No. 21-454

In The
Supreme Court of the United States

MICHAEL SACKETT & CHANTELL SACKETT,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* WYOMING STOCK GROWERS ASSOCIATION, WYOMING ASSOCIATION OF CONSERVATION DISTRICTS, AND PROGRESSIVE PATHWAYS IN SUPPORT OF PETITIONERS

KAREN BUDD-FALEN
Counsel of Record
BUDD-FALEN LAW OFFICES LLC
300 East 18th Street
P.O. Box 346
Cheyenne, WY 82003
(307) 632-5105
karen@buddfalen.com

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF *AMICUS CURIAE*[1]

The Wyoming Stock Growers Association (Association) was organized on April 4, 1872 to advance and protect the interest of the state's livestock producers. It was the second state cattlemen's organization created in the United States. Wyoming Stock Growers Association was the first association formed in the Wyoming territory. It is the only organization in the state focused entirely on serving the needs of the cattle industry, which is the largest segment of Wyoming's agricultural production. The mission of the Association is to serve the livestock business and families of Wyoming by protecting their economic, legislative, regulatory, judicial, environmental, custom, and cultural interests. The Association advocates for the protection of private property rights from overly burdensome regulatory interference. The Association also maintains a legal fund to enable it to initiate, defend or support litigation on critical issues with the potential to have a major impact on its members' ranching enterprises.

The Wyoming Association of Conservation Districts (WACD) provides leadership for the conservation of Wyoming's soil and water resources, promotes the control of soil erosion, promotes and protects the quality of Wyoming's waters, promotes wise use of Wyoming's water and all other natural resources, preserves

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[1] Rule 37 statement: No party's counsel authored any of this brief; *amicus* alone funded its preparation and submission. *See* Sup. Ct. R. 37.6. Counsel for the Petitioners consented in writing to the filing of this *amicus* and Counsel for the Respondent filed a blanket consent. *See* Sup. Ct. R. 37.2(a).

and enhances wildlife habitat, protects the tax base and promotes the health, safety and general welfare of the citizens of the State of Wyoming through a responsible conservation ethic. The WACD advocates for the protection of property rights and land and water resources through local solutions to environmental concerns.

Progressive Pathways is an entity formed by private property owners in Wyoming with the continuing purpose of educating members and other interested publics regarding pipelines, condemnation and landowners' rights, especially as these issues affect private property owners. The association also works to take whatever steps are necessary to protect local residents (including schools, farmsteads, and areas of concentrated populations), to address environmental damage and to help protect and improve landowners' rights through legislation, public education, the courts and any other forum that will further this purpose.

The *Amici Curiae* represent thousands of agricultural landowners owning tens of thousands of acres of land in the West. Many of these landowners are similarly situated to the Petitioners because they are part of the regulated public who face questions regarding whether their lands fall within the Clean Water Act's jurisdiction. As described in greater detail in this brief, the practical effects of not knowing whether one's lands or activities may fall within the auspices of the Clean Water Act are costly. Decades of ambiguous and subjective jurisdictional determinations have created significant uncertainty for landowners who are required

to comply with the Clean Water Act as it is currently being applied by the agencies. A landowner could spend of thousands of dollars to determine whether their land or activity falls within the Clean Water Act in order to avoid spending the hundreds of thousands of dollars it normally costs to acquire a Clean Water Act § 404 permit from the Federal agencies. Even more troublesome, if a landowner guesses the answer wrong, the owner could face millions of dollars in fines and prison time for Clean Water Act violations. The ambiguous and subjective enforcement of the Clean Water Act also creates incalculable opportunity costs for many. Countless projects and improvements have been shelved because a landowner does not want to go through the regulatory burden of undergoing an unpredictable Clean Water Act jurisdictional determination. Accordingly, the *amici* bring a unique perspective to this case as to the impact this case will have to all private property owners and believes that its *Amicus Curiae* brief will assist this Court in its ruling.

SUMMARY OF ARGUMENT

Since this Court issued its decision in *Rapanos v. United States*, 547 U.S. 715 (2006), the Federal agencies have issued inconsistent and vastly divergent regulations and policies defining the terms "waters of the United States" (WOTUS) under the Clean Water Act (CWA). Such vast swings in the regulatory definitions have led private property owners, like the ones represented by *amici*, to expend thousands of dollars in

consulting and attorneys' fees and hundreds of hours of time in trying to decide whether the use of their property could necessitate a permit under the Clean Water Act. While certainly this determination for a landowner is simple if their property includes a defined navigable water, but it is not easy for a landowner in Wyoming whose property includes Lodgepole Creek, a stream whose headwaters starts on the eastern slope of the Laramie Mountains in southeastern Wyoming. That stream crosses private property 15 miles north of the City of Cheyenne, Wyoming, then turns southeast and 278 miles later runs into the South Platte River in Nebraska. The South Platte River is a navigable water. According to the U.S. Geological Survey, Lodgepole Creek is intermittent for much of its path or becomes "perfectly dry" in the summertime. Additionally, at times, entire portions of the creek are diverted into irrigation ditches.[2] For those landowners who own property along the Creek, depending on the Presidential administration in power or the various interpretations of the district and circuit courts, there is simply no way to know what constitutes a "water of the United States" for permitting purposes under the CWA.

