No. 21-454

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL SACKETT, *et al.*, PETITIONERS,

v.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,
et al., RESPONDENTS

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

BRIEF OF *AMICI CURIAE* NATIONAL STONE, SAND AND GRAVEL ASSOCIATION AND THE AMERICAN ROAD AND TRANSPORTATION BUILDERS ASSOCIATION IN SUPPORT OF PETITIONERS

NICK GOLDSTEIN
Vice President, Regulatory & Legal Issues
AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIATION
250 E Street, S.W.
Washington, D.C. 20024

LAWRENCE R. LIEBESMAN
Counsel of Record
ZACHARY E. HOWERTON
SMOUSE & MASON, LLC
223 Duke of Gloucester Street
Annapolis, Maryland 21401
(410) 269-6620
LRL@smouseandmason.com

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The National Stone, Sand and Gravel Association, the American Road and Transportation Builders Association, as *Amici Curiae*, respectfully submit this brief in support of Petitioners Michael Sackett and Chantelle Sackett.[1]

INTERESTS OF THE *AMICI CURIAE*

Amici represent members that build and provide aggregate construction materials for vital public infrastructure services including flood control, clean energy, and water supply management and for transportation projects critical in addressing urgent transportation needs.[1]

On a daily basis, *Amici* are forced to navigate the confusing and ever-changing maze of regulations and policy statements issued by the Army Corps of Engineers ("Corps") and the Environmental Protection Agency ("EPA") to determine the answer to what should be a simple question: does a given wetland fall under federal jurisdiction pursuant to the Clean Water Act ("CWA")?[2]

Under the *Rapanos* "Significant Nexus" test adopted by the Ninth Circuit, determining the answer to this simple inquiry is exceedingly difficult.[3] The

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[1] All parties have consented to the filing of this brief. Pursuant to this Court's Rule 37.6, *Amici* state that no counsel for any party in this case authored this brief in whole or in part, and no person or entity other than the *Amici* and their counsel have made a monetary contribution to the preparation and submission of this brief.

[2] Clean Water Act, 33 U.S.C. §§ 1251-1387 (2022).

[3] *Rapanos v. United States*, 547 U.S. 715 (2006).

answer often varies depending on in which part of the Country the wetland is located or which particular agency staff member is consulted. The time has come for this Court to provide clear criteria for CWA jurisdiction that recognizes the proper limits of federal jurisdiction for wetlands remote from traditionally navigable waters and eliminates the inconsistency and lack of clarity inherent in the significant nexus test.

Amici consist of the following:

The National Stone, Sand and Gravel Association ("NSSGA") the leading advocate for the aggregates industry. Its members are responsible for the essential stone, sand, and gravel used to build road, bridge, port, rail, and public works projects as well as erosion control, wastewater, sewage, air pollution control, and drinking water purification systems. Homes, schools, businesses, and hospitals and the structures that support our modern society would not exist without the building materials mined by NSSGA members. The Association represents about 400 members and over 100,000 working men and women in the aggregates and related industries. During 2021 alone, a total of more than 2.5 billion metric tons of aggregate materials (crushed stone, sand, and gravel), valued at nearly $29 billion, were produced and sold in the United States. Due to geologic factors, sand and gravel are often located near or under streams and other wetlands. Consequently, NSSGA's members frequently excavate materials from these areas. NSSGA members are diligent stewards of the environment and take great effort with land reclamation activities

that include wetland restoration, creation, and enhancement, as well as flood storage enhancement.

The American Road and Transportation Builders Association ("ARTBA"), is made up of more than 8,000 member organizations in the transportation construction industry, including construction contractors, professional engineering firms, federal, state, and local transportation administrators, heavy equipment manufacturers, and materials suppliers. ARTBA's members are responsible for construction of vital public infrastructure projects such as highways, bridges, airports, railroads, and mass transit facilities - a major priority under the recently enacted Infrastructure Investment and Jobs Act ("IIJA").[4] Additionally, ARTBA members are directly involved with the federal wetlands permitting program and undertake a variety of construction-related activities under the CWA. The transportation construction industry generates more than $500 billion annually in U.S. economic activity and sustains more than 4 million American jobs.

SUMMARY OF ARGUMENT

1) The significant nexus test adopted by the Ninth Circuit has created substantial confusion and uncertainty for *Amici*'s members in providing aggregate materials for construction of needed public works transportation projects, making it difficult to deliver materials and to construct these essential

[4] Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).

projects in a timely fashion to protect public health and safety. This vague standard is impacting the ability to efficiently supply materials needed for and to build the infrastructure projects under the Infrastructure Investment and Jobs Act, as well as increasing the costs of public works projects across the country without environmental improvement.

2) The significant nexus test essentially creates a presumption of CWA jurisdiction that is virtually impossible to overcome. Courts have largely granted considerable deference to the Corps and EPA in asserting jurisdiction allowing the agencies to assert jurisdiction based on a range of on non-site specific information such as maps, aerial photography, watershed studies, and National Wetlands Inventory ("NWI") maps. Even the most general regional study could support a finding that any effect, however remote, within a watershed is more than speculative and insubstantial. *Amici* often agree to such expansive jurisdiction to obtain a permit rather than challenging jurisdiction administratively and in court, at great time and expense. The difference in cost can be millions of dollars in mitigation.

3) The Significant Nexus test raises serious due process concerns. The test implicates the void for vagueness doctrine. Due to the lack of precise standards, it fails to ensure fair notice so that regulated entities know what is required of them" and fails to provide guidance "so that those enforcing the law do not act in an arbitrary and discriminatory way." *FCC v. Fox Television's Stations, Inc.*, 567 U.S. 239, 253 (2012).

