No. 21-454

In The
Supreme Court of the United States

MICHAEL SACKETT, ET UX.,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.

Respondents.

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

BRIEF OF *AMICUS CURIAE* NATIONAL CATTLEMEN'S BEEF ASSOCIATION AND AFFILIATED ORGANIZATIONS IN SUPPORT OF *PETITIONERS*

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QUESTION PRESENTED

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).

TABLE OF CONTENTS

Page*(s)*

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT................................ 4

ARGUMENT 6

I. COMBINING THE RELATIVE PERMANENCE AND SIGNIFICANT NEXUS STANDARDS IS THE MOST APPROPRIATE TEST OF CLEAN WATER ACT AUTHORITY 7

A. Shortcomings of the Significant Nexus Standard 7

1. As written by Kennedy: case-by-case determinations run unconstitutionally wild 8

2. As interpreted in the 2015 rule 11

a. Trading Vagueness for Overreach ... 11

b. Physical indicators, alone, are insufficient 12

B. Shortcomings of the relative permanence standard.. 14

1. Regulation of the "merest trickle" 14

2. As interpreted in the Navigable Waters Protection Rule, relative permanence constituted flow in a "typical year" 16

C. Combine significant nexus and relative permanence to achieve a two-part test that constitutionally regulates the nation's waters 17

1. Step 1: Are visual indicators present? .. 18

2. Step 2: If visual indicators are present, does the feature have relatively permanent flow with a continuous surface connection to navigable-in-fact water? 19

3. Combining the tests provides much-needed clarity for landowners 20

4. Adopting the "*Rapanos* two-step" remedies the failings of the significant nexus and relative permanence tests.... 21

II. SHOULD THE COURT DECLINE TO REQUIRE SATISFACTION OF BOTH THE SIGNIFICANT NEXUS AND RELATIVE PERMANENCE TESTS, IT SHOULD FIND THE RELATIVE PERMANANCE TEST AS THE SOLE JURISDICTIONAL TEST 24

A. Varying tests among the federal circuits create uncertainty within the regulated community 24

B. Of the existing tests, the plurality's test most closely follows congressional intent and Supreme Court precedent 26

CONCLUSION.. 30

TABLE OF AUTHORITIES

Page*(s)*

Cases

Duarte Nursery, Inc. v. United States Army Corps of Eng'rs, 2019 U.S. Dist. LEXIS 75309 (E.D. Cal. May 2, 2019) 8

Elonis v. United States, 575 U.S. 723 (2015).. 9

Georgia v. Wheeler, 418 F. Supp. 3d 1336 (S.D. Ga. 2019) 11, 12

Grayned v. City of Rockford, 408 U.S. 104 (1972).. 9

Hawkes v. United States, 578 U.S. 590 (2016)................................... 8, 19, 22

Marks v. United States, 430 U.S. 188 (1977)... 24

Pasqua Yaqui Tribe v. United States EPA, 2021 U.S. Dist. LEXIS 163921 (D. Ariz. Aug. 30, 2021) 28

Precon Dev. Corp. v. U.S. Army Corps of Eng'rs, 633 F.3d 278 (4th Cir. 2011)............................... 26

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

Solid Waste Agency v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001) .... *passim*

Staples v. United States, 511 U.S. 600 (1994).. 10

United States v. Bailey, 571 F.3d 791 (8th Cir. 2009)......................... 11, 25

United States v. Cundiff, 555 F.3d 200 (6th Cir. 2009)............................... 26

United States v. Donovan, 661 F.3d 174 (3d Cir. 2011) 21, 25

United States v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2006) (per curiam) 25

United States v. Johnson, 467 F.3d 56 (1st Cir. 2006) 24, 25, 26

United States v. Lapant, 2019 U.S. Dist. LEXIS 75309 (E.D. Cal. May 2, 2019) 8

United States v. Lucas, 516 F.3d 316 (5th Cir. 2008)............................... 26

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985)...................................... 21, 30

United States v. Robison, 505 F.3d 1208 (11th Cir. 2007).......................... 25

Constitution and Statutes

U.S. Const. amend. V 9

U.S. Const. amend. XIV, § 2 9

33 U.S.C. §§ 1251-1387 (2022)................................ 8

33 U.S.C. § 1321 9

62 Stat. 1155 12

91 Stat. 1566 12

Regulations

33 CFR § 328.3 (2020) 18

Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. 37053 (June 29, 2015) .... *passim*

80 Fed. Reg. 37126 (June 29, 2015)...................... 11

Navigable Waters Protection Rule: Definition of "Waters of the United States", 85 Fed. Reg. 22250 (April 21, 2020) 17, 22, 23

85 Fed. Reg. 22341 (2020)..................................... 16

Proposed Rule, Revised Definition of "Waters of the United States", 86 Fed Reg. 69372 et seq. 6

Other Authorities

https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs142p2_024290.pdf.............. 18

The Nat'l Agric. Law Ctr., *Waters of the United States: Timeline of Definitions* (April 21, 2020)... 4

USDA-ERS, *Total grazing land, by region, State, and United States* (Aug. 28, 2017) 6

U.S. Envtl. Prot. Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Jan. 2015).. 19

INTEREST OF *AMICUS CURIAE*[1]

The National Cattlemen's Beef Association (NCBA), based in Centennial, Colorado, is the largest and oldest national trade association representing American cattle producers. Through direct membership and state affiliate membership, NCBA represents more than 250,000 of America's farmers and ranchers, who provide a significant portion of the nation's supply of food.