The purpose of this brief is to illustrate the breadth in interpretations of the words "waters of the United States." Perhaps the clearest illustration is shown in

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[2] USGS: Professional Paper 17 – Preliminary Report on the Geology and Water Resources of Nebraska West of the One Hundred and Third Meridian (Streams) (nps.gov) (last accessed April 6, 2022).

the exhibits to *amici* WACD's comments to the 2020 Navigable Waters Protection Rule, 86 Fed. Reg. 69372 (Dec. 7, 2021). *See* App. 1. This is a map of the "waters of the United States" within the Middle North Platte Watershed in Natrona County, Wyoming, as defined under the regulations issued on June 29, 2015. 80 Fed. Reg. 37054 (June 29, 2015). App. 2 to this brief is a map of the same location, the Middle North Platte Watershed in Natrona County, Wyoming, as defined under then-draft Navigable Waters Protection Rule. 85 Fed. Reg. 22250 (April 21, 2020). These maps clearly demonstrate the need for a clear, easy to understand definition to assist both the private property owners and Federal agencies in preparing a lasting definition of "waters of the United States."

Another reason for the Supreme Court to clarify the confusion is to provide certainty to private property owners. To illustrate, on June 14, 2005, the COE issued a Regulatory Guidance Letter that stated that jurisdictional determinations of wetlands would be good for five years unless new information warranted revision of the determination before the five-year expiration date. *See* Exhibit 3. In contrast, on January 5, 2022, based on a "nationwide injunction" from the Federal District Court for the District of Arizona,[3] the COE

[3] Although the Federal District Court for the District of Arizona enjoined implementation of the 2019 regulations, No. CV-20-00266-TUC-RM, 2021 WL 3855977, at *5 (D. Ariz. Aug. 30, 2021), the Court of Appeals for the Tenth Circuit refused to issue an injunction, finding that the 2019 rules should remain in effect pending a decision on the merits. 989 F.3d 874 (10th Cir. 2021). No decision on the merits has been issued.

issued guidance that states that it would not rely on approved jurisdictional determinations that were issued under the prior Presidential administration that would have been binding for the five-year period under the 2005 regulatory guidance. *See* App. 8.

As applied to the question before this Court, the Ninth Circuit Court of Appeals affirmed the Federal agencies' reliance on the "significant nexus" test from 2008 even though those terms can be widely defined depending on the Presidential administration in power at the time. *amici* urges the Court to reject the Ninth Circuit Court's determination that the "significant nexus" test alone is the proper test for determining whether a wetland is subject to the permitting requirements of the CWA. Instead, the *Amici* request that this Court determine that the definition of a "water of the United States" must satisfy *both* the significant nexus test and the *Rapanos* plurality's "relative permanence" test.

A finding by this Court that a WOTUS should satisfy both the plurality decision and the significant nexus test would satisfy both Justice Kennedy's and Justice Scalia's concerns as stated in the *Rapanos* decision. The concern regarding the plurality's relative permanence test, as articulated by Justice Kennedy, is that the test could allow the agency to manipulate the objective standard to regulate "the merest trickle." *Id*. at 769. On the other hand, historical application of the significant nexus test has shown that Justice Scalia's concerns are valid in that the significant nexus test, as

it is applied on a case-by-case basis, would impermissibly expand the scope of the CWA due to the natural ambiguity and subjectivity of the test. *See id*. at 756-57; *see also* 80 Fed. Reg. 37054 (June 29, 2015). To address both concerns, the *amici* suggest this Court adopt an approach that equally utilizes *both* tests. The significant nexus test provides important physical indicators that would allow the Federal agencies and the regulated public to assess whether a water body or feature on their property that falls actually contributes to the water quality of a navigable water. The relative permanence standard adds to this by ensuring that the agencies are only regulating features which are actually adjacent to a navigable water or share a continuous surface. Combining the tests and requiring that a water body or feature satisfy *both* is the best way to address the concerns highlighted by both Justice Kennedy and Justice Scalia. There would not be federal regulation of "the merest trickle" and the jurisdictional scope would follow an objective geographical and scientific baseline.

ARGUMENT

Since this Court's decision in *Rapanos*, the Federal agencies' interpretations of whether certain wetlands fall within the definition of a "water of the United States" have varied widely. In deciding that case, Justice Scalia, joined by the Chief Justice Roberts, Justice Thomas and Justice Alito concluded that the phrase

"waters of the United States" "includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that describe in ordinary parlance 'streams,' 'oceans, rivers [and] lakes.'" *Rapanos*, 547 U.S. at 716 [internal citations omitted]. With regard to the terms "navigable waters," the Justices held that while "navigable waters" is broader that the terms "waters of the United States," the CWA confers jurisdiction "only over relatively permanent water bodies of water." *Id.* Regarding wetlands, the Justices would only find federal regulatory jurisdiction in cases where the wetland had a continuous surface connection to other jurisdictional waters. *Id.* at 7763.

