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Chantell and Michael Sackett

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, et al.,

Plaintiffs,

v.

ANDREW R. WHEELER, as Administrator of the U.S. Environmental Protection Agency, et al.,

Defendants,

No. 3:20-cv-03005-RS

NOTICE OF MOTION AND MOTION TO INTERVENE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT (FRCP 24)

Date: June 25, 2020
Time: 1:30 p.m.
Place: San Francisco Courthouse
Courtroom 3 - 17th Floor
Judge: Honorable Richard Seeborg
Action Filed: 5/1/2020

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 25, 2020, at 1:30 p.m., or as soon thereafter as may be heard by this Court, Proposed Defendant-Intervenors Chantell and Michael Sackett ("the Sacketts") move for leave to intervene in this action.

The Sacketts hereby move this Court for an order to intervene as defendants in this action as a matter of right pursuant to Federal Rule of Civil Procedure 24(a). In the alternative, they request leave to intervene by permission pursuant to Federal Rule of Civil Procedure 24(b).

Counsel for the Sacketts contacted the existing parties to determine their positions on this motion and were informed that the federal defendants take no position on the Sacketts' intervention, and that the plaintiffs are not able to take a position prior to the filing of this motion.

The motion is based on this notice of motion and motion to intervene; the accompanying memorandum of points and authorities; the declarations submitted with this motion; the documents previously filed in this action; and any other material the Court may consider in the briefing and oral argument of this matter.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

Pursuant to Federal Rule of Civil Procedure 24, Chantell and Michael Sackett ("The Sacketts") move to intervene to protect their interests in this litigation.

Plaintiffs State of California, et al., (California) challenge the U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Army (Army)'s adoption of a final rule called the Navigable Waters Protection Rule, defining "navigable waters" or "waters of the United States" under the Clean Water Act. Compl. ¶¶ 1-2. California has moved for a nationwide preliminary injunction against the Navigable Waters Protection Rule. ECF. No. 30.

The Sacketts seek to intervene to defend the portion of the rule which defines "adjacent wetlands." *See* 33 C.F.R. § 328.3(c)(1) (proposed). The Sacketts have an interest in the Clean Water Act's regulation of their private property that would be affected by this lawsuit and that interest is not adequately represented by the existing parties. Therefore, they are entitled to intervention as of right. Fed. R. Civ. P. 24(a). Alternatively, the Sacketts move for permissive intervention. Fed. R. Civ. P. 24(b). Accordingly, this Motion should be granted.

The Sacketts submit their proposed Answer in Intervention herewith, attached to this motion as Attachment 1, and their proposed Opposition to California's Motion for Preliminary Injunction, as Attachment 2. The Sacketts request that the Court resolve this Motion to Intervene before or concurrently with California's pending Motion for Preliminary Injunction, so that the Sacketts may be heard as parties on that matter before the Court resolves it.

II. Applicants

Chantell and Michael Sackett are the owners of a residential lot in Priest Lake, Idaho, which is the subject of an EPA jurisdictional determination and compliance order issued in 2008.[1] Sackett Decl. ¶¶ 3-9 and Exhibits A & B thereto. EPA asserted Clean Water Act authority over the lot on the ground that the property contains wetlands regulated under the Clean Water Act as "adjacent wetlands." Sackett Decl. ¶¶ 6-7, 9, Exhibits A & B. The Sacketts' subsequent challenge to the compliance order and assertion of Clean Water Act authority over the lot was the subject of the

[1] The compliance order was recently withdrawn, but the jurisdictional determination was not.

Supreme Court's 2012 decision in *Sackett v. EPA*, 566 U.S. 120 (2012) (district courts have subject matter jurisdiction under APA to review EPA compliance orders as final agency actions). Following remand, the district court upheld EPA's assertion of regulatory authority. That decision is presently pending on appeal in the Ninth Circuit. *See* Sackett v. EPA, No. 19-35469 (9th Cir.). As a result of EPA's jurisdictional determination and compliance order, the Sacketts have been unable to build a home on their residentially-zoned vacant lot for the last 13 years. Sackett Decl. ¶¶ 5-6, 10-11.

The administrative record of the compliance order demonstrates that the Sacketts' residential lot has no surface water connection to a jurisdictional water of the United States. Sackett Decl. ¶ 9, and Exhibits A & B. It is separated from the closest surface water by an impermeable artificial barrier. Sackett Decl. ¶¶ 3-4, and Exhibits A & B. Under prior versions of the definition of "navigable waters" or "waters of the United States," the government has taken the position that the lot is subject to Clean Water Act regulation despite the lack of surface water connection. *See generally Sacket v. EPA*, 566 U.S. 120.

Under the challenged Navigable Waters Protection Rule's redefinition of "adjacent wetlands," the Sacketts' property is excluded from agency authority under the Clean Water Act. Its lack of surface water connection to any other jurisdictional water and its separation from the closest surface water by an impermeable artificial barrier, are both features which preclude Clean Water Act jurisdiction under the new rule. *See* 33 C.F.R. § 328.3(c)(1) (proposed).

III. Background

A. This Lawsuit

On May 1, 2020, Plaintiffs State of California, et al., filed this lawsuit to challenge the U.S. Environmental Protection Agency's and the U.S. Department of the Army, Corps of Engineers' adoption of the Navigable Waters Protection Rule. Plaintiffs allege the new definition of "waters of the United States" conflicts with the text of the Clean Water Act and contradicts the Clean Water Act's objectives. Compl. ¶ 6. Further, they allege that in promulgating the rule, the Agencies' overlooked scientific recommendations and longstanding Agency policies, ignored scientific

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evidence, and unreasonably disregarded the Supreme Court's interpretation of the Clean Water Act, in violation of the Administrative Procedure Act. Compl. ¶¶ 6-12.

On May 18, 2020, Plaintiffs filed a motion for preliminary injunction or stay, seeking nationwide injunctive relief against the rule. ECF No. 30, at 39-40.

B. Clean Water Act and Relation of This Suit to the Sacketts

The Clean Water Act, 33 U.S.C. § 1251, *et seq.*, regulates discharges of "pollutants" from "point sources" to "navigable waters." 33 U.S.C. § 1311(a), § 1362(12). The Act defines "navigable waters" as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The Act defines "the territorial seas" but does not otherwise define "waters of the United States." 33 U.S.C. § 1362(8). Nonexempt discharges require a permit from either the EPA or the Army. Dredge and fill permits from the Army average more than two years, and $250,000 in consulting costs, to obtain. *See Rapanos v United States*, 547 U.S. 715, 721 (2006). Once obtained, dredge and fill permits substantially limit how property encumbered by "navigable waters" can be used by its owner. *See generally* Daniel R. Mandelker, *Practicable Alternatives for Wetlands Development Under the Clean Water Act*, 48 Envtl. L. Rep. News & Analysis 10894 (Oct. 2018).