4) *Amici* submit that there must be credible evidence of: (a) a direct, discrete surface hydrologic connection between an wetland and a navigable water; and (2) a demonstration that a discharge into a wetland adjacent to such a connected water has a substantial injurious impact on the water quality of downstream Traditionally Navigable Water (TNW).[5] The principles of proximate causation and foreseeability set forth by Justice O'Connor in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995) provide a useful legal paradigm for asserting CWA jurisdiction.

5) The significant nexus test violates the fundamental principle of federalism that, absent a "clear statement" from Congress, a reviewing court should not sanction usurpation of State and local control of land and water resources. Affirming the Ninth Circuit's decision would upset the delicate balance between regulation under the CWA and under State and local water pollution programs.

ARGUMENT

I. THE SIGNIFICANT NEXUS TEST HAS RESULTED IN INCONSISTENCY AND CONFUSION CAUSING SIGNIFICANT HARM TO VITAL INFRASTRUCTURE

[5] As the Court held in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) [hereinafter *SWANNC*] the word "navigable" has at least the import of showing use what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made" (citing *U.S. v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-408 (1940)).

PROJECTS.

A. The Real-World Impacts of Confusing CWA Jurisdictional Standards Are Long Standing

Amici have long been confused over CWA jurisdiction. Following the Supreme Court's *SWANCC* decision that coined the phrase "significant nexus" NSSGA surveyed its members seeking information about the state of the CWA jurisdictional regulations.[6] The survey asked respondents to describe the jurisdictional tests that Corps personnel were using to evaluate wetlands, including separate questions regarding the use by field personnel of groundwater, man-made conveyances and the 100-year floodplain to establish jurisdiction. The results of the survey are still relevant in light of the *Rapanos* decision and reveal a gross inconsistency of implementation that is at best unpredictable and at worst, indecipherable.

The following are examples of survey responses demonstrating the inconsistent approaches used by Corps field personnel:

- "At present, the mere presence of a 100-year floodplain and the absence of two barriers to prevent wetland waters from reaching the navigable watersare sufficient criteria to name the wetland as jurisdictional." (SC)

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[6] "It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes." SWANNC*, 531 U.S at 167.

- "The Charleston District uses a combination of distance from the navigable waters to the isolated wetlands and any connection such as a ditch to assert jurisdiction." (SC)

- "No distinction is made by the Corps between natural and man-made conveyances in their assertion of jurisdiction... There is no distance threshold between an "isolated" wetland and a navigable water." (CO)

- "Every swale and abandoned agricultural drainage ditch was subjected to jurisdiction." (VA)

- The Charleston District uses a combination of distance from the navigable waters to isolated wetlands and any connection such as a ditch to assert jurisdiction. (SC)

In fact, Justice Scalia in *Rapanos* highlighted this inconsistency.[7] Industry comments on the impact of the significant nexus test since *Rapanos* reaffirm the survey responses. In his June 3, 2014 testimony before the House Science Committee on the Corps and EPA's proposed Clean Water Rule, Matthew Hinck,

[7] "Even after *SWANCC*, the lower courts have continued to uphold the Corps sweeping assertion of jurisdiction over ephemeral channels and drains as tributaries." *Rapanos*, 547 U.S. at 726 (internal quotes omitted).

Environmental Manager CalPortland Company stated that "The jurisdictional uncertainties in this rule are particularly problematic in the arid west. For example, the proposed rule fails to define the distinction between ephemeral 'tributaries' which are potentially jurisdictional and 'gullies' or 'rills' which are exempt. The proposed rule also irrationally exempts 'vegetated swales' which differ from dry washes and other features of the arid west only in that they occur in more humid parts of the country and are therefore more likely to contain water. …the proposed rule… unjustifiably extend jurisdiction to areas that are functionally equivalent land, not waters, contrary to the requirements of the CWA...". [8]

In testimony delivered to the House Small Business Committee hearing "American Infrastructure & Small Business Perspective" on April 25, 2018, NSSGA member Bill Schmitz of Gernatt Asphalt testified about Corps personnel misidentifying a treatment system as a water of the United States.[9] Mr. Schmitz described a twelve-year ordeal when the Corps incorrectly identified settling basins as wetlands resulting in hundreds of thousands of dollars in consulting and attorney fees and equipment.

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[8] *Corps and EPA Clean Water Rule Before the H. Comm. on Science, Space, and Technology*, 113th Cong. (2014) (statement of Matthew Hinck, Environmental Manager, CalPortland Company).

[9] *American Infrastructure and the Small Business Perspective: Hearing Before the H. Comm. on the Small Bus.*, 115th Cong. 6-7 (2018) (statement of Bill Schmitz, Vice President, Sales and Quality Control, Gernatt Asphalt Company).

It is vitally important that this Court reaffirm the limited jurisdiction of the federal government under the CWA and provide clear jurisdictional criteria. Such a ruling will go a long way toward providing *Amici*'s diverse membership with the certainty and predictability that has long been lacking in wetlands permitting.

B. The Vague Significant Nexus Test Will Harm Planning and Delivery of Important Infrastructure Projects

The scope and reach of CWA jurisdiction directly affects the ability to supply our nation with construction materials needed to build homes and communities and to improve our infrastructure. In the confusion that has followed the *Rapanos* significant nexus test, *Amici* have found it difficult to predict when the Corps will assert jurisdiction over isolated and ephemeral areas, and thereby force *Amici* into the time-consuming and expensive individual section 404 permitting process.[10] The reigning confusion over the proper jurisdictional reach of the CWA in the wake *Rapanos* has had a chilling effect on the carefully considered decisions and investments of state and local governments to meet vital public needs, including lifesaving transportation infrastructure.