Affiliated organizations supporting this brief include the American National CattleWomen, Inc., American Quarter Horse Association, Beef Alliance, Public Lands Council, Alabama Cattlemen's Association, Arkansas Cattlemen's Association, Arizona Cattle Feeders' Association, Arizona Cattle Growers' Association, California Cattlemen's Association, Colorado Cattlemen's Association, Colorado Livestock Association, Florida Cattlemen's Association, Georgia Cattlemen's Association, Hawaii Cattlemen's Council, Idaho Cattle Association, Illinois Beef Association, Indiana Beef Cattle Association, Iowa Cattlemen's Association, Kansas Livestock Association, Kentucky Cattlemen's Association, Louisiana Cattlemen's Association, Maryland Cattlemen's Association, Michigan Cattlemen's Association, Minnesota State

[1] All parties consented to the filing of this brief. 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 *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Cattlemen's Association, Mississippi Cattlemen's Association, Missouri Cattlemen's Association, Montana Stockgrowers Association, Nebraska Cattlemen, Nevada Cattlemen's Association, New York Beef Producers Association, North Carolina Cattlemen's Association, North Dakota Stockmen's Association, Ohio Cattlemen's Association, Oklahoma Cattlemen's Association, Oregon Cattlemen's Association, Pennsylvania Cattlemen's Association, South Carolina Cattlemen's Association, South Dakota Cattlemen's Association, Tennessee Cattlemen's Association, Texas and Southwestern Cattle Raisers Association, Texas Cattle Feeders Association, Utah Cattlemen's Association, Virginia Cattlemen's Association, Washington Cattlemen's Association, Washington Cattle Feeders Association, Wisconsin Cattlemen's Association, and the Wyoming Stock Growers Association.

NCBA works to advance the economic, political, and social interests of the U.S. cattle business and to be an advocate for the cattle industry's policy positions and economic interests. NCBA is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and amicus curiae to safeguard the constitutional and statutory rights, and business interests of cattle producers across the country.

NCBA is deeply interested in the scope of federal jurisdiction under the Clean Water Act (CWA or Act) and has participated in litigation or rulemaking addressing this issue over many years.

Cattle operations require the construction and maintenance of stock and farm ponds, access roads, drainage ditches, weed and insect pest control, subsurface drainage systems, irrigation systems, or the use of retention ponds, basins, pits, or impoundments, which may result in material reaching surface waters. Should the Court uphold the Ninth Circuit's erroneous interpretation of the Act, NCBA's members would face a significantly increased risk of agency enforcement and citizen suits. Many cattle operations could be newly subject to the CWA's permitting requirements. In addition, the Act includes longstanding exclusions for agricultural activities that would be compromised by an overexpansive approach to jurisdiction and its relation to agricultural production. NCBA believes that their long experience operating under the Act will assist the Court in resolving the question presented, which is an issue of immense importance to the nation's cattle producers.

SUMMARY OF ARGUMENT

The Executive Branch has failed. Since the passage of the CWA, cattle producers have managed their operations through 13 iterations of "waters of the U.S." definitions in a mere 50 years. On average, this means that farmers, ranchers, and other landowners experience a change in how features on their property are regulated once every 3.8 years – an untenable scheme that provides no foundation for meaningful business planning. The Nat'l Agric. Law Ctr., *Waters of the United States: Timeline of Definitions* (April 21, 2020).

We urge the Court to define the appropriate test of federal jurisdiction under the CWA. The court is tasked with considering whether the significant nexus standard is the appropriate standard to determine whether water features are subject to federal CWA jurisdiction. In considering this question, the Court must necessarily consider the relative permanence test set forth by the plurality in *Rapanos*. On balance, both tests contain weaknesses that have the potential to inappropriately apply federal jurisdiction beyond constitutional limits. But a solution exists. By combining these tests, the Court ensures that federal jurisdiction and resources are appropriately scoped to water features that significantly affect the nation's waters, while adhering to constitutional limitation.

The question presented to the court is not which waters are left unprotected; it is which waters are properly regulated by the federal government and which by the States. The federal CWA should

regulate only those features that have a significant effect on navigable-in-fact waters. While not a simple calculus, NCBA provides a means to enact such a test through utilization of both standards set forth by the plurality and the concurrence in *Rapanos*. *Rapanos v. United States*, 547 U.S. 715 (2006).

ARGUMENT

America's cattle farmers and ranchers are our country's original environmental stewards. Nearly 800 million acres of land, or one-third of the continental United States, are owned or managed by cattle producers, whose livelihoods and the health of their livestock depend on clear air, plentiful grass, and clean water. USDA-ERS, *Total grazing land, by region, State, and United States* (Aug. 28, 2017). The success of our nation's cattle producers provides green space, wildlife habitat, and a bulwark to urban and suburban sprawl. For decades, the extent of federal jurisdiction under the CWA has been a source of confusion and consternation for NCBA's members. Numerous lawsuits, court decisions, and whipsawing regulatory definitions between Republican and Democratic presidential administrations has left cattle producers in a perpetual state of confusion.

