No. 21-454

In the Supreme Court of the United States

MICHAEL SACKETT, ET UX., PETITIONERS,
v.
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

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

BRIEF OF SAVANNAH ECONOMIC DEVELOPMENT AUTHORITY, GREENLAND DEVELOPERS, LLC, AND RESOURCE & LAND CONSULTANTS LLC, AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Ninth Circuit set forth the proper test for determining whether wetlands are "waters of the United States" under the Clean Water Act. 33 U.S.C. § 1362(7).

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are landowners, developers, and development-focused businesses and consultants in Georgia. *Amicus* Savannah Economic Development Authority creates, grows, and attracts jobs and investments in the Savannah area—directly and through supporting public-welfare policies aligned with the projects discussed below. *Amicus* Greenland Developers, LLC is a landowner and developer of a proposed logistics and rail park in Georgia, which will provide much-needed infrastructure, warehousing, and light manufacturing to support the tremendous growth of the Savannah Port economy. *Amicus* Resource & Land Consultants LLC, supports project developers and landowners in Georgia by ensuring that planning and construction activities comply with applicable environmental laws, including serving as permitting agent for the projects discussed herein.

Amici have deep experience creating jobs and economic-development opportunities through

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[1] Under Rule 37.6, *Amici* affirm that no counsel for a party authored this brief, in whole or in part, and that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Other than *Amici* or their counsel, no other person made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners have consented to the filing of this brief in writing, and Respondents have filed a blanket consent to the filing of merits-stage amicus briefs. Rule 37.3.

significant projects in Georgia, while complying with the requirements of the Clean Water Act ("CWA"). As particularly relevant here, *Amici* obtain or support other developers in obtaining CWA permits to build in or near wetlands, given Georgia's vast wetland resources—most notably those surrounding the Nation's fourth largest port operations in Savannah and Brunswick. *See generally* U.S. Geological Survey, *National Water Summary on Wetland Resources* 8 (1996).[2] *Amici* thus have a strong interest in the proper delineation of the scope of the "waters of the United States" covered by the CWA, 33 U.S.C. § 1362(7), especially as it pertains to wetlands.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents this Court with the ideal opportunity to provide clarity to the "notoriously unclear" scope of CWA jurisdiction. *Sackett v. EPA*, 566 U.S. 120, 132 (2012) (Alito, J., concurring). This Court has considered the jurisdictional phrase "waters of the United States" several times—most recently in *Rapanos v. United States*, 547 U.S. 715 (2006), which failed to command a majority—without moving the Nation much closer to a clear, administrable definition of that phrase. The agencies charged with administering the CWA—the U.S. Army Corps of Engineers ("Corps") and the Environmental

[2] https://pubs.usgs.gov/wsp/2425/report.pdf (all websites last visited April 14, 2022).

Protection Agency ("EPA")—have attempted to define the term by rule, but nearly continuous rulemaking over 15 years has only preserved the status quo of uncertainty.[3] Compounding the confusion, lower courts have either stayed or vacated all of those administrative efforts, and administration changes have shifted the federal government's litigation positions regarding these rules. Meanwhile, the persistent uncertainty has added hundreds of millions of dollars or more in permitting costs and frustrated—even prevented—warehousing and infrastructure development, compounding post-pandemic supply-chain constraints. It is time for this Court to resolve the CWA's ambiguity, providing lasting guidance for the Nation while limiting the vast discretion of the EPA and the Corps.

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*"SWANCC"*), and the plurality in *Rapanos*, this Court pointed the way to an administrable, text-based approach for determining whether a wetland—the type of land at issue here and of most concern to *Amici*—is part of "the waters of the United States," § 1362(7). Under that approach, a wetland would fall within CWA jurisdiction only if it is "adjacent to"

[3] *See* Clean Water Rule, 80 Fed. Reg. 37054 (June 29, 2015); Recodification of Pre-Existing Rules, 84 Fed. Reg. 56626 (Oct. 22, 2019); The Navigable Waters Protection Rule, 85 Fed. Reg. 22250 (Apr. 21, 2020); Revised Definition, 86 Fed. Reg. 69372 (proposed Dec. 7, 2021).

traditional navigable waters, *SWANCC*, 531 U.S. at 170–72, meaning that it has "a continuous surface connection to bodies that are [themselves] 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands," *Rapanos*, 547 U.S. at 742 (plurality op.). The *SWANCC*/*Rapanos*-plurality test provides a clear, workable rule for determining whether a wetland is within the CWA, grounded in its text and structure. To provide clarity and regulatory certainty to landowners throughout the Nation, this Court should adopt this test as the controlling rule, restraining the hopelessly uncertain scope of the CWA that has threatened property owners for decades. *Sackett*, 566 U.S. at 132 (Alito, J., concurring).

As *Amici*'s experience shows, the primary alternative to the continuous-surface-connection test—the significant-nexus test—fails to provide a clear and workable standard. Under that test, a wetland falls within the CWA's jurisdiction if it "possess[es] a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring in the judgment). *Amici* have struggled for years to complete significant projects in wetland-rich Georgia as the extent of federal wetlands on their properties has shifted based on changes in administration or individual district courts staying or vacating nationwide rules. Given the vagaries and arbitrariness inherent in the significant-nexus test, *Amici* are unable to predict accurately which of the

many wetlands on their property a regulator from the Corps may deem within the CWA. As the extent of federal jurisdiction fluctuates, the value of land and the availability and cost of wetland mitigation credits also changes. This is destabilizing and harms economic development and the public welfare.

Amici have, and are supporting, numerous ongoing development projects in Georgia—many of which are needed to support the expansion of Savannah Harbor—that concretely show the grave time and money harms caused by the Corps' inability to predictably and consistently say where "water ends and land begins." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985). The answer to this most basic question has significantly changed at least six times since this Court's decision in *Rapanos*. All the while, the availability of the significant-nexus test to courts and administrations has wreaked havoc on project planning in the broadest sense. In one example, the Corps applied this test to claim that a development site contained an additional 13-football-fields' worth of CWA wetlands than it had previously found a short time ago. That determination increased the compliance costs for the project almost three-fold and delayed the project by an estimated six to eight months. Another example saw the Corps add just under *200 additional acres* of CWA wetlands—about 150 football fields' worth of wetlands—imposing over $45 million in extra compliance costs. The list goes on and on, depriving the residents of Georgia and the broader region from fully realizing the potential of the

more than $1 billion invested in expanding the Savannah Harbor.[4]

This Court should reverse the judgment of the Court of Appeals and provide meaningful clarity to the muddied "waters of the United States" debate.

ARGUMENT

I. This Court Should Adopt A Clear, Easily Administrable Test Grounded In *SWANCC* And The *Rapanos* Plurality Opinion, Thereby Providing Desperately Needed Clarity For Regulated Parties, Regulators, And The Public

A. *SWANCC* And *Rapanos* Provide Foundation For A Clear Test

The CWA prohibits the "discharge of any pollutant" into "navigable waters," without a federal permit—a process that is often very expensive and time intensive. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 594–96 (2016) (citations omitted). The CWA defines "navigable waters" as "the waters of the United States," *id.*; § 1362(7), which, as explained

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[4] *See generally* Nancy Guan, *After 20-Plus Years, Savannah Harbor Expansion Project Is Complete, More Growth Planned*, Savannah Morning News (Mar. 25, 2022), https://www.savannahnow.com/story/news/2022/03/25/savannah-harbor-expansion-project-deepening-georgia-ports-authority-growth/7167473001/.

more fully below, the EPA and the Corps currently interpret to include most of the wetlands across the Nation, *see Hawkes*, 578 U.S. at 594. Further, the Act prohibits the placement of dredged or fill material, such as dirt and rocks, into jurisdictional wetlands unless authorized by a costly and time-intensive permit. 33 U.S.C. § 1344(a); *see Hawkes*, 578 U.S. at 596; *Rapanos*, 547 U.S. at 721 (plurality op.); *see also* Cong. Rsch. Serv., *Redefining* Waters of the United States *(WOTUS): Recent Developments* 28 (Sept. 30, 2021).[5]

This Court most recently addressed "the proper interpretation" of the term "the waters of the United States," § 1362(7), in *SWANCC* and *Rapanos*, in an effort to clarify the CWA's "notoriously unclear" reach, *Sackett*, 566 U.S. at 132 (Alito, J., concurring).

