

No. 21-454

In the Supreme Court of the United States

MICHAEL SACKETT & CHANTELL SACKETT,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

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

**BRIEF OF FREEPORT-MCMORAN INC.
AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICUS CURIAE*¹

Freeport-McMoRan Inc. (“Freeport”) is a leading international mining company headquartered in Phoenix, Arizona. Freeport is the parent company of subsidiaries that operate large, long-lived, and geographically diverse assets with significant proven and probable reserves of copper, gold, and molybdenum. Freeport subsidiaries own and operate copper mining operations in arid regions of Arizona and New Mexico, and molybdenum mines in Colorado.

Freeport has a direct and substantial interest in the scope of federal jurisdiction under the Clean Water Act (“CWA”), 33 U.S.C. § 1251 et seq., and in particular how the CWA applies in arid regions in the southwestern United States. Freeport’s mining operations are subject to multiple regulatory programs under the Clean Water Act, including the National Pollutant Discharge Elimination System permit program under CWA § 402, the discharge permitting program for dredged and fill material in CWA § 404, the Spill Prevention Control and Countermeasures program under CWA § 311, surface water quality standards under CWA § 303(c), and the impaired waters program in CWA § 303(d), among others. The ongoing lack of clarity concerning the extent of federal jurisdiction under the Clean Water Act has introduced significant uncertainties, delay, and costs into various permitting processes for Freeport’s operations.

¹ No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, this brief has been filed with the written consent of all parties.

For more than a decade, Freeport has participated actively in informal and formal federal administrative processes regarding the meaning of the phrase “waters of the United States” as used in the Clean Water Act. See 33 U.S.C. § 1362(7). One of Freeport’s key goals has been to support the investigation of the unique hydrology of water systems in arid desert regions of the southwestern United States where Freeport operates. Those regions are under-studied as compared to more humid and water-rich environments prevalent in other parts of the United States. Freeport has also sought to ensure that efforts to regulate desert environments under the Clean Water Act are consistent with science and the law, including constitutional and statutory limitations on the scope of federal jurisdiction.

Over the course of the last decade, the Environmental Protection Agency (“EPA”) and the U.S. Army Corps of Engineers (“Corps,” and, together with EPA, the “Agencies”) have promulgated several rules concerning the scope of federal jurisdiction under the Clean Water Act. The Obama Administration’s Clean Water Rule was finalized in June 2015 (“2015 Rule”),² but was subsequently repealed in October 2019³ and then replaced with the Trump Administration’s Navigable Waters Protection Rule in April 2020 (“2020 Rule”).⁴ In December 2021, the Biden Administration

² *Clean Water Rule: Definition of “Waters of the United States,”* 80 Fed. Reg. 37,053 (June 29, 2015).

³ *Definition of “Waters of the United States”—Recodification of Pre-Existing Rules,* 84 Fed. Reg. 56,626 (Oct. 22, 2019).

⁴ *Navigable Waters Protection Rule: Definition of “Waters of the United States,”* 85 Fed. Reg. 22,250 (Apr. 21, 2020).

published a proposed rule that would again redefine the scope of the waters protected by the Clean Water Act (“2021 Proposed Rule”).⁵

The past several rulemaking efforts have reflected a range of interpretative and analytic approaches to defining “waters of the United States,” drawing on the various opinions from *Rapanos v. United States*, 547 U.S. 715 (2006). The Obama Administration’s 2015 rulemaking, for instance, gave heavy weight to Justice Kennedy’s “significant nexus” framework. The 2015 Rule sought to justify expansive assertions of federal jurisdiction based on a concept of “connectivity” between certain kinds of upstream and uplands features (considered individually and in the aggregate) and downstream navigable waters. The 2020 Rule took a narrower approach that focused on the statutory text, as informed by (among other things) the *Rapanos* plurality. The 2021 Proposed Rule again takes an expansive approach to the concept of “connectivity”; among other things, it would find a “significant nexus” whenever an upstream feature has anything more than an insubstantial or insignificant effect on downstream waters.