A person engaged in unpermitted, nonexempt discharges or permit violations faces citizen suits, administrative cease-and-desist and compliance orders, administrative penalties, civil actions for monetary civil penalties and injunctive relief, and criminal prosecution. *See generally*, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 52-53 (1987). These severe burdens make it critically important that the regulated public know what is meant by "navigable waters."

In 1986 the Army adopted an updated regulatory definition that stretched the term "navigable waters" to include all non-navigable wetlands "adjacent" (broadly defined as bordering, contiguous, or neighboring) to regulated tributaries and other regulated waters. *See* 33 C.F.R. § 328.3(a)(1)-(7), and § 328.3(c) (2014) (1986 Regulations).

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In a fractured opinion in *Rapanos*, the Supreme Court invalidated the tributary and adjacent wetlands subsections of the 1986 Regulations as exceeding the scope of the statutory term "navigable waters."

The four-Justice *Rapanos* plurality determined that the language, structure, and purpose of the Clean Water Act all limit federal authority over non-navigable tributaries to "relatively permanent, standing or continuously flowing bodies of water" commonly recognized as "streams, oceans, rivers and lakes[.]" *Id.* at 739. The plurality also limited regulation of non-navigable wetlands to only those that physically abut relatively permanent and continuously flowing waters, such that they have an immediate surface water connection which renders the wetland and water body "indistinguishable." *Id.* at 755.

Justice Kennedy joined the plurality in the judgment. But he proposed a broader interpretation of "navigable waters" than the plurality: the "significant nexus" test. *Id.* at 759 (Kennedy, J., concurring). Under this view, the government can regulate a non-abutting wetland if it significantly affects the physical, chemical, and biological integrity of a navigable-in-fact waterway. *Id.* at 779 (Kennedy, J., concurring). Justice Kennedy wrote that wetlands could be analyzed under this standard either standing alone or in combination with features similarly situated within an otherwise undefined "region." *Id.* at 780 (Kennedy, J., concurring).

In 2015, after several years of effort to address *Rapanos*, EPA and the Army adopted new regulations (the 2015 Regulations) redefining "navigable waters." 33 C.F.R. § 328.3 (2016); 80 Fed. Reg. 37,054 (June 29, 2015). Several lawsuits challenged the 2015 Regulations. On August 21, 2019, the U.S. District Court for the Southern District of Georgia ruled on summary judgement that the 2015 Regulations violated the Clean Water Act. *Georgia v. Wheeler*, No. 2:15-cv-00079, 2019 WL 3949922 (S.D. Ga. Aug. 21, 2019). That court permanently enjoined and remanded the 2015 Regulations without vacatur. *Id*. at *31. On October 22, 2019, partially in response to the decision in *Georgia v. Wheeler*, EPA and the Army published a regulation that repealed the 2015 Regulations and readopted the 1986 Regulations. 84 Fed. Reg. 56,626 (Oct. 22, 2019).

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On April 21, 2020, EPA and the Army published yet another regulation called the Navigable Waters Protection Rule ("Navigable Waters Protection Rule" or "2020 Regulations"). 85 Fed. Reg. 22,250 (Apr. 21, 2020). The Navigable Waters Protection Rule redefines "adjacent wetlands," 33 C.F.R. § 328.3(a)(4), as wetlands that abut, 33 C.F.R. § 328.3(c)(1)(i), or are flooded by, 33 C.F.R. § 328.3(c)(1)(ii), other regulated non-wetland waters, or are physically separated from them only by natural, 33 C.F.R. § 328.3(c)(1)(iii), or permeable artificial, 33 C.F.R. § 328.3(c)(1)(iv), barriers. 85 Fed. Reg. at 22,338.

Significantly for the Sacketts' interest in this lawsuit, EPA has claimed since 2007 that the 1986 Regulations regulate their property in Idaho as a neighboring wetland. Sackett Decl. ¶¶ 7, 9, Exhibits A & B. Under the Navigable Waters Protection Rule, the Sacketts' property is not regulated, because although it is separated by an artificial barrier (an elevated road) from a tributary to Priest Lake, that barrier is not permeable. Their property has no surface water connection to any other surface water. Sackett Decl. ¶ 4, 9.

Under the Navigable Waters Protection Rule, the Sacketts would be able to finally build a home on their vacant lot without permission from the Army. The nationwide injunction sought by California would prevent that outcome, by preventing the Navigable Waters Protection Rule from taking effect.

IV. Argument

A. The Sacketts Satisfy Rule 24(a) and Should Be Granted Intervention as of Right

A party has a right to intervene if it (1) applies in a timely manner, (2) claims an interest relating to the subject of the case, which will be impaired or impeded by its disposition, and (3) its interests aren't adequately represented by the existing parties. Fed. R. Civ. P. 24(a). In applying this standard, courts "normally follow 'practical and equitable considerations' and construe the Rule 'broadly in favor of proposed intervenors.'" *Wilderness Soc'y v. U.S. Forest Service*, 630 F.3d 1173, 1179 (9th Cir. 2011) (*en banc*) (quoting *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002)). This is because "'[a] liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the Courts.'" *Id*. (quoting *City of Los Angeles*,

288 F.3d at 397-98). Accordingly, a "prospective intervenor 'has a sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation.'" *Id*. (quoting *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006)).

When analyzing a motion to intervene as of right under Rule 24(a)(2), Ninth Circuit courts apply a four-part test to determine whether to grant an applicant's motion:

(1) The application for intervention must be timely;

(2) The applicant must have a "significantly protectable" interest relating to the property or transaction that is the subject of the action;

(3) The applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and

(4) The applicant's interest must be inadequately represented by the existing parties in the lawsuit.

Wilderness Soc'y, 630 F.3d at 1177; Fed. R. Civ. P. 24(a).

1. The Sacketts' Motion to Intervene Is Timely

Three factors inform whether a motion to intervene is timely: (1) the stage of the proceedings; (2) prejudice to existing parties; and (3) the reason for any delay in moving to intervene. *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004). The Sacketts move to intervene at the outset of this litigation. As such, delay is not an issue. *See Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011) (noting that a motion to intervene was timely when it was filed within three months of the filing of the complaint and two weeks of the filing of an answer). The complaint in this litigation was filed on May 1, 2020, less than a month prior to the filing of this motion. *See* ECF No. 1. Further, a motion for preliminary injunction, which has the potential to significantly affect the Sacketts' interests, was filed on May 18, just 3 days prior to the filing of this motion. ECF No. 30. No answer has been filed and no substantive matters have been ruled on. Because intervention is sought so early, it will not prejudice any of the parties nor result in significant disruption or delay. Consequently, the Sacketts' motion is timely.