In *SWANCC*, this Court rejected the Corps' so-called "Migratory Bird Rule," through which the Corps asserted that "isolated ponds" wholly within Illinois were "waters of the United States" solely "because they serve[d] as habitat for migratory birds." 531 U.S. at 171. This Court concluded that the only wetlands that qualified as "waters of the United States" were those "adjacent to" other navigable waters. *Id.* at 170–72. The "nonnavigable, isolated, intrastate waters" like those in *SWANCC* did not satisfy that clear standard, although they may possess some ecological connection with traditional

[5] https://crsreports.congress.gov/product/pdf/R/R46927.

navigable waters in other respects, such as serving as a shared habitat for certain species. *Id.* at 167, 171–72; *see also* The Navigable Waters Protection Rule, 85 Fed. Reg. at 22263–68 (hereinafter "NWPR"). Further, the Court explained that the contrary conclusion would raise "significant constitutional and federalism questions" regarding the CWA, as federal regulation of those intrastate waters would "significant[ly] impinge[ ] . . . the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174.

Then, in *Rapanos* a four-Justice plurality expanded upon *SWANCC* and articulated the continuous-surface-connection test for determining whether a wetland may be considered part of "the waters of the United States." 547 U.S. at 739–42 (plurality op.). As the *Rapanos* plurality described this test, "adjacent" wetlands covered by the CWA are "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands . . . ." *Id.* at 742. Thus, "establishing that wetlands . . . are covered by the Act" under the continuous-surface-connection test requires satisfaction of two specific elements: "[F]irst, that the adjacent channel contains a 'water of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters)." *Id.* (alterations omitted). "[A]nd second, that the wetland has a continuous surface connection with that water,

making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.*; *see also Riverside*, 474 U.S. at 132 ("In determining the limits of its powers to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins."). Just as in *SWANCC*, "ecological considerations" are "irrelevant to the question [of] whether physically isolated waters come within the Corps' jurisdiction." *Rapanos*, 547 U.S. at 741–42 (plurality op.); *see also* NWPR, 85 Fed. Reg. at 22263–68 (discussing *Rapanos*).

Justice Kennedy concurred in the judgment in *Rapanos*, but advocated for an entirely different test to determine whether a wetland falls within the term "the waters of the United States." *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring in the judgment). Under the Justice Kennedy's "significant-nexus" test, a wetland is within the CWA's jurisdiction if that wetland "possess[es] a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* A wetland will satisfy this test if it "significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable,'" when considered "either alone or in combination with similarly situated lands in the region." *Id.* at 780.

B. The *SWANCC/Rapanos*-Plurality Test Is Grounded In The CWA's Text And Easily Administrable

1. The CWA defines the "navigable waters" as "*the waters* of the United States". *Rapanos*, 547 U.S. at 732 (plurality op.) (emphasis added); *see also SWANCC*, 531 U.S. at 164, 171. This phrase "plainly . . . does not refer to water in general," but rather "more narrowly" to "only relatively permanent, standing or flowing bodies of water"—that is, "'streams,' 'oceans,' 'rivers,' 'lakes,' and 'bodies' of water 'forming geographical features.'" *Rapanos*, 547 U.S. at 732–33 (plurality op.). Wetlands are *not* "a subset of" those "waters" as a "textual" or "linguistic" matter. *Id.* at 740. That said, there is a practical "difficulty [in] delineating the boundary" between wetlands physically adjacent to traditional navigable waters and those traditional navigable waters themselves. *Id.* The continuous-surface-connection test derived by the *Rapanos* plurality from *SWANCC* solves that "boundary-drawing problem" by placing only these adjacent wetlands within the Act's scope, without atextually sweeping in all wetlands across the Nation or enabling agencies to designate wetlands as subject to CWA jurisdiction with boundless discretion. *Id.* at 742.

The *SWANCC*/*Rapanos*-plurality test respects the traditional federal/state balance that Congress embedded in the CWA. Congress designed the CWA to "preserve" the "traditional power of States to

regulate land and water resources within their borders," while recognizing "the need for a national water quality regulation." NWPR, 85 Fed. Reg. at 22252. The *SWANCC*/*Rapanos*-plurality test comports with that design by limiting the wetlands within the Act's reach to those that are essentially indistinguishable from the traditional navigable waters comprising the core of the Act's scope and certain tributaries to those waters. *Rapanos*, 547 U.S. at 741 (plurality opinion). This leaves the States free to regulate and protect the use and enjoyment of the remaining wetlands within their borders, exercising the zoning and intrastate-environmental-protection authority that they uniquely possess. *Rapanos*, 547 U.S. at 738 (plurality op.); *see also* Cong. Rsch. Serv., *supra*, at 22.

2. The *SWANCC*/*Rapanos*-plurality test also creates a clear and workable rule.

A wetland qualifies as part of "the waters of the United States" under the *SWANCC*/*Rapanos*-plurality test if it satisfies two specific elements. First, the wetland must be "adjacent" to a "channel [that] contains a 'water of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters)." *Rapanos*, 547 U.S. at 742 (plurality op.) (alterations omitted). Second, it must have "a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.*

These two elements establish "a clear, general principle of decision." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989). This clarity provides an "obvious advantage" to industry actors regulated by the CWA, since it gives them "the means of knowing what [the law] prescribes" *ex ante*—that is, the ability to know which wetlands fall within the Act's jurisdiction—as is consistent with the demands of "[r]udimentary justice." *Id.* This predictability benefits the work of regulators too, as such "general rule[s]" constrain their power to declare certain wetlands within the Act's scope by tying their judgments to "governing principle[s]," rather than leaving them out to sea with "arbitrary" standards. *Id.* at 1179–80. And it benefits the States as well, as they will know with greater clarity the wetlands within their borders that they may exclusively regulate and protect. *Accord SWANCC*, 531 U.S. at 174.

Viewing the two elements of the *SWANCC*/*Rapanos*-plurality test with more particularity further shows that this test yields a clear, easily administrable rule for both regulators and industry alike. The test's first element for classifying a wetland as part of "the waters of the United States," § 1362(7), requires only the identification of "traditional interstate navigable waters" and those "relatively permanent bod[ies] of water connected to [them]," *Rapanos*, 547 U.S. at 742 (plurality op.). That is a relatively straightforward endeavor, given that these waters are "continuously

present, fixed bodies of water" that form "geographical features," which are typically ascertainable with a minimal degree of difficulty or deviation from regulators. *Id.* at 732–33; *see* Cong. Rsch. Serv., *supra*, at 8–10. The test's second element is likewise clear and administrable, asking only if there is "a continuous surface connection" between the wetland at issue and the already identified jurisdictional water. *Rapanos*, 547 U.S. at 742 (plurality op.). This typically requires the completion of straightforward, *external* observations of the wetland and the jurisdictional water for a *permanent, surface-level link* between them. *See id.* That is far more administrable than, for example, expensive and involved studies of any potential groundwater connection "below the surface" between the wetland and the jurisdictional water, or the more-subjective assessments needed to discern any connection via "ephemeral streams" or other ecological factors. *See* Cong. Rsch. Serv., *supra*, at 16–17. And while marginal cases may present some line-drawing challenges, the test properly accounts for that reality by requiring a "*clear* demarcation between 'waters' and wetlands" before declaring them beyond the CWA's scope. *Rapanos*, 547 U.S. at 742 (plurality op.) (emphasis added). This will inherently narrow the discretion afforded the agencies—while providing more certainty to States, as they determine whether to exercise their regulatory authority—when analyzing those marginal cases or crafting a regulatory definition to establish a predictable framework within those margins.