While recent rulemakings have taken different analytical approaches to defining “waters of the United States,” each rulemaking docket has included expert reports authored by leading scientists studying the hydrology of watersheds in the arid Southwest (the

⁵ *Revised Definition of “Waters of the United States,”* 86 Fed. Reg. 69,372 (Dec. 7, 2021).

“Technical Reports”).⁶ These Technical Reports demonstrate that the frequency, magnitude, and duration of flows in ephemeral features in the arid Southwest do not generally provide the kind of hydrologic “connectivity” to downstream traditional navigable waters as do channels elsewhere in the country, and thus do not have the same effects on downstream jurisdictional waters. To the contrary, the Technical Reports conclude that arid ephemeral drainages “are unlikely to be hydrologically connected to downstream Traditionally Navigable Waters.” 2019 Technical Report at 1.

⁶ See Comments of Freeport-McMoRan, Inc., Docket ID EPA-HQ-OW-2021-0602-0597 (filed Feb. 7, 2022), <https://bit.ly/3vfc5pG> (“2022 Freeport Comments”) (attaching Jason P. Julian, *Significant Nexus of Ephemeral Streams to Foundational Waters in the Arid Southwestern United States – Technical Comments on the Applicability of the 2021 Revised Definition of “Waters of the United States” in Arid Landscapes* (Feb. 5, 2022) (“2022 Technical Report”)); Comments of Freeport-McMoRan, Inc., Docket ID EPA-HQ-OW-2018-0149-8958 (filed Apr. 15, 2019), <http://bit.ly/3r77DGz> (“2019 Freeport Comments”) (attaching Martin W. Doyle & Jason P. Julian, *Assessing Potential Waters of the U.S. and Connectivity in Arid Regions – Technical Comments on the Applicability of the Clean Water Rule on Jurisdictional Waters Determination in Arid Landscapes* (Apr. 12, 2019) (“2019 Technical Report”), and Martin W. Doyle & Jason P. Julian, *Technical Comments on the Applicability of the Proposed Rule of Jurisdictional Waters Determination in Arid Landscapes* (2014) (“2014 Technical Report”)); Comments of the Arizona Mining Ass’n, Docket ID EPA-HQ-OW-2011-0880 (filed Nov. 12, 2014), <https://bit.ly/3JG3IJ2> (attaching Benjamin R. Parkhurst, *Comments on U.S. Environmental Protection Agency’s (2013) Draft Report “Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence”* (Nov. 5, 2013) (“2013 Technical Report”)).

This case involves questions about the proper test for when *wetlands* constitute “waters of the United States.” But the Court’s resolution of that issue may have implications for the scope of federal Clean Water Act jurisdiction in other important contexts nationwide, including in the arid Southwest. This *amicus* brief seeks to draw to the Court’s attention areas of legal, conceptual, and analytical overlap between the scope of jurisdiction over wetlands and the scope of Clean Water Act jurisdiction in more arid environments. The brief identifies the serious concerns that have arisen when the Agencies have used certain theories of federal jurisdiction—i.e., past efforts to interpret “waters of the United States”—to justify sweeping assertions of federal authority over broad swaths of bone-dry American desert. The brief also highlights scientific evidence about the characteristics of the kinds of ephemeral erosional features that represent the vast majority of “streams” in the arid Southwest, and explains that the Court should guard against the possibility of future federal overreach in arid (and other) environments, as it crafts a test in this case for when wetlands constitute “waters of the United States.”