2. The Sacketts' Interests Relate to the Subject of This Litigation

To intervene as of right, a party must have an "interest relating to the property or transaction that is the subject of the action . . . ." Fed. R. Civ. P. 24(a)(2). This interest test is not a bright-line rule but is instead met if applicants will "suffer a practical impairment of [their] interests as a result of the pending litigation." *California ex rel. Lockyer*, 450 F.3d at 441. Accordingly, a court should make a "practical, threshold inquiry," *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993), and "'involv[e] as many apparently concerned persons as is compatible with efficiency and due process.'" *Cty. of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980) (quoting *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)). The types of interests protected are interpreted "'broadly, in favor of the applicants for intervention.'" *Sierra Club v. EPA*, 995 F.2d 1478, 1481 (9th Cir. 1993) (quoting *Scotts Valley Band of Pomo Indians of Sugar Bowl Rancheria v. United States*, 921 F.2d 924, 926 (9th Cir. 1990)).

The Sacketts have a significant interest in this litigation based on their ownership and use of private land which the Agencies claim contains regulated wetlands under the Clean Water Act. As discussed above, the Sackett's own a residential lot in Priest Lake, Idaho, which, prior to the Defendants' adoption of the Navigable Waters Protection Rule, was found subject to federal permitting authority under the Clean Water Act. Sackett Decl. ¶¶ 7, 9. Should Plaintiffs prevail in this litigation, and the Defendants' redefinition of "adjacent wetlands" be preliminarily or permanently enjoined, the Sacketts' property would remain subject to EPA and Army Corps' claim of permitting authority under the previous rules. Sackett Decl. ¶¶ 10, 14.

The Sacketts are currently engaged in ongoing litigation in the Ninth Circuit regarding federal permitting jurisdiction as to their property. *See Sackett v. EPA*, No. 19-35469 (9th Cir.). Should Plaintiffs' prevail, and the new regulatory redefinition of "adjacent wetlands" is enjoined nationwide and/or vacated, the revival of the prior rule would have a significant negative effect on their ability to use their property without a Clean Water Act permit. Sackett Decl. ¶ 14.

For these reasons, the Sacketts have significant protectable interests in this action as private landowners. *See Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1494 (9th Cir. 1995) ("[W]hen, as here, the injunctive relief sought by plaintiffs will have direct,

immediate, and harmful effects upon a third party's legally protectable interests, that party satisfies the 'interest' test of Fed. R. Civ. P. 24(a)(2); [it] has a significantly protectable interest that relates to the property or transaction that is the subject of the action."), *abrogated on other grounds*, *Wilderness Soc'y v. United States Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011). Indeed, as the objects of the regulation at issue, their interests easily qualify them for intervention. *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (noting that there is "ordinarily little question" of standing for the object of a regulation).

3. Disposition of This Case May Impair/Impede the Sacketts' Interests

Disposition of this case plainly threatens to impair and impede the Sacketts' interests. The threshold for demonstrating potential impairment of interests is low, as Rule 24(a)'s requirement addresses whether, as a practical matter, a denial of intervention would impede a prospective intervenor's ability to protect its interests. *California ex rel. Lockyer*, 450 F.3d at 442 ("Having found that appellants have a significant protectable interest, we have little difficulty concluding that the disposition of this case may, as a practical matter, affect it.").

The interests identified above may be impaired or impeded if the Sacketts are denied intervention. As discussed, if Plaintiffs prevail and the Navigable Waters Protection Rule's definition of "adjacent wetlands" is enjoined nationwide and/or vacated, it will alter the regulations that govern the Sacketts use of their property, to their detriment. *See S.W. Center for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001) ("We follow the guidance of Rule 24 advisory committee notes that state that '[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene.'") (quoting Fed. R. Civ. P. 24 advisory committee note to 1966 amendment).

4. No Party Adequately Represent the Sacketts' Interests

The "burden in showing inadequate representation is minimal: it is sufficient to show that representation *may* be inadequate." *Forest Conservation Council*, 66 F.3d at 1498 (citations omitted) (emphasis in the original). *See also Citizens for Balanced Use v. Mountain Wilderness Ass'n*, 647 F.3d at 898 (same); *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10

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(1972) ("[T]he burden of making that showing should be treated as minimal."). The Ninth Circuit has established a three-part test for addressing this factor:

(1) Whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments;

(2) Whether the present party is capable and willing to make such arguments;

(3) Whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect.

647 F.3d at 898. The "most important factor," however, is "'how the interest compares with the interests of existing parties.'" *Id*. If the "'government is acting on behalf of a constituency that it represents," then there is "an assumption of adequacy.'" *Id.* (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003)).

The Sacketts meet the "minimal" threshold for demonstrating that the government will not adequately represent their interests, a common conclusion where a regulated party seeks to intervene in a case in which its regulator is also a party. Prior to application of the Ninth Circuit test for this element, it bears noting that the Sacketts and EPA are adverse parties in currently pending litigation over whether the Clean Water Act applies to their property, *see Sackett v. EPA*, Ninth Circuit case no. 19-35469.

As to the first element of the Ninth Circuit test, the federal government's public interests are not such that it will undoubtedly make all of the Sacketts' arguments. The government has a variety of regulatory interests implicated by this case, including maximizing its power and discretion. *See Forest Conservation Council*, 66 F.3d at 1499 (noting that the government is more focused on "broad public interests") (collecting cases). *See also Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1255 (10th Cir. 2001) (same). As private landowners whose ability to develop, use, and enjoy their residential property is shaped by the challenged regulations, the Sacketts have direct interests in this case that the general public lacks. *See Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998) (intervention appropriate where intervenor's interest is narrower and more parochial than those of the public at large). The

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government may not give the same consideration to these interests as the Sacketts would, given the need to balance other political and policy concerns.

Further, the Sacketts will defend the Rule's redefinition of "adjacent wetlands" on different grounds than we expect the federal defendants will. For instance, the government is likely to defend the rules on grounds that maximize the Agencies' discretion going forward, to preserve agency power. *See* 85 Fed. Reg. 22,250, 22,263 (Apr. 21, 2020) (describing the rule's changes to the scope of wetland regulation as an exercise of agency judgment and discretion). The Sacketts, by contrast, will argue that the redefinition of "adjacent wetlands" is legally compelled by Supreme Court precedent—the controlling plurality opinion in *Rapanos v. United States*. 547 U.S. 715 (2006) (Scalia, J., plurality opinion); *see also* M. Reed Hopper, *Running Down the Controlling Opinion in* Rapanos v. United States, 21 U. Denv. Water L. Rev. 47 (2017-2018). The Clean Water Act and Supreme Court precedent, properly understood, not only permits the Agencies' new regulatory definition of "adjacent wetlands," but requires it.

