No. 21-454

IN THE

Supreme Court of the United States

MICHAEL SACKETT & CHANTELL SACKETT,

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 THE WESTERN URBAN WATER COALITION AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICUS CURIAE*[1]

The question presented is whether the Ninth Circuit set forth the proper test for determining whether wetlands are "waters of the United States" under the Clean Water Act, 33 U.S.C. § 1362(7). *Amicus* the Western Urban Water Coalition (WUWC) submits this brief to make the Court aware that its answer to the question presented affects not only the wetlands at issue in this case but also the very different hydrological features found in the arid West. The agencies that administer the Clean Water Act (CWA)—the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps)—have applied and will in the future apply to these arid West hydrological features any test that this Court sets out for determining what is, or is not, a jurisdictional "water of the United States" (WOTUS) under the CWA. Thus, in deciding the proper test for determining whether the wetlands in this case are WOTUS, *amicus* strongly urges the Court to develop a test that considers the facts and circumstances found in arid West environments.

Historically, the arid West has been challenged by an inadequate supply of water, and it is now being affected by climate change, droughts, and wildfires. To meet these challenges, water supply utilities need to build new water infrastructure systems, repair and expand existing infrastructure, and pursue innovative new projects incorporating water purification,

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[1] Pursuant to Rule 37.2(a), counsel for all parties have consented to the filing of this brief. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part and no person or entity other than *amicus*, its members, or counsel made a monetary contribution to its preparation or submission.

recycling, reuse, and desalination. These water infrastructure systems often cross the usually dry intermittent and ephemeral streambeds and similar features characteristic of the arid West. Without appropriate criteria for determining WOTUS—which will apply not only to the wetlands at issue in this case but also to the features in the arid West in which *amicus* members build and operate their infrastructure—*amicus* expects continued confusion and regulatory overreach in applying the CWA throughout the Western states.

Amicus is a coalition[2] of nonprofit public utilities dedicated to providing a reliable, high-quality urban water supply for present and future generations in the largest cities in the Western states, which together serve more than 40 million water consumers in 18 major metropolitan areas. WUWC and its members strongly support the water quality goals of the CWA and depend upon full and effective implementation of

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[2] WUWC consists of the following members: **Arizona** (Central Arizona Project, City of Phoenix and Salt River Project); **California** (Eastern Municipal Water District, the City of Los Angeles Department of Water and Power, The Metropolitan Water District of Southern California, San Diego County Water Authority, Santa Clara Valley Water District, and City and County of San Francisco Public Utilities Commission); **Colorado** (Aurora Water, Colorado Springs Utilities, and Denver Water); **Nevada** (Las Vegas Valley Water District, Southern Nevada Water Authority, and Truckee Meadows Water Authority); **New Mexico** (Albuquerque Bernalillo County Water Utility Authority); **Utah** (Salt Lake City Public Utilities); and **Washington** (Seattle Public Utilities). Seattle Public Utilities is not participating in the submission of this *amicus* brief on behalf of WUWC.

its requirements to help deliver high quality water to their customers. Through this brief, these urban water supply utilities seek to improve the application of the CWA and to help the Court understand the ways in which the unique conditions of the arid West are affected by the question under review.

Amicus' water supply infrastructure in the West includes human-constructed water diversion, delivery and treatment facilities e.g., pipelines, canals, ditches, groundwater infiltration basins, and reservoirs. This infrastructure often covers great linear distances and in many cases crosses streams, stream channels (sometimes called "washes"), drainages, arroyos (nearly vertically walled, flat floored stream channels), and similar areas that only flow in response to extreme precipitation events but otherwise are dry and are prevalent in arid regions—a group of similar hydrologic features we refer to as "ephemeral drainages." If these ephemeral drainages are subject to regulation as WOTUS, then *amicus* members' construction, repair and replacement of these facilities may require a CWA discharge permit. Determining whether these ephemeral drainages are WOTUS can add significant time and cost to a project, while permit denial can preclude such necessary activity altogether.

