PACIFIC LEGAL FOUNDATION

February 7, 2022

VIA ELECTRONIC DELIVERY

The Hon. Michael S. Regan
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Mr. Jaime A. Pinkham
Acting Assistant Secretary of the Army
for Civil Works
Department of the Army
108 Army Pentagon
Washington, DC 20310–0104;

Mr. Damaris Christensen
Oceans, Wetlands and Communities
Division, Office of Water
Environmental Protection Agency,
1200 Pennsylvania Avenue NW
Washington, DC 20460

Ms. Stacey Jensen
Office of the Assistant Secretary of the
Army for Civil Works
Department of the Army
108 Army Pentagon
Washington, DC 20310–0104;

Federal eRulemaking Portal
http://www.regulations.gov
Docket ID No. EPA–HQ–OW–2021–
0602
FRL–6027.4–03–OW

OW-Docket@epa.gov.
Docket ID No. EPA–HQ–OW–2021–
0602

Re: Docket ID No. EPA–HQ–OW–2021–0602
Revised Definition of "Waters of the United States
Request for Suspension of the Proposed Rulemaking in Light of *Sackett v. EPA*

Dear Administrator Regan, Mr. Pinkham, Mr. Christensen, and Ms. Jensen:

Pacific Legal Foundation, Chantell and Michael Sackett, Coalition of Arizona/New Mexico Counties for Stable Economic Growth, New Mexico Cattle Growers' Association, New Mexico Wool Growers, Oregon Cattlemen's Association, and Washington Cattlemen's Association, respectfully submit the following comments on the United States Environmental Protection Agency (EPA) and the United States

Department of the Army's (Army) (together, the "Agencies"), proposed rule entitled "Revised Definition of Waters of the United States" (the "Proposed Rule").[1] Pacific Legal Foundation, Chantell and Michael Sackett, Coalition of Arizona/New Mexico Counties for Stable Economic Growth, New Mexico Cattle Growers' Association, New Mexico Wool Growers, Oregon Cattlemen's Association, and Washington Cattlemen's Association urge the Agencies to suspend their proposed rulemaking until the Supreme Court of the United States has issued an opinion in *Sackett v. EPA*, Docket No. 21-454 (*Sackett II*).

The Proposed Rule seeks to define the scope of the Agencies' authority to regulate "navigable waters" pursuant to the Clean Water Act.[2] In *Sackett II* the Supreme Court will clarify the extent to which the Agencies' authority to regulate "navigable waters" extends to non-navigable wetlands—a question that has baffled the Agencies for over four decades. *Sackett II* will therefore provide much needed guidance to the Agencies as they attempt to craft a "durable" regulatory definition of "navigable waters."[3] The Agencies should wait for that guidance. Proceeding without it will only create further uncertainty and confusion regarding the scope of the Agencies' regulatory authority, imposing significant costs on the regulated public.

The Commenters

Pacific Legal Foundation is the nation's leading public interest organization advocating, in courts throughout the country for the defense of private property rights and other constitutional freedoms. Protecting the environment is a legitimate policy goal but, like any other policy goal, it cannot override citizens' fundamental liberties. As a nonprofit law firm concerned about the rights of property owners burdened by overreaching environmental regulation, Pacific Legal Foundation attorneys have extensive experience with the Clean Water Act. They have been counsel of record in many cases concerning the interaction of the Clean Water Act, property rights, and the separation of powers.[4] They have also produced substantial scholarship on these subjects.[5] Pacific Legal Foundation attorneys are counsel of record before the United States Supreme Court in *Sackett II*.[6]

Chantell and Michael Sackett are a couple engaged in a fifteen-year battle with EPA over permission to build a single-family home on their 0.63-acre residential lot near Priest Lake, Idaho. EPA asserted, and continues to assert, that the Sacketts' lot contains wetlands regulable as "navigable waters" under the expansive pre-2015 definition of "navigable waters." The Sacketts' challenge to EPA's assertion of Clean Water Act authority over their lot was the subject of the Supreme Court of the United States' 2012 decision in *Sackett v. EPA*.[7] Following remand, the District of Idaho upheld EPA's assertion of regulatory authority, and the Ninth Circuit affirmed.[8] On January 24,

2022, the United States Supreme Court agreed to hear the Sacketts' challenge to EPA's assertion of authority over their lot.[9] As a result of their ongoing legal dispute with EPA, the Sacketts have been unable to build a home on their residentially-zoned vacant lot for the last fifteen years.