As to the second element of the Ninth Circuit test, given the Agencies' institutional interest in preserving their judgment, power, and discretion, they are unlikely to be capable of making, or willing to make, all of the Sacketts' arguments. *See* 85 Fed. Reg. at 22,263. Further, the Agencies' inconsistency on the issues raised in this case creates serious doubts as to their ability to steadfastly advance the Sacketts' interests and arguments. In its redefinition of regulated wetlands, the challenged rule reverses earlier rules issued by the very same agencies. Indeed, these conflicting rules are of a very recent vintage. *See* 84 Fed. Reg. 56,626 (Oct. 22, 2019); 80 Fed. Reg. 37,054 (June 29, 2015). Given the vicissitudes of agency politics, there is at least some doubt that the Agencies will be capable of making, and willing to make, all of the same arguments as the Sacketts throughout the course of litigation.

As to the third element of the Ninth Circuit test, as private landowners who are directly affected by the regulatory scheme at issue, the Sacketts provide an important perspective which is currently absent from the case. *Cf. Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1255 (10th Cir. 2001) (The minimal inadequacy "showing is met when the applicant for intervention has expertise the government may not have."). In a case otherwise litigated between state and federal

government agencies, the Sacketts bring knowledge and perspective regarding the on-the-ground effects of Clean Water Act regulations and regulatory definitions on private landowners. Further, the Sacketts bring an element of immediacy to the defense of the redefinition of "adjacent wetlands," which is otherwise lacking from the Federal Defendants' interests. Should the Navigable Waters Protection Rule's redefinition of "adjacent wetlands" be enjoined and/or vacated and the prior rules restored, the Sacketts' property would remain subject to an ongoing dispute over federal permitting jurisdiction. This brings an important perspective to the litigation.

B. In the Alternative, The Sacketts Satisfy the Standard for Permissive Intervention

If the Court denies the Sacketts' motion to intervene as of right, it should alternatively grant them permission to intervene pursuant to Rule 24(b). Courts have broad discretion to grant intervention under the permissive standard. *See Orange Cty. v. Air California*, 799 F.2d 535, 539 (9th Cir. 1986). Rule 24(b) "'plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation.'" *Employee Staffing Servs. v. Aubry*, 20 F.3d 1038, 1042 (9th Cir. 1994) (quoting *SEC v. United States Realty & Improvement Co.*, 310 U.S. 434, 459 (1940)). Notably, "[u]nlike Rule 24(a), a 'significant protectable interest' is not required by Rule 24(b) for intervention; all that is necessary for permissive intervention is that intervenor's 'claim or defense and the main action have a question of law or fact in common.'" *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108 (9th Cir. 2002) (citing Fed. R. Civ. P. 24(b)).

The Sacketts' defense of the challenged rule raises a question of law or fact in common with Plaintiffs' claims and the government's defenses. For instance, the argument that Supreme Court precedent compels the Agencies' redefinition of regulated wetlands raises a question of law (whether Justice Scalia's plurality opinion or Justice Kennedy's concurring opinion in *Rapanos v. United States* controls), which is also raised by Plaintiffs' complaint. *See* Compl. ¶¶ 7, 58, 60, 61, 69. Therefore, were the Court to conclude that the Sacketts lack a right to intervene, it should allow intervention permissively under Rule 24(b).

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CONCLUSION

The Sacketts have a right to intervene or, in the alternative, should be given permission to intervene to protect their interests at stake in this litigation. The motion to intervene should be granted.

DATED: May 21, 2020.

Respectfully submitted,

ANTHONY L. FRANÇOIS
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Chantell and Michael Sackett

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, et al., Plaintiffs, v. ANDREW R. WHEELER, as Administrator of the U.S. Environmental Protection Agency, et al., Defendants, and CHANTELL and MICHAEL SACKETT, Defendant-Intervenors.	No. 3:20-cv-03005-RS **[PROPOSED] ANSWER OF DEFENDANT-INTERVENORS CHANTELL AND MICHAEL SACKETT** Judge: Honorable Richard Seeborg

For their answer to the complaint of State of California by and through Attorney General Xavier Becerra and California State Water Resources Control Board, State of New York, State of Connecticut, State of Illinois, State of Maine, State of Maryland, State of Michigan, State of New Jersey, State of New Mexico, State of North Carolina ex rel. Attorney General Joshua H. Stein, State of Oregon, State of Rhode Island, State of Vermont, State of Washington, State of Wisconsin, Commonwealths of Massachusetts and Virginia, the North Carolina Department of Environmental Quality, the District of Columbia, and the City of New York (collectively "State Plaintiffs"), Defendant-Intervenors Chantell Sackett and Michael Sackett ("The Sacketts") admit, deny, and allege as follows:

INTRODUCTION

1. The Sacketts admit the allegations in paragraph 1 to the extent that those named are the parties to this lawsuit.

2. The allegations in paragraph 2 purport to characterize the Navigable Waters Protection Rule: Definition of "Waters of the United States" (2020 Rule), which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of the 2020 Rule are denied.

3. The allegations in paragraph 3 purport to characterize the 2020 Rule and the Clean Water Act which speak for themselves and are the best evidence of their contents. Any allegations contrary to the plain language and meaning of these documents are denied. The allegations in paragraph 3 also contain conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

4. The allegations in paragraph 4 purport to characterize the 2020 Rule and the 2015 "Clean Water Rule," which speak for themselves and are the best evidence of their contents. Any allegations contrary to the plain language and meaning of these Rules are denied.

5. The allegations in paragraph 5 purport to characterize the 2019 Rule, which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of the 2019 Rule are denied.

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6. The allegations in paragraph 6 purport to characterize the 2020 Rule, the 2019 Rule, and the Clean Water Act, which speak for themselves and are the best evidence of their contents. Any allegations contrary to the plain language and meaning of these documents are denied. The allegations in paragraph 6 also constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

7. The allegations in paragraph 7 constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

8. The allegations in paragraph 8 constitute conclusions of law and Plaintiffs' characterization of the 2020 Rule and 33 U.S.C. § 1251(a), to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

9. The allegations in paragraph 6 purport to characterize the 2020 Rule, the 2015 Rule, the 2019 Rule, and the Clean Water Act, which speak for themselves and are the best evidence of their contents. Any allegations contrary to the plain language and meaning of these documents are denied. The allegations in paragraph 9 also constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

10. The Sacketts lack information sufficient to form a belief as to the truth of the allegations in paragraph 10, and on that basis deny the same.

