NOTIFICATION OF ADMINISTRATIVE APPEAL OPTIONS AND PROCESS AND REQUEST FOR APPEAL

Applicant: Dan Ward, Genesis 27:3, LLC	File Number: 2022-1472	Date: 1/2/2024
Attached is:		See Section below
	INITIAL PROFFERED PERMIT (Standard Permit or Letter of permission)	A
	PROFFERED PERMIT (Standard Permit or Letter of permission)	B
	PERMIT DENIAL WITHOUT PREJUDICE	C
	PERMIT DENIAL WITH PREJUDICE	D
X	APPROVED JURISDICTIONAL DETERMINATION	E
	PRELIMINARY JURISDICTIONAL DETERMINATION	F

SECTION I

The following identifies your rights and options regarding an administrative appeal of the above decision. Additional information may be found at https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/appeals/ or Corps regulations at 33 CFR Part 331.

A: INITIAL PROFFERED PERMIT: You may accept or object to the permit

- ACCEPT: If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.

- OBJECT: If you object to the permit (Standard or LOP) because of certain terms and conditions therein, you may request that the permit be modified accordingly. You must complete Section II of this form and return the form to the district engineer. Upon receipt of your letter, the district engineer will evaluate your objections and may: (a) modify the permit to address all of your concerns, (b) modify the permit to address some of your objections, or (c) not modify the permit having determined that the permit should be issued as previously written. After evaluating your objections, the district engineer will send you a proffered permit for your reconsideration, as indicated in Section B below.

B: PROFFERED PERMIT: You may accept or appeal the permit

- ACCEPT: If you received a Standard Permit, you may sign the permit document and return it to the district engineer for final authorization. If you received a Letter of Permission (LOP), you may accept the LOP and your work is authorized. Your signature on the Standard Permit or acceptance of the LOP means that you accept the permit in its entirety, and waive all rights to appeal the permit, including its terms and conditions, and approved jurisdictional determinations associated with the permit.

- APPEAL: If you choose to decline the proffered permit (Standard or LOP) because of certain terms and conditions therein, you may appeal the declined permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

C. PERMIT DENIAL WITHOUT PREJUDICE: Not appealable
You received a permit denial without prejudice because a required Federal, state, and/or local authorization and/or certification has been denied for activities which also require a Department of the Army permit before final action has been taken on the Army permit application. The permit denial without prejudice is not appealable. There is no prejudice to the right of the applicant to reinstate processing of the Army permit application if subsequent approval is received from the appropriate Federal, state, and/or local agency on a previously denied authorization and/or certification.

D: PERMIT DENIAL WITH PREJUDICE: You may appeal the permit denial
You may appeal the denial of a permit under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

E: APPROVED JURISDICTIONAL DETERMINATION: You may accept or appeal the approved JD or provide new information for reconsideration

- ACCEPT: You do not need to notify the Corps to accept an approved JD. Failure to notify the Corps within 60 days of the date of this notice means that you accept the approved JD in its entirety and waive all rights to appeal the approved JD.

- APPEAL: If you disagree with the approved JD, you may appeal the approved JD under the Corps of Engineers Administrative Appeal Process by completing Section II of this form and sending the form to the division engineer. This form must be received by the division engineer within 60 days of the date of this notice.

- RECONSIDERATION: You may request that the district engineer reconsider the approved JD by submitting new information or data to the district engineer within 60 days of the date of this notice. The district will determine whether the information submitted qualifies as new information or data that justifies reconsideration of the approved JD. A reconsideration request does not initiate the appeal process. You may submit a request for appeal to the division engineer to preserve your appeal rights while the district is determining whether the submitted information qualifies for a reconsideration.

F: PRELIMINARY JURISDICTIONAL DETERMINATION: Not appealable
You do not need to respond to the Corps regarding the preliminary JD. The Preliminary JD is not appealable. If you wish, you may request an approved JD (which may be appealed), by contacting the Corps district for further instruction. Also, you may provide new information for further consideration by the Corps to reevaluate the JD.

