No. 21-454

IN THE

# Supreme Court of the United States

MICHAEL SACKETT; CHANTELL SACKETT,
*Petitioners*,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY;
MICHAEL S. REGAN, ADMINISTRATOR,
*Respondents*.

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

**BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS**


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## QUESTION PRESENTED

Should this Court's 4-1-4 decision in *Rapanos* be revisited to clarify the appropriate test for wetlands jurisdiction under the Clean Water Act?

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## INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the Nation's business community.

Many industries in which the Chamber's members operate regularly confront issues concerning the scope of the Clean Water Act ("CWA" or "the Act") and are adversely affected by the lack of clarity on the reach of federal jurisdiction under the CWA. The lack of clarity results, in significant part, from this Court's jurisprudence. Without clear guidance from this Court, the Chamber's members will continue to endure an expensive, vague, and time-consuming process whenever they need to determine

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[1] All parties, including counsel for Respondents, received timely notice of the intent of the Chamber of Commerce of the United States of America to file this brief under Rule 37(2)(a) and have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

whether a project or activity will impact waters subject to federal jurisdiction under the CWA. Indeed, the substantial burdens that this uncertainty causes, including the expense of this regulatory process and exorbitant potential penalties for even inadvertent violations of the Act, often lead the Chamber's members to avoid or abandon valuable activities and projects altogether.

## SUMMARY OF ARGUMENT

This Court's review is necessary to clarify the applicable scope of federal jurisdiction under the CWA and to eliminate the confusion resulting from this Court's fractured decision in *Rapanos v. United States*, 547 U.S. 715 (2006). The entrenched split of authority over the meaning of *Rapanos* has created regulatory uncertainty as the lower courts, the U.S. Environmental Protection Agency ("EPA"), and the U.S. Army Corps of Engineers (collectively "the agencies") have been unable to agree on which *Rapanos* test to apply and how to apply it. The agencies have attempted, without success, to promulgate regulations to provide more clarity. The result is a regulatory framework lacking in uniformity and predictability.

Regulatory certainty is always desirable. But it is particularly important with respect to the scope of federal jurisdiction under the CWA. Without certainty and predictability businesses and individuals are left with little to help them decide between undergoing the expense and time required to navigate the permit process, on the one hand, and risking the substantial penalties imposed for discharging pollutants without a permit, on the other. As a

result, important activities and projects—including projects needed to upgrade our nation's infrastructure, feed Americans, and meet our nation's energy needs—are often delayed or may be abandoned altogether.

As the agencies begin another round of rulemaking with uncertain prospects, now is the time for this Court to step in to provide clarity. *Rapanos* has proven an unworkable foundation for building a rule that defines jurisdictional waters. The absence of a clearly discernible controlling opinion and the vagueness of the significant nexus test mean that lower courts have taken, and continue to take, a variety of different views of the meaning of *Rapanos*. That in turn has created a highly unproductive cycle: agencies attempt to create a rule defining "waters of the United States" consistent with *Rapanos*; a court somewhere in the country declares the rule unlawful based on its reading of *Rapanos*; and the agencies default to the 1980s regulations as interpreted by the agencies' 2008 *Rapanos* guidance document[2] (which all agree provides little in the way of actual guidance). All the while, project proponents are left to try to guess which "waters of the United States" definition will apply and how the agencies will apply it for their projects and activities.

This Court's intervention is necessary to break this cycle. This Court can provide clarity and consistency by granting review and adopting a test for CWA jurisdiction that is consistent with the text of the CWA and provides a

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[2] EPA & Army Corps, Memorandum re: Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2008), A-45 to A-70, https://perma.cc/JNN9-HKEG.

workable and durable framework for the regulatory process. Resolving this long-standing conflict in the lower courts over the reach of the CWA will finally end the years-long confusion stemming from the Court's *Rapanos* decision and provide much-needed predictability to regulated parties.

## REASONS FOR GRANTING THE PETITION

### I. This Court's Review Is Necessary To Clarify The Applicable Scope Of Federal Jurisdiction Under The CWA And To Eliminate The Confusion Resulting From *Rapanos*.