Coalition of Arizona/New Mexico Counties for Stable Economic Growth is a nonpartisan, nonprofit organization made up of four counties in Arizona and nine counties in New Mexico. The Coalition also includes representation from timber, livestock, mining, small business, farming, sportsman, trapping, and outfitter industries who make their homes and livings in the member counties as well as throughout New Mexico. The Coalition's purpose is to serve as an advocate and to protect its membership from a variety of threats, including overreaching federal environmental regulation. Many of its members have been and continue to be burdened by the Agencies' frequently shifting and unlawfully expansive approach to regulating "navigable waters" pursuant to the Clean Water Act. The Coalition is currently a party to pending litigation over the legality of the Agencies' 2015 attempt to define "navigable waters."[10]

New Mexico Cattle Growers' Association, New Mexico Wool Growers, Oregon Cattlemen's Association, and **Washington Cattlemen's Association** are nonprofit trade associations that represent ranchers, wool growers, and property owners throughout more than twenty states. Each association's primary purpose has been to serve as an advocate for ranchers, wool growers, and landowners, and to protect the livestock industry from a variety of threats, including overreaching environmental regulation. Many members have been, and continue to be, burdened by the Agencies' frequently shifting and unlawfully expansive approach to regulating "navigable waters" pursuant to the Clean Water Act. Each organization has devoted substantial resources to publishing information on Clean Water Act issues for members, performing research pertaining to Clean Water Act regulation, submitting comments to government agencies addressing concerns about how regulations under the Clean Water Act affect members, and engaging in litigation when members are threatened by illegal government action taken pursuant to the Clean Water Act. New Mexico Cattle Growers' Association, Oregon Cattlemen's Association, and Washington Cattlemen's Association are currently party to pending litigation over the legality of the Agencies' prior attempts to define "navigable waters."[11]

Background

The following background is necessary to properly evaluate the context of the Agencies' Proposed Rule.

Legal Background

The Clean Water Act,[12] regulates discharges of "pollutants" from "point sources" to "navigable waters."[13] The Act defines "navigable waters" as "waters of the United States, including the territorial seas."[14] Although the Act defines "territorial seas," it does not define "waters of the United States."[15]

Nonexempt discharges to "navigable waters" require a permit from either EPA (called a National Pollutant Discharge Elimination System, or NPDES, permit) or, if the discharge involves "dredged or fill material," from the Corps (commonly called a Section 404 permit).[16] In practice, the Clean Water Act's permitting regime is time-consuming and expensive.[17] Even when obtained, a permit can result in significant changes to the applicant's intended operations and may substantially limit the use of the property.[18] And a person who discharges pollutants without a required permit, or who violates permit conditions, risks administrative compliance orders, administrative penalties, civil penalties and injunctions, and even criminal prosecution.[19]

The significant costs and liability that the Clean Water Act can impose underscore the importance of clearly demarcating where the Act's reach begins and where it ends. Unfortunately, construing the meaning of "navigable waters" has proved to be an overwhelmingly difficult task for the Agencies.

Shortly after the Clean Water Act was enacted, EPA and the Corps adopted regulations defining "navigable waters."[20] Although EPA's initial interpretation was quite broad,[21] the Corps' was more limited. Guided by the Supreme Court's longstanding definition of the term "navigable waters of the United States," as that phrase was employed in predecessor statutes, the Corps construed the Act to reach interstate waters that are navigable in fact or readily susceptible of being rendered so.[22] In 1975, a federal district court rejected this interpretation as too narrow.[23] Rather than appeal the ruling, the Corps followed EPA's example and promulgated much broader regulations.[24]

These revised regulations purported to extend the scope of "navigable waters" to the outer limits of Congress' power to regulate interstate commerce.[25] Thus, federal permitting authority was asserted not just over interstate waters, but also intrastate waters with various relationships to interstate or foreign commerce, all tributaries of such waters, and all wetlands "adjacent" to, *i.e.*, bordering, contiguous, or neighboring,

any regulated water.[26] Over the ensuing years the Agencies also claimed authority over isolated waters used by migratory birds, pursuant to the so-called "Migratory Bird Rule,"[27] as well as "ephemeral streams" and "drainage ditches" with an ordinary high water mark.[28]

The Supreme Court has to date addressed the legality of the Agencies' interpretation of "waters of the United States" three times.