POINT OF CONTACT FOR QUESTIONS OR INFORMATION:

If you have questions regarding this decision you may contact:	If you have questions regarding the appeal process, or to submit your request for appeal, you may contact:
Albert Frohlich USACE – Rock Island District – Regulatory Division P.O. Box 2004 Rock Island, IL 61204 (309) 794-5859	Brian Oberlies Regulatory Appeals Review Officer Mississippi Valley Division 1400 Walnut St. Vicksburg, MS 39180 (601) 634-5820

SECTION II – REQUEST FOR APPEAL or OBJECTIONS TO AN INITIAL PROFFERED PERMIT

REASONS FOR APPEAL OR OBJECTIONS: (Describe your reasons for appealing the decision or your objections to an initial proffered permit in clear concise statements. Use additional pages as necessary. You may attach additional information to this form to clarify where your reasons or objections are addressed in the administrative record.)

See attached.

ADDITIONAL INFORMATION: The appeal is limited to a review of the administrative record, the Corps memorandum for the record of the appeal conference or meeting, and any supplemental information that the review officer has determined is needed to clarify the administrative record. Neither the appellant nor the Corps may add new information or analyses to the record. However, you may provide additional information to clarify the location of information that is already in the administrative record.

RIGHT OF ENTRY: Your signature below grants the right of entry to Corps of Engineers personnel, and any government consultants, to conduct investigations of the project site during the course of the appeal process. You will be provided a 15-day notice of any site investigation and will have the opportunity to participate in all site investigations.

CTyates Signature of appellant or agent.	Date: February 26, 2024
Email address of appellant and/or agent: Charles T. Yates, Attorney for Appellants CYates@pacificlegal.org	Telephone number: (916) 419-7111

PACIFIC LEGAL FOUNDATION

February 26, 2024

Mr. Brian Oberlies
Regulatory Appeals Review Officer
Mississippi Valley Division
United States Army Corps of Engineers
1400 Walnut Street
Vicksburg, Mississippi 39180
brian.m.oberlies@usace.army.mil

VIA FEDEX AND EMAIL

Re: Request for Appeal of U.S. Army Corps of Engineers (Corps) Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023) (File Number 2022-1472), on behalf of Dan Ward and Genesis 27:3, LLC

Dear Mr. Oberlies:

In accordance with United States Army Corps of Engineers regulations found at 33 C.F.R. Part 331, Mr. Dan Ward and Genesis 27:3, LLC (Appellants) object to, and request an administrative appeal of, the approved jurisdictional determination, entitled *U.S. Army Corps of Engineers (Corps) Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of* Sackett v. EPA, *143 S. Ct. 1322 (2023)*, File No. 2022-1472, and issued by the district engineer on January 2, 2024 (hereinafter the "AJD"). The AJD unlawfully asserts Clean Water Act jurisdiction over an unnamed tributary on property owned by Appellant Genesis 27:3, LLC. The reasons for this appeal are as follows:

(1) By asserting Clean Water Act jurisdiction over the unnamed tributary, the district engineer contravened the Supreme Court's clear command in *Sackett v. EPA*: that its authority to regulate "waters" for purposes of the Clean Water Act "encompasses 'only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" 598 U.S. 651, 671 (2023) (quoting *Rapanos v. United States*, 547 U.S. 715, 739 (2006) (plurality opinion)) (cleaned up). The unnamed tributary does not meet this standard, and in issuing the AJD, the district engineer therefore acted contrary to, and in excess of, the

Clean Water Act's grant of authority to regulate "navigable waters," defined as "the waters of the United States." *See* 33 U.S.C. §§ 1344(a), 1362(7), (12).

(2) By failing to explain or reconcile contradictory information in the administrative record, the district engineer failed to identify a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). The district engineer therefore acted in an "arbitrary and capricious" manner, and failed to support its decision with substantial evidence, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (E).

(3) Because the text of the Clean Water Act implements only Congress' "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made"—that is, "waters that are, were, or could be used as highways of interstate or foreign commerce," *Sackett*, 598 U.S. at 685, 703–04 (Thomas, J., concurring), the district engineer violated the Act by asserting authority over the unnamed tributary—which never has been, and never could be, used as a highway of interstate or foreign commerce.