INTRODUCTION AND SUMMARY OF ARGUMENT

1. Petitioners and their *amici* have vividly illustrated the range of legal, practical, and constitutional concerns that have arisen from vague and overbroad interpretations of “waters of the United States” in the 16 years since *Rapanos*. *E.g.*, Pet’r Br. 5, 18-22. The Sacketts here challenge EPA’s assertion of jurisdiction over their residential building lot in Idaho. But the history of the Agencies’ over-expansive approach to

Clean Water Act jurisdiction has hardly been limited to wetlands. For example, the Agencies’ 2015 Rule categorically asserted jurisdiction over a vast array of erosional desert features with physical indicators of a bed, bank, and so-called “ordinary high water mark,” even if water flowed across them only in response to a decades-past precipitation event. That formulation in turn led the Agencies to classify as “waters” a variety of features that any ordinary person would regard as dry land. A similar approach is reflected in the 2021 Proposed Rule, where the Agencies have suggested that even *isolation* between waters can serve as evidence of supposed “connectivity,” thereby supporting an assertion of jurisdiction.

2. This Court granted certiorari to address the “proper test” for deciding when wetlands can constitute “waters of the United States.” But this Court’s decision may have significant implications for Clean Water Act jurisdiction in many other contexts, including over ephemeral features in America’s arid Southwest. Indeed, the evolution of the “significant nexus” test—which was originally developed in a case about ponds and mudflats, and then applied to wetlands, and then applied to various other hydrological features—demonstrates that whatever guidance this Court offers here will likely be interpreted to have applicability outside the specific context of wetlands. Moreover, the history of expansive agency assertions of jurisdiction in the arid Southwest, and the legal theories on which those assertions have rested, provide important context for this Court’s interpretation of the Clean Water Act’s central jurisdictional term, “waters of the United States.”

A textually sound and legally durable interpretation of “waters of the United States” should take into account several foundational principles: First, different regions of the United States are characterized by dramatic hydrological diversity, with more water-rich areas presenting distinct practical, legal, interpretative, and regulatory challenges than those encountered in the desert Southwest. An enduring interpretation of “waters of the United States” should be sensitive to the range of contexts in which it will need to apply. Second, the presence and contribution of actual water flows is a critical consideration in drawing a lawful and administrable line between non-jurisdictional upland and upstream features, and jurisdictional, downstream traditional navigable waters. Third, regulated entities, States, and federal regulators all urgently need a clearer and more easily-administrable standard in this notoriously unsettled area.

3. Given that the jurisdictional term “waters of the United States” delineates Clean Water Act jurisdiction across the entire country, the Court should be sensitive to the variety of different regions, including the arid Southwest, that may be affected by the interpretation adopted in this case. With regard to the particular characteristics of arid regions, scientific literature confirms that ephemeral erosional features in the arid Southwest are, as a general matter, unlikely to be connected to traditional navigable waters in a manner that would support the kinds of broad assertions of federal jurisdiction seen in some recent rulemakings. Water channels located in more water-rich environments tend to flow in predictable places for long

stretches of time. In contrast, desert erosional features often carry water only for short periods of time in direct response to infrequent precipitation events, and even then tend to follow variable paths due to the erodibility and highly porous nature of desert soil. Because water flows in the arid Southwest are so often discontinuous, ephemeral drainages in this region are unlikely to be connected in a meaningful way—if at all—to downstream waters. Moreover, arid ephemeral features are characterized by either the absence of flow (their normal condition) or “flashy” high flows (in direct response to rain). These features therefore generally do not play a significant role in the kinds of chemical and biological processes that affect the integrity of downstream waters, which depend on water-mediated transformations that do not occur in flows of this type.

Although this case does not involve agency attempts to regulate arid ephemeral features in the desert Southwest, the Court’s decision here will likely play a critical role in restoring meaningful limits on the scope of federal Clean Water Act jurisdiction nationwide, consistent with the plain language of the statute and constitutional constraints. Whatever test this Court adopts should account for, and avoid endorsing, the problematic, overly expansive legal theories on which the Agencies have relied in the past, including in seeking to justify sweeping assertions of federal jurisdiction. Absent such care, the Agencies may craft rules that allow for the overbroad conceptions of federal jurisdiction reflected in (among other things) the 2015 Rule, which asserted Clean Water Act jurisdiction over vast swaths of dry American desert, including arid washes and erosional features that no

ordinary speaker of English would ever characterize as “waters of the United States.”