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[10] The Corps defines "ephemeral streams" as having "flowing water only during, and for a short duration after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow." 65 Fed. Reg. 12818, 12897 (Mar. 9, 2000).

The federal wetlands permitting program directly shapes the work environment for ARTBA members as they plan and build transportation improvements under CWA jurisdiction. Improving the nation's transportation infrastructure and protecting essential water resources are complementary interests which can be reflected in implementation of the CWA.

Of all the CWA's provisions, the regulatory definition of "Waters of the United States" ("WOTUS") is the most important for parties to a transportation project. Public agencies, planners, designers, and contractors need transparent guidance in this regard to allow them to fund, plan, and schedule a project accurately. Overly broad and ambiguous WOTUS definition delays project construction creating additional costs. For example, the 2015 Clean Water Rule[11] made it more likely that regulators could apply federal jurisdiction to a ditch ancillary to a project with little or no advance notice. The resultant permitting process creates unexpected project delays. Moreover, project opponents can weaponize this regulatory uncertainty to stop or delay transportation improvements – and the job opportunities they support – entirely.

The need to resolve CWA confusion under the significant nexus test has become especially important with the enactment of the bipartisan

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[11] 2015 Clean Water Rule, 80 Fed. Reg. 37054-55 (June 29, 2015).

Infrastructure Investment & Jobs Act ("IIJA").[12] The law includes the largest increase in federal highway and infrastructure investment in more than fifty years. It offers an unprecedented opportunity to repair and modernize every state's transportation system. In addition, the legislation provides new investments that will build renewable energy projects, upgrade the power grid, expand broadband, build new water and waste systems, invest in ports, rail, transit and airport facilities and create new opportunities to improve environmental mitigation projects.

The IIJA also codifies the "one Federal Decision" streamlined reviews under the National Environmental Policy Act ("NEPA") by consolidating permitting decisions into one single document, designating a federal "lead" agency that determines a schedule for the process, sets a goal of finalizing reviews within an average of two years, and requires completion of all authorization decisions for major projects within ninety days of the issuance of a record of decision.,[13] Thus, Congress recognized need to expedite the NEPA process for timely delivery of these critical projects. Given the need for timely delivery of aggregate materials, the vague and expansive significant nexus test could result in permit delays

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[12] Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).

[13] AM. ROAD & TRANSP. BUILDERS ASS'N, INFRASTRUCTURE INVESTMENT & JOBS ACT, ANALYSIS & TIMELINE OF ARTBA LEADERSHIP ON THE ROAD TO REAUTHORIZATION 17 (Am. Road & Transp. Builders Ass'n ed., 2020), https://www.artba.org/wp-content/uploads/2021/12/IIJA_Publication-1.pdf.

and mitigation expenses impacting the ability to produce the materials needed to meet tight project delivery schedules under the IIJA.

Additionally, project delays resulting from the current transportation project review and approval process lead to demonstrable and significant costs to the taxpayers. According to a 2016 report by the Texas A&M Transportation Institute based on example projects, delays were estimated to cost $87,000 per month for a small project (e.g., reconstruction of a rural road), $420,000 per month for a medium-sized project (e.g., widening of a semi-rural highway), and $1.3 million per month for a large project (e.g. reconstruction of a highway in a large metro area).[14]

A 2022 study by David Sunding and Gina Waterfield demonstrates the problems, costs, and delays in applying the significant nexus test. In commenting on the agencies recent proposed revisions to the Waters of the United States ("WOTUS") definition that would reinstate the significant nexus test, Sunding and Waterfield cite to their 2002 study quoted by Justice Scalia in *Rapanos* that "the average applicant for in 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 the costs of mitigation or

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[14] CURTIS BEATY ET AL., ASSESSING THE COSTS ATTRIBUTED TO PROJECT DELAY DURING PROJECT PRE-CONSTRUCTION STAGES 2, 13 (Tex. A&M Transp. Inst. ed., 2016), https://static.tti.tamu.edu/tti.tamu.edu/documents/0-6806-FY15-WR3.pdf.

design changes."[15] They note that, "These delays are likely to be larger if an increase of new permits is not offset by additional staff and infrastructure for processing. The likelihood of delays may also increase considerably, given the subjectivity of the proposed rule in identifying the jurisdictional waters compared to the relatively clear standards of the [Navigable Waters Protection Rule]" - which eliminated the significant nexus test.[16] Further, "In addition to the cost of delays and uncertainty to permittees, the regulatory authority will also incur costs associated with an increased number of case-by-case reviews and jurisdictional determinations… and the potential for disagreements between permittee and permitting authority." In fact, the agencies admit that reinstating the significant nexus test will increase permit costs and permitting time and compensatory mitigation costs.[17]

Thus, the ability to deliver important infrastructure projects, supply materials needed to

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[15] *Rapanos*, 547 U.S. at 721 (citing David Sunding & David Zilberman, *The Economics of Environmental Regulating by Licensing: An Assessment of Recent Changes to Wetlands Permitting Process*, 42 NAT. RES. J. 59, 74-76 (2002)).

[16] DAVID SUNDING & GINA WATERFIELD, REVIEW OF THE ENVIRONMENTAL PROTECTION AGENCY AND THE DEPARTMENT OF THE ARMY 2021 ECONOMIC ANALYSIS FOR THE PROPOSED "REVISED DEFINITION OF WATERS OF THE UNITED STATES" RULE 10 (The Brattle Group ed., 2022).

