

No. 21-454

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**In The  
Supreme Court of the United States**

MICHAEL SACKETT, ET UX.,

*Petitioners,*

*v.*

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

*Respondents.*

On Petition for Writ of Certiorari to  
The United States Court of Appeals  
For the Ninth Circuit

BRIEF OF *AMICUS CURIAE*  
THE NATIONAL ASSOCIATION OF HOME  
BUILDERS OF THE UNITED STATES IN  
SUPPORT OF *PETITIONERS*

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**QUESTION PRESENTED**

Should *Rapanos* be revisited to adopt the plurality's test for wetlands jurisdiction under the Clean Water Act?

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Supreme Court Rule 29.6, *Amicus* The National Association of Home Builders of the United States (“NAHB”) states that it is a non-profit 501(c)(6) corporation incorporated in the State of Nevada, with its principal place of business in Washington, D.C. NAHB has no corporate parents, subsidiaries or affiliates, and no publicly traded stock. No publicly traded company has a ten percent or greater ownership interest in NAHB.

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**INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

The National Association of Home Builders of the United States (“NAHB”) is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB’s goals are providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB’s approximately 120,000 members are home builders or remodelers and are responsible for the construction of 80% of all new homes in the United States. The remaining members are associates working in closely related fields within the housing industry, such as environmental consulting, mortgage finance and building products and services.

A large part of building and selling homes consists of obtaining and preparing land for construction.<sup>2</sup>

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<sup>1</sup> Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*’s intention to file this brief. *Amicus curiae* has obtained consent from the Respondent and Petitioners have filed a blanket consent with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

<sup>2</sup> NAHB Economics and Housing Policy Group, Special Studies, *Cost of Constructing a Home* (Jan 2, 2020) [https://www.nahbclassic.org/fileUpload\\_details.aspx?contentT](https://www.nahbclassic.org/fileUpload_details.aspx?contentT)

That land often contains Clean Water Act “waters of the United States,” as the federal government has defined and interpreted that term. *See* 33 C.F.R. § 328.3(a); 40 C.F.R. § 122.2. Often land developers must alter those “waters” to ensure that their community makes the best use of the land in accordance with local and state zoning and land use requirements. Unfortunately, the boundaries of the Clean Water Act have been ever changing due to the “significant nexus” test developed in *Rapanos v. United States*, 547 U.S. 715 (2006) and as interpreted by the government. These ever-changing rules make it more costly for developers to purchase and develop land and these costs make it difficult to provide homes that the public can afford.

## SUMMARY OF THE ARGUMENT

The court below relied on Justice Kennedy’s concurring opinion in *Rapanos v. United States*, 547 U.S. 715 (2006) to determine that the Sacketts’ property contained geographic features that are Clean Water Act “waters of the United States.” *Sackett v. U.S. Environmental Protection Agency*, 8 F.4th 1075, 1091 (9th Cir. 2021) (“[T]he Kennedy concurrence is still the controlling opinion from *Rapanos*.”). Justice Kennedy’s *Rapanos* concurrence is often referred to as the “significant nexus” test. Unfortunately, the test is unclear and not even the expert agencies have been able to decipher its meaning. Additionally, litigation involving the “significant nexus” test is unfair to property owners because if the government fails to prove a feature is a “water of the United States” under the significant nexus test, the courts remand the case to the government so it may “take another bite at the apple.”

## ARGUMENT

### I. THE EXPERT AGENCIES CANNOT DETERMINE WHAT TO, HOW TO, OR WHETHER TO APPLY THE “SIGNIFICANT NEXUS” ANALYSIS.

In *Rapanos v. United States*, 547 U.S. 715 (2006), Justice Kennedy developed the “significant nexus” test for determining whether wetlands and streams are “waters of the United States” under the Clean Water Act (“CWA”). *Rapanos*, 547 U.S. at 779 (explaining that jurisdiction is based on “the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense.”) (J. Kennedy concurring). After this Court’s decision in *Rapanos*, the Environmental Protection Agency and Army Corps of Engineers (the Agencies) began applying their interpretation of Justice Kennedy’s “significant nexus” test to determine the reach of the CWA. Unfortunately, the test is vague and ambiguous. This has left the regulated community with no clear course to determine whether the federal government has authority over their private property.