ARGUMENT

I. This Court Should Restore Statutory and Constitutional Limits on the Scope of Clean Water Act Jurisdiction.

As Petitioners and their other *amici* compellingly demonstrate, the years following this Court’s decision in *Rapanos* have been characterized not only by persistent ambiguity about the scope of federal jurisdiction, but also by expansive agency assertions of federal regulatory authority. This case presents the Court with an opportunity to provide much-needed clarity about the statutory and constitutional limits on the scope of the Clean Water Act, and to break the cycle of agency rulemaking and litigation.

The facts of this case, involving an assertion of wetlands jurisdiction on a small residential lot near Priest Lake, Idaho, illustrate how uncertainty in the lower courts about the proper interpretation of *Rapanos* has invited regulatory overreach. But the need for clarity is by no means limited to the wetlands context. Of particular interest to Freeport is a history of expansive assertions of federal jurisdiction in the desert Southwest, including under the 2015 Rule (which categorically asserted federal jurisdiction over vast swaths of dry desert land) and under the most recent proposed rule (which reflects an aggressive approach to concepts of connectivity and aggregation).

Indeed, numerous examples illustrate how a lack of clarity concerning the meaning of “waters of the United States” has historically led to significant over-

reach in the arid Southwest. The Obama Administration’s 2015 Rule, for instance, categorically asserted jurisdiction over “tributaries,” a term that rule defined to include any land feature with physical indicators of “a bed and banks and an ordinary high water mark” that “contributes flow either directly or through another water” to a traditional navigable water, even if that flow was ephemeral. 2015 Rule, 80 Fed. Reg. at 37,105-06. In practice, that sweeping assertion of jurisdiction over “tributaries” captured a wide variety of geographic features not plausibly understood as “waters.” To take just a few examples, Figure 1 on the following page of this brief depicts minor ephemeral washes at the Hyder Valley Solar Project in Arizona that the Agencies understood to exhibit high-water mark features.⁷ These features—which ordinary speakers of English would characterize as dry desert lands—would have been treated as “waters of the United States” under the 2015 Rule.

⁷ See Letter from William E. Cobb, Vice President, Freeport-McMoRan Copper & Gold, to Jim Laity, White House Off. Mgmt. & Budget, Attachment A at 3 (Feb. 12, 2014) (attached as Comment C to Comments of Freeport-McMoRan Inc., Docket ID EPA-HQ-OW-2011-0880-14135 (filed Nov. 12, 2014), <https://bit.ly/2LBYLJ3>).



Figure 1

Similarly, the 2015 Rule would have asserted jurisdiction over other desert erosional features (such as those depicted in Figure 2 of this brief), based on a rationale that it was possible to trace a path from those features to a distant “study reach” of the Santa Cruz River, that had itself been designated as a traditional navigable water. See 2019 Freeport Comments at 6. That portion of the Santa Cruz River itself experiences “no flow” conditions an average of 326 days per year. See 2019 Technical Report at 5–7 & tbl. 2; 2019 Freeport Comments at 4. Put differently, the 2015 Rule sought to justify treating as “waters of the United States” erosional features in dry desert land based on a connection to a distant riverbed that itself had no water nearly 90 percent of the time.



Figure 2

Even these few practical examples from the arid Southwest help illustrate the dangers of accepting some of the broader readings of “waters of the United States” that the Agencies have advanced and adopted in recent years.

II. A Decision Here Could Affect the Scope of Clean Water Act Jurisdiction in Numerous Other Contexts, Including in the Arid Southwest.

1. The question presented in this case concerns “the proper test for determining whether *wetlands* are ‘waters of the United States.’” But this Court’s ruling in the Sacketts’ case, and interpretation of the central statutory term “waters of the United States,” could have significant ramifications for other aspects of the scope of Clean Water Act jurisdiction nationwide.