[17] U.S. EPA & Dep't of the Army, Economic Analysis for the Proposed "Revised Definition of 'Waters of the United States" Rule 77 (U.S. EPA & Dep't of the Army, eds. 2021), https://www.epa.gov/system/files/documents/2021-11/revised-definition-of-wotus_nprm_economic-analysis.pdf.

sustain and improve communities in a timely and cost effective manner will only worsen if the significant nexus test remains.

II. THE SIGNIFICANT NEXUS TEST ESSENTIALLY CREATES A PRESUMPTION OF CWA JURISDICTION THAT IS VIRTUALLY IMPOSSIBLE TO OVERCOME

The Government has the burden of proof in establishing a CWA violation by a preponderance of the evidence in a civil case and "beyond a reasonable doubt" in a criminal case.[18] However, since *United States v. Riverside Bayview Homes,* 474 U.S. 121 (1985) the courts have largely granted the Government considerable deference creating a presumption that is almost impossible to overcome.[19] A landowner contesting jurisdiction is faced with bringing an expensive, time consuming, and likely unsuccessful administrative appeal of a Corps jurisdictional determination, not to mention further litigation.[20] Indeed, *Amici* are at the mercy of Corps reviewers who could rely on a range of non-

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[18] *United States v. Lucas*, 516 F.3d. 316 (5th Cir. 2008) (upholding criminal conviction for CWA violations holding that the wetlands at issue, which were adjacent to tributaries of navigable waters were waters of the United States under all three tests set forth in *Rapanos*).

[19] See *Precon Development Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d. 278 (4th Cir. 2011); *United States v. Cundiff*, 480 F. Supp. 2d. 940 (W.D. Ky. 2007), *aff'd*, 555 F.3d. 200 (6th Cir. 2009); *N. Cal. River Watch v. City of Healdsburg*, 457 F.3d. 1023 (9th Cir. 2006), *withdrawn & superseded*, 496 F.3d. 993 (9th Cir. 2007).

[20] 33 C.F.R. §§ 331.1-331.12 (2022).

site specific information such as maps, aerial photography, watershed studies, National Wetland Inventory maps, National Oceanic and Atmospheric Administration ("NOAA") data, hydrologic models, and/or literature studies to find a significant nexus.[21] Even the most general regional study could support a finding that any effect, however remote, within a given watershed, meets the significant nexus test. The risk that the Corps may assert jurisdiction over such routine and necessary actions such as pits excavated in dry land for the purpose of obtaining fill, sand, or gravel that accumulate water has a direct impact on routine aggregate operations.

Similarly, ARTBA members' concern has been the erratic treatment of roadside ditches. They are common to transportation improvement projects, primarily because they accommodate stormwater runoff and keep the roadway from flooding during rain events. If the owner and contractor on a project have a common understanding that ditches do not require federal permits, then they can build and maintain them without delay using the best safety-related practices. Conversely, even the possibility of federal permitting for these ditches compels the parties to delay their addition to a project – or delay progress on the entire project – until completing this bureaucratic process. The

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[21] *See* U.S. EPA & DEP'T OF THE ARMY, TECHNICAL SUPPORT DOCUMENT FOR THE PROPOSED "REVISED DEFINITION OF 'WATERS OF THE UNITED STATES'" RULE 228- 38 (U.S. EPA & Dep't of the Army eds., 2021), https://www.epa.gov/system/files/documents/2021-12/tsd-proposedrule_508.pdf.

federal permitting process and associated delays also carry associated administrative and legal costs.

The significant nexus test is especially problematic under the agencies' recent proposal to restore the pre-2015 WOTUS definition because it allows CWA jurisdiction over wetlands to be established through an unbroken shallow subsurface connection to a Traditionally Navigable Water ("TNW").[22] The agencies have never defined how to distinguish such a connection from groundwater that has never been considered Water of the United States. The shallow subsurface connection based on "best professional judgment" can be imprecise and prone to abuse in the field. For example, one Corps reviewer could find that groundwater from a tributary has a shallow subsurface connection because it occasionally reaches the twelve-inch root zone but is usually at a much lower depth. Another reviewer looking at the same kind of hydrologic system could find that the subsurface waters is deep groundwater, although it occasionally inundates the root zone. The reviewer in the former case could then establish adjacency over a large area of the landscape. Whereas the latter reviewer may not. In many areas of the United States, digging a shallow subsurface depression in the ground leads to groundwater. Will the potential connection to shallow subsurface flow lead to monitoring and perhaps mitigation? The practical consequences of

[22] Revised Definition of "Waters of the United States", 86 Fed. Reg. 69435 (proposed Dec. 7, 2021).

the variations of "best professional judgement" are staggering. The nebulous distinction on the groundwater/shallow subsurface connection creates an almost impossible burden on a landowner trying to determine if subsurface flow is unregulated groundwater. A landowner would have to install well and monitor the groundwater seasonally to attempt to prove that underground flow does not establish an adjacency connection – an expensive and time-consuming process.[23]

The case of *Orchard Hill Building Co. v. U.S. Army Corps of Engineers*, 893 F.3d. 1017 (7th Cir. 2018) (before Bauer, Barrett, and St. Eve) illustrates the kind of burden facing a land owner in contesting the Corps finding on whether a wetland in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable" to satisfy Justice Kennedy's significant nexus test.[24] In *Orchard Hill* the Corps had asserted jurisdiction over a thirteen-acre wetland, Warmke Wetlands, surrounded by

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[23] Ground water alone should not create a hydrologic connection, unless the wetland connected by groundwater is directly abutting a navigable water so as to be "inseparably bound up" with that water (as in *Riverside Bayview*). As the Fifth Circuit explained in *Rice v. Harken Exploration Co.,* 250 F.3d 264 (5th Cir. 2001), it would be an unwarranted expansion of the CWA to conclude that a discharge that migrates into a navigable water via natural groundwater seepage could become a "discharge" into a navigable water. *Id*. at 271 (Congress was aware of the connection between groundwater and surface water, but nonetheless decided to leave groundwater unregulated under the CWA).