The significant nexus test is so unworkable that the Agencies themselves have had trouble determining what to apply it to, how to apply it and whether to apply it. A review of the Agencies guidance documents and rulemakings illustrate their struggle and the regulatory confusion.

First, in 2008, the Agencies developed a document often referred to as the “Rapanos Guidance” that explains the Agencies’ understanding of the Court’s decision and the manner in which they would make CWA jurisdictional determinations. EPA/Army Memorandum, *Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in Rapanos v. United States & Carabell v. United States* (originally issued June 5, 2007; revised Dec. 2, 2008) [https://www.epa.gov/sites/default/files/2016-02/documents/cwa\\_jurisdiction\\_following\\_rapanos120208.pdf](https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf).<sup>3</sup> Then, in 2015, the Agencies promulgated the “Clean Water Rule” which established a new jurisdictional line for the CWA.<sup>4</sup> Clean Water Rule: Definition of “Waters of the United States,” 80 Fed. Reg. 37054 (June 29, 2015). Finally, in 2020, the Agencies developed the Navigable Waters Protection Rule (“NWPR”) which again set a new boundary for the reach of the CWA. The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22250 (April 21, 2020). In all of these documents the Agencies interpreted Justice Kennedy’s significant nexus test differently.

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<sup>3</sup> The 2008 Rapanos Guidance was a revised version of the 2007 guidance developed after considering public comments.

<sup>4</sup> The Clean Water Rule never took effect nationwide and was ruled illegal by two district courts. *Georgia v. Wheeler*, 418 F.Supp.3d 1336 (S.D. Ga. 2019); *Texas v. U.S. Evt’l Prot. Agency*, 389 F.Supp.3d 497 (S.D. Tex. 2019). For a brief time, the Agencies recodified preexisting rules. Definition of “Waters of the United States”—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56626 (Oct. 22, 2019).

For instance, in the Rapanos Guidance the Agencies established that the significant nexus test only applied to specific geographic features.<sup>5</sup> One of those features was ephemeral tributaries. Therefore, between 2008 and 2015 ephemeral tributaries were jurisdictional only if the Agencies could prove a significant nexus existed between the tributary and a downstream traditional navigable water. Rapanos Guidance at 1, 8. By 2015, the Agencies believed that the significant nexus analysis was the “key to [their] interpretation of the CWA”<sup>6</sup> and concluded that every intermittent and ephemeral tributary in the country had a significant nexus to traditional navigable waters and were therefore jurisdictional without analyzing the specific waterbody.<sup>7</sup> Subsequently, in 2019, the

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<sup>5</sup> Specifically, the Rapanos Guidance provides that the significant nexus analysis will be applied to 1) non-navigable tributaries that are not relatively permanent, 2) wetlands adjacent to non-navigable tributaries that are not relatively permanent, and 3) wetlands adjacent to, but not directly abutting, a relatively permanent tributary. Rapanos Guidance at 1, 8. Furthermore, with respect to 1) above, the Agencies explained that they were referring to intermittent and ephemeral tributaries. Rapanos Guidance at 7.

<sup>6</sup> 80 Fed. Reg. at 37060.

<sup>7</sup> In the Clean Water Rule, the Agencies explained that “tributaries’ . . . are jurisdictional by rule, as defined, because the science confirms that they have a significant nexus to traditional navigable waters, interstate waters, or territorial seas.” 80 Fed. Reg. at 37058. Furthermore, the Agencies provided that “[a]ll tributary streams, including perennial, intermittent, and ephemeral streams, are chemically, physically, and biologically connected to downstream rivers via channels and associated alluvial deposits where water and

Agencies again changed their view of the significant nexus test, explaining that it is a “limiting test necessarily constraining overly broad application of the statute.” 84 Fed. Reg. 56626, 56643 (Oct. 22, 2019). This, among other reasons, led the Agencies to determine that the CWA does not provide the Agencies with authority over any ephemeral feature. 85 Fed. Reg. at 22251, 22338 (April 21, 2020). Therefore, employing the significant nexus test the Agencies went from deeming *some* ephemeral tributaries jurisdictional, to *all* ephemeral tributaries jurisdictional to *no* ephemeral tributaries jurisdictional.