3. Adopting the *SWANCC*/*Rapanos*-plurality test would avoid the unconstitutional vagueness lurking within the CWA. *See Hawkes*, 578 U.S. at 603 (Kennedy, J., concurring); *Sackett*, 566 U.S. at 132 (Alito, J., concurring); *accord Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring). The void-for-vagueness doctrine prohibits the government from depriving someone of their property under a law "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015). If the CWA's governing rule is not based upon a clear test defining when wetlands are "waters of the United States," § 1362(7), the Act would be unconstitutionally vague because ordinary citizens would not know when they could face serious penalties, including criminal fines, for not obtaining the relevant CWA permit. As for the fair-notice prong, the term "waters of the United States," standing alone, fails to offer constitutionally sufficient notice even to sophisticated "regulated entities," who must blindly "feel their way on a case-by-case basis" when considering whether their wetlands fall within the Act. *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring); *Sackett*, 566 U.S. at 133 (Alito, J., concurring); *accord Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 624 (2018). As for the arbitrary-enforcement prong, the term "waters of the United States"—without an administrable test—leaves "ordinary Americans" wholly "at the mercy" of federal "employees," which is "unthinkable" in "a

Nation that values due process," *Sackett*, 566 U.S. at 132 (Alito, J., concurring).

II. As *Amici's* Experience Demonstrates, The Significant-Nexus Test Is Vague And Unworkable, Making Compliance Costly And Uncertain

Amici, along with numerous landowners, developers, and economic-development groups in the wetland-rich State of Georgia, have struggled for years to operate under the significant-nexus test—and, more broadly, to operate with the agencies' rapid shifting of tests over time—for defining when a wetland is part of "the waters of the United States," § 1362(7). That test has proved hopefully vague and unworkable, failing to offer any measure of predictability or administrability for determining whether the numerous wetlands found in *Amici*'s projects are "waters of the United States." § 1362(7). That test also gives the administering agencies too much power to manipulate Congress' term "waters of the United States," thereby extending the power of the federal government to over millions and millions of acres of land—the kind of power that *SWANCC* warned against providing to the unelected bureaucracy. *Accord SWANCC*, 531 U.S. at 172–72. Thus, as it does with the Sacketts here, the significant-nexus test leaves *Amici* blindly "feel[ing] their way on a case-by-case basis" to plan their properties, while also fulfilling their desire to protect the environment in accord with the CWA, *Rapanos*,

547 U.S. at 758 (Roberts, C.J., concurring)—putting them "at the mercy" of individual federal employees applying a subjective test, *Sackett*, 566 U.S. at 132 (Alito, J., concurring).

Below, *Amici* explain the development process that they follow for projects that require, or may require, the filling or alteration of wetlands to ensure compliance with the CWA. *Infra* Part II.A. Then, *Amici* explain how uncertainty over the jurisdictional status of their wetlands harms this process by imposing additional monetary and time costs. *Infra* Part II.B. Finally, *Amici* use multiple ongoing projects within Georgia as examples of the negative impacts of the significant-nexus test's unworkability, as well as the harm caused by the agencies' rapid shifting of tests over short periods of time. *Infra* Part II.C.

A. *Amici*'s Development Process Requires The Expenditure Of Significant Resources, Including To Obtain CWA Permits

Amici's process to complete successfully large, economic-development projects potentially requiring the fill or alteration of wetlands classified as "waters of the United States" comprises four delicately interrelated steps. Each step requires the developer to assume business risk and expend significant resources, both in terms of money and time.

A developer typically begins a project by first identifying whether the property to be developed contains wetlands. *See generally Hawkes Co., Inc. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 1003 (8th Cir. 2015) (Kelly, J., concurring), *aff'd*, 578 U.S. 590, (2016). This involves the developer engaging experts to analyze the property to determine if it contains any wetlands at all—whether within the CWA's jurisdiction or not. *See generally* EPA, *What is a Jurisdictional Delineation under CWA Section 404?*.[6] That is, the developer must hire specialists—like *Amicus* Resource & Land Consultants—to study whether part of its property falls within the traditional definition of a "wetland," meaning area that is normally "inundated or saturated by surface or ground water," such that it supports "a prevalence of vegetation typically adapted for life in saturated soil conditions." *See* NWPR, 85 Fed. Reg. at 22341.

Next, assuming that the property does contain wetlands, the developer may obtain a decision from the Corps over whether those wetlands are "waters of the United States," within the CWA's jurisdiction. *See Hawkes*, 578 U.S. at 594–95. Such a determination often comes in the form of either an "approved" or "preliminary" "jurisdictional determination" from the Corps prior to applying for a CWA permit. *See id.* Importantly, the Corps' determination of whether a developer's particular

[6] https://www.epa.gov/cwa-404/what-jurisdictional-delineation-under-cwa-section-404.

wetlands fall within the CWA's scope represents its in-the-field application of the test for "the waters of the United States"—whatever that test may be at the time. *See id.* at 595; EPA, *Current Implementation of Waters of the United States*.[7] More importantly, the Corps' decision is a critical, initial input into project planning and feasibility.

The developer then engages professional engineers to create site-development plans. This includes efforts to avoid and minimize impacts to jurisdictional features to the maximum extent practicable, as the CWA regulatory framework requires. *See* EPA, *Types of Mitigation under CWA Section 404*.[8] Where impacts are unavoidable, the developer must pursue the requisite permit under the CWA—a step described more fully below, *infra* pp. 19–21—which includes consideration of both on-site and off-site alternatives to meet the project purpose and need, *see Hawkes*, 578 U.S. at 596. The process of drawing and redrawing construction plans and alternative site designs is exceedingly costly for the developer—particularly when completing large development projects of the kind needed to support major port operations. As relevant here, the core, initial question is "[w]here does the water end and the

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[7] https://www.epa.gov/wotus/current-implementation-waters-united-states#.

[8] https://www.epa.gov/cwa-404/types-mitigation-under-cwa-section-404-avoidance-minimization-and-compensatory-mitigation.

land begin?" *Accord Riverside*, 474 U.S. at 132. The limits of the term "waters of the United States" drives everything—project feasibility, site-suitability, avoidance and minimization, alternatives development, and, frankly, project viability.

The site-development plans also factor into discussions with potential investors and tenants. For example, long before a major retailer or logistics company opens a warehouse or distribution center, it enters into discussions and even lease negotiations with developers about their proposed projects. Similarly, many of these proposed projects involve hundreds of millions of dollars in capital investment, thus lenders and equity investors discuss project plans with the developers in the course of negotiating loan and investment agreements. When there is uncertainty about where the water ends and the land begins—or, worse, as demonstrated here, where that fact is subject to relatively frequent, dramatic changes based on agency shifts and lower court decisions—it significantly frustrates the timelines of these discussions and project planning. And, of course, when there are changes (*e.g.*, nine months into the jurisdictional-determination process), the planning—avoidance and minimization, alternatives analysis, and the like—must start again at the beginning.

Finally, assuming that the developer must fill or otherwise alter some wetlands subject to CWA jurisdiction to complete its project, the developer

must then apply for and obtain a CWA permit—specifically a Section 404 permit—before commencing construction. *See Hawkes*, 578 U.S. at 596. A Section 404 permit "authorizes 'the discharge of dredged or fill material into the navigable waters at specified disposal sites," *id.* (quoting § 1344(a)), including the filling or altering of wetlands as needed to make construction possible, *see Sackett*, 566 U.S. at 124–25 (plurality op.). Obtaining a Section 404 permit is no easy feat, as even the Corps itself admits that "the permitting process can be arduous, expensive, and long." *Hawkes*, 578 U.S. at 601.

This Court recognized in *Hawkes* that "[t]he costs of obtaining such a permit are significant." *Id.* at 594. That is because an applicant must spend appreciable funds to "conduct scientific investigations, negotiate with the issuing agency over the conditions of the permit, and redesign the proposed project based on the agency's decision." David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Nat. Res. J. 59, 59–60 (2002).[9] For example, a "specialized 'individual' permit" under Section 404 required the applicant to, on average, "spend[ ] 788 days and $271,596 in completing the process," while the "[e]ven more readily available 'general' permits took applicants, on average, 313 days and $28,915 to

[9] https://wineindustryinsight.com/Duarte-CoE/EconomcsofEnvironmentalRegulation-Sunding.pdf.

complete." *Hawkes*, 578 U.S. at 594–95 (citations omitted) (referencing data from the time of *Rapanos*).

