I will explain in more detail, the 2022 Army Corps and EPA rule interpreting the statutory phrase “the waters of the United States” is crucial to protecting the progress we have made and to turning the additional promise of the Clean Water Act into reality.

The rule is necessary to protect water quality. It is consistent with the Clean Water Act’s text and with decades of nearly uninterrupted agency interpretations and practice. It makes economic sense. And it is also necessary because the regulation it replaces — a rule promulgated in 2020 under the previous administration — was at odds with statutory text, water quality protection, rational economics, and its own stated justifications.

I am the Harry D. Sunderland Professor at the University of California College of Law, San Francisco, where I teach classes in environmental law, water law, and statutory interpretation and

¹ 50 Years after the Clean Water Act – Gauging Progress, U.S. Govt. Accountability Office, October 17, 2022, <https://www.gao.gov/blog/50-years-after-clean-water-act-gauging-progress>.

² Americans Strongly Support Environmental Protections in the Clean Water Act, Walton Family Foundation, September 20, 2022, <https://www.waltonfamilyfoundation.org/learning/access-and-availability-to-clean-water-is-a-concern-nationwide> (“The poll found strong support among Americans for the Clean Water Act, with 75% in favor of protecting more waters and wetlands. It also showed Americans strongly prefer the federal government, through the Environmental Protection Agency, to maintain water standards in the country.”).

³ 50 Years after the Clean Water Act – Gauging Progress, U.S. Govt. Accountability Office, October 17, 2022, <https://www.gao.gov/blog/50-years-after-clean-water-act-gauging-progress>.

administrative law. I have worked in the environmental field for my entire career, first as a consultant helping regulated businesses comply with environmental laws and then as a water lawyer and law professor.⁴ Most of my research focuses on water resource management, and several of my research papers focus specifically on implementation of the Clean Water Act by the Army Corps and EPA.⁵ I also have spent much of my research career trying to understand, often through conversations with regulators and regulated-entity attorneys, how regulators and regulated communities work together to promote environmental protection and economic development.⁶

II. Statutory Text

Our governance system requires that agencies take actions consistent with their statutory mandates. The 2022 EPA/Army Corps rule respects that responsibility. The preceding regulation did not.

Each rule tries to explain the meaning of the statutory phrase “the waters of the United States.”⁷ The two rules differ primarily in their application of that phrase to aquatic features, like streams, wetlands, and ponds, that lack continuous surface-water connections to larger waterways. The 2020 rule would have excluded most of those aquatic features. The 2022 rule would include those features, so long as protecting them has “sufficient nexus” — in other words, a genuine connection — to maintaining water quality in what we refer to as “navigable-in-fact” waterways.⁸

Statutory interpretation is supposed to start with the ordinary meaning of the text,⁹ and as a matter of textual reading, the former rule’s demand for continuous surface connections to navigable-in-fact waterways does not make sense. In normal, everyday speech, a pond, swamp, or stream counts as “waters” regardless of the average flow level in its outlet or the fact that it might come and go with the seasons.¹⁰ If someone tells you, “There are no waters on this land,” you would not expect to encounter a pond, stream, or wetland. And if you did encounter such a

⁴ These comments draw on that previous work, and they also draw in places on text I have written for amicus briefs submitted on behalf of members of Congress.

⁵ See *Little Streams and Legal Transformations*, 2017 Utah L. Rev. 1; *Regional Federal Administration*, 63 UCLA L. Rev. 58 (2016).

⁶ See, e.g. *The Negotiable Implementation of Environmental Law*, 75 Stan. L. Rev. 137 (2023); *Consultants, the Environment, and the Law*, 61 Ariz. L. Rev. 823 (2019); *Critical Habitat and the Challenge of Regulating Small Harms*, 64 Florida L. Rev. 141 (2012); *Urbanization, Water Quality, and the Regulated Landscape*, 82 U. Colo. L. Rev. 431 (2011); see also Todd Aagaard, Dave Owen & Justin Pidot, *Practicing Environmental Law* (2nd ed. 2021).

⁷ 33 U.S.C. § 1362(7).

⁸ The test comes from Justice Kennedy’s opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). Because the four dissenting justices also would also have supported finding jurisdiction for any water with a significant nexus to water quality in navigable-in-fact waters, Justice Kennedy’s opinion has held controlling weight for waters to which it applies.

