IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
CENTRAL DIVISION

THE BLACKSTONE HEADWATERS COALITION, INC.,

Plaintiff,

v.

GALLO BUILDERS, INC.,
R.H. GALLO BUILDERS, INC.,
ARBORETUM VILLAGE, LLC,
STEVEN A. GALLO,
and ROBERT H. GALLO,

Defendants.

No. 4:16-cv-40053-MRG

Brief of Amicus Curiae Pacific Legal Foundation in Support of Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

INTRODUCTION 2

STATEMENT OF FACTS 2

LEGAL BACKGROUND 3

LEGAL ARGUMENT 6

A. There Is No "Continuous Surface Connection" Between the Honeysuckle Wetland and Stream 6

B. The Honeysuckle Stream Is Not a "Relatively Permanent" Body of Water 9

CONCLUSION 10

CERTIFICATE OF SERVICE 11

TABLE OF AUTHORITIES

Cases

Gundy v. United States,
139 S. Ct. 2116 (2019) 1

Kisor v. Wilkie,
139 S. Ct. 2400 (2019) 1

Lewis v. United States,
88 F.4th 1073 (5th Cir. 2023) 6, 8-9

Lucia v. SEC,
585 U.S. 237 (2018) 2

Rapanos v. EPA,
547 U.S. 715 (2006) 1, 4-6, 9-10

Sackett v. EPA,
566 U.S. 120 (2012) 1

Sackett v. EPA,
598 U.S. 651 (2023) 1-2, 5-10

Seila Law LLC v. CFPB,
591 U.S. 197 (2020) 1

The Glynn Envtl. Coal., Inc. v. Sea Island Acquisition, LLC,
No. 2:19-cv-50, 2024 WL 1088585 (S.D. Ga. Mar. 1, 2024) 8-9

U.S. Army Corps of Eng'rs v. Hawkes Co.,
578 U.S. 590 (2016) 1

Statutes

33 U.S.C. § 1311(a) 3

33 U.S.C. § 1362(7) 4, 6

33 U.S.C. § 1362(8) 4

33 U.S.C. § 1362(12) 3, 6

Other Authority

Webster's Second International Dictionary (2d ed. 1954) 4

IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to the Court's April 26, 2024 Text Order (ECF 230), Pacific Legal Foundation ("PLF")[1] submits this amicus brief in support of Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction (ECF 224). Founded in 1973, PLF is a nonprofit, tax-exempt corporation organized under the laws of the state of California for the purpose of engaging in litigation in matters affecting the public interest. PLF is the most experienced public-interest legal organization advocating for private property rights and defending the constitutional principle of separation of powers in the arena of administrative law. Most relevant to this case, PLF attorneys have served as counsel for some of the Supreme Court's most recent Clean Water Act ("CWA") cases. *See, e.g.*, *Sackett v. EPA*, 598 U.S. 651 (2023) (application of CWA's "waters of the United States" provision to wetlands); *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590 (2016) (Army Corps' CWA approved jurisdictional interpretation is final agency action under Administrative Procedure Act ("APA")); *Sackett v. EPA*, 566 U.S. 120 (2012) (plaintiffs may sue under APA to challenge EPA's CWA administrative compliance order); *Rapanos v. EPA*, 547 U.S. 715 (2006) (application of CWA's "waters of the United States" provision to wetlands).

Also, its attorneys have participated as counsel for amici in several cases involving the role of the Judiciary as an independent check on the Executive and Legislative Branches under the Constitution's separation of powers. *See, e.g.*, *Seila Law LLC v. CFPB*, 591 U.S. 197 (2020) (restriction on President's ability to remove CFPB Director); *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (*Auer* deference); *Gundy v. United States*, 139 S. Ct. 2116 (2019) (nondelegation doctrine);

[1] PLF affirms that no counsel for any 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 PLF, its members, or its counsel made a monetary contribution to its preparation or submission.

Lucia v. SEC, 585 U.S. 237 (2018) (SEC administrative law judge is "officer of the United States" under the Appointments Clause). PLF's advocacy for constitutional principles and broad CWA litigation experience offer the Court an important perspective that will assist it in deciding whether the wetland and stream at issue in this case constitute "waters of the United States" for the purposes of Plaintiff's Second Amended Complaint.