These steep time and monetary costs do *not* include the costs of the "mitigation" required by the agencies during the Section 404 permit process. *Id.* (citations omitted). To obtain a Section 404 permit to fill or alter a wetland within the CWA, the EPA and the Corps may require the applicant to, among other things, engage in "compensatory mitigation" to "replace the loss of wetland and aquatic resource functions in the watershed" as a result of the applicant's development. EPA, *Wetlands Compensatory Mitigation* (emphasis omitted);[10] Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. 19594 (Apr. 10, 2008). Such compensatory mitigation is often exceedingly costly for the would-be permit holder. Indeed, one study estimated that the "annual amount of funds spent on compensatory mitigation" under Section 404 was "over $2.9 billion," Env't L. Inst., *Mitigation of Impacts to Fish and Wildlife Habitat: Estimating Costs and Identifying Opportunities* 2 (Oct. 2007)[11]—or roughly $4 billion in today's dollars.

While there are multiple forms of approved mitigation, the EPA and the Corps' "explicit

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[10] https://www.epa.gov/sites/default/files/2015-08/documents/compensatory_mitigation_factsheet.pdf.

[11] https://www.eli.org/sites/default/files/eli-pubs/d17_16.pdf.

preference" is the use of the so-called "mitigation bank credits" system. *See* Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. at 19600. Under this system, third-party entities restore, preserve and set aside certain wetland areas for the specific purpose of "compensat[ing]" for a developer's "future conversion[ ]" of other "wetlands for development activities." EPA, *Wetlands Compensatory Mitigation*, *supra.* The Corps then assigns a certain number of "credits" to each of these preserved wetland areas, which credits a developer may then purchase on a watershed-limited market to satisfy the compensatory-mitigation obligations imposed on them via a Section 404 permit. *Id.*; *see* EPA, *Mitigation Banks under CWA Section 404*.[12] Since the mitigation bank credits system is deliberately exposed to market forces, and the number of credits available at any given time is finite, the cost of a credit fluctuates and correlates with demand. Further, as the scope of CWA jurisdiction expands, more development projects may affect wetlands subject to CWA jurisdiction, meaning that the Corps may order more permit applicants to complete compensatory mitigation. This, in turn, increases the cost of mitigation in two ways: (1) applicants must purchase more credits to offset more affected wetlands, and (2) that increased demand for the credits drives up the cost per credit, *see* NWPR, 85 Fed. Reg. at 22335; Clare Condon,

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[12] https://www.epa.gov/cwa-404/mitigation-banks-under-cwa-section-404.

What Does Wetlands Mitigation Cost?, EHS Daily Advisor (Sept. 13, 2017)[13]—as the specific examples that *Amici* discuss below readily show, *infra* Part II.C.

B. The Significant-Nexus Test Fails To Provide Developers Even A Modicum Of Certainty During The Development Process

The Corps currently uses the significant-nexus test to determine whether a wetland falls within the CWA, which test, unfortunately, makes developers' compliance with the Act for any given project deeply uncertain and, therefore, very costly.

The Corps began employing the significant-nexus test to determine whether a developer's wetlands were part of "the waters of the United States" after this Court's decision in *Rapanos* failed to garner a majority. *See* NWPR, 85 Fed. Reg. at 22256 (discussing and citing the EPA's "*Rapanos* Guidance"). The Corps used iterations of this test in Georgia until the EPA promulgated the NWPR in 2020.[14] That 2020 rule created a "clear" and

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[13] https://ehsdailyadvisor.blr.com/2017/09/wetlands-mitigation-cost/.

[14] The Clean Water Rule was promulgated in 2015, 80 Fed. Reg. 37054, but was quickly stayed nationwide, *In re EPA*, 803 F.3d 804 (6th Cir. 2015), *vacated sub nom. In re United States Dep't of Def.*, 713 F. App'x 489 (6th Cir. 2018), and then enjoined

"predictable" test that incorporated the continuous-surface-connection test from the *Rapanos*-plurality/*SWANCC*, while also identifying three other discrete circumstances that qualified a wetland as part of "the waters of the United States." *See id.* at 22307; *see also* Cong. Rsch. Serv. *supra*, at 10. However, a district court has vacated the NWPR, triggering a reversion to the significant-nexus test as the Corps' preferred field method for determining the jurisdictional status of wetlands. EPA, *Current Implementation*, *supra* (discussing *Pascua Yaqui Tribe v. EPA*, No. CV-20-00266-TUC-RM, 2021 WL 3855977 (D. Ariz. Aug. 30, 2021)).

Under the significant-nexus test, a wetland falls within the CWA's reach if that wetland "possess[es] a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Rapanos*, 547 U.S. at 759 (Kennedy, J., concurring in the judgment). "[W]etlands possess the requisite nexus . . . if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780. This contrasts with wetlands that have "speculative or insubstantial" "effects on water quality," which would "fall outside" the jurisdiction of the CWA. *Id.*

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in Georgia, *Georgia v. Pruitt*, 326 F. Supp. 3d 1356 (S.D. Ga. 2018).

The significant-nexus test fails to provide even a modicum of certainty to developers attempting to determine whether their property contains wetlands covered by the CWA and thus—as a direct result—makes CWA compliance more costly. Most problematically, "[t]his test leaves no guidance on how to implement its vague, subjective centerpiece"; that is, "exactly what is 'significant' and how is a 'nexus' determined?" *United States v. Chevron Pipe Line Co.*, 437 F. Supp. 2d 605, 613 (N.D. Tex. 2006); *accord* Jamison E. Colburn, *Don't Go in the Water: On Pathological Jurisdiction Splitting*, 39 Stan. Envtl. L.J. 3, 56 (2019). Further, "Justice Kennedy did not define" when a wetland is "'similarly situated'" to other lands, which itself is "a broad and ambiguous term." *Orchard Hill Bldg. Co. v. U.S. Army Corps of Eng'rs*, 893 F.3d 1017, 1025 (7th Cir. 2018). The upshot is that the significant-nexus test makes it intolerably "difficult and confusing" for "a landowner to predict whether or not his or her land falls within CWA jurisdiction," which raises the cost of compliance. *Hawkes*, 782 F.3d at 1003 (Kelly, J., concurring).

Given the significant-nexus test's vagueness, that test necessarily empowers regulators to make arbitrary and inconsistent designations of which wetlands are subject to federal jurisdiction—even similarly situated wetlands. "[I]t is quite easy" for a regulator to claim that any wetlands fall within the Clean Water Act under this test. Samuel P. Bickett, *The Illusion of Substance: Why* Rapanos v. United

States *and Its Resulting Regulatory Guidance do not Significantly Limit Federal Regulation of Wetlands*, 86 N.C. L. Rev. 1032, 1041 (2008). The subjectivity of this test, *see Chevron Pipe Line*, 437 F. Supp. 2d at 613, also means that *different* regulators may designate *different* wetlands on a developer's property as subject to CWA jurisdiction at *different* points in time—such as when a developer obtains a new jurisdictional determination from the Corps after its previous determination has expired. *See Hawkes*, 578 U.S. at 595. In light of the inherent subjectivity of the significant-nexus test, many developers frequently acquiesce to broad assertions of jurisdiction by the Corps under a preliminary jurisdictional determination (or equivalent non-binding ecological assessment) in order to streamline the time-consuming and expensive permitting process, effectively giving up their property rights to avoid endless battles with an empowered bureaucracy. *Accord Sackett*, 566 U.S. at 132 (Alito, J., concurring) ("[M]ost property owners [have] little practical alternative but to dance to the EPA's tune."); *Hawkes*, 578 U.S. at 602–03 (Kennedy, J., concurring) (explaining that the CWA's "consequences . . . can be crushing" and that its scope "continues to raise troubling questions").

C. *Amici*'s Experience With Specific Projects Demonstrates The Grave Harms From The Vague Significant-Nexus Test

Amici's concerns with the unworkability of the significant-nexus test are the result of their multiple, costly experiences under that test. *Amici* currently support or are involved in multiple large development projects—including critical projects needed to expand warehousing near the Port of Savannah—that have already experienced the very harms discussed immediately above, with the Corps frequently declaring what once were considered isolated wetlands now CWA jurisdictional waters under the significant-nexus test.