First, in *United States v. Riverside Bayview Homes, Inc.*,[29] the Court upheld the Agencies' regulation of wetlands that "actually abut[] on" traditional navigable waters.[30]

Second, in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (*SWANNC*),[31] the Court struck down the Migratory Bird Rule, thereby rejecting the Agencies' attempted regulation of "nonnavigable, isolated, intrastate waters."[32]

Finally, in *Rapanos v. United States*, a majority of the Court held the Agencies' broad interpretation of "navigable waters" to be invalid insofar as it would reach all tributaries of traditionally navigable waters and all wetlands adjacent to such tributaries.[33] But no opinion explaining why the Act cannot be so construed garnered a majority of the Justices' votes.

Writing for three other members of the Court, Justice Scalia argued that the Clean Water Act reaches only those wetlands that, as in *Riverside Bayview*, actually abut other regulated waters, such that it would be difficult to tell where the wetland ends and the abutting water begins.[34] Put another way, the surface water connection must be so substantial that the wetland and abutting water are rendered "*indistinguishable*."[35]

Although Justice Kennedy provided the fifth vote to support the Court's judgment rejecting the Agencies' attempt to regulate all tributaries and wetlands adjacent thereto, he disagreed with the plurality's rationale for that rejection.[36] Instead of a surface-connection test for wetlands jurisdiction, Justice Kennedy proposed a "significant nexus" standard.[37] According to this standard, a wetland may be regulated if it, either alone or in combination with other "similarly situated" wetlands in the "region," significantly affects the physical, chemical, and biological integrity of a traditional navigable water.[38] As Justice Kennedy recognized, the significant nexus test requires a case-by-case assessment for determining federal authority over any given wetland.[39]

Regulatory History Since 2006

Shortly after *Rapanos*, EPA and the Corps issued a guidance document articulating a hodgepodge test, taking some aspects from the *Rapanos* plurality and some from Justice Kennedy's concurrence.[40] But by EPA's own admission, the guidance guided nobody.[41]

Recognizing that failure, and taking a cue from the Supreme Court,[42] the Agencies then embarked upon notice-and-comment rulemaking.[43] Issued in 2015, the "Clean Water Rule"[44] was the result of several years of intense scientific and economic analysis from agency staff, hundreds of meetings with state and local governments, regulated parties, and others, as well as a six-month public comment period that produced over a million comments.[45] Yet despite these mighty efforts to craft a rule consistent with *Rapanos*, it was preliminarily enjoined within just a few months of its adoption for being inconsistent with various aspects of *Rapanos*.[46] Ultimately, two other courts held on the merits that the rule was unlawful,[47] and shortly thereafter, in December 2019, the Agencies repealed it and reinstated the prior regulations, at issue in *Rapanos*, defining "navigable waters."[48]

EPA and the Corps then tried again in 2020, issuing a "Navigable Waters Protection Rule."[49] Like the Clean Water Rule, the Navigable Waters Protection Rule was the result of intense agency work, as well as significant engagement with regulated parties and review of hundreds of thousands of public comments.[50] In the new rule's preamble, the Agencies observed that "litigation has continued to confuse the regulatory landscape," which fact underlined "the importance of providing clear guidance to the regulated community."[51] The Agencies therefore sought through the new rule to "adher[e] to Constitutional and statutory limitations, the policies and objective of the [Clean Water Act], and case law," so as to enable "the regulatory agencies and the regulated community to protect navigable waters from pollution while providing an implementable approach to determining regulatory jurisdiction under the [Clean Water Act]."[52] But this third agency effort at construing *Rapanos* failed as well, with one district court preliminarily enjoining it shortly after its issuance,[53] and another vacating it because of the rule's "fundamental, substantive flaws."[54]