Justice Kennedy, in his concurring opinion, framed the question before the Court as whether the term navigable water extends to wetlands that do not contain, and are not adjacent to, waters that are navigable. *Id.* at 759. He answered that question by determining that the Federal agencies would be required to make a "case-by-case determination" on whether there was a "significant nexus" between a wetland and an adjacent non-navigable tributary or a navigable water. *Id.* at 784.

A. "Waters of the United States" 1899 to 2015

Jurisdiction of the federal government over "waters of the United States" has a vast history. Starting in 1899, the Rivers and Harbors Appropriations Act was passed, giving federal jurisdiction over "navigable

waters of the United States." *See* Rivers and Harbors Appropriations Act of 1899, 30 Stat. 1121, 1151 (codified in 33 U.S.C. § 401). The term "navigable in fact" meant that the waters were "used, or are susceptible of being used, . . . as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *The Daniel Ball*, 77 U.S. 557, 563 (1870).

In 1948, Congress started using the term "interstate waters" to determine federal jurisdiction under the Federal Water Pollution Control Act of 1948. *See* Federal Water Pollution Control Act of 1948, 62 Stat. 1155. These waters were "all rivers, lakes, and other waters that flow across, or form a part of, a state's boundaries." 62 Stat. at 1161. In 1972, the Federal Water Pollution Control Act Amendments of 1972 (later known as the Clean Water Act) amended the jurisdictional reach of the federal government to "the waters of the United States, including the territorial seas." *See* Federal Water Pollution Control Act Amendments of 1972, P.L. 92-500, § 502(7), 86 Stat. 816, 886 (codified at 33 U.S.C. § 1362(7)).

Originally, under the CWA, 33 U.S.C. § 1311(a), any discharge of dredged or fill materials into navigable waters, defined as waters of the United States, was forbidden unless authorized by a permit issued by the Department of Defense, Army Corp of Engineers (COE) pursuant to 33 U.S.C. § 1344. In 1978, the COE issued regulations redefining "WOTUS" to include "tributaries, interstate waters and their tributaries, and non-navigable intrastate waters whose use or misuse could affect interstate commerce." 33 C.F.R.

§ 328.3(a) (1978). The COE also defined the term wetlands to mean those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. 33 C.F.R. § 323.2(c) (1978).

The application of those regulations was brought to the Supreme Court in 1985. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). In that case, the Respondent owned 80 acres of "low-lying, marshy land" near Lake St. Clair in Macomb County, Michigan. *Id.* In 1976, the Respondent began placing fill materials on its property to prepare to construct a housing development. *Id.* The COE filed suit in the United States District Court for the Eastern District of Michigan, seeking to enjoin Respondent from filling the property without the COE's permission. *Id.* at 125. The COE argued that because a portion of the Respondents' land was below 575.5 feet above sea level, it was a covered wetland and thus required a permit before filling. *Id.*

The lower court determined that "the [COE's] regulatory authority under the statute and its implementing regulations must be narrowly construed to avoid a taking without just compensation in violation of the Fifth Amendment." *Id.* at 126. The Supreme Court disagreed on three bases. First, regarding the "regulatory takings" argument, the Court noted that "land-use regulations to a particular piece of property [are] a taking only 'if the ordinance does not substantially advance

legitimate state interests . . . or denies an owner economically viable use of his land.'" *Id.* Thus, the Court concluded that "If neither the imposition of the permit requirement itself nor the denial of a permit necessarily constitutes a taking, it follows that the Court of Appeals erred in concluding that a narrow reading of the [COE] regulatory jurisdiction over wetlands was 'necessary' to avoid 'a serious taking problem.'" *Id.* at 127.

Second, the Supreme Court used the 1978 COE's regulations to determine that the land was a wetland categorized as a jurisdictional WOTUS under the CWA. *Id.* at 130. The Court stated:

> The District Court found that respondent's property was "characterized by the presence of vegetation that requires saturated soil conditions for growth and reproduction," and that the source of the saturated soil conditions on the property was groundwater. . . . In addition, the court found that the wetland located on respondent's property was adjacent to a body of navigable water, since the area characterized by saturated soil conditions and wetland vegetation extended beyond the boundary of respondent's property to Black Creek, a navigable waterway. . . . Together, these findings establish that respondent's property is a wetland adjacent to a navigable waterway. Hence, it is part of the "waters of the United States" as defined by 33 C.F.R. § 323.2 (1985), and if the regulation itself is valid as a construction of the term "waters of the United States" as used in the Clean Water

> Act, a question which we now address, the property falls within the scope of the [COE's] jurisdiction over "navigable waters" under § 404 of the Act.