The CWA was enacted with the clear intent of protecting our nation's water resource – a mission that becomes increasingly difficult with every muddled decision issued by the courts. The current administration seeks to whipsaw the navigable waters definition once again. *See* Proposed Rule, Revised Definition of "Waters of the United States" (86 Fed Reg. 69372 et. seq.). While the Executive Branch is an easy target, the whipsawing takes place due, in great part, to this Court's fractured decision in *Rapanos*. *Rapanos*, 547 U.S. 715. The Court has the unique opportunity, and duty, to address the issue again, provide clear judicial guidance, and put the matter to rest.

I. COMBINING THE RELATIVE PERMANENCE AND SIGNIFICANT NEXUS STANDARDS IS THE MOST APPROPRIATE TEST OF CLEAN WATER ACT AUTHORITY.

The question presented to the Court asks which existing test from *Rapanos v. United States* should be adopted for implementation of the CWA, but both the significant nexus and relative permanence tests fail to effectively regulate America's waters while providing necessary stakeholder clarity. *Id.* The use of either tests will lead to the unintended establishment of jurisdiction over insignificant features. However, by combining these tests, the Court will ensure that the government maximizes water quality protection and stakeholder clarity, while remaining squarely within the bounds of the CWA.

A. Shortcomings of the Significant Nexus Standard

The significant nexus test, both in its use by the *Rapanos* concurrence and its application in the 2015 Clean Water Rule (2015 Rule), fails to constitutionally implement the CWA. *Rapanos,* 547 U.S. 715*;* Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. 37053 (June 29, 2015).

1. As written by Kennedy: case-by-case determinations run unconstitutionally wild.

The significant nexus test, as outlined in the concurrence of *Rapanos,* creates a dangerously vague standard without constitutional guard rails. 547 U.S. at 759. The concurrence acknowledged this fact: "[a]bsent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries." *Id.* at 782. Case-by-case determinations are the enemy of regulatory certainty, establishing a basis for "gotcha" enforcement actions across the country. *United States v. Lapant*, 2019 U.S. Dist. LEXIS 75309 (E.D. Cal. May 2, 2019); *Duarte Nursery, Inc. v. United States Army Corps of Eng'rs*, 2019 U.S. Dist. LEXIS 75309 (E.D. Cal. May 2, 2019). The inability for landowners to know whether a feature on their property is federally jurisdictional puts them at unavoidable risk of violating the CWA.

The definition of "waters of the United States" is a necessary element in finding violations of the CWA, but the limits of this jurisdictional standard are unknown amongst those potentially subject to the Act's requirements. *See* 33 U.S.C. §§ 1251-1387 (2022). Nearly ten years after *Rapanos*, Justice Kennedy recognized the vagueness and due process concerns with the significant nexus test, and the "crushing" penalties imposed by the Act. *Hawkes v. United States*, 578 U.S. 590 (2016) (Kennedy, concurring in the opinion). Overly vague standards are unconstitutional when they fail to provide

"persons of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly," and establish "explicit standards" to avoid "arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104 (1972). The impact of the significant nexus test to landowners relies almost entirely on how it is interpreted and applied by individual regulators. Regulated stakeholders have little opportunity to clearly know what is prohibited because they are subject to the arbitrary application of an unclear standard. Without a clear definition of "waters of the U.S." the CWA risks unconstitutional vagueness and violation of the fifth and fourteenth amendments. U.S. Const. amend. V; U.S. Const. amend. XIV, § 2.

The significant nexus standard's failure to adequately draw a jurisdictional line in the sand prevents the effective implementation of the CWA. Consider an elemental breakdown of criminal liability under Section 1321(b)(3) of the Act: (1) any person who (2) negligently or knowingly violates (3) this section (4) by causing (5) a discharge (6) of oil or hazardous substances (7) *into or upon the navigable waters of the United States*, adjoining shorelines, or into or upon the waters of the contiguous zone (8) in harmful quantities. 33 U.S.C. § 1321 (b)(3). To be convicted of a crime, a defendant must conduct an act with knowledge that they are doing so. In *Elonis*, the Court held that "a defendant generally must know the facts that make his conduct fit the definition of the offense, even if he does not know that those facts give rise to a crime." *Elonis v. United States*, 575 U.S. 723 (2015). When applying this standard to the CWA, an entity must have

enough information at their disposal to know that their actions constitute a discharge to waters of the United States. The significant nexus test does little to indicate to the average landowner whether a feature is subject to the Act. For landowners who manage ephemeral streambeds, isolated ponds, or dry washes, there is no indication that these features are federally jurisdictional, and thus no indication that a discharge to them is a violation of the Act.

The CWA was designed to establish strict liability for the discharge of pollutants, but Congress provides no indication of a desire to eliminate the mens rea requirement for criminal violations of the Act. The Court additionally held in *Staples* that "Absent a clear statement from Congress that mens rea is not required, a court should not apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with mens rea." *Staples v. United States*, 511 U.S. 600 at 618 (1994). No language in the CWA conveys Congressional intent to eliminate the mens rea requirements for liability. Therefore, the statute must be interpreted in a way that allows the effective development of mens rea. The significant nexus standard wholly fails to establish a baseline upon which mens rea may be cultivated.