#### A. The fractured *Rapanos* decision continues to create regulatory uncertainty and lower court divisions.

As the Petition demonstrates, lower courts have been divided for nearly fifteen years regarding the test established in *Rapanos*. Pet. 17–20. That division results from the fact that this Court's "*Marks* [test for deciphering cases that lack a majority] does not translate easily" to *Rapanos*. *United States* v. *Johnson*, 467 F.3d 56, 64 (1st Cir. 2006). *Marks* provides that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks* v. *United States*, 430 U.S. 188, 193 (1977) (internal quotation marks and citation omitted). But this approach is "workable . . . only when one opinion is a logical subset of other, broader opinions." *King* v. *Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc).

The "narrowest grounds" standard is difficult to apply to *Rapanos*. The cases where Justice Kennedy would find jurisdiction are not a subset of the cases in which the broader plurality would find jurisdiction. *Johnson*, 467 F.3d at 64. For example, in cases where there is a small surface water connection, the plurality's test would be satisfied even though there might not be a significant nexus under Justice Kennedy's test. *Ibid.* Indeed, Justice Kennedy highlighted that under the plurality's test for reasonably permanent waters, "[t]he merest trickle, if continuous," could be subject to federal jurisdiction, even though it may not be significant for downstream water quality. 547 U.S. at 769.

As a result, courts have disagreed as to which *Rapanos* test controls. Some hold that the significant nexus test from Justice Kennedy's concurrence applies. See, *e.g.*, *Sackett* v. *U.S. EPA*, 8 F.4th 1075, 1088–89 (9th Cir. 2021); *United States* v. *Robison*, 505 F.3d 1208, 1221–22 (11th Cir. 2007); *United States* v. *Gerke Excavating, Inc.*, 464 F.3d 723, 724 (7th Cir. 2006) (per curiam). For example, the Seventh Circuit explained that Justice Kennedy's understanding is narrower than the *Rapanos* plurality's understanding "in most cases, though not in all." *Gerke Excavating, Inc.*, 464 F.3d at 724–25. Thus, the court concluded that "as a practical matter the Kennedy concurrence is the least common denominator." *Ibid.*

At the same time, following Justice Stevens's dissent in *Rapanos*, other circuits allow the government to meet either the plurality's test or Justice Kennedy's test. *Rapanos*, 547 U.S. at 810 n.14 (Stevens, J., dissenting) (observing that "Justice Kennedy's approach will be

controlling in most cases" but, where it is not, courts should find jurisdiction under the plurality's approach). See, *e.g.*, *United States* v. *Donovan*, 661 F.3d 174, 176 (3d Cir. 2011); *United States* v. *Bailey*, 571 F.3d 791, 799 (8th Cir. 2009); *Johnson*, 467 F.3d at 60. For example, the First Circuit, "[f]ollowing Justice Stevens's instruction," concluded that applying one test and then the other "ensures that lower courts will find jurisdiction in all cases where a majority of the Court would support such a finding." *Johnson*, 467 F.3d at 64.

Worse still, the Fourth, Fifth, and Sixth Circuits have not identified any governing standard from *Rapanos*. In some cases, these circuits effectively require landowners to disprove jurisdiction under *both* the plurality and Kennedy tests. See *Precon Dev. Corp.* v. *U.S. Army Corps of Eng'rs*, 633 F.3d 278, 288 (4th Cir. 2011); *United States* v. *Lucas*, 516 F.3d 316, 325–27 (5th Cir. 2008); *United States* v. *Cundiff*, 555 F.3d 200, 210 (6th Cir. 2009).[3] In others, these circuits simply apply the standard agreed to by the parties. *Compare Precon Dev. Corp.*, 633 F.3d at 288 ("The parties here agree that Justice Kennedy's 'significant nexus' test governs . . . ."), *with Deerfield Plantation Phase II-B Prop. Owners Ass'n* v. *U.S. Army Corps of Eng'rs, Charleston Dist.*, 501 F. App'x 268, 273 (4th Cir. 2012) (per curiam) ("[T]he parties agreed that if either test was satisfied, the Contested Waters qualified as 'waters of the United States.'").