Similarly, the Agencies have had trouble deciding which wetlands should be analyzed under the significant nexus test. In 2008, the Agencies thought the significant nexus analysis only applied to wetlands adjacent to non-navigable tributaries that are not relatively permanent (intermittent and ephemeral), and to wetlands adjacent to, but not directly abutting, a relatively permanent tributary. Rapanos Guidance at 1, 8-12. Thus, between 2006 and 2015, if wetlands were not “adjacent” they could not be jurisdictional. In 2015, however, the Agencies determined that the significant nexus analysis could be applied to non-adjacent wetlands. Then they explained that five (5) specific types of wetlands<sup>8</sup>,

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other materials are concentrated, mixed, transformed, and transported,” and “[u]nder the rule, flow in the tributary may be perennial, intermittent, or ephemeral.” *Id.* at 37063, 37076.

<sup>8</sup> The five wetlands are prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools, and Texas coastal prairie wetlands. 80 Fed. Reg. at 37071-37073, 37105.

wetlands within a floodplain of certain waters, and wetlands within certain distances of jurisdictional waters could be jurisdictional if a significant nexus was present—regardless of adjacency. 80 Fed. Reg. at 37060, 37105 (June 29, 2015). In 2020, under their latest interpretation of the *Rapanos* decision, the Agencies determined that Justice Kennedy’s opinion limited CWA coverage, such that only wetlands that are adjacent to the territorial seas, traditionally navigable waters, perennial and intermittent tributaries and lakes and ponds and impoundments are jurisdictional. 33 C.F.R. § 328.3(a), (c)(1); 40 C.F.R. § 120.2(1), (3)(i).

The Agencies have not only had trouble resolving what features to apply the significant nexus test to, but they have also struggled deciding how to apply it. According to Justice Kennedy, jurisdictional wetlands possess the requisite significant nexus if the wetlands “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.’” *Rapanos*, 547 U.S. at 780 (emphasis added). In 2008, the Agencies concluded that when determining whether an adjacent wetland is jurisdictional, it will “consider the flow characteristics and functions performed by the tributary to which the wetland is adjacent along with the functions performed by the wetland and all other wetlands adjacent to that tributary.” *Rapanos* Guidance at 9. In other words, in 2008 “similarly



situated [wet]lands in the region”<sup>9</sup> were those wetlands adjacent to the same tributary as the wetland that the Agencies were reviewing. Under the Clean Water Rule the Agencies read the term “in the region” very differently. In 2015, the Agencies explained that wetlands in the region were not just along the same tributary but proclaimed that “in the region” means the “watershed that drains to” the nearest traditionally navigable or interstate water or territorial sea. 80 Fed. Reg. at 37059, 37106 (June 29, 2015). Thus, under the Clean Water Rule, “in the region” greatly expanded the reach of the CWA such that “the vast majority of water features in the United States may have come within the jurisdictional purview of the Federal government.” 85 Fed. Reg. at 22258 (April 21, 2020). Later, in the NWPR, the Agencies again reinterpreted the *Rapanos* decision as eliminating the case specific “significant nexus” analysis and in turn any questions about which wetlands are “in the region.” Thus, when determining whether a specific wetland was jurisdictional, the Agencies went from considering the impacts of other wetlands along the same tributary, to other wetlands in the entire watershed, to not considering any other wetlands.