[24] *Rapanos*, 547 U.S. at 780.

residential development adjacent to Midlothian Creek near Chicago. The closest navigable water was Little Calumet River, eleven miles away. In between the wetlands and river are man-made ditches, open-water basins, and sewer pipes. The builder spent twelve years and three administrative appeals challenging the claim of jurisdiction before the Seventh Circuit finally held that the Corps had not provided substantial evidence of a significant nexus.[25] The Corps had claimed that the Warmke Wetlands were similarly situated with 165 wetlands identified on NWI maps and were considered part of the Midlothian Creek Watershed. The Corps cited the flooding problems in the area and the nutrient reduction benefits of wetlands and claimed, based on scientific literature and studies, that the Warmke Wetlands, in combination with the other 165 wetlands, met the significant nexus test. However, in finding that the Corps failed to provide substantial evidence that 165 wetlands were similarly situated, the Court faulted the Corps reliance on the NWI maps, without any explanation of how these wetlands in the same watershed of twenty square miles were adjacent to the same tributary. In rejecting the Corps evidence as insufficient, the Court held the Corps did not provide record evidence to support its assumption that the 165 acres were "similarly situated" stating that "while we review the Corps determination narrowly, no amount of agency deference permits us to let slide critical findings bereft of record support… Without first showing or explaining how the land is in fact similarly

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[25] The Court noted that "the history of the Warmke [Wetlands] jurisdictional determination can be described as lengthy, contentions and complex" as the Corps district engineer aptly put it. *Orchard Hill Bldg. Co.*, 893 F.3d at 1019.

situated is to disregard the test's limits." *Orchard Hill Bldg. Co.*, 893 F.3d. at 1026.[26]

These examples highlight the importance of this Court finally providing clarity on the reach of Clean Water Act jurisdiction.

III. THE SIGNIFICANT NEXUS TEST RAISES SERIOUS DUE PROCESS CONCERNS

The application of the significant nexus test implicates the void for vagueness doctrine raising "discrete due process concerns." *FCC v. Fox Television Stations, Inc.,* 567 U.S. 239, 253 (2012). Due to the lack of precise standards, it fails to ensure fair notice so that regulated entities "know what is required of them so they may act accordingly" and fails to provide guidance "so that those enforcing the law do not act in an arbitrary or discriminatory way." *Id*. Vague standards "enable intrusions into the private lives and freedoms of Americans by bare edict rather than only with the consent of their elected representatives." *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor*, 142 S.Ct. 661, 669 (2022) (Gorsuch, J., concurring). Since

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[26] In *Orchard Hill Building Company*, the Court cited the Fourth Circuit's decision in *Precon Development Corp. v. U.S. Army Corps of Engineers,* 633 F.3d. 278 (4th Cir. 2011) where the Court rejected the Corps assertion of jurisdiction over 4.8 acres of wetlands more than 7 miles from the nearest navigable water because the record did contain enough evidence to assess the effects of the wetlands at issue in relation to the 448 acres of wetlands in the watershed. The Corps eventually developed more site-specific evidence which led to another round of litigation and a second appellate ruling upholding the record supporting jurisdiction four years later. *Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 603 Fed. App'x 149 (2015).

Rapanos, this Court has expressed concern that the CWA's reach is "notoriously unclear and the consequences to landowners even for inadvertent violations can be crushing." *U.S. Army Corps of Eng'rs v. Hawkes,* 578 U.S. 590, 602 (Kennedy, J., concurring) (quoting *Sackett v. EPA,* 566 U.S. 120, 132 (2012)); *see also Rapanos,* 547 U.S. at 757 (Roberts, C.J., concurring) (advising the agencies to stop asserting "essentially limitless" jurisdiction under the CWA and issue a definitional rule that ordinary landowners can understand and abides by the "clearly limiting terms Congress employed in the CWA").[27]

Aggregate operations often require access to mining sites that may be dry most of the year, especially in the west. A site is often mined in phases over several years. Defining the precise limits of CWA jurisdiction over marginally wet areas is difficult. Without precise standards defining the limits of CWA jurisdiction, a mine operator can face substantial civil and even criminal penalties under CWA section 1319 (c)(d) by determining, in good faith, that an ephemeral "wet depression" miles from any flowing stream is an exempted, only to face an enforcement action claiming the impacted area as regulated under the significant nexus test. Aside from penalties, such enforcement could impact the operator's ability to supply aggregate for important road construction projects.

IV. CWA REQUIRES CLEAR EVIDENCE OF A SURFACE HYDROLOGIC CONNECTION AND OF SUBSTANTIAL HARM TO THE WATER QUALITY OF A NAVIGABLE

[27] *Rapanos*, 547 U.S. at 757.