Amicus' reference to the "arid West" means the arid and semiarid portions of the western United States. The arid West region consists of desert and shrub-steppe ecosystems in the rain shadow of the Cascade and Sierra Nevada Mountain ranges, plus portions of central and southern California that have a Mediterranean climate with mild winters and dry

summers.[3] The region is characterized by relatively high average temperatures, low humidity, and often extreme temporal and spatial variability in precipitation amounts, and the climate drastically influences the hydrology, channel-forming processes, and distribution of the physical indicators of flow in ephemeral drainages found across the region.[4]

Amicus is uniquely positioned to explain to the Court why its decision should account for the unique features of ephemeral drainages in the arid West, which are far different than what are commonly referred to as "wetlands." Even the regulatory definition of "wetlands" makes clear that they are water-dependent features that typically do not include ephemeral drainages.[5] Previous tests for determining WOTUS—including the one applied by the Ninth Circuit in this case—have not facilitated distinguishing wetlands from arid West ephemeral drainages. The Court can correct that shortcoming here when it clarifies the test for WOTUS.

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[3] *See* Arid West Water Quality Research Project, *Arid West Water Quality Research Project Final Report* (April 2007) (funded by EPA Region 9), http://s3-us-west-2.amazonaws.com/ucldc-nuxeo-ref-media/5071c4d1-c76d-416f-aaaa-633c00148488.

[4] R. Lichvar and S. McColley, *A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States*, Delineation Manual, at 1 (Aug. 2008), https://erdc-library.erdc.dren.mil/jspui/bitstream/11681/5308/1/CRREL-TR-08-12.pdf.

[5] 40 C.F.R. § 230.41(a)(1) ("Wetlands consist of areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.").

SUMMARY OF ARGUMENT

Amicus submits this brief in support of neither party but instead to urge the Court to issue a clear test for CWA jurisdiction that will apply not only the wetlands in this case, but to all WOTUS. In setting forth that test, we ask the Court to ensure that it accounts for the unique geographic, geologic, and hydrologic conditions found in the arid West. Otherwise, the regulatory confusion that has characterized WOTUS determinations in the arid West will continue, with resulting adverse consequences on the infrastructure construction, maintenance, and operation required for *amicus*' vital water supply activities.

ARGUMENT

A. The CWA's main purpose is to protect water quality, but previous cases, rulemakings, and guidance on the test for determining CWA jurisdiction have created confusion and resulted in regulatory overreach, especially with respect to ephemeral drainages in the arid West.

Congress's objective in enacting the CWA was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The goals and policy behind the CWA focus on the protection of the quality of those waters. *E.g., id.* at § 1251(a)(1) (goal to eliminate the discharge of pollutants into waters); § 1251(a)(2) (goal to achieve water quality to protect and propagate fish, shellfish, and wildlife, and recreation in and on water).

This case is testament to the confusion over the appropriate test for CWA jurisdiction, which has been incorporated into widely varying regulatory definitions of WOTUS over the decades. This turmoil remains sixteen years after the Court last addressed the question in *Rapanos v. United States*, 547 U.S. 715 (2006). Neither case law nor administrative guidance and regulations that purport to define WOTUS address how the jurisdictional standards established in a case about wetlands in Michigan (where petitioners in *Rapanos* were located) should be applied in the dry environment found in arid regions of the country. This confusion has resulted in EPA and the Corps making determinations that certain ephemeral drainages in the arid West qualify as WOTUS, even though such results do not advance the water quality goals of the CWA.

1. The *Rapanos* decision and the *Rapanos* Guidance.

The CWA seeks to achieve its water quality goals by regulating, among other things, what and how substances may be discharged into "navigable waters." 33 U.S.C. §§ 1311(a), 1344(a). Yet the statute fails to set out any standards or test for what is, and what is not, a "navigable water," defining that term only as "waters of the United States, including the territorial seas." *Id.* at § 1362(7). As a result, since the enactment of the CWA in 1972, the agencies tasked with administering the statute—the EPA and the Corps—have sought several times to issue regulations and guidance defining what qualifies as WOTUS, and this Court has weighed in on the same issue on three occasions.

In the first two cases, the Court ruled on the Corps' interpretation of its 1986 rules defining WOTUS, focusing on (1) non-navigable wetlands that abutted a traditional navigable waterway, and (2) isolated but seasonally ponding sand and gravel pits. *See United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121 (1985) (upholding the Corps' interpretation of the former as WOTUS and thus jurisdictional); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (rejecting the Corps' interpretation of the latter as WOTUS). Notably, none of the features at issue in these cases were like the ephemeral drainages prevalent in the arid West.