INTRODUCTION

The Court should enter judgment in Defendants' favor because the wetland and stream at issue[2] are not "waters of the United States." In May 2023, the Supreme Court provided clear guidance regarding what "waters" constitute "waters of the United States" under the CWA. It held that the CWA provides jurisdiction over only those wetlands having a "continuous surface connection" to "relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes." *Sackett v. EPA*, 598 U.S. 651 (2023) (simplified). Given this clear holding, this case does not involve "waters of the United States" because (1) the Honeysuckle Wetland lacks a "continuous surface connection" to the Honeysuckle Stream, and (2) the Honeysuckle Stream is not a "relatively permanent" body of water.

STATEMENT OF FACTS

PLF incorporates by reference Defendants' factual recitation. *See* ECF 229 at 2-4, 9-11. By way of additional facts pertinent to this amicus brief, PLF provides the following. Stormwater

[2] Both parties reference a wetland that receives stormwater and a stream located near this wetland. *See* ECF 213 ¶ 28 (discussing the Sophia-Honeysuckle wetland and stream); Supplemental Expert Witness Report of Christopher M. Lucas ("Lucas Report") § 7 (ECF 226-1 at 9-15) (discussing a "pre-existing wetland" and an "unnamed intermittent stream"). This brief refers to the wetland as the "Honeysuckle Wetland" or "Wetland" and the stream as the "Honeysuckle Stream" or "Stream." Sometimes, this brief collectively refers to them as the "Honeysuckle Wetland and Stream."

runoff discharges from a point source (the "Honeysuckle Outfall") to the Honeysuckle Wetland. *See* Lucas Report § 7.6-7 (ECF 226-1 at 11). Water leaves the Wetland through a "human-made" "riprapped channel in a generally southerly direction for a length of approximately 650 feet" and "passes through and/or under three (3) separate constructed stone berms/filters which range from 160 to 200 feet apart." *Id.* § 7.9 (ECF 226-1 at 12) (footnote omitted). Rather than entering a body of water, any water that makes it through these berms/filters "enters a human-made culvert," which runs for 150 feet under Sophia Drive. *Id.* § 7.10 (ECF 226-1 at 12). Upon exiting this culvert, "the water flows overland through a second human-made riprap swale/channel southwesterly for approximately 150 feet." *Id.* § 7.10-12 (ECF 226-1 at 12-13). This "swale/riprap channel has been observed as not flowing (i.e., intermittent) on at least five occasions." *Id.* § 7.12 (ECF 226-1 at 13) (citing Affidavit of Scott Morrison ("Morrison Aff.") ¶ 8; Affidavit of Paul J. McManus ("McManus Aff.") ¶ 5). Water from this swale/channel *finally* empties into "an unnamed southerly-flowing intermittent stream near the Worcester/Auburn municipal line," which is the Honeysuckle Stream. *Id.* § 7.12 (ECF 226-1 at 13). "Once the water reaches this unnamed intermittent stream, the water continues its southerly flow for approximately 4,665 feet to the City of Worcester's human-made Flood Control Diversion Channel ('Diversion Channel'), located near public highway Route 20." *Id.* § 7.15 (ECF 226-1 at 14). "The Diversion Channel leads into the Blackstone River just south of the Upper Blackstone Wastewater Treatment plant." *Id.* § 7.16 (ECF 226-1 at 14).

LEGAL BACKGROUND

Prior to May 2023, there was confusion regarding the jurisdictional scope of the CWA, which regulates discharges of "pollutants" from "point sources" to "navigable waters." *See* 33 U.S.C. §§ 1311(a), 1362(12). Although the CWA defines "navigable waters" as "the waters of the

United States, including the territorial seas," 33 U.S.C. § 1362(7), and defines "territorial seas," *id.* § 1362(8), it does not define "waters of the United States." Thus, courts struggled to clarify this phrase. The Supreme Court attempted to bring clarity in *Rapanos v. United States*, where it considered "whether four Michigan wetlands, which lie near ditches or man-made drains that eventually empty into traditional navigable waters, constitute 'waters of the United States.'" 547 U.S. 715, 729 (2006) (plurality). However, no opinion garnered a majority. Instead, the Court ruled for the petitioners through a four-Justice plurality, with Justice Kennedy providing the fifth vote through a concurrence in the judgment.