WATER - PROXIMATE CAUSATION/FORSEEABILITY PRINCIPLES PROVIDE A GOOD LEGAL PARADIGM

The fundamental problem with "significant nexus," a term that does not appear anywhere in the Clean Water Act, is that it **has no inherent limiting principles**. It empowers the agencies to assert CWA jurisdiction over any wetland adjacent to a water feature with an intermittent, remote, or indirect connection to a navigable water and expands CWA jurisdiction well beyond the limits set by Congress.[28] Under the significant nexus test, every isolated wetland with even the most tenuous and fleeting of connections to a navigable water will be subject to federal jurisdiction under the CWA if one molecule of water from the wetland eventually reaches, or could potentially reach, a navigable water.[29] Clearly, such a result is not what Congress intended under the CWA as recognized by the EPA's Scientific

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[28] *Amici* supported the National Waters Protection Rule, 85 Fed. Reg. 22250 (Apr. 21, 2020) that eliminated the significant nexus test and based on CWA jurisdiction on wetlands directly connected by surface flow to a protected navigable water. That rule was vacated by *Pascua Yaqui Tribe v. U.S. EPA*, No. CV-20-00266-TUC-RM, 2021 WL 3855977 (D. Ariz. Aug. 30, 2021).

[29] The district court decision in *U.S. v. Rueth Development Co.,* 189 F. Supp. 2d. 874 (N.D. Ind. 2001), *aff'd*, 335 F.3d. 598 (7th Cir. 2003) following *SWANCC* is instructive. The Court reasoned that if "a molecule" of water from the disputed wetland eventually intermingles with the molecules of a navigable water, the Corps has jurisdiction." A drop of rainwater landing in the Site is certain to intermingle with water from the Little Calumet River... the Site, therefore, has the 'significant nexus' to a navigable waterway [as required by *SWANCC*]." *Rueth*, 189 F. Supp. 2d at 877.

Advisory Board.[30]

Amici submit that, in order to be true to the Clean Water Act, there must be credible evidence of (1) a continuous surface hydrologic connection between a wetland and a Traditionally Navigable Water ("TNW"); **and** (2) a demonstration that a discharge into the wetland has a substantial injurious impact on the water quality of the connected TNW. The greater the distance and the more tenuous the connection to that navigable water, the stronger the site-specific evidence is needed to assert jurisdiction. Under *SWANCC*, an isolated water or wetland would not be covered.[31].

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[30] The Scientific Advisory Board panel commenting on the EPA's proposed Clean Water rule in 2014 recognized that significant nexus is not a scientific, but a legal term which requires a policy determination in light of law and science. The panel urged the EPA to "articulate a definition that recognizes the relative strength of downstream effects to inform the conclusion of those effects for purposes of interpreting the CWA." The SAB also stated that there is a "decreasing likelihood that waters with less than perennial or intermittent flows will affect the chemical, physical, and biological integrity of downstream waters." Memorandum from Dr. Amanda Rodewald, Chair of the SAB Panel, to Dr. David Allen, Chair of EPA's Scientific Advisory Board on the Technical Basis of the Proposed Rule 6 (Sept. 2, 2014) (on file with author).

[31] The agencies recent proposal rule would apply the significant nexus test to "other waters" to include intrastate waters such as mudflats, prairie potholes, sloughs, and wet meadows that lack any surface flow to a tributary of a TNW. Revised Definition of "Waters of the United States", 86 Fed. Reg. 69419-20 (proposed Dec. 7, 2021). The proposed rule allowing aggregation of such waters within a watershed amounts to an end run around *SWANCC*. *SWANCC*., 531 U.S at 161 ("Permitting respondents to claim federal jurisdiction over ponds and mudflats falling within the migratory bird rule would result in a significant

Amici suggest that applying the time-tested principles of proximate causation and foreseeability can provide a useful legal paradigm to give meaning to the CWA's limits.[32] These principles are long standing.[33] They have been applied under the Endangered Species Act ("ESA")[34] and other federal environmental statues. Justice O'Connor's concurrence in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon,* 515 U.S. 687, 708 (1995) applying these principles to the ESA provides a good framework for determining whether impacting a wetland a distance from a navigable water would violate the CWA. Justice O'Connor held that "significant habitat modification must cause actual as opposed to hypothetical or speculative death or injury noting that "the regulations application is limited by ordinary principles of proximate causation which introduces notions of foreseeability." *Id.* at 709-10 (O'Connor, J., concurring). Importantly, she specifically stated, "I see no indication that Congress… intended to dispense of ordinary

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impingement of the State's traditional and primary power over land and water use").

[32] See Lawrence R. Liebesman et al., *Rapanos* v. *United States: Searching for a Significant Nexus Using Proximate Causation and Foreseeability Principles,* 40 ENV'T L. REP. (ENV'T L. INST.) 1124 (Dec. 2010).

[33] *See* DAN. B. DOBBS ET AL., THE LAW OF TORTS 443, 559-60 (2d ed. 2000). Under *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339 (1928) "Proximate Cause" is not the same as "but for" factual cause. It is "not about causation at all but about the appropriate scope of responsibility…." [describing] the practical necessity for restricting liability within some reasonable bounds in the strict liability context.

[34] 16 U.S.C. §§ 1531-1544 (2022).

principles of proximate causation." *Id.* at 712 (O'Connor, J., concurring). Strict liability means liability "*without fault, it does not normally mean liability for every consequence, however remote, of one's conduct*." *Id.* at 712. (O'Connor, J., concurring). "*[P]roximate causation depends to a great extent on considerations of fairness of imposing liability for remote consequences."* *Id.* at 713. (O'Connor, J., concurring) (emphasis supplied). In so doing, Justice O'Connor noted that the same principles were applicable under the Trans-Alaska Pipeline Authorization Act,[35] but not under the Comprehensive Environmental response and Liability Act ("CERCLA")[36] ("Superfund") where Congress expressly rejected the causation requirement.[37] *Id*. at 712 (O'Connor, J., concurring). In her view, the ESA's "harm" regulation is limited to significant habitat modification, by impairing essential behaviors which proximately (or foreseeably) cause actual death or injury to identifiable animals that are protected under the ESA. However, where the connection between the habitat modification and the injury is so indirect, it did not satisfy that test. She took issue with the Court of Appeals ruling holding that "state agency had committed a taking of the endangered Palila bird by permitting federal sheep to eat mamani-naio seedlings that when full-grown, might have fed and

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[35] 43 U.S.C. §§ 1651-1656 (2022).