Id. at 130 to 131. (Internal citations omitted)

Finally, the Court looked to the COE's expertise as an "adequate basis for a legal judgement." *Id.* at 134. The Court determined that while Congress may not have specifically suggested that a WOTUS should include waters that are not "navigable in fact," the intent of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *Id.* at 132 (*noting* that for the "protection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.'" S. Rep. No. 92-414, p. 22 (1972) *reprinted in* 1972 U.S. Code Cong. & Admin. News, 3668, 3742. This determination was based, in part, on the finding that:

> The regulation of activities that cause water pollution cannot rely on . . . artificial lines . . . but must focus on all waters that together form the entire aquatic system. Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, regardless of whether it is above or below an ordinary high-water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system.

Id. at 133 to 134.

As an additional justification, the Supreme Court determined that in 1977, Congress had attempted to determine the scope of the COE's jurisdiction under § 404 of the CWA. *Id.* at 136 (citing to House Bill 3199, 95th Cong., 1st Sess., § 16 (1997)). However, no consensus could be reached and the original definition of "waters of the United States" was retained. *Id.* at 137. Thus, the Supreme Court determined that Congress' failure to limit the authority of the COE was significant because "a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it." *Id.* (*citing Bob Jones University v. United States*, 461 U.S. 574, 599–601 (1983); *United States v. Rutherford*, 442 U.S. 544, 554 (1979)). Thus, the Court determined that the COE's judgement was reasonable to allow federal jurisdiction over wetlands adjacent to navigable waters. *Id.* at 134.

Following *Riverside Bayview Homes*, the COE and the Environmental Protection Agency (EPA) engaged in rulemaking to again interpret the CWA. For example, the COE interpreted the CWA to "govern all waters which were used or may have been used by migratory birds crossing state lines." 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986). The EPA adopted these same regulations in 1988. 53 Fed. Reg. 20764, 20765 (June 6, 1988). *See also*, Congressional Research Service (CRS),

Evolution of the Meaning of "Waters of the United States" in the Clean Water Act, R44585 (2019).

In 1989, additional guidance was issued, this time to counter the disagreements about the technical standards used to delineate the physical boundaries of jurisdictional waters, particularly wetlands. Ralph E. Heimilic et al., Economic Research Service, U.S. Dep't of Agriculture, *Wetlands and Private Interests and Public Benefits*, AER-765, 11 (1998). This led to the first Federal Manual for Identifying and Delineating Jurisdictional Wetlands in January 1989. *See* U.S. Dep't of the Interior, Fish and Wildlife Service., et al., Federal Manual for Identifying and Delineating Jurisdictional Wetlands (1989).

Additional guidance was also issued by the COE following the Fourth Circuit Court's decision in *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997). In that case, a jury convicted three defendants of violating the CWA when they placed fill material into wetland property located ten miles from the Chesapeake Bay and six miles from the Potomac River in Maryland. *Id.* at 254. The defendants argued that the regulatory definition of "waters of the United States" which included all waters for which the use, degradation, or destruction of which could affect interstate or foreign commerce exceeded the COE's statutory authority in the Clean Water Act and Congress's constitutional authority in the Commerce Clause. *Wilson*, 133 F.3d at 256-257. The Fourth Circuit agreed. *Id.* Thus, the COE's 2000 guidance that was issued in response to that case explained that "within the Fourth Circuit only, 'isolated waters'

must be shown to have an actual connection to interstate or foreign commerce. 'Isolated waters,' in Clean Water Act parlance, are waters that are not navigable-in-fact, not interstate, not tributaries of the foregoing, and not hydrologically connected to such waters – but whose use degradation or destruction could affect interstate commerce." CRS R44585 at 18.

In 2001, the Supreme Court heard *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159. In that case, the Court evaluated whether the CWA's jurisdiction extended to an abandoned sand and gravel pit which contained water that became habitat for migratory birds. The Court held that the COE's assertion of jurisdiction over isolated waters based on their use by migratory birds exceeded their authority. The Court contrasted *SWANCC* to *Riverside Bayview Homes* by recognizing that the wetlands in question in *Riverside Bayview Homes* were *adjacent* to navigable waters. *See SWANCC*, 531 U.S. at 167-68. Emphasis added. In *SWANCC*, the waters in question were not adjacent to open water and therefore lacked a "significant nexus" to navigable waters.

In January 2003, the COE and EPA issued a notice of proposed rulemaking, including a joint memorandum, regarding how Federal agency field staff should address jurisdictional issues under the CWA, including a revised joint memorandum on the effect of *SWANCC*. 68 Fed. Reg. 1991, 1995 App. A Joint Memorandum (Jan. 15, 2003). The agencies later abandoned that proposed

rulemaking effort, leaving uncertainties regarding interpretations of *SWANCC*.

B. The 2015 Clean Water Rule used the Significant Nexus Test to Assume Jurisdiction over Wetlands not Traditionally Regulated by the Clean Water Act.