The AJD is therefore "arbitrary, capricious, an abuse of discretion, not supported by substantial evidence in the administrative record, [and] plainly contrary to a requirement of law . . . ." *See* 33 C.F.R. § 331.9(b). For these reasons, discussed further below, the AJD must be disapproved in its entirety and remanded to the district engineer with specific instructions for reconsideration consistent with the Clean Water Act, the *Sackett* decision, and the Administrative Procedure Act.

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INTRODUCTION

On May 25, 2023, the Supreme Court issued its decision in *Sackett v. EPA*. 598 U.S. 651. In that decision a unanimous Supreme Court rejected the Environmental Protection Agency and the Corps' historically expansive approach to regulating private land under the Clean Water Act. And a majority of the Court set forth a clear test requiring drastic revision of the agencies' historical approach to Clean Water Act regulation: The Corps' authority to regulate "waters" for purposes of the Clean Water Act "encompasses 'only those relatively permanent, standing or continuously flowing bodies of water "forming geographic[al] features" that are described in ordinary parlance as "streams, oceans, rivers, and lakes."'" *Sackett*, 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739).

Notwithstanding these clear requirements, Appellants find themselves subject to an unlawful assertion of Clean Water Act authority. On January 2, 2024, the district engineer issued an approved jurisdictional determination, asserting Clean Water Act authority over an "unnamed tributary" on property owned by Appellant Genesis 27:3, LLC. *See* Letter from Albert J. Frohlich Project Manager—Western Branch, Regulatory Division, United States Army Corps of Engineers, to Dan Ward (January 2, 2024) (CEMVR-RD-2022-1472) (hereinafter "Frohlich Letter"); Memorandum for Record, U.S. Army Corps of Engineers Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*, 143 S. Ct. 1322 (2023), No. 2022-1472 (Jan. 2, 2024), at 2 (hereinafter "AJD Memo"). As discussed below, the unnamed tributary cannot be jurisdictional, and the AJD is therefore illegal.

This request for appeal is set forth in three parts. *First*, it provides a discussion of the Clean Water Act and other applicable law. *See infra* 4–7. *Second*, it provides a statement of the facts in the administrative record pertaining to the AJD's assertion of authority over Appellants' property. *See infra* 7–8. And *third*, it provides a discussion of the reasons for appeal, with citations to the applicable law and facts in the administrative record. *See infra* 8–14.

APPLICABLE LAW

I. The Clean Water Act and the Corps' historically expansive approach to regulating "navigable waters" pursuant to the Clean Water Act

The Clean Water Act regulates discharges of "pollutants" from "point sources" to "navigable waters." 33 U.S.C. §§ 1311(a), 1362(12). The Act defines "navigable waters" as "the waters of the United States, including the territorial seas." *Id*. §1362(7). Although the Act defines "territorial seas," *id*. §1362(8), it does not define "the waters of the

United States." *See id*. § 1362. Nonexempt discharges to "navigable waters" require a permit from either EPA (called a National Pollutant Discharge Elimination Program, or NPDES, permit) or, if the discharge involves "dredged or fill material," from the Corps (commonly called a Section 404 permit). *See id*. §§ 1342(a), 1344(a).

The significant costs and liability the Act can impose underscore the importance of clearly demarcating the geographic scope of its reach. *Cf. Sackett*, 598 U.S. at 661 ("Due to the CWA's capacious definition of 'pollutant,' its low *mens rea*, and its severe penalties, regulated parties have focused particular attention on the Act's geographic scope."). Properly interpreting the statutory phrase "navigable waters"—and providing clear guidance to the regulated public—is therefore central to the Act's lawful application. Unfortunately, since the early days of the Act's implementation, EPA and the Corps have unlawfully construed their own authority in the broadest and most opaque terms possible. *See Rapanos*, 547 U.S. at 724.

Shortly after the Clean Water Act was passed, EPA and the Corps adopted regulations defining "navigable waters." 38 Fed. Reg. 13,528, 13,529 (May 22, 1973); 39 Fed. Reg. 12,115, 12,119 (Apr. 3, 1974). EPA's interpretation was expansive, *see* 40 C.F.R. § 125.1(p)(2), (4), (6) (1974) (claiming 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), whereas the Corps' was notably more limited. Guided by the Supreme Court's longstanding construction of the phrase "navigable waters of the United States," as it was employed in predecessor statutes, the Corps construed the Act principally to reach interstate waters that are navigable in fact or readily susceptible of being rendered so, *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). In 1975, a federal district court rejected this interpretation as too narrow. *Natural Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975). The Corps did not appeal the ruling. Instead, following EPA's example, the Corps promulgated much broader regulations. *See Rapanos*, 547 U.S. at 724.