This Court's intervention is warranted to correct this confusion. Its fractured decision has led the meaning of

[3] In the Fifth Circuit, a landowner may even have to disprove jurisdiction under the dissent as well. See *Lucas*, 516 F.3d at 325–27.

"waters of the United States" to vary from circuit to circuit. That serious lack of uniformity creates challenges for regulators and companies operating in multiple jurisdictions. It also complicates agency efforts to write a nationwide rule that provides some measure of uniformity and that can survive judicial review.

Further percolation is not likely to resolve the issue. The lower courts have been grappling with the difficult task of interpreting *Rapanos* for fifteen years. Nearly every circuit has now had occasion to examine the question. And in the case of the Ninth Circuit, the court has revisited the question multiple times: first adopting the significant nexus test, then considering that jurisdiction might be permissible under the plurality opinion too, and finally returning, here, to reliance on the significant nexus test. Pet. 18–19.

The lower courts have also had the opportunity to consider and respond to each other. For example, in adopting Justice Kennedy's concurrence as the controlling test, the Eleventh Circuit expanded on one notable critique of the First Circuit's approach. *Robison*, 505 F.3d at 1221–22. In the Eleventh Circuit's view, "*Marks* does *not* direct lower courts interpreting fractured Supreme Court decisions to consider the positions of those who dissented," but only the positions of "those who 'concurred in the judgment.'" *Id.* at 1221 (quoting *Marks*, 430 U.S. at 193). The Eleventh Circuit concluded that the First Circuit had erred in "allow[ing] the dissenting *Rapanos* Justices to carry the day and impose an 'either/or' test." *Ibid.*

### B. Courts and agencies struggle to apply the significant nexus standard with any degree of uniformity and predictability.

Another cause of the uncertainty and unpredictability of "waters of the United States" determinations is that agencies may stretch the meaning of the significant nexus test to fit their policy goals. Under the significant nexus standard, a wetland may qualify as "navigable waters" if it, alone or in combination with similarly situated lands in a region, significantly affects the chemical, physical, and biological integrity of federally protected waters. *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring in the judgment). In contrast, when the effects on water quality are "speculative or insubstantial," a wetland is deemed non-navigable. *Ibid.* But as the *Rapanos* plurality noted, a fundamental problem with this test is that it does not clearly distinguish between when a wetland "significantly" affects covered waters and when the effects are "speculative or insubstantial." *Id.* at 756 n.15 (plurality opinion).

The standard is thus difficult to apply with any certainty and predictability—and susceptible to manipulation—because it turns on a highly subjective evaluation of when an effect is significant and what it means to affect the chemical, physical, and biological integrity of covered waters. As one court observed, the significant nexus standard is often "too nebulous" to determine whether particular wetlands are understood as navigable. *United States* v. *Acquest Transit LLC*, No. 09-CV-00055S(F), 2018 WL 3861612, at *31 (W.D.N.Y. Aug. 14, 2018). What is more, "the ensuing analysis of each concept, *e.g.*, finding a 'significant biological'

impact . . . renders this standard more subjective and, thus, prone to, at best, simple error, and at worse, bias and deliberate 'weaponization' by" the agencies. *Ibid.*

Furthermore, although Justice Kennedy's significant nexus test was conceived in the context of evaluating jurisdiction for wetlands, some courts have applied it to features that are not wetlands. *Compare Benjamin* v. *Douglas Ridge Rifle Club*, 673 F.Supp.2d 1210, 1215, n.2 (D. Or. 2009) ("Justice Kennedy limits the applicability of his legal standard to wetlands adjacent to jurisdictional waters."), *and Simsbury-Avon Pres. Soc'y, LLC* v. *Metacon Gun Club, Inc.*, 472 F. Supp. 2d 219, 227 (D. Conn. 2007) ("[T]he Court considers whether the . . . site is a 'wetland' to which the *Rapanos* analysis is applicable."), *aff'd on other grounds sub nom. Simsbury-Avon Pres. Club, Inc.* v. *Metacon Gun Club, Inc.*, 575 F.3d 199 (2d Cir. 2009), *with Envtl. Prot. Info. Ctr.* v. *Pacific Lumber Co.*, 469 F. Supp. 2d 803, 823 (N.D. Cal. 2007) (analyzing CWA jurisdiction over a non-navigable tributary using the significant nexus standard). Out of an "abundance of caution," for example, some courts have used the significant nexus standard when the agencies assert jurisdiction over a tributary. See *United States* v. *Vierstra*, 803 F. Supp. 2d 1166, 1171–72 (D. Idaho 2011), *aff'd*, 492 F. App'x 738 (9th Cir. 2012).