⁹ See *FCC v. AT&T Inc.*, 562 U.S. 397, 403 (2011) (“When a statute does not define a term, we typically give the phrase its ordinary meaning.”) (internal quotation marks omitted).

¹⁰ See, e.g., *Porter v. Armstrong*, 39 S.E. 799, 799 (N.C. 1901) (referring to “the waters” of a swamp); *Com. v. Reed*, 34 Pa. 275 (1859) (same). Outside of legal speech, the same conventions exist. The Bible, for example, repeatedly refers to “the waters” of springs without mentioning whether those springs had continuous surface connections to navigable-in-fact waters. E.g. *Judges 5:19* (referring to “the waters of Meggido”).

feature, you certainly would not say, “Well, it’s not actually a body of water because the outlet might dry up in July.” Normal speech does not even hint at the tortured linguistic distinctions of the 2020 rule. In contrast, everyday language is consistent with a definition that includes the nation’s intermittent streams and disconnected wetlands as part of “the waters of the United States.” They are waters, and they are of the United States.

The 2022 rule’s interpretation also is historically grounded. In 1975, the Army Corps issued regulations interpreting Clean Water Act jurisdiction as extending to “the entire length of rivers and streams,” bringing its interpretation in line with a position EPA had asserted several years earlier.¹¹ In 1977, the Army Corps finalized those rules.¹² For the next four decades, both agencies consistently maintained that interpretation of their jurisdiction. Only under the Trump administration did they purport to discover a narrower mandate in the statute. Meanwhile, Congress twice enacted significant amendments to the Clean Water Act, both times choosing to leave these jurisdictional interpretations intact — as it also did in the many years it chose to leave the Clean Water Act alone.¹³

The 2022 regulations therefore are not doing something novel or unfamiliar. They are simply clarifying long-established standards and correcting a historical anomaly.

III. Water Quality and a Scientific Basis

Congress chose the Clean Water Act’s name for a reason. The central purpose of the Clean Water Act, as repeatedly stated by Congress, is to protect water quality, and Congress clearly expected that protection to be grounded in scientific knowledge. The statute opens by declaring, “[t]he objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation’s Waters.”¹⁴ The statute’s opening section also states that water quality regulation must provide for “the protection and propagation of fish, shellfish, and wildlife” and “provide[] for recreation,” all of which requires understanding, through science, the conditions upon which fish, shellfish, wildlife, and recreation depend, and the relationships between those conditions and water pollution.¹⁵ Any lawful regulation interpreting the term “waters of the United States” must respect this text and must be crafted to advance this central statutory purpose.¹⁶

The 2020 rule made no pretense of honoring that purpose. The agencies did not even try to explain how their new rule would improve water quality. They also made almost no effort to

¹¹ Permits for Activities in Navigable Waters or Ocean Waters, 40 Fed. Reg. 31320 (July 15, 1975).

¹² Regulatory Programs of the Army Corps of Engineers, 42 Fed. Reg. 37,122, 31,129 (July 19, 1977).

¹³ Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977); 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, 881–86 (1993).

¹⁴ 33 U.S.C. § 1251(a).

¹⁵ 33 U.S.C. § 1251(a)(2).

¹⁶ See 5 U.S.C. § 706(2)(A);

Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43, 49 (1983) (finding that an agency’s rule was arbitrary and capricious when it failed to consider options consistent with the intent of the underlying statutory scheme)

grapple with the extensive scientific studies they had previously compiled, or with the huge body of scientific literature upon which those studies drew. Indeed, they did not even try to gather information on the numbers of streams and wetlands that would lose protection. When asked for that information by members of Congress, a political appointee candidly admitted that the agencies did not know.¹⁷

If the 2020 rule had taken water-quality science seriously, it would have acknowledged how important protecting wetlands and small streams is to protecting water quality everywhere. The agencies' earlier studies and the supporting scientific literature explain in great detail how protecting even the smallest tributaries — including intermittent and ephemeral tributaries and wetlands that lack direct surface connections to nearby waters — is essential to protecting water quality in larger waterways.¹⁸ Small tributaries and wetlands absorb nutrients, limiting toxic and costly algae blooms in downstream waterways.¹⁹ They capture and store floodwaters, sustaining navigability and protecting people who live or work downstream.²⁰ They nurture fish and wildlife, sustaining the food webs that make rivers fishable — and that support popular human activities like hunting and birdwatching.²¹

In short, the scientific literature demonstrates that small wetlands and streams are as essential to a river system as leaves are to a tree.²² The 2020 rule simply ignored that importance.