The constitutional implications of the significant nexus test have tangible practical effect. The Agencies struggle with effective implementation of this nebulous standard – subject to litigation at every turn. Federal courts across the nation have split on the Agencies' 2015 interpretation of the

fractured *Rapanos* decision. See, e.g., *Sackett v. U.S. EPA*, 8 F.4th 1075, 1088–89 (9th Cir. 2021); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009). In many of these cases, landowners conducted activities on their property with no indication that they were violating the Act. This regulatory struggle only compounds stakeholder uncertainty.

2. As interpreted in the 2015 rule

a. Trading Vagueness for Overreach

The Agencies' 2015 Rule acknowledged concerns from regulated stakeholders related to the significant nexus standard's lack of clarity. *See* 80 Fed. Reg. 37053.

These concerns were answered with an equally unconstitutional expansion of CWA authority. The 2015 Rule expanded authority to all features that could potentially flow surface water, regardless of whether they actually do.[2]

Congress did not intend the federal regulation of water features that do not materially contribute to the physical, chemical, or biological health of the nation's waters; this notion is exemplified through Congress' contemplation of interstate waters. In *Georgia v. Wheeler*, the 11th circuit found that categorical regulation of all interstate waters "reads the term navigability out of the CWA." *Georgia v.*

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[2] The 2015 rule exclusively relies on the presence of physical indicators including a bed and banks, and an ordinary high water mark as a proxy for surface water flow. See 80 Fed. Reg. 37126 (June 29, 2015).

Wheeler, 418 F. Supp. 3d 1336, 1358 (S.D. Ga. 2019). Notably, Congress replaced the term "navigable or interstate waters" with "navigable waters" in 1972. *Compare* 62 Stat. 1155 with 91 Stat. 1566. Congress saw an inherent need to include "interstate waters" in addition to "navigable waters" when it intended to extend federal authority to non-navigable interstate waters. The passage of the CWA, along with its cooperative federalism structure, empowered states to manage non-navigable features – regardless of their interstate status.

The legislative history of the CWA indicates Congress' intent to expand federal jurisdiction beyond interstate waters to all navigable waters. However, this statutory change did not affect which interstate waters are subject to federal regulation. Waters that are not navigable-in-fact, their tributaries, impoundments, or adjacent wetlands, or waters directly contemplated by this Court are not subject to federal regulation based solely on their geographic proximity to a state border.

b. Physical indicators, alone, are insufficient

The 2015 Rule exclusively adopted the significant nexus test as its foundation for establishing federal jurisdiction. *See* 80 Fed. Reg. 37053. However, the Agencies' interpretation of the significant nexus test differed significantly from even Justice Kennedy's original construction. The Agencies relied exclusively on the physical indicators to signal whether features carry sufficient flow to justify federal authority. *See* 80 Fed. Reg. 37054, 37126. The exclusive use of physical indicators stretches the

authority of the Act far beyond actual flowing water, to streambeds and dry washes that cover most of the western United States, many of which rarely convey water.

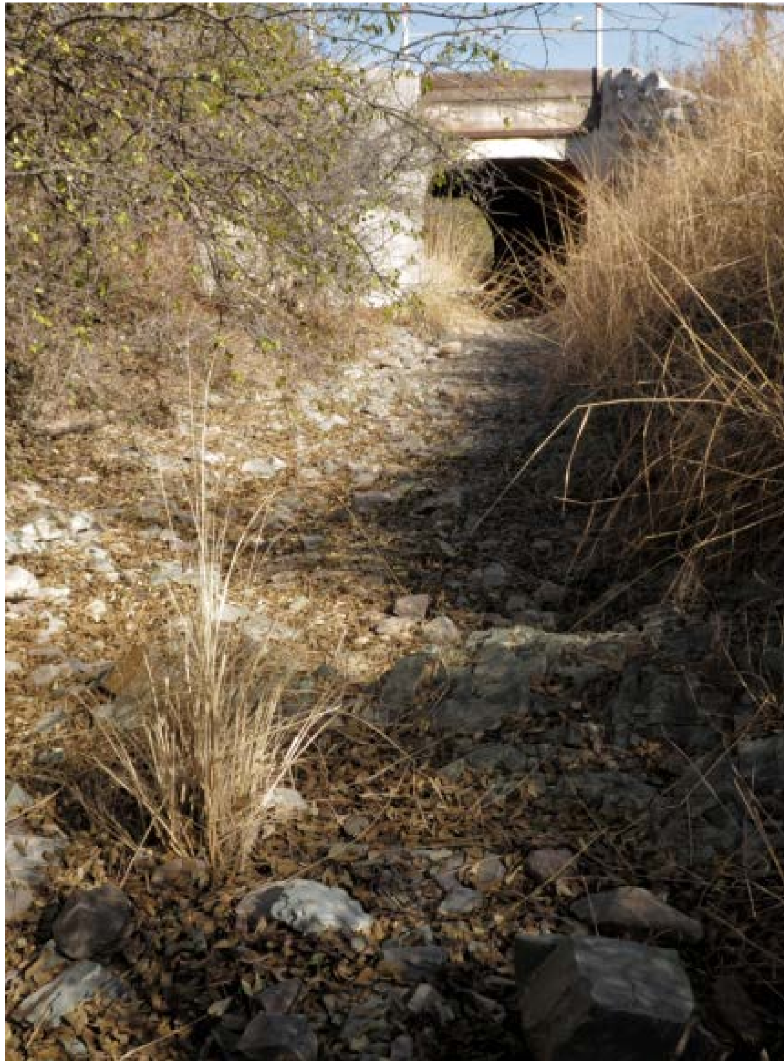

Image 1. Dry wash on a cattle operation

The image above portrays a dry wash on a cattle operation in the arid southwest region of the country. This feature contains certain physical indicators, such as a bed and banks, that would contribute to a finding under the 2015 Rule that the feature is categorically jurisdictional. Notably, the feature is devoid of surface water and is dry at all times except during and shortly after a precipitation event.