In 2006, this Court granted *certiorari* in both *Rapanos* and *Carabell v. United States* regarding the jurisdictional status of wetlands in Michigan. *See* 547 U.S. 715. The result was a 4-1-4 decision setting forth two different tests for determining WOTUS. The plurality set forth what is known as the "relative permanence" test, which deems jurisdictional only those "relatively permanent, standing or flowing bodies of water" and wetlands with a "continuous surface connection" to such permanent waters. *Id.* at 739, 742. The concurrence, on the other hand, set forth the "significant nexus" test, under which wetlands qualify as WOTUS if "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780.

After the *Rapanos* decision, EPA and the Corps issued guidance that incorporated both tests and applied them to all potential WOTUS, not just wetlands. *See* U.S. EPA and U.S. Army Corps

Memorandum, "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*" (Dec. 2, 2008) (the "*Rapanos* Guidance").[6] The Guidance stated that the agencies would deem relatively permanent waters as jurisdictional but would also assert jurisdiction over non-relatively permanent waters if they had a significant nexus to a traditional navigable water[7] based on a host of characteristics that the agencies would evaluate, including hydrologic and ecologic factors. *See id.*

2. Application of the *Rapanos* decision and *Rapanos* Guidance in arid West resulted in confusion and overbroad jurisdictional determinations.

Once the agencies began implementing the *Rapanos* Guidance, it became clear how difficult the tests for WOTUS set out by this Court were to apply, especially when attempting to determine whether there is a significant nexus between arid West ephemeral drainages and a downstream traditional navigable water. This is because these drainages, ubiquitous in the arid West, most often have only periodic flows that do not reach a downstream traditional navigable water. As discussed below, this difficulty has persisted

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[6] https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.

[7] The *Rapanos* Guidance considered the following waters referenced in 33 C.F.R. § 329.4 to be "traditional navigable waters": "Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce." *Rapanos Guidance*, at 4–5.

through to the present, despite three rounds of rulemakings.[8]

The two photographs below provide a comparison of a typical ephemeral drainage in the arid West and a "traditional" wetland[9] that demonstrates how

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[8] For example, 66 percent and 20 percent of the drainage basins in Nevada and New Mexico, respectively, are closed and drain into playas (dry lakes). *See* U.S. EPA & Dep't of the Army, *Technical Support Document for the Proposed Revised Definition of 'Waters of the United States' Rule*, at 169, https://www.epa.gov/system/files/documents/2021-12/tsd-proposedrule_508.pdf. Comparable percentages would be expected in other arid western states. Similarly, alluvial fans (features in which occasional flow ends in a fan-shaped area where silt, sand, gravel, and other sediment are deposited over a long period of time) are widespread in the southwestern U.S. where it is estimated that about 31 percent of the land surface is covered by alluvial fan deposits. Lichvar and McColley 2008, at 7. In many situations, the diffuse runoff over alluvial fans is likely to infiltrate into the alluvial fan, resulting in a lost spatial connectivity. Very large flows may be required for runoff to cross the alluvial fan and connect to a more permanently flowing downstream waterway. *See* David C. Goodrich et al., *Southwestern Intermittent and Ephemeral Stream Connectivity*, 54 J. Am. Water Res. Ass'n, at 401, 403 (2018), http://dx.doi.org/10.1111/1752-1688.12636.

[9] The first photograph, taken in Escalante Canyon, Utah, shows a typical ephemeral drainage found in the arid West. *See* WUWC Comments on Proposed WOTUS Rule, Attach. 1, Appendix A, Photo 1 (Apr. 15, 2019) (Docket ID EPA–HQ–OW–2018-0149). The second photograph shows a feature commonly referred to as "wetlands," located in Little St. Simons Island, Georgia. R.W. Tiner, *Predicting Wetland Functions at the Landscape Level for Coastal Georgia Using NWIPlus Data*, U.S. Fish and Wildlife Service, National Wetlands Inventory Program, Region 5, Hadley, MA (2011) (in cooperation with the Georgia Department of Natural Resources, Coastal Resources Division, Brunswick,

different they are, even though EPA and the Corps have, at times, applied one or both of the *Rapanos* tests for WOTUS to ephemeral drainages and traditional wetlands:

GA and Atkins North America, Raleigh, NC) (Photograph of Salt marsh on Little St. Simons Island, Georgia (Credit: R. Tiner)), https://digitalmedia.fws.gov/digital/collection/document/id/1363.