Under the guise of following the science, as well as this Court's guidance in *SWANCC* and *Rapanos*, the EPA and the COE published a final rule defining the scope of waters falling under the jurisdiction of the CWA on June 29, 2015. 80 Fed. Reg. 37054. In its executive summary, the Federal agencies emphasized that Justice Kennedy's significant nexus standard was an important element of their interpretation of the CWA. *Id*. at 37056. The agencies further claimed that they also used the *Rapanos* plurality's standard by establishing boundaries on the scope of "waters of the United States" and in support of the exclusions of their definition of a WOTUS. *Id*.

In determining the parameters of the significant nexus test, the Federal agencies focused on Justice Kennedy's words that those bodies of water must "either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id*. at 37065 *citing Rapanos*, 547 U.S. at 780. Since many of Justice Kennedy's terms in his significant nexus test were left undefined, the agencies liberally interpreted

the test based on their objectives. *Id*. In turn, the agencies used three criteria to analyze whether a water body fell under the significant nexus test: (1) which waters are "similarly situated," and thus should be analyzed in combination, with (2) the waters in the "region," for purposes of a significant nexus analysis; and (3) the types of functions that should be analyzed to determine if waters significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas. *Id*.

In using those guiding principles to develop the 2015 rule, the changes to the scope of the CWA compared to the 1980s regulations and the 2008 guidance document were immense. First, the 2015 CWA rule included all waters located within 4,000 feet of the high-water mark of waters identified as "waters of the United States" whenever that water body is determined to have a significant nexus with a traditionally navigable water. 33 C.F.R. § 328.3(a)(8) (2015). The rule then defined the term "*significant nexus*" to mean a water, including wetlands, either alone or in combination with other similarly situated waters in the region, that significantly affects the chemical, physical, or biological integrity of a water used for (or capable of being used for) interstate commerce, all interstate waters, and territorial seas. 33 C.F.R. § 328.3(c)(5) (2015). A water had a significant nexus when any single function or combination of functions performed by the water, alone or together with similarly situated waters in the region, contributed significantly to the chemical, physical, or biological integrity of the nearest water

used for interstate commerce, interstate water, or territorial sea. *Id*. Thus, under the 2015 rule, a body of water could fall within the jurisdiction of the CWA even if its individual connection or function may not independently qualify because it falls within "similarly situated waters."

Similar to the 1986 rule, the 2015 CWA rule defined adjacent wetlands as jurisdictional. 33 C.F.R. § 328.3(a)(1) (2015). However, the definition of "adjacent" was expanded to include "neighboring" waters. 33 C.F.R. § 328.3(c)(1) (2015). The rule then broadly defined "neighboring" waters, as including: (1) waters within 100 feet of a water used for interstate commerce, interstate water, territorial seas, impoundment of jurisdictional waters, or tributary; (2) waters within 100-year floodplain to a maximum of 1,500 feet of the ordinary high-water mark; or (3) waters within 1,500 feet of the high tide line. 33 C.F.R. § 328.3(c)(2) (2015). Additionally, the rule specified that the entire water was considered "neighboring" even if only a portion of the body falls into any of the definitions. *Id*.

Finally, the 2015 rule greatly expanded the jurisdiction of the CWA by specifying that certain tributaries could be considered a WOTUS. The 2015 rule defined tributaries as those bodies that contribute flows to a water used for interstate commerce, interstate water, or territorial sea characterized by the presence of physical indicators of a bed and banks and an ordinary high-water mark. 33 C.F.R. § 328.3(c)(3) (2015). Tributary may be natural, man-altered, or man-made. *Id*. Importantly, no flow metrics measuring a typical

standard year were required to determine whether a tributary fell within jurisdiction of the CWA, instead, the agency relied on the subjective physical indicators of having a bank, a bed and an ordinary high-water mark to determine whether a tributary had a significant nexus to a navigable water. *Id*.

Ultimately, the 2015 Clean Water rule specifically inflicted two burdens onto the regulated public. First, it significantly expanded the floor of what may be considered a jurisdictional water beyond what was ever previously contemplated by the regulated public. Second, the 2015 rule failed to provide regulatory certainty to the public.

As indicated in App. 1, a map prepared by the WACD, the 2015 rule widened the reach of the CWA to include isolated wetlands that fell within a flood plain or within 4000 feet of an ordinary high-water mark. Before the 2015 rule many of these waters were never considered jurisdictional waters and presumably fell under state and local government jurisdiction. The 2015 rule, however, shifted the presumption to assume that bodies of water within these buffer zones, even if they may be isolated, were jurisdictional waters under the Clean Water Act.