On the most extreme end of application, the 2015 Rule asserted jurisdiction over dry features that hardly, if ever, convey surface water to downstream waters. Indeed, these features present little to no risk of carrying pollutants to navigable-in-fact waters and certainly don't meet the muster of federal protection.

B. Shortcomings of the relative permanence standard

Like the significant nexus test, the relative permanence standard fails to adequately scope CWA authority because it considers surface water flow exclusively, regardless of the volume, or impact, of that flow. For that reason, a hydrological connection alone is an insufficient basis to justify CWA jurisdiction.

1. Regulation of the "merest trickle"

While the relative permanence standard attempts to apply federal jurisdiction to those features that satisfy Congressional intent, it fails in one

significant way. The concurrence points to this failing:

> The merest trickle, if continuous, would count as a "water" subject to federal regulation, while torrents thundering at irregular intervals through otherwise dry channels would not. Though the plurality seems to presume that such irregular flows are too insignificant to be of concern in a statute focused on "waters," that may not always be true.

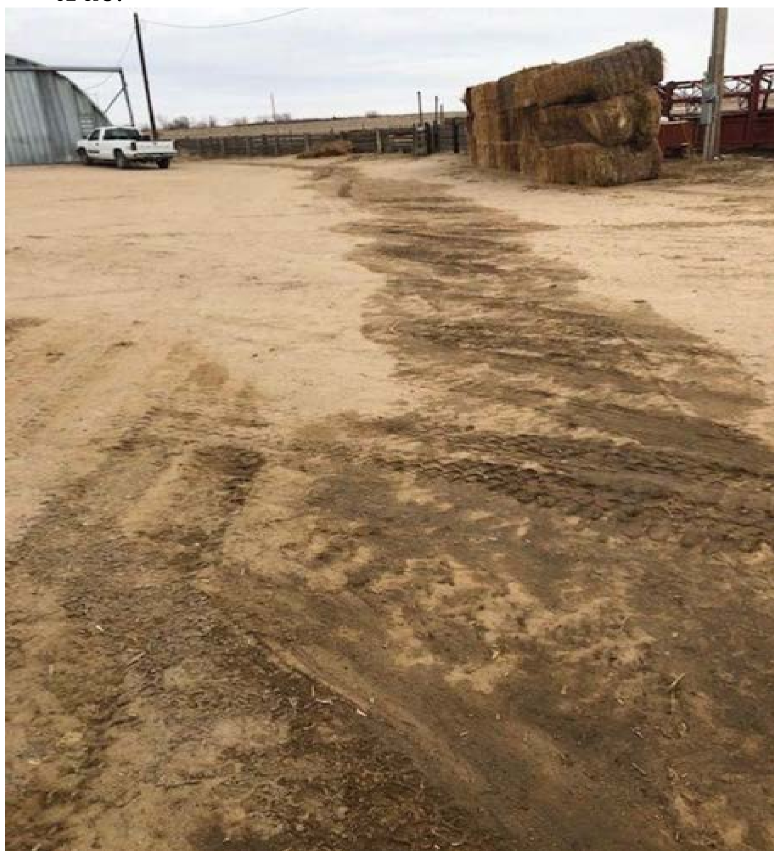

Image 2. Hydrologic feature on a cattle operation

The preceding image portrays a hydrologic feature in the rocky mountain region that bisects a cattle operation. The feature has no physical indicators but is consistently wet. This is the "merest trickle" that Justice Kennedy identified as a failing of the relative permanence test.

2. As interpreted in the Navigable Waters Protection Rule, relative permanence constituted flow in a "typical year".

The latest definition of "navigable waters" yielded a regulation that adhered to the plurality's relative permanence standard by requiring that a covered water have surface water flowing in a "typical year". This inquiry analyzes the yearly frequency of surface water flowing through a feature based on a rolling 30-year period. 85 Fed. Reg. 22341 (2020). Meeting this test, the EPA determined, satisfies the plurality's requisite "continuously flowing bodies of water". 547 U.S. at 739 (2006).

While successful in accounting for relative permanence, the typical year standard fails to solve for Kennedy's criticism of regulating the "merest trickle". *Id.* at 769 (2006). Indeed, the hydrologic feature bisecting the cattle operation would likely satisfy the typical year standard and constitute a water covered by the Act. In our view, this is a major failing.

C. Combine significant nexus and relative permanence to achieve a two-part test that constitutionally regulates the nation's waters.