The Proposed Rule

On December 7, 2021, the Agencies issued the Proposed Rule—their fourth attempt at defining "navigable waters" since 2015. That rule seeks the formal readoption of the regulatory definition of "navigable waters" in effect prior to 2015—the so-called "1986 regulations."[55] In doing so, it makes a number of amendments to the text of the 1986 regulations, in order to reflect the Agencies' interpretation of the Supreme Court case law addressing the scope of the Agencies' authority to regulate "navigable waters."[56]

The Agencies represent that their overall goal for the rulemaking is to craft a "durable" regulatory definition of "navigable waters."[57]

Sackett v. U.S. Environmental Protection Agency

On January 24, 2022, shortly after the Agencies' announced the Proposed Rule, the Supreme Court granted certiorari and agreed to hear the case of *Sackett v. EPA*.[58] As discussed above, *Sackett* has been winding its way through the courts for fifteen years. Throughout, the Sacketts have argued that the *Rapanos* plurality contains the controlling rule of law for EPA's wetlands jurisdiction, and that their homesite—which is bounded by permanent roads on both ends and has no surface water connection to any water body—cannot fall within the Act's ambit because the *Rapanos* plurality limits federal authority to wetlands that have a continuous surface water connection to regulated waters.[59] Nevertheless, on August 16, 2021, the Ninth Circuit concluded that EPA has authority to regulate the Sacketts' homesite under the pre-2015 regulatory regime.[60] In doing so, it rejected the Sacketts' argument that the *Rapanos* plurality governs and held that the significant nexus test set forth in Justice Kennedy's concurrence is the controlling rule of law.[61]

In hearing the Sacketts' challenge to the Ninth Circuit's ruling, the Supreme Court will address the following question: "Whether the U.S. Court of Appeals for the 9th 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)."[62] Oral argument will be heard during the Court's upcoming October 2022 term.[63]

The Agencies Should Suspend the Proposed Rulemaking Until the Supreme Court Decides *Sackett II*

The Agencies should suspend their current rulemaking and refrain from finalizing the Proposed Rule until the Supreme Court has issued an opinion in *Sackett II*. There are myriad reasons why this is the case, but three primary reasons are worthy of particular emphasis.

First, given the timing of the Court granting certiorari and the nature of the question presented, *Sackett II* will provide much needed guidance to the Agencies as they seek to craft a "durable" regulatory definition of "navigable waters." As amply demonstrated by the discussion above, the Agencies have persistently failed to craft anything close to a "durable" definition of "navigable waters," in the absence of guidance from the Supreme Court.[64] In *Sackett II* the Supreme Court will clarify the scope of the Agencies' authority to regulate wetlands. By incorporating the Court's decision in *Sackett II* into

any new definition of "navigable waters," the Agencies will significantly increase the "durability" of the rule.

Second, proceeding without the guidance of the Supreme Court will potentially lead to a short-lived regulation, and the need for immediate revisions to incorporate the Court's opinion. Indeed, by formally reinstating the pre-2015 regulatory regime, the Proposed Rule would adopt the very same framework under which EPA asserts authority over the Sacketts' lot, and under which the Ninth Circuit purported to find the Sacketts' lot regulable. By addressing the question presented in *Sackett II*, the Supreme Court will necessarily consider the legality of that regime. It makes little sense for the Agencies to formally codify a regulatory regime which is currently being reviewed by the Supreme Court.

Third, proceeding with the rulemaking without waiting for the Supreme Court's opinion in *Sackett II* would significantly harm the regulated public. Such a course of action would create further uncertainty and confusion regarding the scope of the Agencies' regulatory authority. And it would lead to significant wasted expenditures by the regulated public. With each post-*Rapanos* regulatory definition of "navigable waters," the scope of the federal government's authority has shifted and with it the range of projects requiring a federal permit to maintain compliance with the Clean Water Act. With each change, businesses, local governmental jurisdictions, and private property owners have had to delay projects, amend plans, and alter management practices. And with each shift, the associations that represent them—such as the Coalition of Arizona/New Mexico Counties for Stable Economic Growth, New Mexico Cattle Growers' Association, New Mexico Wool Growers, Oregon Cattlemen's Association, and Washington Cattlemen's Association—have had to expend additional resources advocating for their members' interests and educating them about the changing regulatory landscape. Finalizing the Proposed Rule would represent the fourth time since 2015 that the regulated public has had to pivot in such a manner. Finalizing the rule without waiting for the Court to decide *Sackett II* would increase this harm because any final rule would potentially require immediate amendment as soon as a decision is issued—necessitating yet another costly pivot.