11. The allegations in paragraph 11 constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

12. The allegations in paragraph 12 constitute Plaintiffs' characterization of their claim for relief, which requires no response. To the extent that a response may be deemed required, the Sacketts deny that Plaintiffs are entitled to the relief requested or to any relief whatsoever.

JURISDICTION AND VENUE

13. The allegations in paragraph 13 constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

14. The allegations in paragraph 14 constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

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INTRADISTRICT ASSIGNMENT

15. The allegations in paragraph 15 constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

PARTIES

16. The Sacketts admit the allegations in the first, third, and fifth sentences of paragraph 16. The allegations in the fourth sentence paragraph 16 purport to characterize 33 U.S.C. § 1362(3), which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of this provision are denied. The Sacketts lack information sufficient to form a belief as to the truth of the allegations in the remainder of paragraph 16, and on that basis deny the same

17. The Sacketts admit the allegations in paragraph 17.

18. The allegations in paragraph 18 constitute conclusions of law to which no answer is required.

19. The Sacketts admit the allegations in paragraph 19.

20. The allegations in paragraph 20 constitute conclusions of law to which no answer is required.

STATUTORY AND REGULATORY FRAMEWORK

The Administrative Procedure Act

21. The allegations in paragraph 21 constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

22. The allegations in paragraph 22 purport to characterize 5 U.S.C. § 551(5), which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of this provision are denied.

23. The allegations in paragraph 23 purport to characterize the APA and 5 U.S.C. § 553(b), (c), which speak for themselves and are the best evidence of their contents. Any allegations contrary to the plain language and meaning of these provisions are denied.

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24. The allegations in paragraph 24 purport to characterize 5 U.S.C. § 553(c), which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of this provision are denied.

25. The allegations in paragraph 25 purport to characterize 5 U.S.C. § 553(c), which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of this provision are denied. The allegations in paragraph 25 also contain conclusions of law, to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

26. The allegations in paragraph 26 constitute conclusions of law and Plaintiffs' characterization of the APA, to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

27. The allegations in paragraph 27 constitute conclusions of law and Plaintiffs' characterization of the APA, to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

28. The allegations in paragraph 28 constitute conclusions of law and Plaintiffs' characterization of the APA, to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

29. The allegations in paragraph 29 purport to characterize 5 U.S.C. § 706(2)(A), which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of this provision are denied. The allegations in paragraph 29 also contain conclusions of law, to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

The Clean Water Act

30. The allegations in paragraph 30 purport to characterize the Clean Water Act and 33 U.S.C. § 1251(a), which speak for themselves and are the best evidence of their contents. Any allegations contrary to the plain language and meaning of these provisions are denied.

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31. The allegations in paragraph 31 purport to characterize 33 U.S.C. §§ 1311(a), 1342, 1344, and 1362(7), (12), which speak for themselves and are the best evidence of their contents. Any allegations contrary to the plain language and meaning of these provisions are denied.

32. The allegations in paragraph 32 constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

33. The allegations in paragraph 33 purport to characterize the Clean Water Act, S. Rep. No. 92-414 at 77 (1972), and 33 U.S.C. §§ 1311, 1342, and 1344, which speak for themselves and are the best evidence of their contents. Any allegations contrary to the plain language and meaning of these documents are denied.

34. The allegations in paragraph 34 purport to characterize the Clean Water Act and 33 U.S.C. § 1344 (a), (h), which speak for themselves and are the best evidence of their contents. Any allegations contrary to the plain language and meaning of these documents are denied.

35. The allegations in paragraph 35 purport to characterize the Clean Water Act, and 33 U.S.C. §§ 1342(a), (b), which speak for themselves and are the best evidence of their contents. Any allegations contrary to the plain language and meaning of these provisions are denied.

36. The allegations in paragraph 36 purport to characterize 33 U.S.C. § 1342(d), which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of this provision are denied.

37. The allegations in paragraph 37 purport to characterize 33 U.S.C. § 1313, which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of this provision are denied.

38. The allegations in paragraph 38 purport to characterize 33 U.S.C. § 1341(a)(1), (2), which speak for themselves and are the best evidence of their contents. Any allegations contrary to the plain language and meaning of these provisions are denied.

39. The allegations in paragraph 39 purport to characterize the Clean Water Act and 33 U.S.C. §§ 1321(b), (j)(5), (s), which speak for themselves and are the best evidence of their contents. Any allegations contrary to the plain language and meaning of these provisions are denied.

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The allegations in paragraph 39 also contain conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

40. The allegations in the first sentence of paragraph 40 purport to characterize the Clean Water Act, and 33 U.S.C. § 1370(1), which speak for themselves and are the best evidence of their contents. Any allegations contrary to the plain language and meaning of these provisions are denied. The Sacketts lack information sufficient to form a belief as to the truth of the remaining allegations in paragraph 40, and on that basis deny the same. The remaining allegations in paragraph 40 also contain conclusions of law to which no answer is required.

Agency Regulations and Guidance Defining "Waters of the United States"

41. The allegations in paragraph 41 purport to characterize 42 Fed. Reg. 37, 144 (July 19, 1977); 45 Fed. Reg. 85,336 (Dec. 24, 1980); 47 Fed. Reg. 31,794 (July 22, 1982); 51 Fed. Reg. 41,206 (Nov. 13, 1986); and 53 Fed. Reg. 20,764 (June 6, 1988) (the 1980s Regulations), which speak for themselves and are the best evidence of their contents. Any allegations contrary to the plain language and meaning of these documents are denied.

42. The allegations in paragraph 42 purport to characterize the 2003 *SWANCC* Guidance, which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of this document are denied.

43. The allegations in paragraph 43 purport to characterize the 2008 *Rapanos* Guidance, which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of this document are denied.

44. The allegations in paragraph 44 purport to characterize the 2008 *Rapanos* Guidance, which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of this document are denied.

45. The allegations in paragraph 45 purport to characterize 80 Fed. Reg. at 37,054 and 82 Fed. Reg. 34,899, 34,901. Which speak for themselves and are the best evidence of their contents. Any allegations contrary to the plain language and meaning of these documents are denied.

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46. The allegations in paragraph 46 purport to characterize the 2015 Rule, which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of this document are denied. The allegations in the second sentence of paragraph 46 also constitute conclusions of law, to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

47. The allegations in paragraph 47 purport to characterize the 2015 Rule and *U.S. EPA, Connectivity of Streams and Wetland to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Final Report)*, EPA/600/R-14/475F (Washington, D.C. 2015) (2015 Connectivity Report), which speak for themselves and are the best evidence of their contents. Any allegations contrary to the plain language and meaning of these documents are denied.