While both *Rapanos* tests have flaws, they are shortcomings that can be easily remedied. The assertion of federal jurisdiction must be premised on a feature containing surface water on a relatively permanent basis that continuously flows to a navigable-in-fact water by virtue of an unbroken surface connection. And this feature must have the hallmark visual indicators that demonstrate a significant nexus to "navigable waters." This paradigm merges not only the *Rapanos* tests, but also the Executive Branch's attempts to codify these tests in regulation. *See generally* Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. 37053 (June 29, 2015); Navigable Waters Protection Rule: Definition of "Waters of the United States", 85 Fed. Reg. 22250 (April 21, 2020).

NCBA's proposes a two-step process. To find a feature jurisdictional, regulators must show both (1) the presence of visual indicators *and* (2) relatively permanent flow with a continuous surface connection to navigable-in-fact water. With distinct consideration of both visual indicators and surface water flow, the Agencies will establish federal regulatory authority over waters that both the concurrence and plurality agreed upon, and no more. Importantly, the two-step process would find the previously highlighted features on cattle operations do not constitute covered waters under the Act, correcting the failings of each test alone.

1. Step 1: Are visual indicators present?

Visual indicators establish a starting point for landowners and the government to conduct their analysis. Visual indicators are hydrogeographic features that signify the flow or presence of a body of water or wetland. For a flowing body of water, visual indicators can include a bed, banks, point bars, cutbanks, and other features visually-indicative of a mature water body.[3] For wetlands, the visual indicators embodied in the regulatory definition of wetland which relies on three criterion – hydrology, hydrophytic vegetation, and hydric soils - is fertile ground for satisfying the first step in this process. 33 CFR § 328.3 (2020). Requiring the presence of visual indicators significantly curbs the risk of unknowing violations of the Act. These characteristics would allow cattle producers and other landowners to visually identify the features of a surface water or wetland, as a first step of determining the existence of a covered water. This requirement puts landowners and managers on notice that actions in and around these features may be subject to federal permitting requirements, remedying vagueness and due process.

[3] NCBA does not request the Court to determine exactly which visual indicators are required to satisfy the first step of the two-step process, as that will best be determined by the expert agencies. For reference, the Rosgen system of stream classification provides ample guidance on appropriate visual indicators.
https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs142p2_024290.pdf.

2. Step 2: *If* visual indicators are present, does the feature have relatively permanent flow with a continuous surface connection to navigable-in-fact water?

If visual indicators exist, regulators may then determine whether the feature satisfies a surface water flow requirement. The significance of water contribution may be determined by analyzing the frequency or volume of surface water contained or flowing through that feature.

The best available science demonstrates that all waters are hydrologically connected to some degree. U.S. Envtl. Prot. Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (Jan. 2015). The Court is not tasked with assessing federal jurisdiction based on mere connectedness but must determine the proper roles of federal and state governments in regulating waters. In *Rapanos*, the plurality clearly drew the line of cooperative federalism at those waters that have a relatively permanent flow and continuous surface connection to navigable-in-fact water. And the rest belongs to the states. Supreme court precedent clearly indicates a disinterest in asserting federal jurisdiction over isolated features and ephemeral tributaries that have little impact on downstream water quality. *See generally Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Hawkes v. United States*, 578 U.S. 590 (2016).

A feature should only be jurisdictional if it satisfies both the visual indicators and relative permanence

requirements. Both steps are necessary to ensure that the federal government is regulating those water bodies that are contributing to downstream water quality and are more than "the merest trickle."

3. Combining the tests provides much-needed clarity for landowners

The two-step process enables landowners to have a measure of independence in determining the presence of federally covered waters on their property. Visual indicators put some level of control back in the hands of farmers, ranchers, and landowners who have too long been forced to hire attorneys, hydrologists, and consultants to interpret the presence of a federally covered water on their property.

With the naked eye, a landowner can identify visual indicators of a water feature and the presence of surface water and then make a determination as to whether a federally covered water exists on their property. Therefore, the two-step process serves an important role in not only satisfying the needs of the *Rapanos* concurrence and plurality, but also the elusive but profoundly important policy goal of enabling landowners to take back control of their property.

4. Adopting the "*Rapanos* two-step" remedies the failings of the significant nexus and relative permanence tests.

The justices, in their *Rapanos* opinions, made clear their concerns related to the opposing tests. 547 U.S. 715. Justice Kennedy presented legitimate shortcomings related to the relative permanence standard. Most notably, Justice Kennedy highlighted that the relative permanence test has the potential to regulate "the merest trickle" if that trickle is reliable. *Id.* at 769. Likewise, Justice Scalia had concerns about the significant nexus test related to its expansive potential. His opinion highlights the importance of narrowly defining significance in a way that does not reach beyond limits created by *Riverside Bayview* and *SWANCC. United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001). Following the *Rapanos* decision, federal circuits noted similar concerns:

> [I]f there is a small surface water connection between a wetland and a remote navigable water, the plurality would find jurisdiction, while Justice Kennedy might not. Furthermore, a wetland that lacks a surface connection with other waters, but significantly affects the chemical, physical, and biological integrity of a nearby river would meet Justice Kennedy's test but not the plurality's.