As a result, this "seemingly opaque" test "leaves the door open to continued federal overreach," *Johnson*, 467 F.3d at 66 (Torruella, J., concurring in part and dissenting in part), of a type that both the plurality and Justice Kennedy rejected. Though the *Rapanos* plurality and Justice Kennedy did not agree on the specific tests for CWA jurisdiction, both found that the agencies had gone too far in asserting that CWA jurisdiction extends to any non-

navigable water that has a "mere hydrologic connection" to navigable waters. And both the plurality and Justice Kennedy articulated principles intended to limit CWA jurisdiction.[4] But as the plurality observed, the significant nexus test's "unverifiable standard is not likely to constrain an agency whose disregard for the statutory language has been so long manifested." *Rapanos*, 547 U.S. at 757, n.15 (plurality opinion). Indeed, the plurality's prediction has now been borne out. The agencies have stretched the significant nexus concept far enough to assert jurisdiction over features like the remote waterbodies that Justice Kennedy found were "little more related to navigable-in-fact waters than were the isolated ponds [that the Court had previously] held to fall beyond the Act's scope." *Id.* at 781-82 (Kennedy, J., concurring in the judgment).

In the end, the significant nexus standard has not provided clear guidance to administrations of either party. The Obama Administration's 2015 Clean Water Rule, 80 Fed. Reg. 37,054 (June 29, 2015), relied on Justice Kennedy's significant nexus test, while the Trump Administration's 2020 Navigable Waters Protection Rule, 85 Fed. Reg. 22,250 (Apr. 21, 2020) relied on both Justice Kennedy's significant nexus test and the plurality's test. Each change in administration has resulted in the adoption of a new—and, under current law, vulnerable—framework

[4] See *Rapanos*, 547 U.S. at 731–32 (explaining that the CWA "cannot bear the expansive meaning that the Corps would give it") (plurality opinion); *Id.* at 781 (Kennedy, J., concurring in the judgment) (noting "the breadth" of the Corps' interpretation that "seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes toward it").

for CWA jurisdiction, as discussed in more detail below. That is not conducive to the regulatory certainty that is required in such an important area of the law.

### C. This Court should adopt an interpretation of the Clean Water Act that provides greater clarity and consistency than was provided by *Rapanos*.

This brief does not opine on the ultimate question of what legal standard should be adopted in replacing *Rapanos*. But any such test should satisfy three basic criteria. First, the test should be consistent with the text of the CWA. Second, the test should be workable; it should be a standard that can be implemented with greater predictability than the significant nexus test. Third, the test should respect proper constitutional limits on federal authority.

First, the Court should adopt a standard that accords with the statutory text. With respect, Justice Kennedy's approach not only "misread[]" the Court's prior decisions but also "ignor[ed] the text of the statute." *Rapanos*, 547 U.S. at 754–55 (plurality opinion). The Court should adopt an approach that is instead grounded in the statute, including all relevant provisions, applying "this Court's canons of construction." See *id.* at 731–32, 739.

Second, the Court should adopt an approach that provides direction and is easier for courts, regulators, and property owners to apply. For example, under the standard set forth in the plurality opinion in *Rapanos*, wetlands are covered by the CWA if they satisfy two criteria: (1) whether

"a relatively permanent body of water [is] connected to traditional interstate navigable waters" and (2) whether "the wetland has a continuous surface connection with that water." *Id.* at 742. The plurality then provided clear guidance as to when a water is "permanent" and when a "continuous surface connection" is present. *Id.* at 733, n.5.