The plurality interpreted "waters of the United States" to "include[] 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) (quoting Webster's Second International Dictionary 2882 (2d ed. 1954)) (cleaned up). This interpretation excluded "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id.* As to wetlands, the plurality held that the CWA provides jurisdiction over "*only* those wetlands with 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 742 (stating that "[w]etlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States'" are not covered).

Although Justice Kennedy provided the fifth vote, he did not agree with the plurality's reasoning. Instead, he would have found jurisdiction under the CWA where "a water or wetland . . . possess[es] a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759 (Kennedy, J., concurring in the judgment) (citation omitted). His "significant nexus" test was to be considered by examining multiple factors. *Id.* Following

Rapanos, there was uncertainty regarding whether the plurality's or Justice Kennedy's opinion controlled, with the government maintaining that the significant nexus test was "sufficient to establish jurisdiction over 'adjacent' wetlands." *Sackett*, 598 U.S. at 669. In *Sackett*, however, all nine Justices rejected Justice Kennedy's significant nexus test, and *Sackett* produced a majority opinion that now controls and clarifies the CWA's jurisdictional scope.

The *Sackett* majority "conclude[d] that the *Rapanos* plurality was correct," and thus held that "the CWA's use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes.'" *Id.* at 671 (quoting *Rapanos*, 547 U.S. at 739 (plurality)) (cleaned up). Regarding wetlands, *Sackett* held that "the CWA extends to only those wetlands that are 'as a practical matter indistinguishable from waters of the United States.'" *Id.* at 678 (quoting *Rapanos*, 547 U.S. at 755 (plurality)). *Sackett*'s test "requires the party asserting jurisdiction over adjacent wetlands to establish 'first, that the adjacent body of water constitutes waters of the United States, (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the water ends and the wetland begins.'" *Id.* at 678-79 (quoting *Rapanos*, 547 U.S. at 742 (plurality)).[3] This "continuous surface connection" exists when "'there is no clear demarcation between waters and wetlands,'" "such that it is 'difficult to determine where the water ends and the wetland begins.'" *Id.* at 678 (quoting *Rapanos*,

[3] *Sackett* also produced a four-Justice concurrence in the judgment that would have found CWA jurisdiction over "wetlands adjacent to a river or lake that is itself a water of the United States." *Sackett*, 598 U.S. at 717 (Kavanaugh, J., concurring in the judgment) (citation omitted). Under this non-controlling concurrence, "adjacent wetlands include both (i) those wetlands contiguous to or bordering a covered water, *and* (ii) wetlands separated from a covered water only by a man-made dike or barrier, natural river berm, beach dune, or the like." *Id.* at 716.

547 U.S. at 742 (plurality)). Although only one court of appeals has applied *Sackett*'s test, it has confirmed that, "[f]rom a legal standpoint, this test significantly tightens the definition of federally regulable wetlands, as compared with the 'significant nexus' test and interim administrative regulations." *Lewis v. United States*, 88 F.4th 1073, 1078 (5th Cir. 2023).

As discussed below, Plaintiff cannot meet its burden of satisfying *Sackett*'s test.

LEGAL ARGUMENT

The Court should enter judgment in Defendants' favor because there are no facts indicating that the Honeysuckle Wetland and Stream are "waters of the United States." The parties do not dispute that the Site's stormwater runoff discharges from a point source (the Honeysuckle Outfall) to the Honeysuckle Wetland. *See* Lucas Report § 7.6-7 (ECF 226-1 at 11). This point source discharge, however, is not enough to establish liability, because only the addition of pollutants "*to navigable waters* from any point source" creates liability. *See* 33 U.S.C. § 1362(12) (emphasis added). Thus, to establish liability, Plaintiff must prove that the Honeysuckle Wetland and Stream constitute "waters of the United States," which is how the CWA defines "navigable waters." *See id.* § 1362(7). This requires Plaintiff to prove that (1) the Honeysuckle Wetland has a "continuous surface connection" to an "adjacent body of water," and (2) the "adjacent body of water" is "a relatively permanent body of water." *Sackett*, 598 U.S. at 678-79. Plaintiff cannot meet either prong of this test because (1) the Honeysuckle Wetland lacks a continuous surface connection to any body of water, and (2) the Honeysuckle Stream is not a relatively permanent body of water.