United States v. Donovan, 661 F.3d 174 (3d Cir. 2011). Most notable, however, may be Justice

Kennedy's more recent reflection on the significant nexus test as applied by the agencies. A decade after constructing the significant nexus test, Justice Kennedy cast doubt on the constitutionality of the federal government's implementation of his test in the aftermath of *Rapanos*, stating the "reach and systemic consequences of the Clean Water Act remain a cause of concern" and "the Act…continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation." *Hawkes v. United States*, 578 U.S. 590 (2016) (Kennedy, concurring in the opinion). Justice Kennedy remained concerned that even with the ability for regulated stakeholders to obtain judicial review of certain government actions taken under the Act that "the Act's ominous reach would again be unchecked". *Id.*

At its foundation, a test that establishes jurisdictional boundaries for the federal government concerning water regulatory jurisdiction should consider how much surface water actually flows. The 2015 Rule fails to take this important factor into account, requiring the existence of flow, but positing that flow could be demonstrated through the presence of physical indicators. Rather than keeping the two elements distinct, the Agencies instead propped one element on another, the result of which was only one element needing to be satisfied – the presence of physical indicators. Though different on its face, the Navigable Waters Protection Rule (2020 Rule) puts regulated stakeholders in a similar predicament. *See* Navigable Waters Protection Rule: Definition of "Waters of the United States", 85 Fed.

Reg. 22250 (April 21, 2020). Distinct consideration of both flow and physical indicators is necessary to determine the presence of a jurisdictional tributary. Fortunately, the problem has an intuitive solution.

This case is a line drawing exercise – the Court is not asked to determine where environmental protection ends, rather, it is asked where federal authority ends and state authority begins. The Act grants the federal government authority over point source discharges to "navigable waters," and the government is tasked with determining whether a discharge actually occurs – this does not change with the definition of "waters of the U.S." Appropriately scoping federal authority does not limit the effect of the CWA, but properly focuses federal resources on the features that matter most to our nation's water quality.

Tributaries and ditches are conveyances that may be considered "point sources" under the Act. Discharges to these features, and from these features, can be regulated if they are significant enough to be measured and traced to federally jurisdictional waters. By appropriately scoping the definition of "waters of the U.S." the Court can ensure that only those discharges that impact the chemical, biological, and physical health of the nation's waters are regulated, rather than dedicating resources to regulate discharges that would dilute beyond measurable impact through downstream flow.

II. SHOULD THE COURT DECLINE TO REQUIRE SATISFACTION OF BOTH THE SIGNIFICANT NEXUS AND RELATIVE PERMANENCE TESTS, IT SHOULD FIND THE RELATIVE PERMANANCE TEST AS THE SOLE JURISDICTIONAL TEST.

A. Varying tests among the federal circuits create uncertainty within the regulated community.

In the sixteen years since the Supreme Court's decision, federal courts have contemplated the correct interpretation of *Rapanos* with little uniformity. *Rapanos,* 547 U.S. 715. This division is the result of varying applications of the *Marks* test: "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188 at 193 (1977) (internal quotation marks and citation omitted). While the Marks test may be easy to apply in some cases, the "narrowest grounds" standard cannot be easily applied to *Rapanos*. *Rapanos*, 547 U.S. 715.

The features that Justice Kennedy would find jurisdictional are not a subset of the features in which the broader plurality would find jurisdiction. *United States v. Johnson*, 467 F.3d 56, 64 (1st Cir. 2006). For example, in cases where there is a small surface water connection, the plurality's test would be satisfied even where a significant nexus may not

exist. As noted previously, Justice Kennedy highlighted that under the plurality's test for relatively permanent waters, "[t]he merest trickle, if continuous," could be subject to federal jurisdiction, even though it may not be significant for downstream water quality. 547 U.S. at 769. As a result, courts have disagreed as to which *Rapanos* test controls. *Rapanos*, 547 U.S. 715.

Some federal courts hold that the significant nexus test applies. See, e.g., *Sackett v. U.S. EPA*, 8 F.4th 1075, 1088–89 (9th Cir. 2021); *United States v. Robison*, 505 F.3d 1208, 1221–22 (11th Cir. 2007); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724 (7th Cir. 2006) (per curiam). For example, the Seventh Circuit explained that Justice Kennedy's understanding is narrower than the *Rapanos* plurality's understanding "in most cases, though not in all." *Gerke Excavating, Inc.*, 464 F.3d at 724–25. Thus, the court concluded that "as a practical matter the Kennedy concurrence is the least common denominator." *Ibid.*

Following Justice Stevens's dissent in *Rapanos*, other circuits allow the government to meet either the plurality or concurrence test to establish jurisdiction. *Rapanos*, 547 U.S. at 810 n.14 (Stevens, J., dissenting) (observing that "Justice Kennedy's approach will be controlling in most cases" but, where it is not, courts should find jurisdiction under the plurality's approach). See, e.g., *Donovan*, 661 F.3d at 176; *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009); *Johnson*, 467 F.3d at 60. For example, the First Circuit, "[f]ollowing Justice

Stevens's instruction," concluded that applying one test and then the other "ensures that lower courts will find jurisdiction in all cases where a majority of the Court would support such a finding." *Johnson*, 467 F.3d at 64.

Perhaps most confusing, the Fourth, Fifth, and Sixth Circuits have not identified any governing standard from *Rapanos*. In some cases, these circuits effectively place the burden on regulated entities to demonstrate that features are not jurisdictional under both tests. See *Precon Dev. Corp. v. U.S. Army Corps of Eng'rs*, 633 F.3d 278, 288 (4th Cir. 2011); *United States v. Lucas*, 516 F.3d 316, 325–27 (5th Cir. 2008); *United States v. Cundiff*, 555 F.3d 200, 210 (6th Cir. 2009). This contortion of the CWA, alone, is sufficient to justify the Court's intervention to define "navigable waters." The lack of uniformity in applying *Rapanos* creates challenges for regulated stakeholders and regulators alike and must be remedied once and for all.