1. To take one example, *Amici* are supporting the development of a 793-acre site for warehousing and supply-chain distribution space near the Port of Savannah. *Amici* Appendix ("*Am*.App.") at 1a–3a (Project F). This property obtained confirmation of an approved jurisdictional determination from the Corps in May 2021. Applying the NWPR's clear test, the Corps classified 184.5 acres of wetlands as waters of the United States. The developer had contracted to purchase this property based upon this jurisdictional determination, submitting an individual Section 404 permit application that triggered a corresponding public notice. In the application, the developer calculated that the project would impact 15.5 of those 184.5 acres of jurisdictional wetland. Those impacts would require the purchase of 93 credits for

compensatory mitigation at market cost of $25,000/credit, for a total mitigation cost of $2,325,000.

But after the NWPR vacatur in August 2021, a new jurisdictional determination from the Corps was required for the property—an unprecedented retroactive application of a district-court vacatur by the Corps. *See* EPA, *Current Implementation*, *supra* (explaining the EPA and Corps' position that "[t]he Corps will not rely on an AJD [*i.e.*, approved jurisdictional determination] issued under the NWPR . . . in making a new permit decision" in light of the NWPR vacatur). Now applying the uncertain significant-nexus test, the Corps discovered 201.9 acres of wetlands as potentially waters of the United States, or an increase of about 13 football fields. The developer then calculated that the project would now impact 31.3 acres—an unexpected doubling of the projected impact. This would now require the purchase of 187.8 credits for mitigation, at a significantly higher and unexpected cost of $35,000/credit, resulting in a new total mitigation cost of $6,573,000—just under three times the previous cost. And that substantial increase in cost does not account for increases in development and permitting costs that the developer also experienced. All told, this change in jurisdictional determination caused an estimated six- to eight-month delay, with a three-month delay in the sale of the property alone.

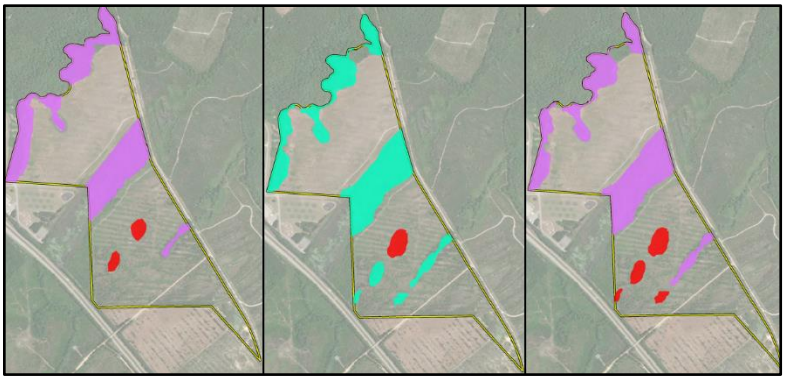
(Image on next page.)

(On left: May 2021 AJD; On right: Post-NWPR-Vacatur JD. For all images, pink is wetlands within CWA, green is wetlands potentially within CWA, and red is wetlands outside of CWA.)

2. Multiple other projects provide equally powerful and representative examples of the time and money costs that *Amici* and other developers have suffered from the Corps' jurisdictional determinations under its application of the desperately uncertain, but broadly applied, significant-nexus test.

With the development of a 296-acre site in Bryan County, Georgia, the Bryan County Development Authority saw the jurisdictional status of on-site wetlands change four times in 14 years, beginning with 56.53 covered acres in December 2007 and then expanding to 60.36 acres in October 2013, dropping to 58.67 acres in February 2021 and then expanding to 60.36 acres in February 2022. *Am.*App.4a–6a (Project E). The expansion between 2021 and 2022 nearly doubled the mitigation costs for this project,

from about $1 million to over $2 million, and again imposed an estimated project delay of six to eight months.



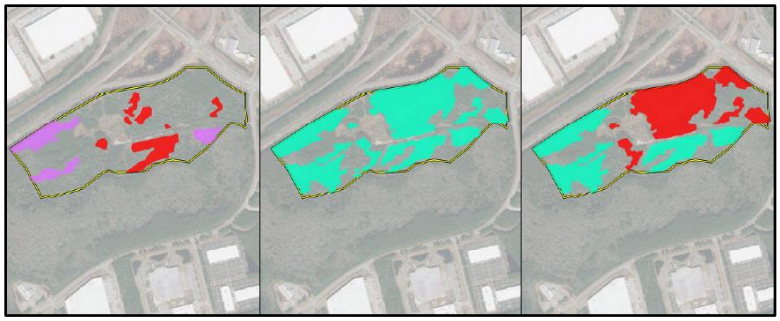
(On left: December 2007 JD; In middle, October 2013 JD; On right: February 2021 AJD.)

For the development of a 315-acre site for warehousing and distribution facilities in Belfast Commerce Park, the covered wetlands changed three times in five years. *Am.*App.7a–9a (Project A). These unanticipated changes more than tripled the expected mitigation costs—from about $1 million to over $3 million—and also resulted in an estimated six to eight-month delay.

Next, for the development of a site in Effingham County, Georgia, the estimated wetlands subject to CWA jurisdiction soared from 215.77 acres in 2001, to 292.30 acres in 2006, to 467.32 acres in 2019, and then dipped to 414.56 acres in 2020. *Am.*App.10a–13a (Project I). Incredibly, that represents a total increase of just under 200 acres of jurisdictional

wetlands for this project—or about 150 football fields—imposing *over $45 million* more in mitigation costs between 2019 and 2021.

Finally, another project involving *Amici* saw its federal-jurisdictional wetlands acreage change four times in 25 years. *Am.*App.14a–17a (Project C). The CWA-wetland acreage began at 8.82 acres in 1996 and then significantly rose to 51.73 acres in 2016, only to fall to 24.58 acres in 2021 after application of the NWPR. Yet, after the vacatur of that rule, the CWA-wetland acreage reverted back to 51.73 in late-2021. The ping-pong from 51.73 acres to 24.58 acres and back to 51.73 acres caused a substantial increase in mitigation costs—from just under $3 million in 2016, to just over $10 million in 2021, to just over $27 million in late-2021.



(On left: October 1996 determination; In middle, May 2016 JD; On right: Late-2021 JD.)

* * *

As *Amici*'s on-the-ground experience shows, the extreme uncertainty of the significant-nexus test imposes grave costs on development projects that are necessary to support and grow the Nation's economy, as well as create well-paying jobs. Further, the sheer inability to predict where and when the Corps will inflict such costs on *Amici* and other developers, as it continues to apply the significant-nexus test in the future, ensures that *Amici* and similarly situated developers have no practical means to avoid or account for these costs during their development process going forward. Accordingly, this Court should emphatically reject the significant nexus test, in favor of the *SWANCC*/*Rapanos*-plurality test articulated above.

CONCLUSION

This Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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April 2022

AMICI APPENDIX

PROJECT F
ARMY CORPS OF ENGINEERS
NO.SAS-2020-00914[15]

Summary

This is a 793-acre site for warehousing and supply-chain distribution space near the Port of Savannah. Purchase contract was in place based on December 2020 Corps AJD. An individual permit application was submitted to the Corps based on this AJD. The Savannah District issued a public notice for this permit application.

After NWPR vacatur, Corps effectively revoked AJD, requiring submittal of revised permit application. Project delay estimated at 6–8 months.

Timeline

December 2020: 17.4 acres of non-regulated aquatic resources, 184.5 acres of potential-WOTUS (Corps field verified and verbal confirmation occurred in May 2021).

November 2021: 201.9 acres of potential-WOTUS.

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[15] Public notice: https://www.sas.usace.army.mil/Missions/Regulatory/Public-Notices/Article/2862774/sas-2020-00914-sp-tck/.