A. There Is No "Continuous Surface Connection" Between the Honeysuckle Wetland and Stream

The facts show there is no continuous surface connection between the Honeysuckle Wetland and Honeysuckle Stream. *See* Morrison Aff. ¶ 7 (ECF 226-4 at 129) (listing eight dates where he "had occasion to observe the Honeysuckle Outfall having . . . no surface water present").

Instead of any water in the Wetland being aquatically connected to water in the Stream such that the Wetland is "as a practical matter indistinguishable from" the Stream, *Sackett*, 598 U.S. at 678, the facts show that water leaves the Wetland through a "human-made" "riprapped channel in a generally southerly direction for a length of approximately 650 feet" and "passes through and/or under three (3) separate constructed stone berms/filters which range from 160 to 200 feet apart." *See* Lucas Report § 7.9 (ECF 226-1 at 12) (footnote omitted). Rather than entering a body of water, any water that makes it through these berms/filters "enters a human-made culvert," which runs for 150 feet under Sophia Drive. *Id.* § 7.10 (ECF 226-1 at 12). Upon exiting this culvert, "the water flows overland through a second human-made riprap swale/channel southwesterly for approximately 150 feet." *Id.* § 7.10-12 (ECF 226-1 at 12-13). This "swale/riprap channel has been observed as not flowing (i.e., intermittent) on at least five occasions." *Id.* § 7.12 (ECF 226-1 at 13) (citing Morrison Aff. ¶ 8; McManus Aff. ¶ 5). Water from this swale/channel *finally* empties into "an unnamed southerly-flowing intermittent stream," which is the Honeysuckle Stream. *Id.* § 7.12 (ECF 226-1 at 13).

As this review shows, rather than the Wetland being "as a practical matter indistinguishable from" the Stream, there is a "clear demarcation" between the Wetland and Stream, *i.e.*, the *hundreds of feet* of human-made berms, swales, channels, and culverts. *Sackett*, 598 U.S. at 678 (citation omitted). Stated differently, rather than being "difficult to determine where the 'water' ends and the 'wetland' begins," it is *easy* to determine where the Stream ends and the Wetland begins. *Id.* at 678-79 (citation omitted). The Honeysuckle Wetland is "separate from" the Stream, which means that the Wetland "cannot be considered part of [the Stream], even if the[Stream is] located nearby." *Id.* at 676. The Honeysuckle Wetland, thus, is nonjurisdictional, as confirmed by post-*Sackett* case law.

For example, the Fifth Circuit reversed a district court's denial of a plaintiff's summary judgment motion because "photographs of the property depict[ed], there [was] no 'continuous surface connection' between any plausible wetlands on the Lewis tracts and a 'relatively permanent body of water connected to traditional interstate navigable waters.'" *Lewis*, 88 F.4th at 1078 (quoting *Sackett*, 598 U.S. at 678). Rather than there being a continuous surface connection, "the nearest relatively permanent body of water [was] removed miles away from the Lewis property by roadside ditches, a culvert, and a non-relatively permanent tributary. In sum, it [was] not difficult to determine where the 'water' ends and any 'wetlands' on Lewis's property begin—there [was] simply no connection whatsoever." *Id.* The separation of the *Lewis* wetland from water by "roadside ditches, a culvert, and a non-relatively permanent tributary" makes the *Lewis* fact pattern highly analogous to the one here, as the Honeysuckle Wetland likewise is separate from the Stream by berms, swales, channels, and culverts.