The 2022 rule, with its emphasis on water quality connections, appropriately respects the importance of science. This time around, the agencies have quantified the areas that would retain protection. Likewise, they have explained, at length, how scientific research informs their choices about the geographic scope of Clean Water Act protection. They have respected, rather than ignored, their mandate from Congress.

IV. The 2022 Regulations Make Economic Sense

Because it makes environmental sense, the 2022 rule also makes economic sense. The 2020 rule did not, and indeed, the previous administration went to great lengths to hide just how much its rule would cost America.²³ That should be of great concern to this Congress, which is appropriately focused on the nation's economy. It also is a major legal reason why the 2020 rule

¹⁷ Hearing before the Subcommittee on Water Resources and the Environment of the Committee on Transportation and Infrastructure, September 18, 2019, pp 16-17 (Sept. 18, 2019), *available at* <https://www.govinfo.gov/content/pkg/CHRG-116hhrg40826/pdf/CHRG-116hhrg40826.pdf>.

¹⁸ See Dave Owen, Little Streams and Legal Transformations, 2017 Utah L. Rev. 1, 6-11 (summarizing this literature).

¹⁹ See Richard B. Alexander et al., Dynamic Modeling of Nitrogen Losses in River Networks Unravels the Coupled Effects of Hydrologic and Biogeochemical Processes, 93 Biogeochemistry 91, 110 (2009).

²⁰ See Comm. On Reducing Stormwater Discharge Contributions to Water Pollution, Nat'l Research Council, Urban Stormwater Management in the United States 166-70 (2009) (describing flooding impacts).

²¹ See Judy L. Meyer et al., The Contribution of Headwater Streams to Biodiversity in River Networks, 43 J. Am. Water Resources Ass'n 86 (2007).

²² U.S. EPA, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence 2-14 (2015).

²³ See David A. Keiser et al, Report on the Repeal of the Clean Water Rule and its Replacement with the Navigable Waters Protection Rule to Define Waters of the United States (WOTUS) 4-6 (2020), https://cb4388c0-f641-4b7b-a3ad-281c0e6f8e88.filesusr.com/ugd/669644_5aa4f5f0493a4902a3aaed117bd92aef.pdf.

needed to be replaced. Regulations must be informed by careful economic analyses, not by sleight of hand.

The 2022 rule recognizes the obvious: water quality is economically valuable. Improved water quality raises home values.²⁴ Many economic activities directly depend on clean water and on protection of the physical integrity of streams and wetlands. Hunting, fishing, and boating are all large industries — as well as activities that bring many Americans the difficult-to-quantify happiness that comes from recreating outside.

Many other businesses depend on quality water as an industrial input. A notorious recent example captures this importance: in 2012, when the City of Flint switched to a dirtier water supply, a General Motors plant dealt with months of operational problems and finally had to find a new water source.²⁵ Additionally, every business in the nation has employees who need to drink.

Dirty water also poses huge financial burdens on public water suppliers and the customers they serve.²⁶ Water treatment is expensive, and it becomes more expensive if the water source has more contaminants.²⁷ Preventing pollution is usually much cheaper than cleaning it up, but if the Clean Water Act does not apply, and pollution prevention does not occur, the public can get stuck with big bills.

As other researchers have explained in detail, the 2020 rule pretended that many of these benefits didn't exist. A study by the Institute for Policy Integrity (at NYU Law School) provides a succinct summary of the previous rule's analytical failings:

[T]hese analyses suffer from severe methodological flaws. And correcting the analyses would very likely show that the rollbacks are net costly to society, depriving the public of potentially billions of dollars in annual forgone benefits. The agencies' flaws fall into several broad categories.