While significantly expanding the theoretical scope of the CWA, the 2015 rule also failed to provide regulatory certainty to the public. For example, the agency relied heavily upon physical indicators as to whether a tributary may be jurisdictional. In the arid West, there are ditches and gullies that may receive

water flow once a decade (or in some cases, once every hundred years), but the 2015 regulations did not provide clarity as to whether those ditches or gullies would have been considered jurisdictional. *See* 33 C.F.R. § 328.3(c)(3) (2015). Thus, the regulated public could not rely upon the 2015 regulations to determine whether they would have to acquire a CWA § 404 permit to perform work on an ephemeral or an intermittent tributary located on their property. *See* App. 1. The public also had the same problem when determining whether a feature on their land would become jurisdictional because of "similarly situated waters." The rule did not articulate any objective standard or limitation as to the geographic connectivity or limitation of what features could be connected, thus, a landowner whose feature may not individually amount to a significant nexus connection to a navigable water could suddenly be grouped in with countless other features in the region to suddenly fall within the agencies' jurisdiction.

C. The 2019 Clean Water Rule Withdrew the 2015 Rule and the 2020 Rule Used the *Rapanos* Plurality Test to Define a "Water of the United States."

With the inauguration of President Trump in 2019, the Clean Water Act regulations changed again. First, on October 22, 2019, the Federal agencies promulgated a final rule repealing the 2015 rule for its failure to: (1) provide any limitations on the Federal agencies authorities, including those articulated by Justice Kennedy in the *Rapanos* decision; (2) recognize

and preserve the State's primary responsibilities to "prevent, reduce, and eliminate pollution"; (3) avoid an unconstitutional encroachment of federal jurisdiction over State authority; and (4) provide an adequate administrative record support for the 2015 "distance-based" limitations.[4] 84 Fed. Reg. 56626 (Oct. 22, 2019). The Federal agencies also repealed the 2015 rule based upon the myriad of federal court challenges and injunctions to implementing the rule. Those included *North Dakota v. EPA*, 127 F.Supp.3d 1047, 1060 (N.D.N. 2015) (enjoining implementation of the 2015 rule in the States of Alaska, Arizona, Arkansas, Idaho, Iowa, Missouri, Montana, Nebraska, Nevada, North Dakota, South Dakota, and Wyoming); *In re E.P.A.*, 803 F.3d 804, 808 (6th Cir. 2015) (staying the 2015 rule based, in part, on the uncertainty in the definitions of navigable waters and "waters of the United States.") The 2019 regulations then instructed that the Federal agencies were to implement the regulations that existed pre-2015, informed by applicable agency guidance documents and Supreme Court precedent. 84 Fed. Reg. at 56626.

Second, on April 21, 2020, the Federal agencies issued a new rule defining "waters of the United States," "navigable waters" and wetlands. 85 Fed. Reg. 22250 (Apr. 21, 2020). The 2020 rule determined that "waters of the United States" included:

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[4] See 33 C.F.R. § 328.3(c)(2) (2015). *Compare* Exhibit 1 *with* Exhibit 2.

> (1) The territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide; (2) Tributaries; (3) Lakes and ponds, and impoundments of jurisdictional waters; and (4) Adjacent wetlands.
>
> 33 C.F.R. § 328.3(a)(1).

Adjacent wetlands were defined as wetlands that: (1) "Abut, meaning to touch at least at one point or side of"; (2) "Are inundated by flooding in a typical year"; (3) "Are physically separated but only by a natural berm, bank, dune, or similar natural feature"; or (4) "Are physically separated only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrologic surface connection between the wetlands and a 'water of the United States.'" *Id.* at § 328.3(c)(1). "An adjacent wetland is jurisdictional in its entirety when a road or similar artificial structure divides the wetland, as long as the structure allows for a direct hydrologic surface connection through or over that structure in a typical year. *Id.* The Federal agencies have jurisdiction over "adjacent wetlands" if they are adjacent to a traditional navigable water, jurisdictional ditches, jurisdictional lakes and ponds or impoundments of otherwise jurisdictional waters. *Id.* at § 328.3(c).

Just like the 2015 rule, as soon as the 2020 regulation was finalized litigation ensued. On August 20, 2021, the Federal District Court for the District of

Arizona granted the Federal agencies' request to remand the 2020 rule and then vacated the implementation of the rule. *Pascua Yaqui Tribe v. United States Environmental Protection Agency*, No. CV-20-00266-TUC-RM, 2021 WL 3855977, at *5 (D. Ariz. Aug. 30, 2021). In contrast, the Tenth Circuit Court of Appeals held that the Colorado Federal District Court abused its discretion enjoining the implementation of the 2020 rule pending a decision on the merits of the rulemaking. *State of Colorado v. Environmental Protection Agency*, 989 F.3d 874 (10th Cir. 2021). In so holding, the Tenth Circuit included a quotation from the original Sackett case: "The particulars of this case, like so many others, flow from the 'notoriously unclear' reach of the Clean Water Act. *Sackett v. E.P.A.*, 556 U.S. 120, 132 (2012) (Alito, J., concurring)." 989 F.3d at 879 (10th Cir. 2021).

D. The 2021 Proposed Rule Proposes to Revise the Definition of "Waters of the United States" and Subsequent Announcements from the Army Corps of Engineers further the Regulatory Uncertainty Suffered by the Public.