* * *

Pacific Legal Foundation, Chantell and Michael Sackett, Coalition of Arizona/New Mexico Counties for Stable Economic Growth, New Mexico Cattle Growers' Association, New Mexico Wool Growers, Oregon Cattlemen's Association, and Washington Cattlemen's Association, urge the Agencies to suspend their proposed rulemaking until the Supreme Court has issued its opinion in *Sackett v. U.S. Environmental Protection Agency*.

Sincerely,

CHARLES T. YATES
DAMIEN M. SCHIFF
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, California 95814
Telephone: (916) 419-7111
Email: cyates@pacificlegal.org
Email: dschiff@pacificlegal.org

PAIGE E. GILLIARD
Pacific Legal Foundation
3100 Clarendon Blvd., Suite 610
Arlington, Virginia 22201-5330
Telephone: (202) 888-6881
Email: pgilliard@pacificlegal.org

On behalf of Pacific Legal Foundation, Chantell and Michael Sackett, Coalition of Arizona/New Mexico Counties for Stable Economic Growth, New Mexico Cattle Growers' Association, New Mexico Wool Growers, Oregon Cattlemen's Association, and Washington Cattlemen's Association.

---

[1] 86 Fed. Reg. 69,372 (Dec. 7, 2021).

[2] *Id.* at 69,372.

[3] *See About Waters of the United States*, U.S. Envtl. Prot. Agency, https://www.epa.gov/wotus/about-waters-united-states (last visited Feb. 1, 2022) (noting that the Proposed Rule is the first step in the Agencies' quest to create a "durable" definition of "navigable waters").

[4] *See*, *e.g.*, *United States v. Robertson*, 875 F.3d 1281 (9th Cir. 2017), *vacated*, 139 S. Ct. 1543 (2019); *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 578 U.S. 590 (2016); *Sackett v. EPA*, 566 U.S. 120 (2012); *Rapanos v. United States*, 547 U.S. 715 (2006).

[5] *See*, *e.g.*, Damien Schiff, *Keeping the Clean Water Act Cooperatively Federal—Or, Why the Clean Water Act Does Not Directly Regulate Groundwater Pollution*, 42 Wm. & Mary Envtl. L. & Pol'y Rev. 447 (2018); M. Reed Hopper, *Running Down the Controlling Opinion in Rapanos v. United States*, 21 U. Denv. Water L. Rev. 47 (2017-2018).

[6] *See* Petition for Writ of Certiorari, *Sackett v. EPA*, No. 21-454 (docketed Sept. 22, 2021), *available at* https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-454.html.

[7] 566 U.S. 120 (2012) (*Sackett I*) (holding that federal district courts have jurisdiction under the Administrative Procedure Act to review EPA compliance orders as final agency action).

[8] Order, *Sackett v. EPA*, No. 2:08-cv-00185-EJL (D. Idaho Mar. 31, 2019), ECF No. 120; *Sackett v. EPA*, No. 19-35469, 8 F.4th 1075 (9th Cir. Aug. 16, 2021).

[9] *See* Order List at 3, 595 U.S. (Jan. 24, 2022), *available at* https://www.supremecourt.gov/orders/courtorders/012422zor_m6io.pdf.

[10] *See* Order Granting Coalition of Arizona/New Mexico Counties for Stable Economic Growth's Motion to Intervene, *North Dakota v. EPA*, No. 3:15-cv-00059 (D.N.D. May 14, 2019), ECF No. 279.

[11] *See New Mexico Cattle Growers' Ass'n v. EPA*, No. 1:19-cv-00988 (D.N.M. Oct. 22, 2019); *Or. Cattlemen's Ass'n v. EPA*, No. 3:19-cv-00564 (D. Or. Apr. 16, 2019); *Wash. Cattlemen's Ass'n v. EPA*, No. 2:19-cv-00569 (W.D. Wash. Apr. 16, 2019).