Finally, unlike an approach where "whatever affects waters is waters," *id.* at 757, the Court should adopt a test for regulatory jurisdiction that respects "the proper constitutional limit on federal regulation." *Johnson*, 467 F.3d at 66 (Torruella, J., concurring in part and dissenting in part). In interpreting a fundamental precondition to the assertion of federal power under the Clean Water Act, this Court must "strike[] a constitutional balance between federal and state regulatory interests, and our nation's interest in clean water and the individual land owner's right to manage their property in accordance with their dreams and aspirations, whether economic or otherwise." *Id.* at 66–67. That is what this Court did in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), and it should do so again here.

## II. Before The Agencies Promulgate Another Rulemaking, This Court Should Provide Clarity to Eliminate the Confusion Caused by *Rapanos*.

### A. *Rapanos* has proven an unworkable foundation for durable rulemaking.

Over the past 15 years, the agencies have tried to define "waters of the United States" consistent with *Rapanos*, but they have had little success in doing so.

Following *Rapanos*, the agencies issued a guidance document that sought to provide some guidelines for making case-by-case significant nexus determinations.[5] But, as the Petition explains, the guidance document has provided very little in the way of actual guidance and has not resulted in consistent, predictable jurisdictional determinations. Pet. at 21.

Then in 2015, the agencies issued a rule asserting categorical jurisdiction over certain features based on the significant nexus standard. 80 Fed. Reg. at 37,057. Two federal district courts found the rule unlawful and remanded it to the agencies. *Texas* v. *U.S. EPA*, 389 F. Supp. 3d 497 (S.D. Tex. 2019); *Georgia* v. *Wheeler*, 418 F. Supp. 3d 1336 (S.D. Ga. 2019). While litigation was pending, the rule was also preliminarily enjoined by multiple district courts. See *Georgia* v. *Pruitt*, 326 F. Supp.

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[5] EPA & Army Corps, Memorandum re: Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2008), A-45 to A-70, https://perma.cc/JNN9-HKEG.

3d 1356, 1370 (S.D. Ga. 2018) (staying operation of the Rule in Georgia, Alabama, Florida, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah, West Virginia, and Wisconsin); *North Dakota* v. *U.S. E.P.A.*, 127 F. Supp. 3d 1047 (D.N.D. 2015) (staying operation of the Rule in North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, South Dakota, and Wyoming). As a result, more than half the states continued to operate under the pre-*Rapanos* regulations as implemented by the 2008 guidance.

With a new administration in 2017, the agencies went back to the drawing board. On October 22, 2019, the agencies rescinded the 2015 Rule and reinstated the pre-*Rapanos* regulations as informed by the 2008 guidance document. Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019). In 2020, the agencies issued the Navigable Waters Protection Rule, which the agencies designed to be consistent with both the plurality's test and Justice Kennedy's test. See 85 Fed. Reg. at 22,262. After the rule was challenged in federal district court, the court vacated and remanded the rule to the agencies without evaluation of the merits of the challenges to the 2020 Rule, even though the Department of Justice had merely requested remand without vacatur. *Pascua Yaqui Tribe* v. *U.S. EPA*, No. CV-20-00266-TUC-RM, 2021 WL 3855977, at *5 (D. Ariz. 2021); see also *Navajo Nation* v. *Regan*, No. 20-CV-602-MV/GJF, 2021 WL 4430466, at *5 (D.N.M. Sept. 27, 2021) (similarly vacating and remanding 2020 rule, despite Department of Justice request for remand without vacatur); compare *California* v. *Regan*, No. 20-CV-03005-

RS, 2021 WL 4221583, at *1 (N.D. Cal. Sept. 16, 2021) (remanding 2020 Rule without vacatur; finding that vacatur question was moot in light of *Pascua Yaqui Tribe* decision, but opining that vacatur would be inappropriate without consideration of the merits of the challenges to the 2020 Rule).

The agencies have announced that they have now halted implementation of the rule and are again interpreting "waters of the United States" according to the pre-*Rapanos* regulations as informed by the 2008 guidance.[6] And they have announced their intent to initiate (again) a new rulemaking process to revise the definition of "waters of the United States."[7] In the meantime, regulators and applicants have had to abruptly pivot to a different regulatory regime for pending permit applications and jurisdictional determinations that were already in progress.