[36] 42 U.S.C. §§ 9601-9675 (2022).

[37] Justice O'Connor cited *Benefiel v. Exxon Corp.*, 959 F.2d 805, 807-08 (9th Cir. 1992) (in enacting the Trans-Alaska Pipeline Authorization Act which provides for strict liability of damages, Congress did not intend to abrogate common-law principles of proximate causation to reach "remote and derivative" consequences).

sheltered the bird." *Palila v. Hawaii Department of Land and Natural Resources*, 852 F.2d. 1106 (9th Cir. 1988). To Justice O'Connor, *Palila* was wrongly decided because "the destruction of the seedlings did not proximately cause actual death or injury to indefinable birds, it merely prevented the regeneration of forest land not currently inhabited by actual birds." *Babbitt*, 515 U.S. at 714 (O'Connor, J., concurring).

The *Sweet Home* Court left open how the proximate cause limitations might be applied.[38] Over the years, federal courts have largely followed Justice O'Connor's analysis. The Fifth Circuit in *Aransas Project v. Shaw* ("*TAP*"), 775 F.3d. 641, 660 (5th Cir. 2014) found her analysis "instructive" in holding that the "long chain of causation" precluded imposing liability" for the death of whooping cranes in the Gulf of Mexico on the Texas Commission on Environmental Quality's issuance of water withdrawal permits. ("Applying a proximate cause limit to the ESA must therefore mean that liability may be based neither on the 'butterfly effect' nor on remote actors in a vast and complex ecosystem"). *Id*. at 658-59. The *TAP* Court cited several Supreme Court rulings applying proximate causation principles.[39] The Court also

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[38] See Lawrence R. Liebesman & Steven A.G. Davison, *Takings of Wildlife Under the Endangered Species Act After Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 5 UNIV. OF BALT. J. OF ENV'T L. (1995) ("Because a majority of the Justices held that habitat modification only violates the FWS regulation when it proximately causes death or injury to members of a wildlife species protected under the Act, lower courts are now required to resolve various issues involving what constitutes 'injury' to a protected species.") *Id*. at 137.

[39] In *Exxon Co., U.S.A. v. Sofec, Inc*., 517 U.S. 830 (1996) the

noted that "other courts have held certain regulatory acts resulted in ESA liability where a close connection existed between the liable actor's conduct and habitat destruction or killing of endangered species." *Id* at 659.[40]

The proximate causation/foreseeability principles applied in *Sweet Home* and other cases are relevant to determining the limits of CWA jurisdiction. Section 101 of the CWA has two clear goals (1) to "restore and maintain the chemical, physical, and biological integrity of the Nation's water **and** (2) to "recognize, preserve, and protect the primary responsibilities of the states to prevent, reduce and eliminate pollution, to plan the development and use of... land and water resources and to consult with the Administrator…" The CWA's permit programs are the regulatory vehicles to further the Act's goals. Proximate

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Court affirmed that "proximate causation principles are generally thought to be a necessary limitation on liability." In *Paroline v. United States*, 572 U.S. 434, 445 (2014) ("…a requirement of proximate cause thus serves inter alia, to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity.")

[40] In *Department of Transportation v. Public Citizen*, 541 U.S. 752, 766 (2004), the Court applied similar principles under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 to 4370m-8 (2022). in the context of the agency's underlying authority. In finding that NEPA did not require the Federal Motor Carrier Safety Administration ("FMCSA") to consider the environmental effects arising from the entry of Mexican trucks as a result of the President's lifting or modification of the moratorium against such entries, Court held that the "but for" causation test was "insufficient" to establish" the requisite causal link between a proposed agency action and possible environmental effect."

causation/foreseeability principles provide a useful legal paradigm for imposing liability for actions consistent with these goals. In fact, several post *SWANCC* decisions lend support for this rationale. In *Rice v. Harken Exploration Co.* 250 F.3d. 264, 272 (5th Cir. 2001), in construing the CWA and Oil Pollution Act's[41] "navigable waters" definitions as the same, the court held that "the Rice's have failed to produce evidence of a close, direct, and **proximate** link between…the discharges of oil and any resulting actual, identifiable oil contamination…. of a particular body of natural surface water." (Emphasis supplied.) *In re Needham*, 354 F.3d. 340 (5th Cir. 2003) followed *Rice* in holding that the definition of "navigable waters," to include all waters that have any hydrological connection with a "navigable water," is "unsustainable under *SWANCC*." *Id.* at 345.[42]

Specific application of these principles could lead to differing conclusions. For example, the likelihood of a foreseeable impact on a Traditionally Navigable Water ("TNW") is higher when considering the discharge of a liquid waste stream from an industrial plant than the discharge into the same wetland of mere fill material. The same limiting principles could also apply in determining if discharges to similarly situated wetlands adjacent to the relevant reach of the same intermittent stream

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[41] Oil Pollution Act, 33 U.S.C. §§ 2701-2762 (2022).