First, the agencies leave out most of the harmful impacts from their cost-benefit analyses—including impacts on safe drinking water, flooding, and habitats for aquatic and endangered species—claiming false helplessness in the face of data gaps. Second, though the agencies monetize the impact of the rollbacks on wetlands that will be lost, their analysis arbitrarily excludes most of the relevant forgone benefits. For example, they arbitrarily limit their calculations to the benefits of protecting wetlands inside a state only, ignoring the well-recognized benefits that people derive from waters outside of their state. Moreover, the agencies erroneously limit the benefits that in-state residents derive from wetlands protection, through an arbitrary assumption that allows them to undervalue the per-acre benefits and through ignoring the unique local benefits that wetlands

²⁴ See, e.g., See Lynne Y. Lewis et al., Dams, Dam Removal and River Restoration: A Hedonic Property Value Analysis, 26 Contemp. Econ. Pol'y 175, 185 (2008)

²⁵ See Mike Colias, How GM Saved Itself from Flint Water Crisis, Automotive News, January 31, 2016.

²⁶ See Margo Pollans, Drinking Water Protection and Agricultural Exceptionalism, 77 Ohio St. L.J. 1195 (2016).

²⁷ See David Sedlak, Water 4.0 (2014).

provide. The agencies also make the unsupported assumption that states will choose to fill the regulatory gap left after the rollbacks—despite the lack of any federal mandate to do so and the fact that many states have recently demonstrated antipathy to additional clean-water regulation. And third, the agencies overvalue the cost savings of the rules.²⁸

Even with all this sleight of hand, the agencies still could not say that their calculations showed a net benefit to society. Instead, they simply speculated that such a benefit might occur.

On the other side of the ledger, the costs of protecting wetlands and streams tend to be greatly overstated. The subset of businesses that objects to Clean Water Act regulations typically argues that the law shuts down productive activities and that perceived ambiguities in the scope of Clean Water Act coverage create crippling uncertainty.

But the former claim ignores the flexibility available to property owners through permitting processes. In many places, the presence of protected streams or wetlands does not prevent construction; instead, the property can be developed in a different way that avoids the wetlands or streams. That avoidance will benefit the people who ultimately use the site; their houses or businesses will not be constructed in places that routinely flood.²⁹

And if avoidance is not possible, property owners may use compensatory mitigation — which means compensating for on-site impacts by protecting or restoring similar streams or wetlands in a different place — to proceed with their project.³⁰ The result can be economic development *and* enhanced environmental protection, with each occurring in places where they make the most sense. A secondary result is the growth and sustenance of industries devoted to finding ways to accommodate both development and environmental protection.³¹

The latter claim ignores the many ways property owners can find out about the scope of Clean Water Act coverage. The Army Corps publishes a detailed manual explaining how to identify waters subject to regulatory coverage.³² An extensive environmental consulting industry can help landowners identify protected aquatic features.³³ In fact, consultants had done just that in some of the most prominent Clean Water Act controversies. John Rapanos, for example, was warned that there were protected wetlands on his properties, and he chose to destroy those wetlands in open defiance of the law, not because he was ignorant of the Clean Water Act's applicability.³⁴

²⁸ Bethany Davis Noll et al., *Beneath the Surface: The Concealed Costs of the Clean Water Rule Rollback* (2020).

²⁹ Construction techniques can protect houses and buildings from floodwaters, but usually just by pushing the water somewhere else. It still will come down from the sky and go somewhere. That means filling in streams and wetlands—which, even if they are ephemeral, are places that predictably flood—almost inevitably means putting people's property, and perhaps their lives, at risk.

³⁰ See Palmer Hough & Morgan Robertson, *Mitigation Under Section 404 of the Clean Water Act: Where It Comes from, What It Means*, 17 *Wetlands Ecology & Mgmt.* 15 (2009)

³¹ See National Environmental Banking Association, <https://environmentalbanking.org/>.

³² U.S. Army Corps of Engineers, *Corps of Engineers Wetlands Delineation Manual* (1987), <https://www.lrh.usace.army.mil/Portals/38/docs/USACE%2087%20Wetland%20Delineation%20Manual.pdf>.

³³ See Dave Owen, *Consultants, the Environment, and the Law*, 61 *Ariz. L. Rev.* 823 (2019).