Other types of ephemeral drainages include:

- **Closed basins** (a feature that has no surface outlet for water, so any precipitation is lost to evapotranspiration[10] or infiltration into the soil). The photograph below is of Spring Valley, a topographically closed basin of about 1,700 square miles, located in central Nevada. The closest traditional navigable water to this closed basin is the Colorado River, which is about 200 miles south of the basin.

- **Channels that end in alluvial fans** (features in which occasional flow ends in a fan-shaped area where silt, sand, gravel, and other

[10] Evapotranspiration includes both evaporation (the process of liquid becoming gas) and transpiration (the process of water vapor emitting from plant surfaces).

sediment are deposited over a long period of time). The following photograph shows an alluvial fan complex located in Death Valley, California.[11]

- **Channels with substantial transmission losses** (features with occasional flow, but the flow is lost to infiltration into the bed and banks

[11] Michael N. Machette, Janet L. Slate, and Fred M. Phillips., *Terrestrial Cosmogenic-Nuclide Dating of Alluvial Fans in Death Valley, California*, U.S. Geological Survey Professional Paper 1755, coverage page (2008) (Aerial photograph of the Hanaupah Canyon alluvial fan complex, view from the east. Courtesy of Marli Bryant Miller (2008)), https://pubs.usgs.gov/pp/1755/downloads/PP1755_508.pdf.

of the channel).[12] The following photograph shows an ephemeral drainage with substantial transmission losses, located near Delta, Colorado.[13]

- **Basins that drain into isolated playas** (dry lakes). The following is a photograph of Soda Lake, a playa located on the Carrizo Plain in southeastern San Luis Obispo County, California.[14] The Carrizo Plain is a closed basin.

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[12] Another common type of ephemeral drainage in the arid West is a discontinuous channel, which is a channel with reaches that have physical indicators of flow interspersed with reaches that lack physical indicators of surface flow.

[13] *See* WUWC Comments on Proposed WOTUS Rule, Attach. 1, Appendix, Photo 4 (Apr. 15, 2019) (Docket ID EPA–HQ–OW–2018-0149).

[14] U.S. Geological Survey, *A photo of Soda Lake* (June 2011), https://www.usgs.gov/media/images/a-photo-soda-lake-1.

Under the *Rapanos* Guidance, these ephemeral drainages could easily be determined to be WOTUS. This was possible because the *Rapanos* Guidance directed the Corps to examine historical flow measurements, channel characteristics, and physical indicators of flow (e.g., ordinary high water mark[15] and bed and banks[16]). But these concepts and

[15] Current regulations define an ordinary high water mark as "that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas." 33 C.F.R. § 328.3(c)(7).

[16] *Rapanos* Guidance at 8-9. The Guidance did not provide a definition of "bed and banks," but later regulations defined it as "the substrate and sides of a channel between which flow is confined. The banks constitute a break in slope between the edge

indicators, which were based in large part on characteristics found in humid and wetter regions of the United States, do not translate well to dryland areas. In humid environments, there are greater, more frequent, and more predictable inputs of precipitation and runoff. In arid systems, precipitation and runoff inputs are sporadic and are usually subject to significant gaps in time.[17] These wide fluctuations make it challenging to develop a reliable relationship between a particular flow magnitude and physical indicators of flow—the concepts on which the *Rapanos* Guidance primarily relied.

For example, the *Rapanos* Guidance included historical flow as a metric for determining jurisdiction, but many of the ephemeral drainages in the arid West lack recorded historical flow data due to the remoteness of the sites, the absence of adequate measurement tools, the infrequent occurrence of any water, the sheer number of these dry features in a region, and at least for *amicus* water supply utilities, the cost and difficulty of data collection where the drainage is not a source of supply water.