This new rulemaking seems likely to meet the same obstacles that stymied the previous regulations. The sweeping impact of the definition means that any rule will almost certainly face legal challenges in district courts throughout the country. See *Nat'l Ass'n of Mfrs.* v. *Dep't of Def.*, 138 S. Ct. 617, 624 (2018) (challenges to rules defining "waters of the United States" must be filed in the first instance in federal district courts). And because the meaning of *Rapanos* is so unclear, even if the agencies' new

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[6] EPA, Current Implementation of "Waters of the United States," https://www.epa.gov/wotus/about-waters-united-states#Current, last visited Oct. 18, 2021.

[7] Press Release, EPA, Army Announce Intent to Revise Definition of WOTUS (June 9, 2021), https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus, last visited Oct. 18, 2021.

rule seeks to faithfully implement *Rapanos*, there are bound to be courts that disagree with the agencies' application. Before appeals of such courts' rulings can work their way through the courts of appeals and to this Court, the agencies will move on to the next rulemaking. And the standard will yet again revert to the pre-*Rapanos* regulations as interpreted by the 2008 guidance, and stakeholders will be left in the same uncertain position they have been in for the last 15 years.

Only this Court can break this cycle. All of this stems from *Rapanos*, which the agencies and lower courts are bound to attempt to follow. If this Court does not step in, there is no reason to believe that the cycle can or will change. If so, the agencies, lower courts, and stakeholders remain trapped in what might fairly be described as the water regulatory version of *Groundhog Day*[8]— fated to repeat the same series of events over and over again.

### B. Project proponents require regulatory certainty to predict the scope of federal jurisdiction under the CWA.

Project proponents, in particular, need clarity now and should not be left to slog through another fruitless cycle of rulemaking and judicial challenges.

Parties generally have three options if they suspect that a project could impact areas subject to CWA jurisdiction. Landowners can abandon the use of their land. They can complete the permit process and appeal if a permit is denied. Or they can develop their property without a

[8] GROUNDHOG DAY (Columbia Pictures 1993).

permit and challenge the agency's authority if it issues a compliance order or commences a civil enforcement action. But in any case, the costs are significant and often "prohibitive." *Hawkes Co.* v. *U.S. Army Corps of Eng'rs*, 782 F.3d 994, 1001 (8th Cir. 2015), *aff'd*, 578 U.S. 590 (2016).

Those who apply for a permit face a process that is often arduous, expensive, and long. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 594–95 (2016). Fifteen years ago, this Court observed that "[t]he average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes." *Rapanos*, 547 U.S. at 721 (plurality opinion) (citation omitted). These numbers were also cited in this Court's 2016 *Hawkes* decision, 578 U.S. at 594–95, but in the wake of *Rapanos* and the increased uncertainty in determining jurisdiction, those numbers have no doubt continued to increase. "Besides the cost and time required for the permit itself, companies may be required to comply with costly and resource-intensive mitigation/restoration requirements. In some cases, the cost of mitigation will exceed the cost of the project itself." U.S. Chamber of Commerce, Comment Letter on Proposed Rule: Definition of "Waters of the United States" Under the Clean Water Act, at 11 (Nov. 12, 2014).[9] And when project proponents pursue a permit unnecessarily because the scope of jurisdiction is not clear, "they can never recover the time and money lost in seeking a permit they were not legally obligated to obtain." *Hawkes Co.*, 782 F.3d at 1001.

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[9] https://www.regulations.gov/comment/EPA-HQ-OW-2011-0880-14115.

These costs are amplified by the fact that the 2008 *Rapanos* guidance, which has been in effect for most of the last fifteen years, requires a case-by-case significant nexus analysis for many features. These case-by-case analyses are resource-intensive for both regulators and permittees, requiring expert consultants at substantial costs. For example, this Court noted that the cost to undertake water analyses "alone would cost more than $100,000." See *Hawkes Co.*, 578 U.S. at 601. These expert reports from environmental consultants have become commonplace in CWA jurisdiction cases. See, *e.g.*, *Benjamin*, 673 F. Supp. 2d at 1212 ("Each party employed environmental consultants to perform wetland delineations on the property . . . and each contends that the delineation submitted by the opposing party is inaccurate.").