These revised regulations—commonly known as the "1986 Regulations," *see* 88 Fed. Reg. 3004, 3005 & nn.3–4 (Jan. 18, 2023)—were meant to extend the scope of "navigable waters" to the outer limits of Congress' power to regulate interstate commerce, *see Rapanos*, 547 U.S. at 724 (citing 42 Fed. Reg. 37,122, 37,144 n.2 (July 19, 1977)). Thus, federal permitting authority was asserted not just over interstate waters, but also intrastate waters with various relationships to interstate or foreign commerce, as well as all tributaries of such waters, and all "wetlands" that are "adjacent" to, i.e., bordering, contiguous, or neighboring, any regulated water. 33 C.F.R. § 323.2(a)(2)–(5), (d) (1978). *See Rapanos*, 547 U.S. at 724.

II. The Supreme Court rejects the Corps' historically expansive approach to Clean Water Act authority in *Rapanos v. United States*

In 2006, the Supreme Court decided *Rapanos v. United States*. In that decision, a majority of the Court held that the 1986 Regulations were invalid insofar as they purport to regulate all tributaries of traditionally navigable waters and all wetlands adjacent to such tributaries. *Rapanos*, 547 U.S. at 728 (plurality opinion); *id*. at 759 (Kennedy, J., concurring). 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 Act's term "waters" includes "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] … oceans, rivers, [and] lakes,'" *id*. at 739 (plurality opinion) (quoting Webster's Second at 2882), as well as those wetlands that contain a continuous surface water connection to other regulated waters, such that it would be difficult to tell where the wetland ends and the water begins. *Id*. at 742.[1]

Although Justice Kennedy provided the fifth vote to support the Court's judgment rejecting the 1986 regulations' improper scope, he disagreed with the plurality's rationale. *Id*. at 759 (Kennedy, J., concurring). Justice Kennedy concluded that the Act's use of the term "waters," does not necessarily foreclose the regulation of intermittent or occasionally flowing tributaries. *Id*. at 770–72, 781–82. And he rejected the surface water connection-requirement for wetlands jurisdiction, instead proposing a broad "significant nexus" standard. *Id*. at 759. 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. *Id*. at 779–80.

During the seventeen years following *Rapanos*, the agencies—with limited exception, *see* 85 Fed. Reg. 22,250 (Apr. 21, 2020)—relied upon the significant nexus test to continue broadly asserting authority over private land, *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); 80 Fed. Reg. 37,054 (June 29, 2015); 84 Fed. Reg. 56,626 (Oct. 22, 2019); 88 Fed. Reg. 3004.

[1] Justice Scalia reserved the question of when a "water," might be deemed "of the United States." *Rapanos*, 547 U.S. at 731 ("We need not decide the precise extent to which the qualifiers 'navigable' and 'of the United States' restrict the coverage of the Act.").

III. The Supreme Court sets forth a clear test for the Corps' Clean Water Act authority in *Sackett v. EPA*

On May 25, 2023—the Supreme Court issued its decision in *Sackett*. 598 U.S. 651. In *Sackett*, the Supreme Court unanimously rejected the significant nexus test. And a majority of the Court set forth a clear test for the agencies' Clean Water Act authority. The Court (1) "conclude[d] that the *Rapanos* plurality was correct: the CWA's use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water "forming geographic[al] features" that are described in ordinary parlance as "streams, oceans, rivers, and lakes[,]"'" *id*. at 671 (quoting *Rapanos*, 547 U.S. at 739); and (2) agreed with the *Rapanos* plurality's formulation of when wetlands are regulable: when wetlands have "a continuous surface connection to bodies that are 'waters of the United States' in their own right," so that there is no clear demarcation between "waters" and "wetlands," *id*. at 678.