[12] 33 U.S.C. §§ 1251–1388.

[13] *Id.* §§ 1311(a), 1362(12).

[14] *Id.* § 1362(7).

[15] *Id.* § 1362(8).

[16] *See* 33 U.S.C. §§ 1342(a), 1344(a). The Clean Water Act authorizes EPA and the Corps to delegate their permitting authorities to the states. *See* 33 U.S.C. §§ 1342(b), 1344(g).

[17] *See Hawkes*, 578 U.S. at 595–96 (to obtain a Section 404 permit from the Corps takes an average of more than two years and $250,000 in consulting costs).

[18] *See* Daniel R. Mandelker, *Practicable Alternatives for Wetlands Development Under the Clean Water Act*, 48 Envtl. L. Rep. News & Analysis 10894, 10913 (2018) ("The [Clean Water Act's] practicable alternatives requirement functions . . . as a conditioned permit that requires project modifications to reduce a development's effect on wetlands resources."). *Cf. Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality opinion) ("In deciding whether to grant or deny a permit, the [Corps] exercises the discretion of an enlightened despot . . . .").

[19] *See id. See also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 52–53 (1987).

[20] 38 Fed. Reg. 13,528, 13,529 (May 22, 1973); 39 Fed. Reg. 12,115, 12,119 (Apr. 3, 1974).

[21] For example, EPA claimed NPDES permitting authority over all "[t]ributaries" of navigable waters, as well as all "lakes, rivers, and streams" used by "interstate travelers" or used in interstate "industrial" commerce. *See* 40 C.F.R. § 125.1(*o*)(2), (4), (6) (1974). But EPA also followed the Corps' narrower interpretation for Section 404 permits. *See* 40 Fed. Reg. 41,292, 41,293 (Sept. 5, 1975) (EPA final interim guidelines for the Section 404 program incorporating the Corps' definition, 33 C.F.R. § 209.120(d)(1) (1975)).

[22] *See Rapanos*, 547 U.S. at 723 (citing *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870), and 39 Fed. Reg. at 12,119).

[23] *Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975).

[24] *See Rapanos*, 547 U.S. at 724.

[25] *Id*. (citing 42 Fed. Reg. 37,122, 37,144 n.2 (July 19, 1977)). Commentators at the time recognized that these regulations bore little relationship to congressional intent. *See*, *e.g*., Daniel E. Boxer, *Every Pond and Puddle—or, How Far Can the Army Corps Stretch the Intent of Congress*, 9 Nat. Resources Law. 467, 470 (1976) ("Congress . . . did not intend . . . that the scope of regulatory activity by the Army Corps . . . take the direction of the [revised] regulations."); Gary E. Parish & J. Michael Morgan, *History, Practice and Emerging Problems of Wetlands Regulation: Reconsidering Section 404 of the Clean Water Act*, 17 Land & Water L. Rev. 43, 84 (1982) ("The existing [regulation] looks and has an effect similar to a program of federal land use control. There should be little doubt that Congress did not intend such a result.").

[26] *Rapanos*, 547 U.S. at 724 (citing 33 C.F.R. § 328.3(a)(1), (a)(3), (a)(5), (a)(7), and § 328.3(c) (2004)).

[27] *Id*. at 725 (citing 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986)).

[28] *Id*. (citing 65 Fed. Reg. 12,818, 12,823 (Mar. 9, 2000)).

[29] 474 U.S. 121 (1985).

[30] *Id*. at 135.

[31] 531 U.S. 159 (2001).

[32] *Id*. at 171.

[33] *Rapanos*, 547 U.S. at 728 (plurality opinion); *id*. at 759 (Kennedy, J., concurring in the judgment).

[34] *Id*. at 742 (plurality opinion).

[35] *Id*. at 755 (emphasis in original).

[36] *Id*. at 759 (Kennedy, J., concurring in the judgment).

[37] *Id*.

[38] *Id*. at 779–80.

[39] *See id*. at 773–75.