48. The allegations in paragraph 48 purport to characterize 82 Fed. Reg. 12,497 (April 25, 2017) (Executive Order 13778), which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of this document are denied. The allegations in paragraph 48 also contain conclusions of law, to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

49. The allegations in paragraph 49 purport to characterize 84 Fed. Reg. 4,154 (Feb. 14, 2019) (the 2019 Rule), which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of this document are denied.

The 2020 Rule

50. The allegations in paragraph 50 purport to characterize Executive Order No. 13778, the 2020 Rule, the 1980s Regulations, the *SWANCC* Guidance, the *Rapanos* Guidance, the 2015 Rule, and the 2019 Rule, which speak for themselves and are the best evidence of their contents. Any allegations contrary to the plain language and meaning of these documents are denied. The allegations in paragraph 50 also constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

51. The allegations in paragraph 51 purport to characterize the 2020 Rule, which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of this document are denied. The allegations in Footnote 3 constitute conclusions of law

to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

52. The allegations in paragraph 52 purport to characterize the 2020 Rule, which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of this document are denied.

53. The allegations in paragraph 53 purport to characterize the 2020 Rule, which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of this document are denied.

54. The allegations in paragraph 54 purport to characterize the 2020 Rule, which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of this document are denied.

55. The allegations in paragraph 55 purport to characterize the 2020 Rule, which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of this document are denied. The allegations in paragraph 55 also constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

56. The allegations in paragraph 56 purport to characterize the 2020 Rule, the *Rapanos* Guidance, the 2015 Rule, and the 2019 Rule, which speak for themselves and are the best evidence of their contents. Any allegations contrary to the plain language and meaning of these documents are denied.

57. The allegations in paragraph 57 purport to characterize the 2020 Rule and USACE Internal Communication, September 4-5, 2017, "Breakdown of Flow Regimes in NHD Streams Nationwide," which speak for themselves and are the best evidence of their contents. Any allegations contrary to the plain language and meaning of these documents are denied. The allegations in paragraph 57 also constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

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The 2020 Rule's Deficiencies

58. The allegations in paragraph 58 constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

59. The allegations in paragraph 59 purport to characterize the 2020 Rule, which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of this document are denied.

60. The allegations in paragraph 60 constitute conclusions of law and Plaintiffs' characterization of the 2020 Rule, to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

61. The allegations in paragraph 61 constitute conclusions of law and Plaintiffs' characterization of the 2020 Rule, to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

62. The allegations in paragraph 62 constitute conclusions of law and Plaintiffs' characterization of the 2020 Rule, to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

63. The allegations in paragraph 63 purport to characterize the 2015 Rule and its associated record, which speak for themselves f and are the best evidence of their contents. Any allegations contrary to the plain language and meaning of these documents are denied.

64. The allegations in paragraph 64 purport to characterize EPA's 2015 Connectivity Report, which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of this document are denied.

65. The allegations in paragraph 65 constitute conclusions of law and Plaintiffs' characterization of the 2020 Rule, to which no answer is required; to the extent they may be deemed allegations of fact, they are denied. Any allegations contrary to the plain language and meaning of the 2020 Rule are further denied.

66. The allegations in paragraph 66 purport to characterize 85 Fed. Reg. at 22,261, which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of this document are denied.

67. The allegations in paragraph 67 and Footnote 7 purport to characterize the *SAB Draft Commentary on Proposed Final Rule* (Oct. 16, 2019) and *SAB Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act* (Feb. 27, 2020), which speak for themselves and are the best evidence of their contents. Any allegations contrary to the plain language and meaning of these documents are denied.

68. The allegations in paragraph 68 purport to characterize the 2020 Rule, which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of this document are denied.

69. The allegations in paragraph 69 purport to characterize the 2020 Rule, which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of this document are denied. The allegations in paragraph 69 also contain conclusions of law, to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

70. The allegations in paragraph 70 constitute conclusions of law and Plaintiffs' characterization of the 2020 Rule, the *Rapanos* Guidance, the 2015 Rule, and the 2019 Rule, to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

71. The allegations in paragraph 71 constitute conclusions of law and Plaintiffs' characterization of the 2020 Rule, the *Rapanos* Guidance, the 2015 Rule, and the 2019 Rule, to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

72. The allegations in paragraph 72 constitute conclusions of law and Plaintiffs' characterization of the 2020 Rule, to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

73. The allegations in paragraph 73 purport to characterize the 2020 Rule and its associated record, which speak for themselves and are the best evidence of their contents. Any allegations contrary to the plain language and meaning of these documents are denied.

74. The allegations in paragraph 74 purport to characterize the 2020 Rule and its preamble, which speak for themselves and are the best evidence of their contents. Any allegations contrary to the plain language and meaning of these documents are denied.

THE 2020 RULE HARMS THE STATES AND CITIES

75. The allegations in paragraph 75 constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

76. The Sacketts lack information sufficient to form a belief as to the truth of the allegations in paragraph 76, and on that basis deny the same. The allegations in the final sentence of paragraph 76 also contain conclusions of law to which no answer is required.

77. The Sacketts lack information sufficient to form a belief as to the truth of the allegations in paragraph 77, and on that basis deny the same.

78. The Sacketts lack information sufficient to form a belief as to the truth of the allegations in the first sentence of paragraph 78, and on that basis deny the same. The remaining allegations in paragraph 78 purport to characterize the 2020 Rule, which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of this document are denied.

79. The allegations in the first and second sentences of paragraph 79 purport to characterize the 2020 Rule and the 2019 Rule, which speak for themselves and are the best evidence of their contents. Any allegations contrary to the plain language and meaning of these documents are denied. The Sacketts lack information sufficient to form a belief as to the truth of the allegations in the third and fourth sentences of paragraph 79, and on that basis deny the same. The allegations in the final sentence of paragraph 79 purport to characterize EPA and Department of the Army, *Resource and Programmatic Assessment for the Navigable Waters Protection Rule: Definition of "Waters of the United States"* (Jan. 23, 2020), EPA-HQ-OW-2018-0149 (Resource and Programmatic Assessment), which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of this document are denied.

80. The Sacketts lack information sufficient to form a belief as to the truth of the allegations in the first sentence of paragraph 80, and on that basis deny the same. The remaining allegations in paragraph 80 purport to characterize the Agencies' Resource and Programmatic Assessment, and EPA and Department of the Army, *Economic Analysis for the Navigable Waters Protection Rule: "Definition of Waters of the United States"* (Jan 22, 2020), EPA-HQ-OW-2018-

0149, which speak for themselves and are the best evidence of their contents. Any allegations contrary to the plain language and meaning of these documents are denied.

81. The allegations in paragraph 81 purport to characterize the 2020 Rule and the Agencies' Resource and Programmatic Assessment, which speak for themselves and are the best evidence of their contents. Any allegations contrary to the plain language and meaning of these documents are denied.