The bottom line from *Sackett* is that the regulated public must be able to discern the scope of the Corps' authority—without the need to hire expensive consultants to determine whether they are even subject to the law. *Cf. id*. at 680–81 ("Due process requires Congress to define penal statutes 'with sufficient definiteness that ordinary people can understand what conduct is prohibited' and 'in a manner that does not encourage arbitrary and discriminatory enforcement.'" (citations omitted)).

Like the plurality in *Rapanos*, *see* 547 U.S. at 731, the *Sackett* majority did not reach the question of when a "water" can be deemed to be "of the United States," *Sackett*, 598 U.S. at 685 (Thomas, J., concurring). This question was taken up in a concurring opinion written by Justice Thomas and joined by Justice Gorsuch. Justice Thomas concluded that the statutory terms "navigable waters" and "waters of the United States," invoke "only Congress' authority over waters that are, were, or could be used as highways of interstate or foreign commerce." *Id*.

STATEMENT OF FACTS

Appellant Genesis 27:3, LLC, owns a rural property, located near Lineville, Iowa. Appellant Dan Ward is the sole member and manager of Appellant Genesis 27:3, LLC. Appellants' property contains an "unnamed tributary." AJD Memo at 2. The "unnamed tributary," traverses approximately 3,500 linear feet, and is generally between three and five feet wide. *Id*. at 5. The nearest traditionally navigable water is the Grand River, which itself only becomes a traditionally navigable water about three miles upstream of its confluence with the Missouri River. *Id*. at 4. *See also* Appendix B to AJD Memo

(hereinafter, "Appendix B"). Although the tributary is within the Grand River watershed, it is many times removed. AJD Memo at 4. First, the unnamed tributary flows into Caleb Creek, which then flows into the Weldon River, which then flows into the Thompson River, which then flows into the Grand River. *Id*. The tributary is typically dry. *See* Appendix A to AJD Memo—Applicant Supplied Photos (hereinafter "Appendix A"). *See also* Decatur County Pond Design – Photographic Survey of Unnamed Tributary to Caleb Creek – LT Leon Associates (hereinafter "Photographic Survey"). Indeed, photographs contained within the administrative record demonstrate that even after periods of rainfall, the tributary at most contains isolated pools of standing water. *See* Appendix A. *See also* Photographic Survey.

Seeking to improve the property, Appellants made plans to construct a roughly 9-acre recreational pond. AJD Memo at 2. This pond would be constructed across approximately 2,800 linear feet of the unnamed tributary's reach. *Id*. at 5. To ensure legal compliance, Appellants hired an environmental consultant and sought an AJD from the Corps.

On January 2, 2024, Appellants received a positive AJD determining that the unnamed tributary is regulable. *See* Frohlich Letter; AJD Memo at 2. Based on the use of antecedent precipitation data, various remote sensing and mapping tools, and the observation of unquantified flow in the tributary on a single day—April 10, 2023—the district engineer concluded that "[t]he tributary flows in a seasonal and predictable manner during the spring when groundwater may be present" and therefore "satisfies [*Sackett*'s] relatively permanent standard for streams of this type in this area." AJD Memo at 5–8. This was despite substantial photographic evidence that the tributary is typically dry, is not fed by groundwater recharge, and even after periods of rainfall rarely contains pools of standing, let alone flowing, water. *See* Waters of the US Delineation Report for Decatur County Pond Design–December 16, 2022, by LT Leon Associates (hereinafter "WOTUS Delineation"). *See also* Appendix A; Photographic Survey.

REASONS FOR APPEAL

I. The unnamed tributary is not a relatively permanent water and the AJD therefore contravenes *Sackett*'s test for Clean Water Act jurisdiction

The unnamed tributary does not satisfy *Sackett*'s test for Clean Water Act jurisdiction, and therefore, as a matter of law, cannot be a "water of the United States." 33 U.S.C. §1362(7). By concluding otherwise, the district engineer violated the plain terms of the Clean Water Act.