Those who do not undergo the burdensome permitting process instead face the risk of significant penalties imposed for violations of the CWA. As this Court recognized, "[t]he burden of federal regulation on those who would deposit fill material in locations denominated 'waters of the United States' is not trivial," even for those who are unaware that they are discharging into a "waters of the United States." *Rapanos*, 547 U.S. at 721 (plurality opinion). A single negligent violation of the Act can result in imprisonment for up to one year. 33 U.S.C. § 1319(c)(1). A second negligent violation may subject a person to imprisonment for up to two years. *Ibid.*

The CWA provides for substantial monetary penalties as well. The CWA lists the pre-inflation maximum amounts for different classes of civil and criminal penalties, 33 U.S.C. § 1321(b)–(d), as well as a minimum

amount of "not less than $100,000" for grossly negligent or willful violations. *Id.* at 1321(b)(7)(D). Since 1996, federal agencies have adjusted the statutory civil monetary penalties for inflation under the Federal Civil Penalties Inflation Adjustment Act. Civil Monetary Penalty Inflation Adjustment, 40 C.F.R. pt. 19, 85 Fed. Reg. 83,818 (Dec. 23, 2020). Initially, agencies made the adjustments every four years. Since 2017, however, EPA began to adjust inflation on an annual basis. 85 Fed. Reg. at 83,818. Now, EPA can seek up to an amount of $56,460 each day for each civil violation in addition to criminal penalties. 40 C.F.R. § 19.4 Tbl. 1, 85 Fed. Reg. at 83,820 Tbl. 1. And civil liability can accrue for "each day [the regulated party] wait[s] for the Agency to drop the hammer." *Sackett* v. *U.S. EPA*, 566 U.S. 120, 127 (2012).

In sum, EPA has wide discretion in the penalties it can seek in enforcement actions, and those penalties can be crippling. See, *e.g.*, *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *U.S. EPA*, 846 F.3d 492, 508 (2d Cir. 2017) ($5,749,000 civil penalty and order to obtain permit to transfer turbid water through tunnel); *United States* v. *Donovan*, No. 96–484–JJF (MPT), 2010 WL 3000058, at *1 (D. Del. July 23, 2010), *report and recommendation adopted*, No. CIV.A. 96-484-LPS, 2010 WL 3614647 (D. Del. Sept. 10, 2010), *aff'd*, 661 F.3d 174 (3d Cir. 2011) ($256,000 civil penalty and restoration order); *Foster* v. *U.S. EPA*, No. 14-16744, 2017 WL 3485049, at *4 (S.D. W. Va. Aug. 14, 2017) ("$414,000 penalty and [order to] remediate [s]ite, or face enforcement litigation and more penalties").

The end result is that a wide variety of commercial activities may not be undertaken at all, or may be

abandoned after they are initiated. Put simply, "jurisdictional uncertainty increases paperwork, costs, and time, while decreasing a business' willingness to invest." Waters Advocacy Coalition, Comments on Proposed Rule to Define "Waters of the United States" Under the Clean Water Act, at 65 (Nov. 13, 2014).[10]

And the impact of such uncertainty is widespread, as the CWA affects "a broad range of ordinary industrial and commercial activities." *Hanousek* v. *United States*, 528 U.S. 1102, 1103 (2000) (Thomas, J., dissenting from denial of certiorari). Indeed, a clear definition of the CWA's scope "is necessary to promote modern infrastructure development," consistent with President Biden's ambitious climate, sustainability, and infrastructure priorities. Waters Advocacy Coalition, Pre-Proposal Recommendations on the Definition of "Waters of the United States" at 8-9 (Sept. 3, 2021).[11] "Unclear definitions that depend on case-by-case 'significant nexus' determinations, or otherwise overly expansive definitions, threaten to frustrate that agenda by injecting uncertainty, inconsistency, and delays into project planning and permitting." *Id.*

In short, project proponents need clarity today on the scope of the CWA, so that they can know what rules will govern their projects and activities tomorrow and can plan their conduct accordingly. Only this Court can provide that clarity.

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[10] https://www.regulations.gov/comment/EPA-HQ-OW-2011-0880-14568.

[11] https://www.regulations.gov/comment/EPA-HQ-OW-2021-0328-0316.

## CONCLUSION

The petition for certiorari should be granted.

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