Finally, according to Justice Kennedy, for a wetland to have a significant nexus it must “significantly affect the chemical, physical, *and* biological integrity” of a traditional navigable water. 547 U.S. at 780. (emphasis added). In the *Rapanos* Guidance, the Agencies interpreted this phrase to mean what

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<sup>9</sup> 547 U.S. at 780.

it says—the analysis required an evaluation of all three parameters. Rapanos Guidance at 1, 11. In the 2015 Clean Water Rule, however, the Agencies disregarded the word “and.” They explained that it would subvert the goals of the CWA to require all three attributes to be affected under a significant nexus analysis. 80 Fed. Reg. at 37067 (June 29, 2015). In fact, the Agencies theorized that Justice Kennedy *clearly* meant “or” when he used the word “and.” *Id.* Therefore, in 2015, if a wetland had more than an insubstantial impact on either the chemical, physical *or* biological integrity of a traditionally navigable water, then that wetland had a significant nexus and was jurisdictional. Thus, the Agencies cannot even determine whether the word “and” means *and* or if it means *or*.

\* \* \*

As illustrated above, the Agencies have not been able to deduce what to, how to, or whether to apply the *Rapanos* significant nexus test. This has left the regulated community in a quandary and wasted millions of dollars. The Agencies are planning to develop yet another rule that establishes the jurisdictional boundaries of the CWA. U.S. EPA, *EPA, Army Announce Intent to Revise Definition of WOTUS* (June 9, 2021) <https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus>. As the significant nexus test was developed by the Court, it is appropriate for the Court to either clarify its meaning, or to discard it—before the Agencies struggle to reinterpret it once again.

## II. THE SIGNIFICANT NEXUS TEST LEADS TO NEVER ENDING LITIGATION.

For many landowners the “significant nexus” test is unworkable because it leads to a never-ending loop of litigation. When an agency’s assertion of jurisdiction under the significant nexus test is successfully challenged, a remand to the agency is the general rule. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (explaining that remand is the proper response if the record does not support the agency action). As the agency works to supplement the administrative record with additional facts and analysis to prop-up its jurisdictional claim, the landowner has little choice but to stand idle and brace for the next round of costly litigation. Due to the inherent ambiguity of the significant nexus test it often takes the agency several tries to close the loop. Offering the agency multiple bites at the apple is fundamentally unfair to landowners interested in using their land, not to mention an inefficient use of judicial resources. The cases that follow highlight the problem.

Landowner Precon Development Corporation, Inc. (“Precon”) was interested in developing 10 residential housing lots on its 658-acre property located in Chesapeake, Va. The development plan required United States Army Corps of Engineers (“Corps”) approval to fill 4.8 acres of on-site forested wetlands. On May 31, 2007, the Corps claimed jurisdiction over the wetlands and rejected Precon’s request for a Section 404 wetland fill permit. *Precon Dev. Corp. v. U.S. Army Corps of Eng’rs*, 658 F.Supp.2d 752, 755 (E.D. Va. 2009).

Precon filed an administrative appeal, after which the Corps' appeals officer remanded the jurisdictional determination ("JD") to the Corps' Norfolk District for reconsideration in light of the Rapanos Guidance. On June 2, 2008, the Norfolk District, under a "significant nexus" analysis, again determined that the wetlands were jurisdictional. One month later the appeals officer upheld the Corps' revised JD. *Id.* at 756.

After exhausting its administrative remedies, Precon filed suit on September 18, 2008, in the District Court for the Eastern District of Virginia. The court first determined that the Corps properly analyzed Precons 4.8-acres of wetlands together with a much larger 488-acre system of "similarly situated" wetlands. *Id.* at 765. It also found that the Corps' factual findings linking the 488-acre wetland complex with the traditionally navigable Northwest River were "substantial" and entitled to the "highest level of deference." *Id.* at 766-767.

On Appeal, the Fourth Circuit cautiously accepted the Corps' decision to aggregate the 488-acres of non-contiguous wetlands as part of its significant nexus analysis. The court remarked that Justice Kennedy's instructions in *Rapanos* for evaluating "similarly situated" waters "is a broad one, open for considerable interpretation" and that the Corps' record on this point provided the "bare minimum of persuasive reasoning to which we might defer." *See Rapanos*, 547 U.S. 715 (2006) (Kennedy J., concurring in the judgment); *Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278, 292 (4th Cir. 2011). It further "urge[d] the Corps to consider

ways to assemble more concrete evidence of similarity before again aggregating such a broad swath of wetlands.” *Id.* at 293.