The Clean Water Act authorizes the Corps to exercise authority only as to "navigable waters," defined as "the waters of the United States." 33 U.S.C. §§ 1344(a), 1362(7), (12). In *Sackett*, the Supreme Court held that the Corps' authority to regulate "waters" "encompasses" (1) "'only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes,'" 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739); and (2) "wetlands" with a "continuous surface connection" to such waters that are "'as a practical matter indistinguishable from waters of the United States,' such that it is 'difficult to determine where the "water" ends and the "wetland" begins,'" *id*. at 678 (quoting *Rapanos*, 547 U.S. at 742).[2] If a feature does not satisfy these conditions, it is as a matter of law not a "water of the United States," for purposes of the Clean Water Act.

The unnamed tributary is (a) generally between three and five feet wide, AJD Memo at 5; (b) typically dry, containing no flowing or even standing water, *see* Appendix A; Photographic Survey; and (c) even after periods of rainfall at most contains isolated pools of standing water, *see id*.; but (d) was documented to contain an *unquantified* flow of water, for an *undetermined* period of time, on one single day during the spring of 2023, *see* AJD Memo at 5–8; Appendix B. The unnamed tributary cannot meet *Sackett*'s test, for at least three reasons.

First, at its core, *Sackett*'s definition is one of "common sense and common usage." *Rapanos*, 547 U.S. at 732 n.5 (plurality). The relevant inquiry is whether a reasonable person would—taking into account visual observation of the relatively permanent presence of standing or continuously flowing water—describe the feature in question as a "stream[], ocean[], river[], [or] lake[]." *Sackett*, 598 U.S. at 671 (citations omitted). *Cf. id*. at 680–81 ("Due process requires Congress to define penal statutes 'with sufficient definiteness that ordinary people can understand what conduct is prohibited' and 'in a manner that does not encourage arbitrary and discriminatory enforcement.'" (citations omitted)). No reasonable person would describe the narrow and ordinarily dry depression on Appellants' land using such terminology. *Cf. Rapanos*, 547 U.S. at 732 n.5 ("Common sense and common usage distinguish between a wash and seasonal river.").

Second, the ordinary presence of water is not *sufficient* for a feature to qualify as a water. *Cf. Sackett*, 598 U.S. at 674 ("Consider puddles, which are also defined by the ordinary presence of water even though few would describe them as 'waters.'"). The ordinary presence of water is, however, at the very least *necessary* for regulation. *See Rapanos*, 547

[2] This second part of the *Sackett* test is not at issue here, as there is no assertion that wetlands exist on Appellants' property. *See* AJD Memo at 6.

U.S. at 734 (plurality opinion) ("That limited effect includes, at bare minimum, the ordinary presence of water."). As such, a regulable water must *at the very least* be marked by the ordinary presence of water—or put more plainly, it must be more likely than not that on any given day of the year, there will be water present. *See id*. at 733 ("Even the least substantial of the definition's terms, namely, 'streams,' connotes a continuous flow of water in a permanent channel . . . ."). The unnamed tributary does not meet even this minimal qualification. Photographs in the administrative record demonstrate that it is typically dry. *See* Appendix A; Photographic Survey. And all the district engineer musters to support its conclusion that the tributary in question is regulable, is the observation of an *unquantified* flow of water on a single day, during the spring. AJD Memo at 5. Indeed, the district engineer did not even determine the duration of this purported flow. *Id*. This against a multitude of photographs from dates throughout the spring and summer of the same year, showing no water in the tributary. *See* Appendix A. If the Corps is unable to demonstrate the ordinary presence of water—i.e., by at the very least recording the presence of water on more than a single day—it cannot regulate. *See Rapanos*, 547 U.S. at 732–33 ("All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows."). And if water is present only one day and absent other days, it cannot be said that the tributary is a "'continuously flowing bod[y] of water.'" *Sackett*, 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739).