B. Of the existing tests, the plurality's test most closely follows congressional intent and Supreme Court precedent.

While it has flaws, the relative permanence test appropriately draws a line between waters subject to federal and state regulation, and is the best existing interpretation of the CWA and Supreme Court precedent. Following the significant nexus test as applied in the 2015 Rule, features are pulled into federal jurisdiction that clearly violate the SWANCC holding. *Solid Waste Agency v. United*

States Army Corps of Eng'rs, 531 U.S. 159 (2001). In SWANCC, the Court was asked, and declined, to assert jurisdiction over isolated features. *Id.* at 168 ("In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this."). The 2015 Rule, interpreting the significant nexus test, attempted to do just this. The 2015 Rule asserted federal jurisdiction over adjacent features, defined as "bordering, contiguous, or neighboring, including waters separated from other "waters of the United States" by constructed dikes or barriers, natural river berms, beach dunes and the like", going on to define "neighboring" with numeric distance limitations:

> ((A) All waters located within 100 feet of the ordinary high water mark of a water identified in paragraphs (1)(i) through (v) of this definition. The entire water is neighboring if a portion is located within 100 feet of the ordinary high water mark;
>
> (B) All waters located within the 100-year floodplain of a water identified in paragraphs (1)(i) through (v) of this definition and not more than 1,500 feet from the ordinary high water mark of such water. The entire water is neighboring if a portion is located within 1,500 feet of the ordinary high water mark and within the 100-year floodplain;
>
> (C) All waters located within 1,500 feet of the high tide line of a water identified in

> paragraphs (1)(i) or (iii) of this definition, and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. The entire water is neighboring if a portion is located within 1,500 feet of the high tide line or within 1,500 feet of the ordinary high water mark of the Great Lakes.

Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. 37053 (June 29, 2015). Such an unambiguous assertion of jurisdiction to isolated features is a clear departure from *SWANCC*. *See* 531 U.S. 159. Allowing the implementing agencies to follow significant nexus alone or find features jurisdictional under either standard would stretch jurisdiction beyond the limits established by *SWANCC*. *Id.*

The absence of federal jurisdiction does not correlate to environmental degradation. In 2021, the EPA and Army Corps of Engineers solicited stakeholder input related to the definition of "navigable waters," citing 333 projects that were carried out without 404 permits following the finalization of the 2020 Rule. Defendants' Opposed Motion for Voluntary Remand of the NWPR Without Vacatur and Opposed Motion for Abeyance of Briefing on the 2019 Rule Claims at 36, *Pasqua Yaqui Tribe v. United States EPA*, 2021 U.S. Dist. LEXIS 163921 (D. Ariz. Aug. 30, 2021) (No. 4:20-cv-00255-RM).

16 of the 333 projects were related to grassed waterway construction and maintenance on farms. Grassed waterways are constructed graded channels that are seeded with vegetation. The vegetation

slows water flow, allowing the conveyance of agricultural stormwater while preventing sediment erosion. Grassed waterways are utilized on farmland to reduce topsoil erosion following precipitation events. Individually designed and seeded with grass to transport water slowly out of an area to a stable outlet, these features are implemented as a valuable tool to conserve soil and water quality. A well-maintained grassed waterway holds soil in place and acts as a natural water filter. The maintenance of these features is necessary to ensure their continued ecological benefit. The requirement of a 404 permit to maintain these features in no way increases the environmental value of these projects, and if anything may serve as a deterrent to voluntary on-farm conservation.

Should the Court decline to adopt the "*Rapanos* two-step" presented in Section I., NCBA requests the Court altogether abandon the significant nexus test and rely solely on the plurality's test in *Rapanos*.

CONCLUSION

NCBA offers that the Court should combine both *Rapanos* tests. Doing so would limit federal jurisdiction to only those waters that are properly federal while leaving smaller and less significant features to state authority. The significant nexus test supports the utilization of visual indicators – giving land managers a way to assess whether a feature on their property is potentially jurisdictional. The relative permanence standard adds to this, ensuring that the agencies are only regulating features which provide a notable contribution of surface water to downstream water quality. Combining the tests and requiring that features satisfy both is the best way to curb the negative impacts highlighted by the justices – no federal regulation of "the merest trickle" or dry features that hardly convey surface water, and a jurisdictional scope that follows the *Riverside Bayview* and *SWANCC* precedents. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001). Our recommended two-step process ensures that the feature subject to federal regulation contains both the visual indicators demonstrative of a significant nexus in addition to a contribution of surface water that constitutes a relatively permanent flow to navigable-in-fact water.

Should the Court decline to adopt the "*Rapanos* two-step", it should hold the plurality's relatively permanent test the sole standard for federal jurisdiction under the Act. The relative permanence

test appropriately draws a line between waters subject to federal and state regulation. Allowing the Agencies to follow the significant nexus standard alone, or utilize an either/or approach, will stretch jurisdiction beyond the limits established by *SWANCC*.

Respectfully submitted.

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