82. The allegations in paragraph 82 purport to characterize the 2020 Rule, which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of this document are denied.

83. The Sacketts lack information sufficient to form a belief as to the truth of the allegations in the first sentence of paragraph 83, and on that basis deny the same. The remaining allegations in paragraph 83 purport to characterize the Agencies' Resource and Programmatic Assessment, which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of this document are denied.

84. The Sacketts lack information sufficient to form a belief as to the truth of the allegations in paragraph 84, and on that basis deny the same.

85. The Sacketts lack information sufficient to form a belief as to the truth of the allegations in paragraph 85, and on that basis deny the same.

86. The Sacketts lack information sufficient to form a belief as to the truth of the allegations in paragraph 86, and on that basis deny the same.

87. The Sacketts lack information sufficient to form a belief as to the truth of the allegations in paragraph 87, and on that basis deny the same.

88. The Sacketts lack information sufficient to form a belief as to the truth of the allegations in paragraph 88, and on that basis deny the same.

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FIRST CAUSE OF ACTION
Violation of the Administrative Procedure Act, 5 U.S.C. § 706
Arbitrary and Capricious and Not in Accordance with Law
Impermissible Interpretation of "Waters of the United States"

89. The Sacketts' responses to paragraphs 1 to 88 are incorporated herein by reference.

90. The allegations in paragraph 90 constitute conclusions of law and Plaintiffs' characterization of 5 U.S.C. § 706(2)(A), to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

91. The allegations in paragraph 91 constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

92. The allegations in paragraph 92 constitute conclusions of law and Plaintiffs' characterization of the 2020 Rule, to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

93. The allegations in paragraph 93 constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

94. The allegations in paragraph 94 constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

SECOND CAUSE OF ACTION
Violation of the Administrative Procedure Act, 5 U.S.C. § 706
Arbitrary and Capricious and Not in Accordance with Law
Disregard of Scientific Evidence, Prior Agency
Factual Findings and Policy and Practice

95. The Sacketts' responses to paragraphs 1 to 94 are incorporated herein by reference.

96. The allegations in paragraph 96 constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

97. The allegations in paragraph 97 constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

98. The allegations in paragraph 98 constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

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99. The allegations in paragraph 99 constitute conclusions of law and Plaintiffs' characterization of the 2020 Rule and 2015 Connectivity report, to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

100. The allegations in paragraph 100 constitute conclusions of law and Plaintiffs' characterization of the 2020 Rule, to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

101. The allegations in paragraph 101 constitute conclusions of law and Plaintiffs' characterization of the 2020 Rule, to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

102. The allegations in paragraph 102 constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

THIRD CAUSE OF ACTION
Violation of the Administrative Procedure Act, 5 U.S.C. § 706
Arbitrary and Capricious and Not in Accordance with Law Failure to Consider Statutory Objective and Impacts on Water Quality

103. The Sacketts' responses to paragraphs 1 to 102 are incorporated herein by reference.

104. The allegations in paragraph 104 constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

105. The allegations in paragraph 105 constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

106. The allegations in paragraph 106 constitute conclusions of law and Plaintiffs' characterization of 33 U.S.C. § 1251(a), to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

107. The allegations in paragraph 107 purport to characterize the Clean Water Act, which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of the statute are denied. The allegations in paragraph 107 also contain conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

108. The allegations in paragraph 108 purport to characterize the Clean Water Act and the 2020 Rule, which speak for themselves and are the best evidence of their contents. Any allegations contrary to the plain language and meaning of these documents are denied. The allegations in paragraph 108 also contain conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

109. The allegations in paragraph 109 constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

110. The allegations in paragraph 110 purport to characterize the Clean Water Act, which speaks for itself and is the best evidence of its contents. Any allegations contrary to the plain language and meaning of the statute are denied. The allegations in paragraph 110 also constitute conclusions of law to which no answer is required; to the extent they may be deemed allegations of fact, they are denied.

PLAINTIFFS' REQUEST FOR RELIEF

The remainder of Plaintiffs' Complaint consists of Plaintiffs' Request for Relief, which requires no response. To the extent that a response may be deemed required, the Sacketts deny that Plaintiffs are entitled to the relief requested or to any relief whatsoever.

GENERAL DENIAL

The Sacketts hereby deny any allegations of Plaintiffs' Complaint, whether express or implied, that are not otherwise specifically admitted or qualified herein.

AFFIRMATIVE DEFENSES

Without admitting any of the allegations of Plaintiffs' Complaint, and without admitting or acknowledging that the Sacketts have any burden to prove any of the following allegations, the Sacketts allege the following as separate and independent affirmative defenses as to all claims and claims for relief asserted by Plaintiffs.

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FIRST AFFIRMATIVE DEFENSE

(Commerce Clause/Tenth Amendment)

1. Under the Clean Water Act, the Army Corps of Engineers (Army) and Environmental Protection Agency (EPA) may only regulate discharges to "navigable waters." *See* 33 U.S.C. § 1344(a).

2. The Navigable Waters Protection Rule defines "navigable waters" to exclude wetlands unless they abut other regulated waters, are flooded by other regulated waters, or are separated from other regulated waters only by natural or permeable artificial barriers (collectively "nonregulated wetlands"). 33 C.F.R. § 328.3(c)(1).

3. When enacting the Clean Water Act, Congress had in mind only its traditional regulation of navigation. *SWANCC*, 531 U.S. at 172.

4. *SWANCC* holds that isolated ponds are outside of the scope of the term "navigable waters" under the Clean Water Act, based in part on the absence of a clear statement in the Act that would extend regulation to such features, and the limits that the Commerce Clause and Tenth Amendment place on Congress' regulatory power. 531 U.S. at 174.

5. "Nonregulated wetlands" routinely occur on private property, such as the Sacketts', that legally is or may be used for a wide variety of land uses and purposes, as an aspect of property ownership and affirmed under state and local law. These uses include but are not limited to farming, ranching, roads, ditches, wells, pipelines, tanks, reservoirs, ponds, windmills, power and telecommunications poles and related infrastructure, fencing, livestock pens and corrals, equipment and storage yards, loading facilities, parking areas, and buildings (including but not limited to barns, sheds, shops, warehouses, stores, garages, and homes). All of these are traditional and customary uses of real property and generally create no nuisance conditions.

6. Property owners such as the Sacketts routinely put their real property to most if not all these uses, consistent with local and state regulation and permitting.

7. Many of these uses coincide with areas that contain "nonregulated wetlands," and involve non-exempt discharges of dredged or fill material to those features.