Third, even assuming arguendo that the *Rapanos* plurality—and by extension *Sackett*—do not *necessarily* foreclose the regulation of certain "seasonal rivers," *see Rapanos*, 547 U.S. at 732 n.5 (plurality opinion), the unnamed tributary is not a "seasonal river." Relying upon the observation of unquantified flow in the tributary on a single day—April 10, 2023—the district engineer concludes that "[t]he tributary flows in a seasonal and predictable manner during the spring when groundwater may be present" and therefore "satisfies [*Sackett*'s] relatively permanent standard for streams of this type in this area." AJD Memo at 5–8. But the district engineer cannot extrapolate seasonality from *unquantified* flow, recorded on a single day. The *Rapanos* plurality—while not definitively resolving the question of seasonality, *see Rapanos*, 547 U.S. at 732 n.5—signals that such evidence is insufficient. For example, in discussing the potential for regulation of seasonal rivers, the *Rapanos* plurality refers to a "*290–day*, continuously flowing stream." *Id*. (emphasis added). *Rapanos* also makes clear that intermittent and ephemeral streams—such as those where water might be observed only on a single day—are not jurisdictional seasonal rivers. *See id*. ("It suffices for present purposes that channels containing permanent flow are plainly within the definition, and that the dissent's 'intermittent' and 'ephemeral' streams . . . that is, streams whose flow is '[c]oming and going at intervals . . . [b]roken, fitful' . . . or 'existing only, or no longer than, *a day*; diurnal . . . short-lived' . . . are not." (quoting Webster's Second 1296)

(emphasis added)). The district engineer did not even determine the duration of the flow observed in the unnamed tributary, AJD Memo at 5—let alone determine that such flow occurred for anything close to some period of time that might constitute a "season" (like, for example, the 290 days proffered in *Rapanos*).

Most importantly the *Rapanos* plurality makes clear that seasonal flow or not—the test remains one of "[c]ommon sense and common usage." 547 U.S. at 732 n.5 ("Common sense and common usage distinguish between a wash and seasonal river."). Common usage counsels strongly against the conclusion that the unnamed tributary—which is typically dry and for which the district engineer has only provided evidence of flow on a single day of the year—is a "seasonal river."

* * *

The unnamed tributary does not satisfy *Sackett*'s requirements for Clean Water Act regulation. As a matter of law, it is not a "water of the United States." The district engineer therefore acted contrary to, and in excess of, the Clean Water Act's grant of authority to regulate only "navigable waters," defined as "the waters of the United States," 33 U.S.C. §§ 1344(a), 1362(7), (12), when it issued the AJD.

II. The AJD is arbitrary and capricious and is unsupported by substantial evidence

Under the APA's "arbitrary and capricious" standard, 5 U.S.C. § 706(2)(A), an agency must identify a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (quoting *Burlington Truck Lines*, 371 U.S. at 168). In assessing the evidence in the record and determining jurisdiction over Appellants' property, the district engineer failed in this burden, for two reasons.

First, Appellants provided numerous photographs of the tributary taken between May and August of 2023, each of which show no flowing or standing water in the tributary, even in response to rainfall. *See* Appendix A. Relying upon antecedent precipitation data, the district engineer dismissed the probative value of these photographs due to their purportedly having been taken during "drier than normal conditions." *Id.* Yet, Appellants also provided a series of photographs from December 2022 which likewise show no flowing or standing water in the tributary. *See* Photographic Survey. The same antecedent precipitation data relied upon by the district engineer to dismiss the 2023 photographs demonstrates that the area received an abnormally large amount of precipitation during November and December of 2022. *See* Appendix B. Yet, the tributary still did not contain any flowing or standing water. *See* Photographic Survey. The evidence in the administrative record is therefore plainly inconsistent as to the

effect of rainfall on the unnamed tributary. Beyond the bald assertion that "[o]ther photos provided to the Corps were from times of the year when the stream channel is expected to be dry," AJD Memo at 5, the district engineer reconciles this inconsistency nowhere. The district engineer fails to explain why it was rational to dismiss the probative value of the May through August 2023 photographs based on *drier* than normal conditions, while at the same time refusing to acknowledge the lack of water in the tributary during *wetter* than normal conditions. This inconsistent reliance upon the rainfall data—and corresponding failure to explain the inconsistency—was arbitrary and evinces a lack of a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

Second, the district engineer relies partially upon a determination that "groundwater may be present" in the tributary during the spring, to conclude that it is a relatively permanent water. *See* AJD Memo at 8. Yet a consultant report submitted to the district engineer by Appellants concludes—based on site visits conducted during June and December of 2022—that "[n]o groundwater connection appears to be present as indicated by the soil borings, limited flows during rain events, and direct visual observations of the dry drainageway with no seepage from the banks." WOTUS Delineation. The district engineer fails to acknowledge—let alone reconcile—this inconsistency. Again, failing to identify a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

Alternatively, and for the same reasons, the district engineer's decision is unsupported by substantial evidence. 5 U.S.C. § 706(2)(E). The substantial evidence standard requires an agency decision to be supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *See W. States Cattle Co. v. U.S. Dep't of Agric.*, 880 F.2d 88, 89 (8th Cir. 1989) (quoting *Consolidated Edison v. Labor Board*, 305 U.S. 197, 229 (1938)). The district engineer's outright failure to even acknowledge the contradictory information in the record—let alone justify its position considering it—falls short under this standard.