On November 18, 2021, the EPA and the COE proposed new regulations that rescinded the 2020 Navigable Waters Protection Rule and revised the definition of "waters of the United States" to resemble much of the 2015 Clean Water Rule. 86 Fed. Reg. 69372 (Dec. 7, 2021). However, many aspects of that proposed rule create even greater regulatory uncertainty than even the 2015 rules. The agencies also promised that

there would likely be a second round of rulemaking which would build upon the foundation of the proposed rule. *Id*. at 69374.

The proposed rule again defined adjacent wetlands to include "neighboring" wetlands. 33 C.F.R. § 328.3(c). However, unlike the 2015 rule, the proposed 2021 rule does not define "neighboring," so the public is left to wonder if the agency will unofficially use the broad definition of "neighboring" found in the 2015 rule or if the agency will use some other undefined test. *Id*. Additionally, the proposed rule repeatedly uses the term "similarly situated waters" as a means to bring certain waters into the jurisdictional scope of the CWA by combining those waters with "similarly situated waters." Similar to the 2015 rule, the agency never articulates what a "similarly situated water" might be. Thus, the public is left in a similar situation in which a landowner whose feature may not individually amount to a significant nexus connection to a navigable water could suddenly be grouped in with countless other features in the region to fall within the agency's jurisdiction. Perhaps most troublesome to the public, many of the features that were specifically excluded from the "waters of the United States" definition in the 2015 rule were not included in the 2021 proposed rule. Some of these features include specific exclusions for groundwater water, certain ditches with ephemeral and intermittent flows, and certain features like artificially irrigated areas, stock watering ponds, and puddles. *See* 33 C.F.R. § 328.3(b) (2015) compared to the proposed 33 C.F.R. § 328.3(a)(8) and (9) (2021)

(specifically excluding water treatments systems and prior converted cropland from CWA jurisdiction, but not including other features and bodies of water previously excluded in 2015 and 2020 regulations). Without these specific exclusions, the public is left to speculate whether there are circumstances where those previously excluded waters may fall within the agencies' interpretation of the CWA's jurisdictional scope.

Perhaps even more disruptive to the public, the Federal agencies have now publicly announced that they may not honor jurisdictional determinations made under the previous administration. *See* App. 8, 5 January 2022 – Navigable Waters Protection Rule Vacatur, U.S. Army Corps of Engineers (Jan. 5, 2022). In discussing the vacatur of the 2020 Navigable Waters Protection Rule, the COE announced that it would only honor those approved jurisdictional determinations that were completed prior to the ruling in *Pascua Yaqui Tribe v. U.S. Environmental Protection Agency*. *Id.* at App. 9. Further, the COE suggested that it could reopen certain approved jurisdictional determinations that were issued under the prior Presidential administration that would have been binding for the five-year period under the 2005 regulatory guidance. *See id*. To illustrate how disruptive this stance is to the public, on June 14, 2005, the COE issued a regulatory Guidance letter that stated that jurisdictional determinations of wetlands would be good for five years unless new information warranted revision of the determination before the five-year expiration date. *See* Exhibit 3 – EPA Regulatory Guidance Letter, No. 05-02 (June 14,

2005). Thus, the public now must now decide whether they will risk relying upon a previous determination and face possibly regulatory backlash from the agency in the future.

E. A Subjective Jurisdictional Test of Hydrological Connectivity similar to this Court's "functional equivalent" Test Developed in *County of Maui* will further Burden the Public.

As illustrated in Justice Alito's dissent in *County of Maui, Hawaii v. Hawaii Wildlife Fund*, the risk of an individual guessing the CWA jurisdictional question wrong is immense:

> The Clean Water Act imposes a regime of strict liability, §§ 1311, 1342, 1344, backed by criminal penalties and steep civil fines, § 1319. Thus, "the consequences to landowners even for inadvertent violations can be crushing." *Army Corps of Engineers v. Hawkes Co.*, 578 U.S. ___, ___, 136 S.Ct. 1807, 1816, 195 L.Ed.2d 77 (2016) (Kennedy, J., concurring). The Act authorizes as much as $54,833 in fines per day (or more than $20 million per year), 40 C.F.R. § 19.4; 84 Fed. Reg. 2059 (Feb. 6, 2019), and contains a 5-year statute of limitations. 28 U.S.C. § 2462. And the availability of citizen suits only exacerbates the danger to ordinary landowners. Even when the EPA and the relevant state agency conclude that a permit is not needed, there is always the possibility that a citizen suit will result in a very

> costly judgment. The interpretation set out above, by providing a relatively straightforward rule, provides a measure of fair notice and promotes good-faith compliance.

Cty. of Maui, Hawaii v. Hawaii Wildlife Fund, 140 S. Ct. 1462, 1489 (Alito, J., dissenting) (2020).