As another example, the *Rapanos* Guidance directed the agencies to rely on physical indicators of water flow to determine jurisdiction. But relying on physical indicators of flow in ephemeral drainages is

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of the bed and the surrounding terrain, and may vary from steep to gradual." Clean Water Rule, 80 Fed. Reg. 37053, 37076 (June 29, 2015).

[17] William L. Graf, *Fluvial Processes in Dryland Rivers*, The Blackburn Press, at 104, 197, 296 (1988), https://w3.spa.usace.army.mil/urgwops/eis_admin_record/Ref474.pdf.

challenging. For instance, the Guidance suggested that physical indicators of flow in a hydrologic feature—and thus a significant nexus between that feature and a downstream traditional navigable water—could include the "presence and characteristics of a reliable ordinary high water mark with a channel defined by bed and banks." But this did not—and still does not—work well in the arid West because many ephemeral drainages have nonexistent or vague beds and banks or ordinary high water marks due to sporadic inputs of precipitation and runoff in these areas.

Ultimately, under the *Rapanos* Guidance, it was difficult, if not impossible, in some situations to pinpoint reliable evidence of a connection between many ephemeral drainages like those in the arid West and traditional navigable waters using the factors laid out in that Guidance.

The Corps' difficulty in using the *Rapanos* Guidance to determine whether arid West ephemeral drainages had the physical characteristics indicative of significant flow, and then if and how those flows had more than an insubstantial effect on a downstream traditional navigable water many miles away, resulted in inconsistent jurisdictional determinations that, in some cases, conflicted with the language of the CWA. Indeed, the need to apply the Guidance to ephemeral drainages—even though the Guidance in many instances did not make sense to apply to those drainages—resulted in a burdensome, time-consuming, and expensive review procedure for determining whether a permit was necessary. *See, e.g.,* Administrative Appeal Decision, Clean Water Act, Southern Parkway, Segment 3A-2 Property, Corps

File No. SPK-2000-50443 (Apr. 14, 2011)[18] (relying on the *Rapanos* Guidance and remanding the Corps District's jurisdictional determination that ephemeral washes in Washington County, Utah had a significant nexus to a downstream traditional navigable water, where the Utah Department of Transportation argued to the District that no such nexus existed, and had to administratively appeal the District's decision to the Corps' Division). The following is a Google earth image of these washes dated in July 2011.[19]

Another example of the difficulty of applying the *Rapanos* tests and Guidance, as illustrated in the following photograph, occurred when *amicus* member Southern Nevada Water Authority needed to construct a pipeline through this ephemeral drainage located outside of Searchlight, Nevada. Although the

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[18] https://www.spd.usace.army.mil/Portals/13/docs/regulatory/appealdecisions/southernparkway.pdf.

[19] Google Earth, 37.0486N, 113.4853W, imagery date Apr. 29, 2011, and Google Earth, 37.0486N, 113.4853W, imagery date Jul. 14, 2011.

drainage is located near the town's water supply system, it is also located approximately 35 miles from a traditional navigable water. The Corps determined there was a significant nexus between the drainage and the traditional navigable water and required a CWA permit for work in the drainage.

3. Post-*Rapanos* rulemaking whiplash did not solve the confusion over whether arid West ephemeral drainages were jurisdictional.

Almost nine years after the *Rapanos* decision, EPA and the Corps began a series of rulemakings in which they defined WOTUS based on one or the other of the two *Rapanos* tests. But none of those rules resolved the confusion created by the *Rapanos* case and the *Rapanos* Guidance with respect to ephemeral drainages in the arid West.

In 2015, the agencies promulgated what was known as the Clean Water Rule, 80 Fed. Reg. 37053 (June 29, 2015), which relied heavily on *Rapanos*' significant nexus test to define WOTUS.[20] As a result, the Clean Water Rule looked much like the *Rapanos* Guidance, and did not address the difficulty in applying the significant nexus concept in the arid West. Three particularly egregious examples demonstrate the way that the Clean Water Rule overreached with respect to jurisdiction over hydrologic features, including ephemeral drainages. First, it relied on the *lack* of hydrologic connection to find a significant nexus between an isolated water and a downstream traditional navigable water.[21] Second, it relied on upstream features providing "habitat" for species to create a nexus with a downstream traditional navigable water,[22] even though the availability of

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[20] That rule was challenged in many different courts, and this Court peripherally addressed it in a case holding that challenges to the rule must be brought in district courts in the first instance. *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617 (2018). The result of subsequent litigation was that the Clean Water Rule took effect in only about half of the states. *See* Revised Definition of "Waters of the United States," 86 Fed. Reg. 69372, 69407 (Dec. 7, 2021).