Impacts and Costs

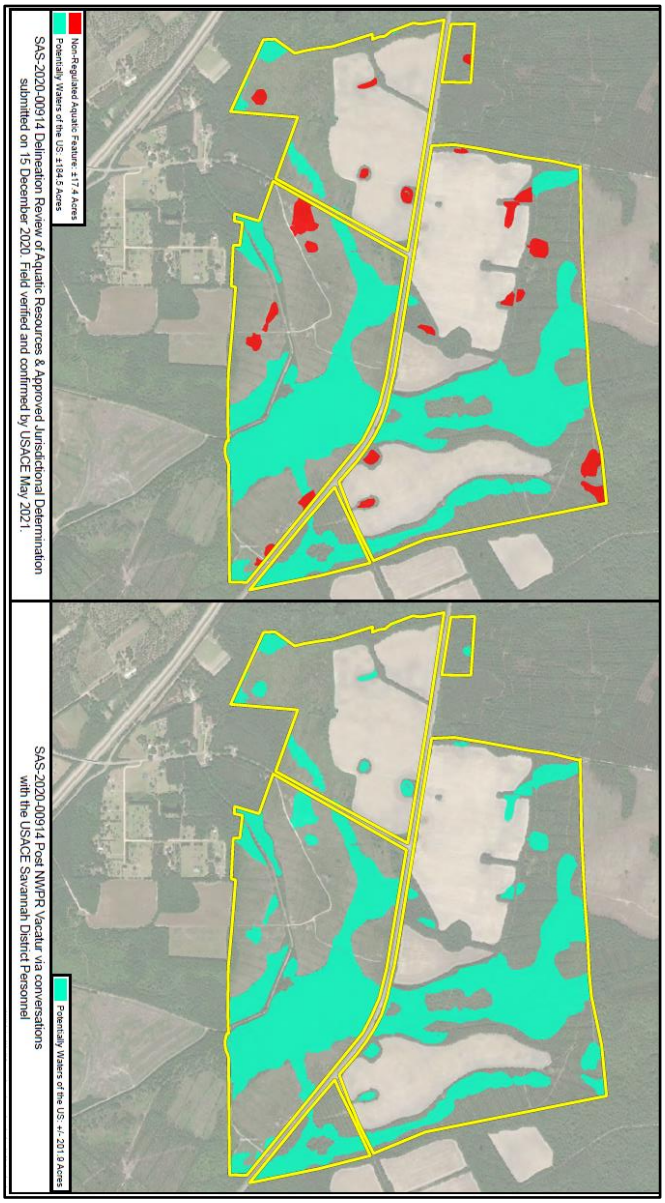
December 2020

- Impacts to potential-jurisdictional wetlands: 15.5 acres.
- Credits: 93 credits (*i.e.*, 6 required credits/impacted acre).
- Estimated mitigation credit cost $25,000/credit = $2,325,000.

November 2021

- Impacts to potential-jurisdictional wetlands: 31.3 acres.
- Credits: 187.8 credits (*i.e.*, 6 required credits/impacted acre).
- Estimated mitigation credit cost $35,000/credit = $6,573,000.

(Image on next page.)


Non-Regulated Aquatic Feature: ±17.4 Acres
Potentially Waters of the US: ±194.5 Acres
SAS-2020-00914 Delineation Review of Aquatic Resources & Approved Jurisdictional Determination submitted on 15 December 2020. Field verified and confirmed by USACE May 2021.
SAS-2020-00914 Post NWPR Vacatur via conversations with the USACE Savannah District Personnel
Potentially Waters of the US: +/- 201.9 Acres

PROJECT E
ARMY CORPS OF ENGINEERS
NO.SAS-2007-00469[16]

Summary

This is a 296-acre site in Bryan County, Georgia. Acreage of federal-jurisdictional wetlands changed four times in 14 years. Preliminary planning, proforma, and engineering for current iteration of project was based on February 2021 Corps AJD. An individual permit application was submitted to the Corps based on this AJD. The Savannah District issued a public notice for this permit application.

After NWPR vacatur, Corps effectively revoked AJD, requiring submittal of revised permit application. Project delay estimated at 6–8 months.

Timeline

December 2007: 3.39 acres of non-regulated aquatic resources, 56.53 acres of potential-WOTUS.

October 2013: 3.82 acres of non-regulated aquatic resources, 60.36 acres of potential-WOTUS.

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[16] Public notice: https://www.sas.usace.army.mil/Missions/Regulatory/Public-Notices/Article/2358977/sas-2007-00469-bryan-acm/.

February 2021: 7.43 acres of non-regulated aquatic resources, 58.67 acres of potential-WOTUS.

February 2022: 3.82 acres of non-regulated aquatic resources, 60.36 acres of potential-WOTUS.

Impacts and Costs

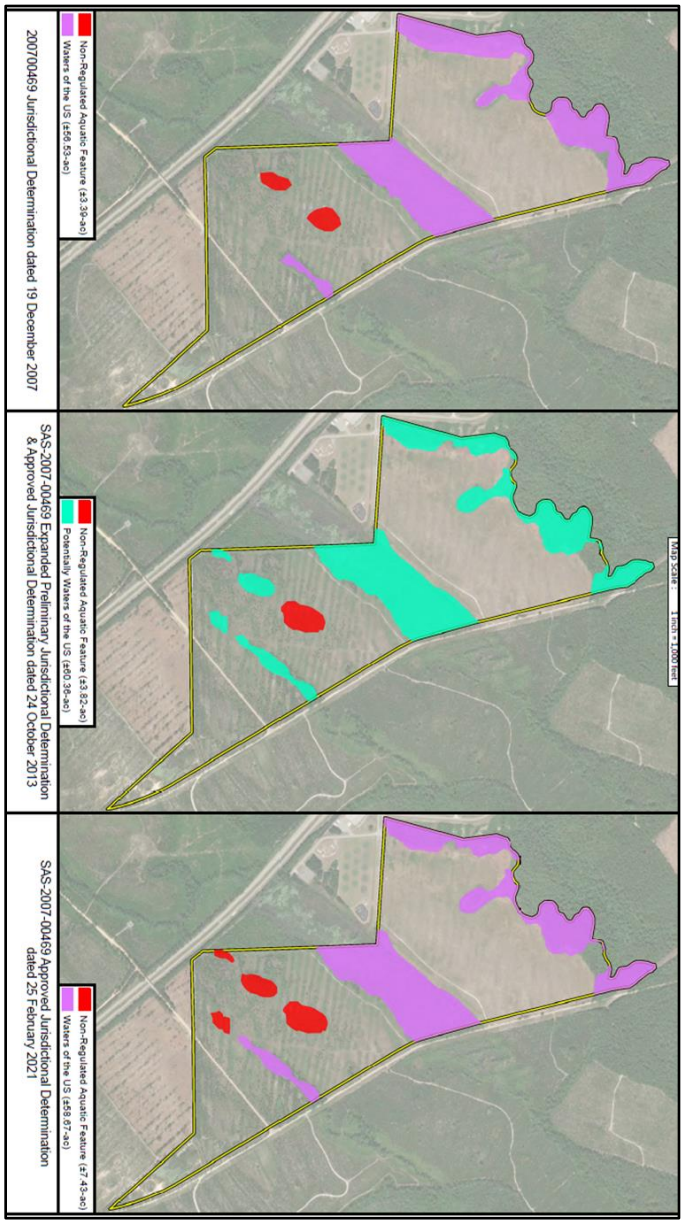
February 2021

- Impacts to potential-jurisdictional wetlands: 8.52 acres.
- Credits: 51.12 credits (*i.e.*, 4–6 required credits/impacted acre).
- Estimated mitigation credit cost $25,000/credit = $1,278,000.

February 2022

- Impacts to potential-jurisdictional wetlands: 11.86 acres.
- Credits: 50.4 credits (*i.e.*, 4–6 required credits/impacted acre).
- Estimated mitigation credit cost $45,000/credit = $2,268,000.

(Image on next page.)