The Sacketts’ case involves questions related to the jurisdictional status of certain wetlands adjacent to a tributary of Priest Lake in northwest Idaho.⁸ Priest

⁸ During the proceedings below, the parties both took the position that Priest Lake is a “traditionally navigable waterway.” *Cf.* Idaho Dist. Ct. Dkt. 08cv185, Doc.103-1, at 18-19; Idaho Dist. Ct. Dkt. 08cv185, Doc. 105-1, at 18. This Court therefore need not address the appropriate test for determining whether a waterway is “traditionally navigable.” But to the extent this Court reaches questions about the relationship between the Clean Water Act and Congress’s authority to regulate navigable waters and the channels of interstate commerce, see Pet’r Br. 29-42, it should recognize that prior guidance from the Agencies and some lower courts have accepted an overly capacious understanding of that term. See *The Daniel Ball*, 77 U.S. 557, 563 (1870) (defining “navigable waters of the United States” to mean only those navigable-in-fact waters that “form in their ordinary condition by themselves, or by uniting with other

Lake is situated in Bonner County, where annual total precipitation is above the national average.⁹ Nearly ten percent of Bonner County is covered by surface water, including the two largest lakes in Idaho, four major rivers, and numerous wetlands.¹⁰ In interpreting the term “waters of the United States” in this case, the Court should remain cognizant that the need for greater clarity, and for clearer outer bounds on federal jurisdiction, is not limited to parts of America that are hydrologically similar to Bonner County. That need is equally pressing in large portions of the desert arid Southwest (where *amicus* operates its business) characterized by the *absence* of water—and where ephemeral drainages and other similar erosional features constitute 89% of all “streams.”

In this case, the Ninth Circuit held that the “significant nexus” test from Justice Kennedy’s concurrence in *Rapanos* “provide[d] the governing standard for determining when wetlands are regulable under the [Clean Water Act].” Pet. App. A-26. This Court granted certiorari to review whether the Ninth Circuit applied the “proper test.” In answering that question, the Court may unavoidably address (or be understood as addressing) the standard for Clean Water Act jurisdiction not only over wetlands, but also more broadly.

waters, a continued highway over which commerce is or may be carried”).

⁹ See *Climate in Bonner County, Idaho*, Sperling’s Best Places, <https://bit.ly/3O9Ao0O> (last visited Apr. 13, 2022).

¹⁰ See *Natural Resources Component Bonner County Comprehensive Plan*, at 1-2, Bonner Cty. Planning Dep’t (May 2003), <https://bit.ly/3jCah4U>.

In the years since *Rapanos*, some courts (like the Ninth Circuit in this case) have adopted and attempted to apply Justice Kennedy’s “significant nexus” standard. In practice, the application of that test has not been limited to wetlands. On the contrary, the Agencies have applied the “significant nexus” test when describing the jurisdictional status of streams and tributaries. For example, the 2021 Proposed Rule suggests that “ephemeral streams that meet the significant nexus standard [will] be jurisdictional as tributaries.” 86 Fed. Reg. at 69,385. And the Obama Administration’s 2015 Rule took the position that Justice Kennedy’s “significant nexus” test was an “analytical framework” not “limited to adjacent wetlands,” and then concluded that ephemeral streams are jurisdictional tributaries because they purportedly have a “significant nexus” to traditional navigable waters. 2015 Rule, 80 Fed. Reg. at 37,058, 37,061.

The “significant nexus” standard was first mentioned in a case about ponds and mudflats. See *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 167 (2001) (“SWANCC”). That standard was then further developed in a case about wetland parcels. See *Rapanos*, 547 U.S. at 767-768 (Kennedy, J., concurring). The “significant nexus” test then morphed (through caselaw and the Agencies’ rulemakings) into something akin to a one-size-fits-all standard that, at least according to some, justifies federal regulation of a multitude of hydrological features that bear little resemblance to any of the waterbodies at issue in *SWANCC* or *Rapanos*. The quick and dramatic evolution of the “significant nexus” test underscores the reality that whatever guidance this Court

provides in this case about the standard for determining federal jurisdiction under the Clean Water Act and the meaning of the phrase “waters of the United States” will likely carry significant weight outside the specific context of wetlands.