More recently, a Georgia district court confirmed that the "CWA only extends to wetlands that are indistinguishable from 'waters of the United States' as a practical matter." *The Glynn Envtl. Coal., Inc. v. Sea Island Acquisition, LLC*, No. 2:19-cv-50, 2024 WL 1088585, at *4 (S.D. Ga. Mar. 1, 2024) (citing *Sackett*, 598 U.S. at 678). Like *Lewis*, *Glynn Environmental* is analogous to this case because the plaintiffs and their experts argued that "water will eventually reach Dunbar Creek by 'surface runoff and groundwater'" and "that the Subject Property[4] and nearby salt marsh are directly connected 'via culverts and pipes.'" *Id.* at *5 (citations omitted). Moreover, "Dunbar Creek [was] hundreds of feet away from the Subject Property" and, in between the two, were "a salt marsh; upland; the road leading from Sea Island Road to Defendant's hotel; a median; the road

[4] The opinion referred to the wetland as the Subject Property. *See Glynn Envtl.*, 2024 WL 1088585, at *3.

from Defendant's hotel to Sea Island Road; and, finally, the Subject Property." *Id.* (citations omitted). The Court rejected the plaintiffs' arguments, holding that they were insufficient to "establish [that] the Subject Property 'has a continuous *surface* connection with [Dunbar Creek], making it difficult to determine where [Dunbar Creek] ends and the [Subject Property] begins.'" *Id.* (quoting *Sackett*, 598 U.S. at 678-79) (alteration in original). Instead, "images attached to Plaintiffs' amended complaint show[ed] there [was] a 'clear demarcation between the Subject Property and Dunbar Creek," which meant the Subject Property wetlands were nonjurisdictional. *Id. Lewis* and *Glynn Environmental* had facts similar to this case, and the result here should be the same as in those cases: no CWA jurisdiction.

B. The Honeysuckle Stream Is Not a "Relatively Permanent" Body of Water

Even if the Honeysuckle Wetland had a continuous surface connection with the Stream, judgment in Defendants' favor would still be appropriate because the Honeysuckle Stream is not a "relatively permanent" body of water. *Sackett* expressly "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 geographical 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 (plurality)) (emphasis added; cleaned up). "[R]elatively permanent" bodies of water are distinct from non-covered "ordinarily dry channels through which water occasionally or intermittently flows." *Rapanos*, 547 U.S. at 732-33 (plurality)); *see also id.* at 732-35 & n.5 (clarifying that waters "containing merely intermittent or ephemeral flow" are not "within the definition"). *Rapanos* also gave additional guidance regarding streams, calling them "the least substantial of the definition's terms" and clarifying that even "'streams,' connotes a continuous flow of water in a permanent channel." *Id.* at 733 (plurality).

Given this limitation, it is clear that the CWA does not provide jurisdiction over the Honeysuckle Stream, which has been described as "an unnamed southerly-flowing intermittent stream near the Worcester/Auburn municipal line." *See* Lucas Report § 7.12 (ECF 226-1 at 13); *see also id.* §§ 7.13-14 (ECF 226-1 at 13-14) ("The status of this stream and all other streams on and in the vicinity of the Site are all deemed intermittent."); Morrison Aff. ¶ 8 (ECF 226-4 at 129) ("I also observed breaks in the water flow in the channel located downgradient from the Sophia Outfall, but before the Upland Street culvert."); McManus Aff. ¶ 5 (ECF 226-4 at 206) ("I also observed breaks in the flow of surface water in the intermittent channel located downgradient (south) from the Sophia Outfall, but upgradient (north) of the Upland Street culvert."). There are no facts suggesting that this Stream is a "'relatively permanent, standing or continuously flowing bod[y] of water.'" *Sackett*, 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739 (plurality)) (cleaned up). For this additional reason, there is no basis for CWA regulation.

CONCLUSION

For these reasons, judgment should be entered in Defendants' favor.

DATED: April 29, 2024.

Respectfully submitted,

/s/ Jonathan Houghton
Jonathan Houghton
Sean Radomski*
Pacific Legal Foundation
3100 Clarendon Blvd., Suite 1000
Arlington, VA 22201
Telephone: (916) 419-7111
jhoughton@pacificlegal.org
sradomski@pacificlegal.org

**pro hac vice* motion filed
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2024, I filed a copy of this document with the Court's ECF system, which will cause an electronic notice of such filing to be sent to counsel of record for each party in this case.

/s/ Jonathan Houghton
Jonathan Houghton
Pacific Legal Foundation
3100 Clarendon Blvd., Suite 1000
Arlington, VA 22201
Telephone: (916) 419-7111
jhoughton@pacificlegal.org

Counsel for Amicus Curiae