Non-Regulated Aquatic Feature (±3.39-ac)
Waters of the US (±56.53-ac)
2007-00469 Jurisdictional Determination dated 19 December 2007
Map Scale = 1 inch = 1,000 feet
Non-Regulated Aquatic Feature (±3.82-ac)
Potentially Waters of the US (±60.36-ac)
SAS-2007-00469 Expanded Preliminary Jurisdictional Determination & Approved Jurisdictional Determination dated 24 October 2013
Non-Regulated Aquatic Feature (±7.43-ac)
Waters of the US (±59.67-ac)
SAS-2007-00469 Approved Jurisdictional Determination dated 25 February 2021

PROJECT A
ARMY CORPS OF ENGINEERS
NO.SAS-2011-00567[17]

Summary

This is a 315-acre site for warehousing and distribution facilities in Belfast Commerce Park. Acreage of federal-jurisdictional wetlands changed three times in five years. Preliminary planning, proforma, and engineering for current iteration of the project was based on July 2021 Corps AJD. An individual permit application was submitted to the Corps based on this AJD. The Savannah District issued a public notice for this permit application.

After NWPR vacatur, Corps effectively revoked AJD, requiring submittal of a revised permit application. Project delay estimated at 6–8 months.

Timeline

October 2011: 6.60 acres of non-regulated aquatic resources, 50.30 acres of potential-WOTUS.

July 2021: 15.39 acres of non-regulated aquatic resources, 41.41 acres of potential-WOTUS.

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[17] Public notice: https://www.sas.usace.army.mil/Missions/Regulatory/Public-Notices/Article/571229/sas-2011-00567-sp-slb/.

December 2021: 6.60 acres of non-regulated aquatic resources, 50.30 acres of potential-WOTUS.

Impacts and Costs

July 2021

- Impacts to potential-jurisdictional wetlands: 6.52 acres.
- Credits: 39.12 (*i.e.*, 6 required credits/impacted acre).
- Estimated mitigation credit cost $25,000/credit = $978,000.

December 2021

- Impacts to potential-jurisdictional wetlands: 14.65 acres.
- Credits: 87.92 credits (*i.e.*, 6 required credits/impacted acre).
- Estimated mitigation credit cost $35,000/credit = $3,077,200.

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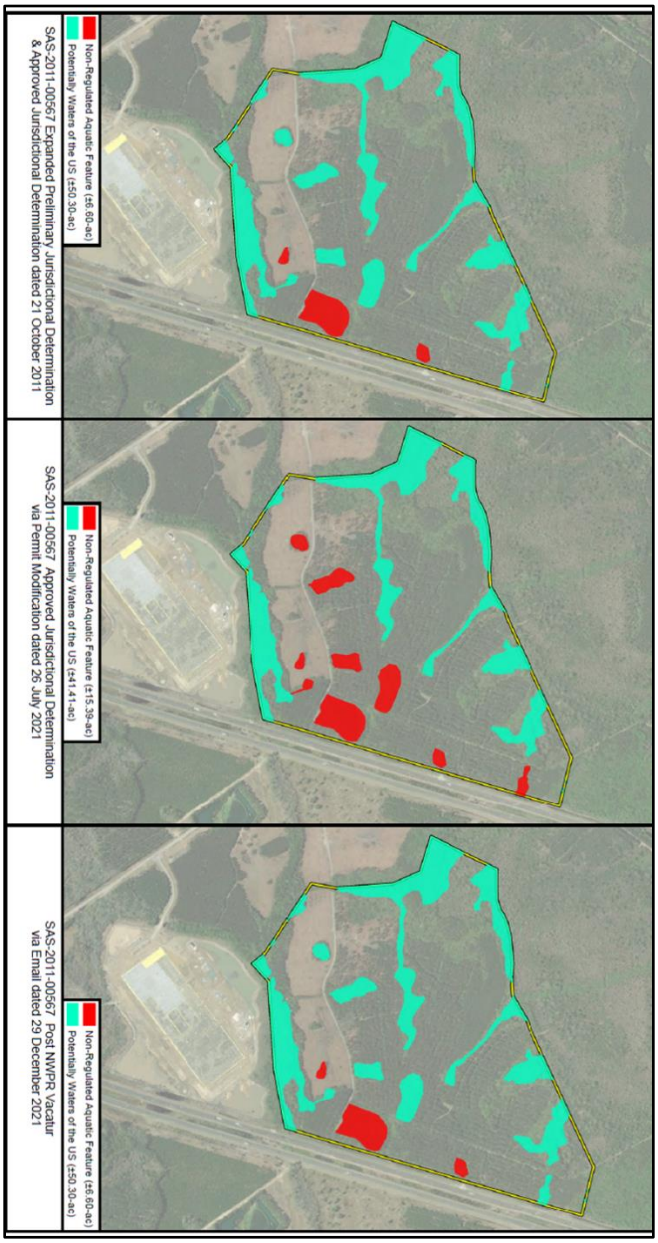
Non-Regulated Aquatic Feature (±6.60-ac)
Potentially Waters of the US (±50.30-ac)
SAS-2011-00567 Expanded Preliminary Jurisdictional Determination & Approved Jurisdictional Determination dated 21 October 2011
Non-Regulated Aquatic Feature (±15.39-ac)
Potentially Waters of the US (±41.41-ac)
SAS-2011-00567 Approved Jurisdictional Determination via Permit Modification dated 26 July 2021
Non-Regulated Aquatic Feature (±6.60-ac)
Potentially Waters of the US (±50.30-ac)
SAS-2011-00567 Post NWPR Vacatur via Email dated 29 December 2021

PROJECT I
ARMY CORPS OF ENGINEERS
NO.SAS-2018-00235[18]

Summary

Permittee entered into a contract to purchase property in 2021 relying on an AJD and submitted an individual permit application to the Corps based on the AJD. The Savannah District issued a public notice for this permit application.

After NWPR vacatur, Corps effectively revoked AJD, requiring submittal of revised permit application. Due to doubling of mitigation costs, entire site plan will likely be revised. Project delay estimated at 6–8 months.

Timeline

December 2001: 139.01 acres of non-regulated aquatic resources, 215.77 acres of potential-WOTUS.

February 2006: 62.48 acres of non-regulated aquatic resources, 292.30 acres of potential-WOTUS.

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[18] Public notice: https://www.sas.usace.army.mil/Missions/Regulatory/Public-Notices/Article/2163834/sas-2018-00235-sp-effingham-0525-sew/.

September 2019: 10.45 acres of non-regulated aquatic resources, 467.32 acres of potential-WOTUS.

October 2020: 63.21 acres of non-regulated aquatic resources, 414.56 acres of potential-WOTUS.

December 2021: Corps notified permittee that 2020 AJD would not be valid for its pending permit application.

Impacts and Costs

September 2019

- Impacts to potential-jurisdictional wetlands: 133.063 acres.
- Credits: 840.72 credits (*i.e.*, 4–8 required credits/impacted acre).
- Estimated mitigation credit cost $19,250/credit = $16,183,860.