2. As Petitioners and their other *amici* explain, the tortured history of agency and judicial efforts to delineate Clean Water Act jurisdiction has been marked by periods of significant overreach, notable litigation defeats, agency retrenchment, and ongoing uncertainty, with a cycle of agency guidance, rulemaking, and litigation. In interpreting the scope of “waters of the United States,” and giving force to the statute’s clearly limiting terms, this Court should bear several interpretative principles in mind.

First, the Court should be sensitive to the reality that the United States is not a hydrological monolith. The Clean Water Act’s central jurisdictional term (“the waters of the United States”) must be interpreted in a manner that provides a lawful and administrable rule across a diversity of geographic contexts. With respect to federal jurisdiction over upstream tributaries to navigable waters, for instance, the scientific record (developed at the Agencies across numerous recent rulemakings) is clear that different regions may have tributaries and streams that affect downstream navigable waters to greatly varying degrees. This Court should not interpret “waters of the United States” in a manner that could support future broad assertions of federal jurisdiction over “tributaries” that fail to account for important regional and scientific differences.

For example, scientific studies of ephemeral drainages and tributaries in the arid Southwest, included in

recent rulemaking proceedings before the Agencies, show that such features do not have the same level of hydrologic connectivity to downstream traditional navigable waters as do tributaries in more water-rich areas of the country. Justice Scalia’s plurality opinion in *Rapanos*, in construing the phrase “waters of the United States,” appropriately accounted for the actual contribution of water flow (or lack thereof) to downstream navigable waters, in setting boundaries on the scope of federal jurisdiction. See *Rapanos*, 547 U.S. at 733 (Scalia, J.) (reading statutory term “waters” to exclude “ordinarily dry channels through which water” only “occasionally” flows); accord *id.* at 732-735, 745-746. The Court should not adopt, or inadvertently endorse, a reading of “waters of the United States” that would justify expanding federal jurisdiction over bone-dry ephemeral washes in the American desert, based on an atextual concept of “connectivity” with, or effects on, downstream navigable waters.

Second, this Court should honor the Clean Water Act’s limiting statutory terms, which plainly “do[] not authorize [a] ‘Land is Waters’ approach.” *Rapanos*, 547 U.S. at 734 (Scalia, J.); accord *id.* at 733-734 (treating “dry arroyos in the middle of the desert” as jurisdictional “waters” stretches the statutory language “beyond parody”). In interpreting “waters of the United States,” this Court should recognize that the presence and amount of actual water flows is an important measure of the connection between non-“water” features (whether wetlands, arid ephemeral washes, or a range of other potential features) and the traditional navigable waters at the center of Clean Water Act jurisdiction.

Third, the Court should be sensitive to the need of regulated parties and regulators alike for a clear and administrable standard that can provide guidance to landowners and serve as a workable tool by which the Agencies can determine the outer boundaries of their jurisdiction. Justice Kennedy’s “significant nexus” standard from *Rapanos*—especially the expansive conception of that test developed and applied by the Agencies over the past 16 years—fails to satisfy that basic criterion. That standard is untethered from the text of the Clean Water Act, and inconsistent with both precedent and the fundamental principles outlined above. To take just one example, the current Administration understands a “significant nexus” to be present anytime an alleged connection to downstream navigable waters is something “more than speculative” or is not “insubstantial.” See 2021 Proposed Rule, 86 Fed. Reg. at 69,430-32, 69,449-50. That framing turns the interpretative inquiry upside down, and eliminates any meaningful boundary on federal jurisdiction.

While statutory text, context, purpose, and history should of course drive the interpretative inquiry, a durable interpretation of “waters of the United States” also must not generate implausible or unworkable practical outcomes, when applied across the diverse range of hydrological conditions in the United States today. To that end, the arid Southwest provides a useful practical indicator—a kind of litmus test—for whether a proposed reading is lawful and workable. In particular, with regard to arid erosional features and other desert drainages—such as are found throughout the southwestern United States, and that flow only infrequently, in response to large and rare

precipitation events—the Act should not be read to support a categorical assertion of federal jurisdiction, absent evidence of actual water flows of a sufficient frequency, duration, and volume. Yet some of the legal standards adopted by the Agencies in past rule-makings—and likely to be raised again in this Court—would have achieved precisely that implausible outcome.