Although a nexus was established between the 488-acre wetland complex and Northwest River, the record did not support a “significant” nexus between the two. *Id.* at 295. The court’s conclusion, however, was not a victory for Precon. The Fourth Circuit sent the case back<sup>10</sup> to the District Court “with instructions to remand to the Corps for further consideration in light of this opinion” and a roadmap detailing what an “adequate record might include.”

<sup>11</sup> *Id.* at 294, 297.

On remand, the Corps again revised the administrative record and again determined that it had jurisdiction over Precon’s property. Precon responded with its third administrative appeal and lost. Finally convinced that the record contained sufficient evidence, the District Court granted the Corps’ Cross Motion for Summary Judgment. *Precon*

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<sup>10</sup> In remanding the case, the court appeared unconcerned about the additional costs Precon would incur re-litigating the significant nexus test. “In doing so, we do not intend to place an unreasonable burden on the Corps. We ask only that in cases like this one, involving wetlands running alongside a ditch miles from any navigable water, the Corps pay particular attention to documenting why such wetlands significantly, rather than insubstantially, affect the integrity of navigable waters.” *Precon*, at 297.

<sup>11</sup> The court provided the Corps with specific guidance on the nature of the documentation that should appear in the re-worked record, including (i) expert testimony, (ii) relevant wetland and tributary functions such as flow rates and significance of flow and (iii) condition of the Northwest River.

*Dev. Corp., Inc. v. U.S. Army Corps of Eng'rs*, 984 F.Supp.2d 538, 562 (E.D. Va. 2013).

On March 10, 2015, nearly 8 years after the Corps' initial claim of jurisdiction over Precon's 4.8-acre wetland site and several trips around the block, the Fourth Circuit affirmed the District Court. The Circuit Court held that improvements to the record on tributary flow measurements and other wetland functions conclusively established the "significance" of a nexus between the wetlands in question and the Northwest River. *Precon Dev. Corp., Inc. v. U.S. Army Corps of Eng'rs*, 603 Fed. Appx. 149, 152-154 (4th Cir. 2015).

Precon Development's ordeal is not an outlier. Hawkes Co., Inc. ("Hawkes") similarly had to follow a circuitous and expensive route to resolution of whether wetlands on its property shared a "significant nexus" with a distant navigable water. It began in 2010 when Hawkes, a peat mining company, applied for a Corps permit to discharge material into wetlands on its property. Fourteen months later the Corps' St. Paul District produced an approved JD concluding that 150-acres of on-site wetlands shared a "significant nexus" with the Red River situated roughly 120 miles away. *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 578 U.S. 590, 596 (2016).

With its permit request denied Hawkes administratively appealed the JD, which was based on a loose connection of ditches, culverts, neighborhood swales and seasonal tributaries with speculative flows and "functions that are generally

performed by wetlands.” *Hawkes Co., Inc. v. U.S. Army Corps of Eng’rs*, 2017 WL 359170 at 3 (D. Minn. Jan. 24, 2017). The Corps’ review officer rejected the JD and gave specific instructions to the Corps District on the chemical, physical and biological documentation necessary to plug holes in the record. *Id.* at 4. On December 31, 2012, the Corps District issued a revised JD “concluding, without additional information, that there is a significant nexus between the property and the Red River of the North . . .” *Hawkes Co., Inc. v. U.S. Army Corps of Eng’rs*, 782 F.3d 994, 998 (8th Cir. 2015).

On January 11, 2013, Hawkes filed suit in the District Court challenging the Corps’ revised JD. The Corps moved to dismiss the challenge, pointing to the 40+ year precedent that a JD is not a final agency action subject to judicial review. The District Court dismissed Hawkes’ case, the Eight Circuit reversed and this Court unanimous affirmed that final JDs are judicially reviewable. *Hawkes Co., Inc.*, 578 U.S. at 602. The case was then sent back to the District Court for litigation on the merits.