[21] Clean Water Rule, 80 Fed. Reg. at 37093 (describing how other waters have an effect on downstream traditional navigable waters due to their isolation, as opposed to their connectivity, and concluding that "even when lacking a surface hydrologic connection, a water can still have a significant effect on the chemical or the biological integrity of downstream traditional navigable waters, interstate waters, or the territorial seas").

[22] *Id.* at 37055 (summarizing the Rule's premise that upstream waters "significantly affect the chemical, physical, and biological integrity of downstream waters by playing a crucial role in

habitat is not necessarily related to water flows, let alone flows that reach a traditional navigable water. Third, in determining whether a single hydrologic feature was a WOTUS, it allowed the aggregation of similarly situated waters in a region even though those waters themselves often were not individually jurisdictional.[23]

In late 2019, the agencies revoked the Clean Water Rule,[24] and then in 2020 issued the Navigable Waters Protection Rule, which defined WOTUS in a manner modeled heavily on *Rapanos*' relative permanence test.[25] While many of the ephemeral drainages in the

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controlling sediment, filtering pollutants, reducing flooding, *providing habitat for fish and other aquatic wildlife*, and many other vital chemical, physical, and biological processes") (emphasis added).

[23] *Id.* at 37059 (describing how waters within a particular floodplain or within certain distance of a high tide line or ordinary high water mark may be evaluated as "similarly situated" for purposes of finding a significant nexus to a downstream traditional navigable water). The *Rapanos* concurrence indicated that such a nexus could be found to exist where the wetlands "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical or biological integrity of other covered waters more readily understood as 'navigable.'" *Rapanos*, 547 U.S. at 780. But in the *Rapanos* Guidance, the agencies transformed this reference to similarly situated "wetlands"—a term long understood and regulatorily defined—to include all hydrologic features, including dry ephemeral drainages. This transformation had no basis in the CWA or in *Rapanos* itself.

[24] Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56626 (Oct. 22. 2019).

[25] EPA Final Rule, The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22250

arid West were excluded from WOTUS under the Navigable Waters Protection Rule, even that rule did not fully resolve the difficulty surrounding the CWA's application to the arid West. For example, although the Navigable Waters Protection Rule provided evidence-intensive methods to determine if a channel was intermittent (which would be a basis for being characterized as WOTUS under the rule), many such methods would require years of study and would be very expensive. *See* 85 Fed. Reg. 22250, 22275–76 (Apr. 21, 2020).

In 2021, the agencies promulgated a rule that revoked the Navigable Waters Protection Rule and returned the CWA jurisdictional regime to pre-2015 (i.e., the *Rapanos* Guidance updated by some subsequent case law). *See* Revised Definition of "Waters of the United States," 86 Fed. Reg. 69372, 69407 (Dec. 7, 2021) (the 2021 Rule).[26] Once again, the 2021 Rule did not adequately or accurately address the appropriate treatment of ephemeral drainages in

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(Apr. 21, 2020). Multiple challenges to the Navigable Waters Protection Rule were filed, but the rule ultimately went into effect until the agencies halted its implementation in response to the decision in *Pasqua Yacqui Tribe v. United States Environmental Protection Agency*, No. cv-20-00266, 2021 WL 3855977 (Aug. 30, 2021) (remanding and vacating the rule). *See* U.S. EPA, *Final Rule: The Navigable Waters Protection Rule* (Sept. 3, 2021), https://www.epa.gov/wotus/final-rule-navigable-waters-protection-rule.

[26] *See also* U.S. EPA Press Release, *EPA, Army Announce Intent to Revise Definition of WOTUS* (June 9, 2021), https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus.

the arid West.[27] The agencies are now in the process of drafting yet another rule to define WOTUS, *see id.* at 69372, 69445–46, which *amicus* expects will once again rely heavily on the "significant nexus" test.