³⁴ See *Rapanos v. United States*, 547 U.S. 715, 763 (2006) (Kennedy, J. concurring). As Justice Kennedy summarizes:

Additionally, if landowners do not want to pay for consultants or want a second opinion, they can ask the Army Corps for a jurisdictional determination — a service the agency provides for free.

The 2022 rule, which is accompanied by detailed and careful economic studies, reveals just how egregious the flaws in the 2020 economic analysis were. After considering the many benefits the 2020 rule pretended were nonexistent, the 2022 economic analysis finds that the new rule is likely to produce between \$854 million and \$1.97 billion in net benefits.³⁵ These numbers are inexact, of course, and the 2022 economic analysis acknowledges these uncertainties.³⁶ But the overall point of the analysis is clear. The 2022 rule will save lots of money and deliver significant benefits to people all across the country.

V. Protecting State Authority

An additional major failing of the 2020 rule was its misunderstanding of state roles in Clean Water Act implementation. This failing was ironic, for the previous administration claimed that federalism was the central justification for its regulatory changes. But it got Clean Water Act federalism completely wrong.

The Clean Water Act is designed to empower states by helping them work with the federal government to protect their water quality. It was not designed to let states turn polluters loose. The act, in other words, seeks to empower states — and in fact does so — but it empowers them to clean up waterways, not to leave them dirty. Because the 2020 rule misunderstood this basic principle, it would have undermined state power.

The Clean Water Act is built on cooperative federalism. In this system, states are crucially important as partners in working toward the shared national goal of water quality protection. That system was a deliberate choice. Congress knew that water pollution does not respect state boundaries and that in the absence of statutory coverage, states would be unable to protect themselves from pollution flowing from further upstream. Congress also knew that polluting industries would play states against each other, seeking favorable treatment. As Minnesota Governor Wendell Anderson explained, in testimony quoted by multiple members:

Every governor in the country knows what is the greatest political barrier to effective pollution control. It is the threat of our worst polluters to move their

Informed that the site included between 48 and 58 acres of wetlands, Rapanos allegedly threatened to “destroy” the consultant unless he eradicated all traces of his report. Rapanos then ordered \$350,000–worth of earthmoving and landclearing work that filled in 22 of the 64 wetlands acres on the Salzburg site. He did so without a permit and despite receiving cease-and-desist orders from state officials and the EPA. At the Hines Road and Pine River sites, construction work—again conducted in violation of state and federal compliance orders—altered an additional 17 and 15 wetlands acres, respectively.

Id.

³⁵ U.S. Environmental Protection Agency and Department of the Army, Economic Analysis for the Final “Revised Definition of ‘Waters of the United States’” Rule xvi (2022).

³⁶ *Id.*

factories out of any State that seriously tries to protect its environment. It is the practice of playing off one State against the other.³⁷

Congress also knew that state employees were ready to work on improving water quality and could tailor water quality programs to local needs, which meant they could be valuable partners in improving the nation's water quality — if they had federal mandates and support. Members repeatedly stressed the important roles states would play in implementing the regulatory regime, and the basic concept was to “engage[] all levels of government... in a concerted national effort to cleanse our water.”³⁸

The 2020 rule misunderstood all of this. Its misunderstanding began, ironically, with the very text it chose to selectively emphasize. The 2020 rule's preamble relied heavily — in fact, nearly exclusively — on Clean Water Act section 101(b), which states, in relevant part,

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.³⁹

This language clearly emphasizes the importance of states. But it expresses Congress's desire for the states to be heavily involved in protecting waters that *are* subject to Clean Water Act jurisdiction. It says nothing about excluding a class of aquatic features from that protection or about turning states loose to authorize pollution.

Other language of section 101 also indicates that the purpose of state involvement was to restrain water pollution, not protect polluters. Section 101(b) itself begins by noting the “responsibilities and rights of States to prevent, reduce, and eliminate water pollution.”⁴⁰ And in section 101(a) — indeed, in the very first words of the statute — Congress emphasized that “[t]he objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.”⁴¹ It then listed seven specific national policies, all focused on improving water quality.

The text therefore makes the goal of section 101(b) crystal clear. Congress was enlisting the states in pursuit of the crucial national goal of protecting water quality. It was not trying to limit the scope of the Clean Water Act's coverage.