October 2020

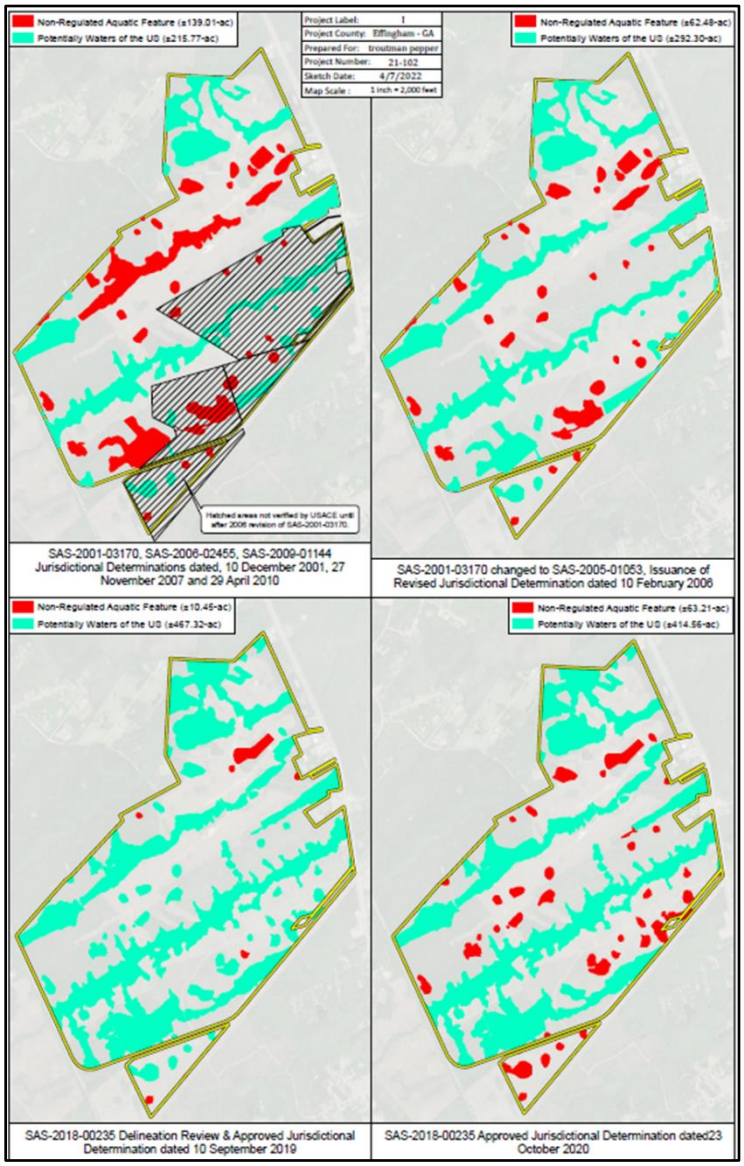
- Impacts to potential-jurisdictional wetlands: 92.317 acres.
- Credits: 596.08 credits (4–8 required credits /impacted acre).
- Estimated mitigation credit cost $55,800/credit = $33,261,264.

December 2021

- Impacts to potential-jurisdictional wetlands: 133.063 acres.

- Credits: 840.72 credits (*i.e.*, 4–8 required credits/impacted acre).
- Estimated mitigation credit cost $76,000/credit = $63,894,720.

(Image on next page.)


Non-Regulated Aquatic Feature (±139.01-ac)
Potentially Waters of the US (±215.77-ac)
Project Label: 1
Project County: Effingham - GA
Prepared For: troutman pepper
Project Number: 21-102
Sketch Date: 4/7/2022
Map Scale: 1 inch = 2,000 feet
Hatched areas not verified by USACE until after 2006 revision of SAS-2001-03170.
SAS-2001-03170, SAS-2006-02455, SAS-2009-01144 Jurisdictional Determinations dated, 10 December 2001, 27 November 2007 and 29 April 2010
Non-Regulated Aquatic Feature (±62.48-ac)
Potentially Waters of the US (±292.30-ac)
SAS-2001-03170 changed to SAS-2005-01053, Issuance of Revised Jurisdictional Determination dated 10 February 2006
Non-Regulated Aquatic Feature (±10.45-ac)
Potentially Waters of the US (±467.32-ac)
SAS-2018-00235 Delineation Review & Approved Jurisdictional Determination dated 10 September 2019
Non-Regulated Aquatic Feature (±63.21-ac)
Potentially Waters of the US (±414.56-ac)
SAS-2018-00235 Approved Jurisdictional Determination dated23 October 2020

PROJECT C
ARMY CORPS OF ENGINEERS
NO.SAS-2016-00045[19]

Summary

Federal-jurisdictional wetlands acreage has changed four times in 25 years. The Corps approved the site for development as part of a master plan 404 permit issued in 1990s, requiring 8.82 acres of jurisdictional-wetland impact. Following permit expiration, new delineation increased acreage of jurisdictional wetland from 8.82 to 51.73 acres in 2016. In 2021, Corps reevaluated the project under the NWPR and reduced the jurisdictional-wetland acreage to 24.58 acres. After NWPR vacatur, jurisdictional-wetland acreage reverted back to 2016 acreage of 51.73 acres.

Timeline

October 1996: 8.09 acres of non-regulated aquatic resources, 8.82 acres of potential-WOTUS.

May 2016: 51.73 acres of potential-WOTUS.

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[19] Public notice: https://www.sas.usace.army.mil/Missions/Regulatory/Public-Notices/Article/2300559/sas-2016-00045-sp-sfs/.

August 2021: 27.82 acres of non-regulated aquatic resources, 24.58 acres of potential-WOTUS.

December 2021: 51.73 acres of potential-WOTUS.

Impacts and Costs

October 1996

- Impacts to potential-jurisdictional wetlands: 8.82 acres.
- Credits: 63.5 credits (*i.e.*, 7.2 required credits /impacted acre).
- Estimated mitigation credit cost $1200/credit = $76,204.

May 2016

- Impacts to potential-jurisdictional wetlands: 51.73 acres.
- Credits: 372.46 credits (*i.e.*, 7.2 required credits/impacted acre).
- Estimated mitigation credit cost $8000/credit = $2,979,680.

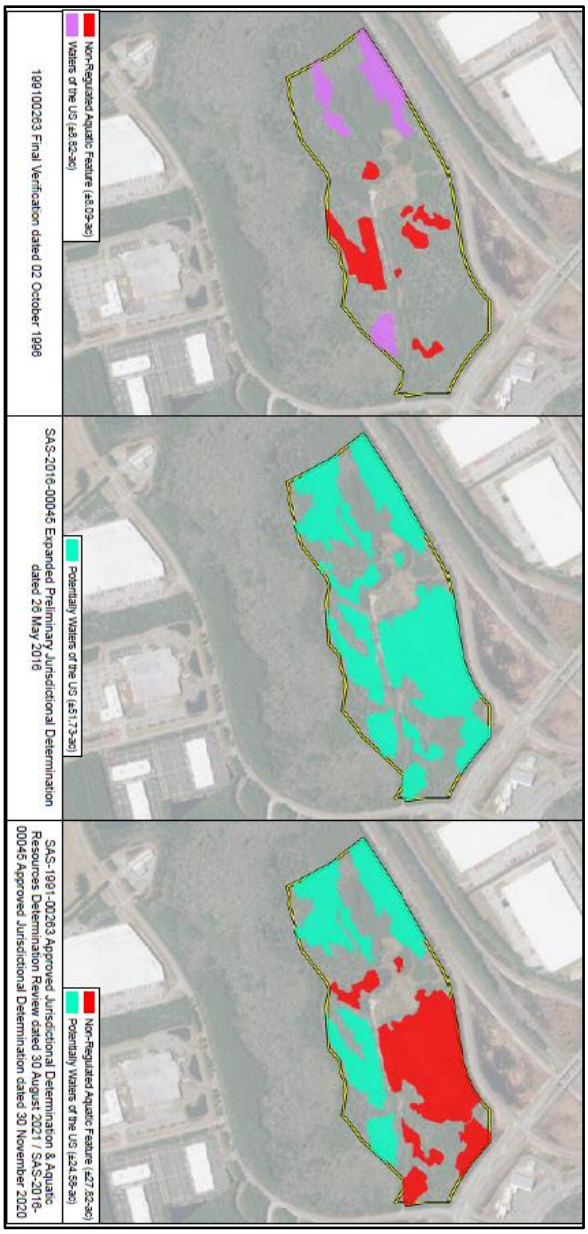
August 2021

- Impacts to potential-jurisdictional wetlands: 24.58 acres.
- Credits: 147.48 credits (*i.e.*, 6 required credits/impacted acre).
- Estimated mitigation credit cost $68,000/credit = $10,028,640.

December 2021

- Impacts to potential-jurisdictional wetlands: 51.73 acres.
- Credits: 310.38 credits (*i.e.*, 6 required credits/impacted acre).
- Estimated mitigation credit cost $87,000/credit = $27,003,060.

(Image on next page.)


Non-Regulated Aquatic Feature (±8.03-ac)
Waters of the US (±8.82-ac)
199100263 Final Verification dated 02 October 1996
Potentially Waters of the US (±51.73-ac)
SAS-2016-00045 Expanded Preliminary Jurisdictional Determination dated 26 May 2016
Non-Regulated Aquatic Feature (±27.82-ac)
Potentially Waters of the US (±24.58-ac)
SAS-1991-00263 Approved Jurisdictional Determination & Aquatic Resources Determination Review dated 30 August 2021 / SAS-2016-00045 Approved Jurisdictional Determination dated 30 November 2020