III. Any Durable and Defensible Interpretation of “Waters of the United States” Should Recognize that Certain Features, Including Arid Ephemeral Drainages, Are Unlikely to Be Subject to Federal Jurisdiction.

In interpreting the statutory phrase “waters of the United States,” this Court will, of course, be guided by statutory text, context, purpose, and history, as well as constitutional considerations related to the appropriate role of the federal government. But the Court should also be conscious of the practical effects that a particular interpretative approach might have for the overall scope of federal jurisdiction.

Characteristics of water flows in the arid Southwest are a useful metric in assessing the durability and legality of a particular interpretation of “waters of the United States.” If a particular interpretative theory or concept results, as a practical matter, in sweeping assertions of federal jurisdiction over broad swaths of dry desert land as “waters of the United States,” something has gone obviously awry.

Many prior efforts to delineate the scope of Clean Water Act jurisdiction in the arid Southwest have resulted in vastly overbroad assertions of federal jurisdiction, based not only on flawed readings of “waters

of the United States,” but also on a fundamental misunderstanding about the unique ecosystems of that area. The dockets from the Agencies’ recent rulemakings—including the docket for the 2021 Proposed Rule—have included expert reports which address the behavior of ephemeral washes and other desert erosional features. These Technical Reports demonstrate that the frequency, magnitude, and duration of flows in ephemeral features in the arid Southwest do not generally provide the kind of hydrologic “connectivity” to downstream traditional navigable waters as do comparable channels elsewhere in the country, and thus do not have the same effects on downstream jurisdictional waters. To the contrary, the Technical Reports conclude that arid ephemeral drainages “are unlikely to be hydrologically connected to downstream Traditionally Navigable Waters.” 2019 Technical Report at 1; see 2022 Technical Report at 2-4 (similar). As this Court considers the proper test for determining Clean Water Act jurisdiction over wetlands, it should bear these underlying scientific principles in mind, and avoid establishing a legal test or endorsing an analytical approach that would—as have several of the Agencies’ recent rulemaking efforts—lead to regulating dry desert lands as federal “waters.”

Within the diversity of climates and ecosystems represented in the United States, the arid Southwest is a unique environment in which erosional drainage systems and surface features cannot be equated with “streams” and “tributaries” in more humid climates.

In more humid environments like those found elsewhere in the United States, surface water channels, including intermittent features, are generally fed by the intersection of the surface and the “groundwater

table” (i.e., the underground boundary between the soil surface and the belowground area where soil or rocks are permanently saturated with water). See 2019 Technical Report at 2. In contrast, physical channels in the arid Southwest often are mere “relics” on the highly erodible, sandy landscape and were “formed by a historic, infrequent event.” 2014 Technical Report at 7. Further, in the arid Southwest, “many rivers can be sourced *solely* by overland flow” because the groundwater table is far below the surface and rarely intersects with surface water. See 2019 Technical Report at 2 (emphasis added). Given that “runoff is the sole source of water” for ephemeral drainages in the arid Southwest, such features often “only flow over short lengths during precipitation events.” *Ibid.* The dependency of water flows on precipitation, in combination with highly porous runoff pathways that lose flow quickly, “results in high temporal and spatial variability” in ephemeral features. *Ibid.* (emphasis omitted). This variability in the time and location of flows in turn makes the arid Southwest “fundamentally distinct” from more humid regions, where channels typically flow in predictable places for long periods of time. *Ibid.*

There is also a low degree of hydrologic connectivity between ephemeral drainage networks and traditional navigable waters in the arid Southwest. Even in the aftermath of large rain events, channel flow in arid environments can be discontinuous due to evaporation and water lost to the subsurface. See 2019 Technical Report at 9. For this reason, ephemeral features in the arid Southwest are unlikely to be connected to a watershed outlet. *Id.* at 10-11. Indeed, with respect to some systems in the arid Southwest,

“it is rare, or even unlikely that headwaters will be hydrologically connected *at all* to downstream waters.” *Id.* at 8 (emphasis added). Outside the context of rare events of sustained flooding, ephemeral features in the arid Southwest will seldom be connected with the broader watershed, and thus will have a limited effect on downstream water quality.