[42] *FD & P Enterprises v. U.S. Army Corps of Eng'rs,* 239 F. Supp. 2d. 509, 517 (2003) (after *SWANCC* "the hydrologic connections test is no longer the valid mode of analysis." The Corps must demonstrate evidence of "substantial injurious impact" to a navigable water.

would impair the TNW's water quality in order determine the cumulative effect of all such discharges.

The Court's recent decision in *County of Maui v. Hawaii Wildlife Fund*, 140 S.Ct. 1462 (2020) does not preclude the use of proximate causation/foreseeability principles to wetlands. The Court held that that discharges from a point source into groundwater that eventually reaches a navigable water must be functionally equivalent to a direct discharge into surface water and set our seven criteria to be applied. The Court's only rejected the use of proximate causation because it did not "significantly narrow" whether a discharge into groundwater that eventually makes its way to a navigable water was "fairly traceable." Unlike the narrow question of traceability of a specific pollutant in *Maui*, applying proximate causation to discharges into a wetland will address whether there is sufficient evidence to demonstrate that impacts to a wetland adjacent to a tributary will foreseeably impair the water quality of the downstream TNW. Such an analysis does not require tracing the path of a specific pollutant. Rather it involves looking at the relationship of the functions of the wetland at issue to the functions of the downstream navigable waters. If the relationship is too tenuous and remote, then no liability should attach for discharges to the wetland.

Should the Court adopt proximate causation/foreseeability principles, *Amici* submit that the Court should remand the issue to the Corps and the EPA to develop appropriate regulations rather than laying out criteria similar to *Maui*. Unlike *Maui* where the Court's factors provided guidance regarding

the potential impacts of specific pollutants traveling through groundwater, applying proximate causation principles to wetland impacts involves a broader analysis regarding whether the discharges into a wetland remote from a downstream water would impair the functions of that water.

V. THE SIGNIFICANT NEXUS TEST VIOLATES THE FUNDAMENTAL PRINCIPLES OF FEDERALISM

This Court in *SWANCC* recognized that the Courts should be hesitant to intrude upon the delicate balance between federal and state regulation of land and water resources absent a "clear statement from Congress that such a result was intended." *SWANNC*, 531 U.S. at 174. One of the principal tenets of federalism is that Courts shall not interpret federal legislation to abrogate local power unless it is clear that Congress considered and intended, when it passed the authorizing legislation, to alter the traditional balance between federal and state powers. This "clear statement" principle applies "in cases implicating Congress's historical reluctance to trench on state legislative prerogatives or to enter into spheres already occupied by the States." *United States v. Lopez*, 514 U.S. 549, 606 (1995) (Souter, J., dissenting) (citation omitted). In cases where a Court seeks to invoke the outer limits of Congress's power, there must be a clear indication that Congress intended that result. *SWANCC,* 531 U.S. at 172. Indeed, this Court has recognized that there is an underlying assumption that the power to legislate in areas traditionally regulated by the States "is an extraordinary power… [that] Congress

does not exercise lightly." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971).

Clearly, in enacting the CWA, Congress never intended to impinge on the traditional and primary power of state and local governments over land and water uses expressly preserved under CWA Section 1251(g).[43] Adoption of the significant nexus test would result in an unprecedentedly broad interpretation of the geographic scope of CWA jurisdiction. As held in *SWANCC*, the Courts should be hesitant to intrude upon the delicate balance between federal and state regulation of land and water resources absent a "clear statement from Congress" that such a result was intended. *SWANNC*, 531 U.S. at 174. Under the "clear statement" principle, Courts must not simply assume that Congress has used its power to override state authority. *SWANCC* 531 U.S. at 172-73. Rather, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). Mere ambiguity will not suffice to demonstrate that Congress intended to intrude into state interests. *Gregory*, 501 U.S. at 464.

Nothing in the plain language of the CWA approaches a "clear statement" from Congress that it

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[43] 33 U.S.C. § 1251(g) (2022). This Court has recognized that "the regulation of land use is perhaps the quintessential state activity." *FERC v. Miss.*, 456 U.S. 742, 767 n.30 (1980).

intended CWA jurisdiction to extend to every intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote. Indeed, Sections 101 (a) and (b) of the CWA must be read together so that Section 101(a) goals do not override primary responsibilities of states under Section 101(b). *United States v, Mills*, 850 F.3d. 693, 698 (4th Cir. 2017). The adoption of the significant nexus test would violate the "cooperative federalism" inherent in the Act as inconsistent with 101(b) that specifically limits the authority of federal agencies to intrude into state and local matters. The wetlands that the Ninth Circuit would have regulated under significant nexus are more properly addressed under state and local laws, policies, and regulations.[44] This careful balance between state and federal power should not be upset.

CONCLUSION

Amici respectfully request this Court to reverse the Ninth Circuit, reject the significant nexus test, and provide clear limiting principles in determining the reach of jurisdiction over wetlands under the Clean Water Act.

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[44] As this Court recently stated in *Maui* "the structure of the statute (CWA) indicates that, as to groundwater pollution and non-point source pollution, Congress intended to leave substantial responsibility and autonomy to the States." *Maui*, 140 S.Ct. at 1471.

Respectfully Submitted,

LAWRENCE R. LIEBESMAN
Counsel of Record
ZACHARY E. HOWERTON
SMOUSE & MASON, LLC
223 Duke of Gloucester Street
Annapolis, Maryland 21401
(410) 269-6620
LRL@smouseandmason.com

NICK GOLDSTEIN
Vice President, Regulatory &
Legal Issues
AMERICAN ROAD &
TRANSPORTATION BUILDERS
ASSOCIATION
250 E Street, S.W.
Washington, D.C. 20024