Further, in addition to the cost of getting the answer wrong, the cost to be in compliance is also immense. The plurality in *Rapanos* perfectly illustrates this dilemma:

> The 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. Sunding & Zilberman, The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process, 42 Natural Resources J. 59, 74-76 (2002). "[O]ver $1.7 billion is spent each year by the private and public sectors obtaining wetlands permits." *Id.*, at 81. These costs cannot be avoided, because the Clean Water Act "impose[s] criminal liability," as well as steep civil fines, "on a broad range of ordinary industrial and commercial activities."

Rapanos v. United States, 547 U.S. 715, 721 (2006).

Landowners in Wyoming have felt the crushing weight of a zealous agency prosecuting their CWA

jurisdictional determination. One example of this is the case of David Hamilton, a landowner in Worland, Wyoming. In 2005 David Hamilton undertook reclamation and improvement activities on the Slick Creek irrigation ditch. *U.S. v. Hamilton*, 952 F.Supp.2d 1271, 1272 (D. Wyo. 2013). Part of his work included filling in and redirecting the ditch. *Id*. In the spring of 2009, the EPA issued a compliance order to Mr. Hamilton claiming that he violated the CWA and that he had to remove the fill material from Slick Creek to restore it to its previous condition. *Id*. Mr. Hamilton contested that Slick Creek was a jurisdictional water of the United States and claimed that the activities fell within an exception to the CWA. *Id*. In turn, the EPA brought suit against Mr. Hamilton seeking an injunction ordering Mr. Hamilton to restore Slick Creek to its previous conditions and imposed civil fines upon him. *Id*. After nearly five years, Mr. Hamilton faced over $62,000,000 in fines. After a lengthy case before the Federal District Court for the District of Wyoming, and over one million dollars spent in costs and attorney's fees, a jury found that Mr. Hamilton did not violate the CWA. *U.S. v. Hamilton*, Case 2:10-cv-00231-ABJ ECF No. 180 *1 (D. Wyo. Jul. 31, 2014). In its order denying the EPA's motion for a judgment as a matter of law, the court noted that "the evidence adduced at trial painted a much more nuanced picture than was presented at the motion for summary judgment stage . . . The Government has used and continues to use 'Slick Creek' in a unitary sense, but the trial evidence showed that two separate drainages feed into Slick Creek as it passes through Hamilton's property and there is a significant

difference in those drainages above and below the influence of irrigation." *Id*. at *4. As an additional note, although requested, Hamilton was not awarded his costs and fees in defending the action brought against him. Thus, even though Mr. Hamilton won his case, he still lost because he could not recover the costs he accumulated from defending a case brought against him by the government agency.

Cases like *Hamilton*, as well as the observations made in *Rapanos* and *County of Maui* highlight the fact that the public needs an objective standard that it can rely upon. The "functional equivalent" test articulated in *County of Maui* does not offer such an objective standard. In *County of Maui*, this Court articulated that a § 404 permit is required when there is a direct discharge from a point source into navigable water or when there is the *functional equivalent of a direct discharge*. *Cty. of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1476 (2020). In creating its ruling that groundwater may be considered a point source when the discharge is a functional equivalent to a direct discharge, this Court acknowledged that "there are too many potential factors applicable to factually different cases for this Court now to use more specific language." *Id*. However, in addition to five other potential factors, time and distance will be the most important factors in most cases, but not necessarily every case. *Id*. at 1477. The Court also recognized the difficulty this approach will have on the regulated public because "it does not, on its own, clearly explain how to deal with middle instances," but that this issue can be resolved through

the courts who can "provide guidance through decisions on individual cases." *Id*. at 1476-77.

Ultimately, the Court's own words indicate that following a "time and distance" standard will place the regulated public in the same position as it currently sits today. Under such a test, each administration could direct the agency to either loosen or strengthen the standards it uses to determine a feature's jurisdiction under the CWA similar to the regulatory yo-yo the public has experienced since nearly the inception of the CWA. As has been noted, CWA includes potential penalties for violating the Act that can amount to thousands of dollars in fines and prison time. Additionally, having to rely on the whims of each presidential administration violates the "clear-statement" rule articulated by the Court which states that Congress must speak clearly if it "wishes to assign an agency decision of vast 'economic and political significance.'" *See Cty. of Maui, Hawaii*, 140 S. Ct. at 1490 (Alito, J., dissent) *citing Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014) (*UARG*). Drafting an opinion that states that a water body or feature must *both* meet the significant nexus test and the relative permanence test will adequately protect the public from the whims of inconsistent and often overzealous regulatory agencies.

CONCLUSION

In sum, *amici* urge this Court to reject the Ninth Circuit Court's test for determining whether wetlands are "waters of the United States" under the Clean Water Act, 33 U.S.C. § 1362(7). Rather, *Amici* believe that the more appropriate standard is the plurality test articulated by Justice Scalia in the *Rapanos* case and with Justice Kennedy's "significant nexus test."

Respectfully submitted,

KAREN BUDD-FALEN
Counsel of Record
BUDD-FALEN LAW OFFICES LLC
300 East 18th Street
P.O. Box 346
Cheyenne, WY 82003
(307) 632-5105
karen@buddfalen.com

Counsel for Amicus Curiae