III. The unnamed tributary never has been and never could be, used as a highway of interstate or foreign commerce, and therefore cannot be regulated under the Clean Water Act

Pursuant to its power to regulate interstate and foreign commerce, U.S. Const. art. I, § 8, cl. 3, Congress may regulate the use and channels of interstate commerce, the instrumentalities of or persons or things in interstate commerce, and activities that substantially affect interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558–59 (1995). It was the first category of regulation—authority over the use and channels of

interstate commerce—that Congress had in mind when it enacted the Act. *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers (SWANCC)*, 531 U.S. 159, 172 (2001) ("The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."). And Congress' deliberate use of the term "navigable waters," defined as the "waters of the United States," 33 U.S.C. §1362(7), indicates an intention to regulate only those waters which were, or could be, used as highways of interstate or foreign commerce—and no further. This is because, at the time of the Act's passage, "the statutory terms 'navigable waters,' 'navigable waters of the United States,' and 'waters of the United States' were still understood as invoking only Congress' authority over waters that are, were, or could be used as highways of interstate or foreign commerce." *Sackett*, 598 U.S. at 685 (Thomas, J., concurring). *Cf. also SWANCC*, 531 U.S. at 168 ("[The Corps'] 1974 regulations defined § 404(a)'s 'navigable waters' to mean 'those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce.' . . . Respondents put forward no persuasive evidence that the Corps mistook Congress' intent in 1974." (citation omitted)).

As such, the text of the Clean Water Act implements only Congress' "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made"—that is, "waters that are, were, or could be used as highways of interstate or foreign commerce." *Sackett*, 598 U.S. at 685, 698, 703–04 (Thomas, J., concurring). *Cf. also Rapanos*, 547 U.S. at 731 n.3 (stating that "the phrase 'of the United States' in the definition retains some of its traditional meaning," which "excludes intrastate waters, whether navigable or not" (citation omitted)); *SWANCC*, 531 U.S. at 168. Yet, the district engineer provides no evidence that the typically dry, isolated channel on Appellants' property ever has been, or ever could be, used as a highway of interstate or foreign commerce. *See* AJD Memo at 4 (determining that the nearest traditionally navigable water for Rivers and Harbor Act purposes is the Grand River, and that there exist three intermediate tributary reaches between the unnamed tributary and the Grand River). Indeed, the unnamed tributary's use as a highway of interstate or foreign commerce is physically impossible—it traverses roughly 3,500 linear feet of entirely intrastate land, AJD Memo at 5, is between three and five feet wide, *id*., and rarely contains standing, let alone flowing, water, *see* Appendix A.

At the very least, by asserting authority over Appellants' construction project—a quintessentially ordinary land use activity occurring in an area presenting as dry land for the majority of the year—the Corps presses its authority to the outer limits of Congress' power to regulate the channels of interstate commerce and raises serious

constitutional federalism questions. *Cf. Hess v. Port Authority Trans–Hudson Corporation*, 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments."). "Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172. The Corps has not, and cannot, point to any such clear statement. *Cf. Sackett*, 598 U.S. at 674 ("It is hard to see how the States' role in regulating water resources would remain 'primary' if the EPA had jurisdiction over anything defined by the presence of water.").

CONCLUSION

The AJD is "arbitrary, capricious, an abuse of discretion, not supported by substantial evidence in the administrative record, [and] plainly contrary to a requirement of law . . . ." *See* 33 C.F.R. § 331.9(b). The AJD must be disapproved in its entirety and remanded to the district engineer with specific instructions for reconsideration consistent with the Clean Water Act, the *Sackett* decision, and the Administrative Procedure Act.

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