Similar to the Corps’ appellate review officer, the District Court struggled with the lack of site-specific data in the administrative record necessary to support a significant nexus between the wetlands and Red River. Because the revised JD failed to cure the deficiencies identified in the initial JD, the Corps’ conclusion that the Hawkes site contained jurisdictional waters was set aside as arbitrary and capricious. *Hawkes*, 2017 WL 359170 at 12.

Although the general rule in the case of a positive JD that is not supported by the administrative record is to remand the matter back to the agency for another try, the District Court broke with tradition. It set aside the JD as unlawful and enjoined the Corps from asserting jurisdiction over the Hawkes site in the future. *Id.* The court noted that the Corps had already been given two opportunities to dial in its significant nexus analysis and that “a third bite at the apple would force Plaintiffs back through a ‘never ending loop.’” *Id.* at 11. Further delay would play into the Corps’ “transparently obvious litigation strategy”—leaving Plaintiffs without an adequate remedy [until] ‘the Corps . . . achieve[s] the result its local officers desire, abandonment of the peat mining project,’ – without ever having to establish CWA jurisdiction.” *Hawkes Co., Inc. v. U.S. Army Corps of Eng’rs*, 2017 WL 359170 at 12 (D. Minn. Jan. 24, 2017) (quoting *Hawkes Co., Inc. v. U.S. Army Corps of Eng’rs*, 782 F.3d 994, 1001 (8th Cir. 2015)).

Finally, while Hawkes Co. was challenging the Corps’ application of the significant nexus test in northern Minnesota, Orchard Hill Building Company (“Orchard Hill”) was fighting a similar battle in Northwestern Illinois. Orchard Hill closed on a 100-acre parcel (the “Warmke Parcel”) in Tinley Park, Illinois for the purpose of developing residential housing. Following the build-out and substantial sale of 168 townhomes in Phase I of the project, Orchard Hill shifted its focus to Phase II which involved the construction of 169 single family homes. Phase II development was abruptly halted



when the Corps designated jurisdictional wetlands on the site.

The Corps' first approved JD was issued on November 17, 2006, five months after this Court's ruling in *Rapanos*. The JD identified 13-acres of jurisdictional wetlands on the Warmke Parcel based on wetland drainage through an 11-mile stretch of sewer pipes, man-made ditches, water detention basins and a creek leading into the navigable Little Calumet River. *Orchard Hill Bldg. Co. v. U.S. Army Corps of Eng'rs*, 2017 WL 4150728 at 1 (N.D. Ill. Sept. 19, 2017); *Orchard Hill Bldg. Co. v. U.S. Army Corps of Eng'rs*, 893 F.3d 1017, 1021 (7th Cir. 2018). Orchard Hill administratively appealed for failure to apply *Rapanos*. The Division Engineer agreed and remanded the JD to the District Engineer for reconsideration. *Orchard Hill Bldg. Co.*, 2017 WL 4150728 at 3.

The Corps' Second approved JD was issued four years later, in October of 2010. Relying on *Rapanos* the Corp District Office determined a "significant nexus" was present between the Warmke Parcel wetlands and Little Calumet River. Orchard Hill filed a second administrative Appeal, which was rejected by the Division Engineer in June 2011. *Id.*

Orchard Hill next asked the Corps to reconsider its October 2010 JD under the jurisdictional exemptions available for prior converted cropland. The Corp agreed to reconsider, but issued a third positive JD on March 26, 2012. Orchard Hill administratively challenged the third JD due to gaps in the Corps significant nexus analysis. The

Division Engineer agreed, “concluding that the appeal had merit ‘because the District [Engineer] failed to provide the requisite explanation for its significant nexus determination.’” The JD was remanded to the Corps for another try. Detailed instructions to further analyze specific issues accompanied the remand order. *Id.* at 3, 5.