Section 101 is not the only Clean Water Act section that demonstrates Congress's intent that

³⁷ A Legislative History of the Water Pollution Control Amendments of 1972 152 (1972) (Statement of Rep. Reuss).

³⁸ *Id.* at 218 (Statement of Sen. Eagleton).

³⁹ 33 U.S.C. § 1251(b) (parentheses in original).

⁴⁰ 33 U.S.C. 1251(b).

⁴¹ 33 U.S.C. 1251(a).

states be key participants in the project of achieving national water quality goals. This emphasis on state participation is particularly salient in the act's key permitting programs. Clean Water Act section 402, which authorizes the National Pollutant Discharge Elimination System (NPDES) permitting program, authorizes delegation of permitting authority to state agencies.⁴² Nearly every state in the country has taken up this invitation, and NPDES permitting now is largely handled at the state level.⁴³

Similarly, Clean Water Act section 404, which creates the permitting program for discharges of dredged or fill material, authorizes delegation of permitting authority (except for a subset of waters reserved for federal permitting authority) to state agencies, but it does not give states the option to exempt waters from regulatory protection.⁴⁴

The theme of all these sections, and many others, is that Congress valued state involvement, and it expected that state involvement to be directed toward the national project of restoring the nation's waters.

These and other provisions of the Clean Water Act also reflect a second theme of section 101(b), which is empowering the states to go *further* than the federal government in protecting water quality, even where that meant giving states power over the federal government. One of the clearest authorizations for these efforts comes from section 401, which authorizes states to issue water quality certifications for projects involving federally licensed discharges.⁴⁵ Section 401 gives states authority to require additional steps, beyond those already imposed by federal agencies, to protect state water quality.⁴⁶

Section 401 reflects a broader theme. As Justice John Paul Stevens once pointedly noted, “[n]ot a single sentence, phrase, or word in the Clean Water Act purports to place any constraint on a State’s power to regulate the quality of its own waters more stringently than federal law might require. In fact, the Act explicitly recognizes States’ ability to impose stricter standards.”⁴⁷ Likewise, section 1365(e) preserves state common law protections, and section 1370 allows additional state regulation as long as it is not “less stringent” than federal requirements.⁴⁸ And section 404, which tends to be at the center of jurisdictional controversies, similarly preserves

⁴² 33 U.S.C. § 1342.

⁴³ See EPA, NPDES State Program Information, <https://www.epa.gov/npdes/npdes-state-program-information>.

⁴⁴ 33 U.S.C. § 1344(e).

⁴⁵ 33 U.S.C. § 1341. In 2020, EPA issued a final rule drastically curtailing the scope of states’ section 401 certification authority, while baldly asserting that its restrictions “neither diminish[] nor undermine[] cooperative federalism.” Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42210, 42226 (2020). The position embodied in these two rulemakings—that federalism carries outcome-determinative importance when states want to authorize water pollution and is irrelevant when the states seek to protect their waterways—turns the core objective of the Clean Water Act on its head. See 33 U.S.C. 1251(a) (“The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”).

⁴⁶ 33 U.S.C. § 1341.

⁴⁷ *PUD No. 1 of Jefferson County v. Wash. Dept. of Ecology*, 511 U.S. 700, 723 (1994) (Stevens, J. concurring) (citing 33 U.S.C. § 1311(b)(1)(C)).

⁴⁸ See 33 U.S.C. §§ 1365(e), 1370.

state authority to regulate above and beyond federal requirements, even when that state regulation constrains federal activities.⁴⁹

For decades, states have acted in reliance on these federal commitments.⁵⁰ Clean Water Act implementation has honored Congress’s blueprint for substantial state roles in advancing water quality, while also preserving states’ ability to be partners in water quality protection and to manage land and water resources. Indeed, because many of these partnerships depend on federal Clean Water Act jurisdiction, the NWPR would actually have undermined state authority.