Based on this confusing and inconsistent back-and-forth by EPA and the Corps in their interpretation of the meaning of WOTUS, it is clear that now is the time for the Court to end the regulatory uncertainty and provide an unambiguous definition of the term. Unless the Court weighs in with a definition that can be rationally applied to ephemeral drainages in the arid West, *amicus* expects that WOTUS determinations in the arid West will remain problematic and confusing, and result in extension of the CWA to areas that are not connected to a traditional navigable water in any meaningful way. The consequences of the continued lack of clarity for the meaning of WOTUS will become increasingly detrimental to western public water

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[27] For example, the latest proposed rule adopts the same inappropriate factors as did the Clean Water Rule in 2015. *See, e.g.*, 2021 Rule, 86 Fed. Reg. at 69393 ("Sometimes it is their [other waters] relative isolation from the stream network (e.g., lack of hydrologic surface connection) that contributes to the important effect that they have downstream . . ."); *id.* at 69389–390 (In laying out the factors the agencies should consider in determining WOTUS, providing that "[t]he functions that 'other waters' provide include storage of floodwater, recharge of ground water that sustains river baseflow, retention and transformation of nutrients, metals, and pesticides, export of organisms to downstream waters and habitats needed for aquatic and semi-aquatic species that also utilize streams."); *id.* at 69418 (providing that "'other waters' meet the significant nexus standard if they, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of a traditional navigable water, interstate water, or the territorial seas.").

supply systems. This is due to the serious challenges associated with climate change, including more frequent and severe droughts and wildfires, and the concomitant need to address these challenges by constructing necessary water supply and stormwater control infrastructure in locations that have been at the center of the controversy and confusion that *amicus* has discussed in this brief. These challenges make it even more urgent for the Court to decide on a test for WOTUS that makes sense in the arid West.

B. The Court should adopt a test for determining WOTUS that can apply to ephemeral drainages found in the arid West to resolve regulatory confusion and overreach, while positioning the CWA to play its proper role in ensuring water quality.

The litigants and many other *amici* in this case will present the Court with a spectrum of arguments about whether EPA validly exercised its authority to regulate the wetlands on the Sacketts' property, and the appropriate test to determine whether the CWA applies to those wetlands. Because any test that the Court adopts for determining whether those wetlands are WOTUS will be applied to more than just traditional wetlands, *amicus* submits that the test should ensure that navigable waters are protected while avoiding the kind of confusion that results when the agencies rely on standards that are not suited to a determination of jurisdiction over the mostly dry ephemeral drainages found in the arid West.

One way for the Court to address the problem that *amicus* has highlighted in this brief would be to set out

a test based on reliable indicators of the presence of adverse water quality impacts to a traditional navigable water. To do that, the test should require a direct physical *hydrologic* connection between the feature being evaluated and a traditional navigable water—such as physical evidence of water flow exchanged between the subject hydrologic feature and the traditional navigable water that has been or can easily be observed in the field. For WOTUS determinations, factors that were included in the Clean Water Rule and then again in 2021 Rule—such as the lack of a connection, the mere presence of wildlife habitat, and the aggregation of similarly situated waters across a broad region[28]—should *not* be included in such a test absent additional evidence. This is because the CWA does not provide any basis for using such factors for determining jurisdiction.

In sum, *amicus* urges that the Court's answer to the question presented in this case end the regulatory confusion that has characterized the agency interpretations of the meaning of the term WOTUS since the *Rapanos* decision. In doing so, the Court also should end the agencies' practice of applying CWA jurisdiction over ephemeral drainages when the water flow from those features does not have a demonstrable effect on the physical, chemical, and biological integrity of a traditional navigable water. Such a test would still protect the quality of water delivered by *amicus* to its members' customers by ensuring that discharges into water features that would have a hydrologic effect on traditional navigable waters are subject to regulation. Any new test must resolve

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[28] 80 Fed. Reg. 37053; *see discussion supra* at 19–20.

existing regulatory confusion and minimize the potential for over-regulation while ensuring that the CWA provides the tools to fulfill its primary function of protecting water quality.

CONCLUSION

For the foregoing reasons, *amicus* Western Urban Water Coalition respectfully requests that this Court finally establish a definitive test for determining WOTUS, and in doing so, consider arid West ephemeral drainages.

Respectfully submitted,

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