The Corps’ fourth and final JD was issued on July 19, 2013, nearly 7 years after its initial JD. Once again, the District Engineer alleged jurisdiction on the basis of a “significant nexus” between the Warmke Parcel wetlands and distant Little Calumet River. The decision was supported with new record evidence, including an 11-page report analyzing the finding of 30 extra-record studies. *Id.* at 4.

With no reasonable expectation that the Corp would permit limited use of its Warmke Parcel if it were to concede jurisdiction, Orchard Hill turned to the federal court. The District Court determined that the Corps’ discussion of general wetland functions and aggregation of the Warmke Parcel’s 13-acres of wetlands with 165 watershed wetlands for estimating chemical impacts was “reasonable” enough for establishing a significant nexus between the Warmke Parcel and Little Calumet River. The Court entered summary judgment in favor of the Corps and Orchard Hill appealed. *Id.* at 6-7, 11.

On appeal the Seventh Circuit reversed. The court took issue with the Corps position that the Warmke Parcel’s wetlands have an “ability” to convey pollutants, the “rough estimate[s]” and “trivial number[s]” surrounding floodwater rise resulting

from their loss and the “wildlife that might lose their habitat” if they are developed. The Corps’ explanations for demonstrating a chemical, physical and biological impact between the Orchard Hill wetlands and Little Calumet River did not support a significant nexus conclusion. *Orchard Hill Bldg. Co.*, at 1025. The Court noted its obligation under the APA to “deferentially examine an agency’s work, but not rubber-stamp it.” *Id.* at 1024.

The court next turned to the Corps’ “similarly situated” analysis, or lack thereof. The Corps’ approved JD and its arguments on appeal focused on the negative effects that the loss of 165 wetlands scattered over an almost 20 square mile watershed might have on the adjacent Midlothian Creek, which feeds into the Little Calumet River. The court explained that “to consider the estimated effects of a wide swath of land that dwarfs the in-question wetlands, without first showing or explaining how that land is in fact similarly situated—is to disregard the [significant nexus] test’s limits.” *Id.* at 1026.

The District Court’s ruling was vacated and the case remanded back to the Corps for another bite at the apple, with the court noting that “[t]his dispute has consumed almost as many years as the Warmke wetlands have acres.” *Id.* at 1027. Perhaps finally realizing that Orchard Hill’s 13-acres are not subject to federal jurisdiction under the ambiguous significant nexus test, the Corps decided not to take another mulligan. The government settled the case, agreeing to pay Orchard Hill’s \$250,000 in litigation costs. *Orchard Hill Bldg. Co. v. U.S. Army Corps of*

*Eng'rs, Stipulation and Order As To Attorneys' Fees and Costs, Case# 1:15-cv-06344, PageID #1649 (N. D. Ill. April 4, 2019).*

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The cases above illustrate the unfairness of the significant nexus test.<sup>12</sup> The test is so ambiguous that the agencies cannot apply it consistently, and when the property owner asks for the courts to make a determination, they often send the case back to the Corps to simply obtain further information. This process holds projects in limbo for years.

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<sup>12</sup> See also, *Lewis v. United States*, 2020 WL 4798496, at 9 (E.D. La. Aug. 18, 2020) (on appeal to the U.S. Court of Appeals for the Fifth Circuit) (A landowner interested in developing his property administratively appealed a positive Corps JD. The Corp review officer found errors in the District's significant nexus analysis and remanded the JD for reconsideration. The record was revised and the JD reissued. On appeal the District Court set aside the JD as arbitrary and capricious. While "sympathetic to plaintiff's desire for finality, considering that he began the formal process . . . five years ago, and an informal one [two years] before that, the appropriate remedy is remand." Rather than revise the flawed JD a third time, the Corp has decided to start afresh and prepare a new one.).

**CONCLUSION**

Due to the impracticability and unfairness of the significant nexus test, NAHB respectfully requests that the Court accept certiorari and provide clear guidance on scope of the Clean Water Act.

Dated: October 25, 2021

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