In practice, states do take the lead in implementing nearly every key part of the statute. They adopt water quality standards.⁵¹ They draft water pollution budgets and engage in continuing planning processes.⁵² Nearly every state holds delegated authority to issue NPDES permits.⁵³ And while only three states (Florida, Michigan, and New Jersey) have elected to hold delegated authority to issue section 404 permits, states influence those permits in a variety of ways. Using their authority under section 401, states routinely work with the Army Corps’ district offices to craft the terms of section 404 permits, and they also work with the Corps to implement compensatory mitigation programs.⁵⁴

State involvement, in short, pervades every part of Clean Water Act implementation, and state implementation of that authority is often intertwined with and supported by federal efforts and contingent upon waters falling within Clean Water Act jurisdiction. Consequently, unless states enact new legislation and appropriate additional funds, many of these state programs would shrink if Clean Water Act jurisdiction were narrowed.

Importantly, there are many other ways in which the Clean Water Act leaves state authority intact. Even if a waterway is subject to federal jurisdiction, states still retain primary responsibility for allocating water rights in that waterway.⁵⁵ If the waterway is navigable-in-fact — and thus unquestionably subject to Clean Water Act jurisdiction — the state in which it is located still owns its streambed.⁵⁶ Similarly, so long as streams or wetlands are not on federally

⁴⁹ 33 U.S.C. § 1344(t).

⁵⁰ For a general summary of state programs, see Association of State Wetlands Managers, Status and Trends Report on State Wetlands Programs in the United States (2015), https://www.nawm.org/pdf_lib/state_summaries/status_and_trends_report_on_state_wetland_programs_in_the_unit ed_states_102015.pdf.

⁵¹ See EPA, State-Specific Water Quality Standards Effective under the Clean Water Act (CWA), <https://www.epa.gov/wqs-tech/state-specific-water-quality-standardseffective-under-clean-water-act-cwa> (last visited October 6, 2020).

⁵² See EPA, Impaired Waters and TMDLs, <https://www.epa.gov/tmdl/overview-total-maximum-daily-loads-tmdls> (last visited October 6, 2020).

⁵³ EPA, NPDES State Program Information, <https://www.epa.gov/npdes/npdes-state-program-information>.

⁵⁴ See Dave Owen, *Regional Federal Administration*, 63 UCLA L. Rev. 58, 98-99, 115 (2016).

⁵⁵ See generally Barton H. Thompson et al., *Legal Control of Water Resources* (6th ed. 2018) (describing, over hundreds of pages, the doctrines states use to allocate waters from waterways subject to Clean Water Act jurisdiction).

⁵⁶ *PPL Montana, LLC v. Montana*, 565 U.S. 576, 589 (2012) (describing “[t]he rule that the States, in their capacity as sovereigns, hold title to the beds under navigable waters”).

owned land, states and local governments retain their land use authority over those streams and wetlands and surrounding uplands. Nor is there *de facto* preemption of that authority. If states or local governments want to authorize development in areas with jurisdictional aquatic features, they generally can, and they routinely do so; the Corps issues tens of thousands of fill permits every year, and permit denials are exceedingly rare.⁵⁷

In short, federal and state authority routinely and productively coexist and support each other, just as the Clean Water Act’s drafters hoped and intended they would. The 2020 regulations would have undermined those partnerships — and would have done so in the false guise of protecting states. The 2022 regulations place those partnerships back on their traditional foundations, so that states, the federal government, and the people of the United States may benefit.

* * * * *

In summary, the new Clean Water Act “waters of the United States” regulations should be welcomed by this Congress. They are consistent with the statute, governing legal authority, decades of tradition, and the preferences of the American public. They are consistent with extensive scientific research emphasizing the importance of streams and wetlands — even small ones — to water quality throughout our nation. They will help sustain and restore traditional, and successful, partnerships between federal and state governments. And they will save the American public hundreds of millions of dollars.

This new rule is not a complete solution to the water quality challenges facing the United States, and we have much more work to do if we are to fulfill the Clean Water Act’s promise and end widespread impairment of our waterways. But the new rule is an important step in the right direction.

⁵⁷ See Ryan W. Taylor, *Federalism of Wetlands* 88 (2013) (“During the time of this study, the USACE approved an average of 86,427 permits per year.”); Dave Owen, *Little Streams and Legal Transformations*, 2017 Utah L. Rev. 1, 41 (quoting an experienced state water-quality regulator, who observed that “there is no stopping things, with very, very, very limited exceptions”).