[40] *See* EPA & Army Corps, Memorandum re: Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2008), *available at* https://perma.cc/JNN9-HKEG.

[41] *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054, 37,056 (June 29, 2015) ("[The] guidance documents did not provide the public or agency staff with the kind of information needed to ensure timely, consistent and predictable jurisdictional determinations."). *See also* Jamison E. Colburn, *Don't Go in the Water: On Pathological Jurisdiction Splitting*, 39 Stan. Envtl. L.J. 3, 56 (2019) (noting how the guidance contributed to "gradient indeterminacy," thereby exacerbating "the vagaries of evidence gathering and other variabilities in the field," and resulting in "polarizing jurisdictional battles").

[42] *See Rapanos*, 547 U.S. at 757–58 (Roberts, C.J., concurring).

[43] *See* Jamison E. Colburn, *Governing the Gradient: Clarity and Discretion at the Water's Edge*, 62 Villanova L. Rev. 81, 133 (2017) ("The [rulemaking] was the Obama Administration's response to the legal mess that [Clean Water Act] jurisdiction has become.").

[44] 80 Fed. Reg. 37,054 (June 29, 2015).

[45] Stephen M. Johnson, *Killing WOTUS 2015: Why Three Rulemakings May Not Be Enough*, 64 St. Louis Univ. L.J. 373, 386 (2020).

[46] *In re EPA & Dep't of Defense Final Rule*, 803 F.3d 804 (6th Cir. 2015), *vacated on other grounds*, *In re U.S. Dep't of Defense*, 713 Fed. Appx. 489 (6th Cir. 2018); *North Dakota v. U.S. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015).

[47] *Texas v. U.S. EPA*, 389 F. Supp. 3d 497 (S.D. Tex. 2019); *Georgia v. Wheeler*, 418 F. Supp. 3d 1336 (S.D. Ga. 2019).

[48] *See* Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019).

[49] 85 Fed. Reg. 22,250 (Apr. 21, 2020).

[50] *See id*. at 22,260–62.

[51] *Id*. at 22,256–57.

[52] *Id*. at 22,262.

[53] *Colorado v. U.S. EPA*, 445 F. Supp. 3d 1295, 1299 (D. Colo. 2020).

[54] *Pascua Yaqui Tribe v. U.S. EPA*, No. CV-20-00266-TUC-RM, 2021 WL 3855977, at *5 (D. Ariz. Aug. 30, 2021).

[55] 86 Fed. Reg. at 69,373. The pre-2015 regulations were largely in place for both Agencies in 1986 and are thus commonly referred to as "the 1986 regulations." Throughout the preamble to the Proposed Rule, the Agencies interchangeably refer to this regime as "the 1986 regulations," "the pre-2015 regulations," and "the regulations in place until 2015." *See id*. at 69,373 & n.5.

[56] 86 Fed. Reg. at 69,373. It is worth noting that since 2006 the Agencies have repeatedly failed to interpret the Supreme Court case law in a way that withstands judicial review. There is no reason to believe that now—on the eve of the Supreme Court providing much needed further guidance—the Agencies have suddenly gained additional insight on the case law.

---

[57] *See About Waters of the United States*, U.S. Envtl. Prot. Agency, https://www.epa.gov/wotus/about-waters-united-states (last visited Feb. 1, 2022).

[58] *See* Order List at 3, 595 U.S. (Jan. 24, 2022), *available at* https://www.supremecourt.gov/orders/courtorders/012422zor_m6io.pdf. *See also* Docket, *Sackett v. EPA*, No. 21-454, *available* at https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-454.html.

[59] *See* Appellants' Opening Brief at 7–27, *Sackett v. EPA*, 19-35469 (9th Cir. Dec. 11, 2019), Dkt # 14.

[60] *Sackett v. EPA*, 8 F.4th 1075 (9th Cir. 2021).

[61] *Id*. at 1088–92.

[62] *See* Order List at 3, 595 U.S. (Jan. 24, 2022), *available at* https://www.supremecourt.gov/orders/courtorders/012422zor_m6io.pdf. *See also* Docket, *Sackett v. EPA*, No. 21-454, *available* at https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-454.html.

[63] *See id*.

[64] *See supra* 4–6.