To take just one example of why this Court should articulate a concrete, administrable standard grounded in the text of the Clean Water Act itself, the Agencies’ 2021 Proposed Rule suggests that *isolation* (i.e., a *lack* of connection between downstream waters and a particular upstream feature) can support a finding of “connectivity” and thus justify asserting federal jurisdiction. See 86 Fed. Reg. 69,437-38. This is supposedly because of factors such as “lag” and “transformation” that occur over a long time horizon. That approach is fundamentally unsound, and, if credited, would lead to a virtually limitless concept of federal jurisdiction, effectively transforming the Clean Water Act’s limited statutory mandate into a general federal land-use regulation.

Moreover, the administrative record developed by the Agencies in several recent rulemaking efforts supports the conclusion that ephemeral features in the arid Southwest do *not* typically play a major role in the kinds of chemical transformations or biological processes that could alter water quality in downstream traditional navigable waters. In the arid Southwest, water and waterborne materials are mostly moved during infrequent storm events rather than through perennial flows. 2019 Technical Report at 11; see *id.* at 8. Flows in this region are therefore either non-existent or very low (their normal condition) or very high

(their short-lived, “flashy” response to large storm events); they seldom resemble the type of constant, steady-flow conditions that are typical of channels in the eastern United States. The opportunity for water-mediated chemical transformations is limited when flows are either too high or too low. 2014 Technical Report at 3. Because ephemeral drainage features in the arid Southwest are hardly ever in the range in which water-mediated chemical transformations can occur, the role of ephemeral features with respect to such transformations will be negligible. 2019 Technical Report at 11. Ephemeral features also lack biological connections with downstream traditional navigable waters because they are typically dry, which results in the absence of aquatic life. See 2013 Technical Report at 9, 11.

Some advocates of capacious Clean Water Act jurisdiction—including the Agencies in their most recently proposed rule—have suggested that, even if certain features (including ephemeral tributaries) *individually* lack connections to downstream waters, the Clean Water Act nonetheless compels or permits the Agencies to regulate all such features as a class—on a watershed or even regional basis—because *in aggregate* they have significant effects on downstream waters. See, *e.g.*, 2021 Proposed Rule, 86 Fed. Reg. at 69,431. It appears EPA relied on a related aggregation theory to justify asserting jurisdiction over the small amount of wetlands alleged to exist on the Sacketts’ land. See Pet’r Br. 4. The aggregation theory lacks a foundation in the statutory text. Moreover, with regard to arid ephemeral features, the scientific record

does not support a finding even of collectively significant effects on water quality.¹¹

This Court should not adopt or inadvertently lend support to any reading of “waters of the United States” that would justify asserting jurisdiction over a vast number of features in the dry southwestern desert that are not plausibly characterized as “waters of the United States.”

¹¹ See 2022 Freeport Comments at 24 (noting that it would be “irrational * * * to conclude that a small isolated ephemeral tributary was jurisdictional merely because other larger ephemeral tributaries in the same region do (individually or in the aggregate) significantly affect traditional navigable waters”); Comments of the Arizona Mining Ass’n at 15-16, Docket ID EPA-HQ-OW-2021-0602 (filed Feb. 7, 2022), <https://bit.ly/37TstEa> (noting that it is neither workable nor legally sound to “aggregat[e] * * * ephemeral drainages that are not similar in terms of key hydrologic factors such as volume, duration, and frequency of flow, proximity to the [traditional navigable waters], average annual rainfall, historic record of water flow, etc.”).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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