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8. Interpreting "navigable waters" in the Clean Water Act to allow regulation of the use of "nonregulated wetlands" on private property such as described in the preceding paragraph would extend federal authority to and beyond the outer reaches of the Commerce Power. The Clean Water Act contains no clear statement of Congressional intent to regulate to such extent. *SWANCC*, 531 U.S. at 174. The agencies' interpreting of the Act in the Navigable Waters Protection Rule to exclude "nonregulated wetlands" is not an exercise of agency discretion, but instead is compelled by the Commerce Clause.

9. Interpreting "navigable waters" in the Clean Water Act to allow regulation of the use of private property such as described in paragraphs 5-7 above would intrude extensively on local land use regulation and water resource regulation and allocation. The Tenth Amendment reserves government power over these questions to the states. *SWANCC*, 531 U.S. at 173 ("This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power."); *see also Rapanos*, 547 U.S. at 737-38. Clean Water Act regulation of such activities would amount to a federal veto power over local land use law, zoning, and permitting. The agencies' interpretation of the Clean Water Act to exclude "nonregulated wetlands" is not an exercise of agency discretion, but instead is compelled by the Tenth Amendment.

SECOND AFFIRMATIVE DEFENSE

(Article I/Nondelegation Doctrine)

10. The Navigable Waters Protection Rule interprets "navigable waters" in the Clean Water Act to exclude wetlands unless they abut other regulated waters, are flooded by other regulated waters, or are separated from other regulated waters only by natural or permeable artificial barriers (collectively "nonregulated wetlands"). 33 C.F.R. § 328.3(c)(1). The Supreme Court has held that while the Clean Water Act regulates some waters that are not navigable-in-fact, it does not regulate all "waters" and that "navigable" must have some limiting meaning. *SWANCC*, 531 U.S. 171-72 (the Act regulates some waters not "deemed 'navigable' under the classical understanding of that term" but not all such waters) (quoting *Riverside Bayview Homes*, 474 U.S. at 133).

11. The Act does not define "navigable." If the term does not have its ordinary meaning but instead has some broader or different meaning, then the statute unconstitutionally delegates to EPA and the Army the task of deciding, as a policy matter, what non-navigable wetlands the agencies will regulate. The agencies themselves see their work as largely one of identifying, balancing, and selecting among competing policy priorities. *See*, *e.g.*, 85 Fed. Reg. at 22,264, 22,270-71, 22,277, 22,290, 22,292, 22,300.

12. In making this delegation, the Clean Water Act lacks any appropriately understood "intelligible principle" and provides no guidance or criteria to the agencies to circumscribe their policy decision defining "navigable."

13. The Act identifies no fact-finding that the agencies must engage in to define "navigable."

14. The Act provides no factors for the agencies to consider, let alone what weight to give to any such factors, in determining the meaning of "navigable."

15. If "navigable" in the statute means something other than "navigable-in-fact," such that the exclusion of "nonregulated wetlands" from the definition of "navigable waters" is not compelled by the text of the Act and/or the Commerce Clause and Tenth Amendment, then the statute delegates unbounded discretion to the agencies to define the term, in violation of the non-delegation doctrine, and Article I of the Constitution (vesting "all legislative powers" in the Congress).

16. If the regulation of "non-regulated wetlands" would violate Article I and the Non-Delegation Doctrine, then the Army and EPA's decision to exclude such "non-regulated wetlands" from the scope of the Navigable Waters Protection Rule cannot be legally invalid on any basis, nor can it be set aside or enjoined under the Administrative Procedure Act.

THIRD AFFIRMATIVE DEFENSE

(Void for Vagueness)

17. The Navigable Waters Protection Rule interprets "navigable waters" in the Clean Water Act to exclude wetlands unless they abut other regulated waters, are flooded by other

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regulated waters, or are separated from other regulated waters only by natural or permeable artificial barriers (collectively "nonregulated wetlands"). 33 C.F.R. § 328.3(c)(1).

18. The Act does not define "navigable." If the term does not have its ordinary meaning but instead has some broader or different meaning, the Act gives no notice of that meaning or its contours. The agencies themselves see their work as largely one of identifying, balancing, and selecting among competing policy priorities, rather than elaborating a technical definition of some commonly known term. *See, e.g.*, 85 Fed. Reg. at 22,264, 22,270-71, 22,277, 22,290, 22,292, 22,300; *see also Sackett v. EPA*, 566 U.S. 120, 133 (2012) (Alito, J., concurring) ("the words themselves are hopelessly indeterminate.").

19. The Due Process Clause of the U.S. Constitution requires that criminal statutes provide adequate notice of the conduct which they proscribe to those who must comply. *United States v. Lanier*, 520 U.S. 259, 265-67 (1997). The Clean Water Act imposes criminal penalties. 33 U.S.C. § 1319(c).

20. The rule of lenity also requires that statutes with criminal penalties be interpreted in the light most favorable to criminal defendants. *United States v. Granderson*, 511 U.S. 39, 54 (1994) ("[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct—we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor.").

21. If the term "navigable" in the Act does not have the ordinary meaning of "navigable," but at the same time does not encompass "all waters," then it is impossible for any regulated party to know from the statute what waters are regulated unless and until the agencies give some meaning to the term.

22. A statute whose requirements are only knowable after they are "interpreted" by enforcement officials is a classic violation of the void for vagueness doctrine. If "navigable" is interpreted in a way that its meaning is unknown absent case by case agency interpretation, then the statute fails to give constitutionally adequate notice of the conduct that it proscribes and is void-for-vagueness under the Due Process Clause.

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23. If "navigable" as used in the Clean Water Act is void-for-vagueness, then the decision of the Army and EPA to exclude "nonregulated wetlands" from the scope of the Navigable Waters Protection Rule cannot be legally unsound under any basis, nor can it be set aside or enjoined under the Administrative Procedure Act.

RESERVATION OF DEFENSES

24. The Sacketts reserve the right to amend this Answer and to assert additional defenses.

PRAYER FOR RELIEF

Defendant-Intervenors pray that Plaintiffs take nothing by their Complaint, and that the Court award Defendant-Intervenors their costs and attorneys' fees, and any other relief the Court may deem just and proper.

DATED: May 21, 2020.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, et al.,

Plaintiffs,

v.

ANDREW R. WHEELER, as Administrator of the U.S. Environmental Protection Agency, et al.,

Defendants.

Case No. 3:20-cv-03005-RS

[PROPOSED] OPPOSITION TO CALIFORNIA'S MOTION FOR PRELIMINARY INJUNCTION

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I. INTRODUCTION

This Court may not enjoin or stay the Navigable Waters Protection Rule, at least as to that rule's exclusion of wetlands from the Defendants', Environmental Protection Agency and U.S. Army (Agencies), authority under the Clean Water Act. *See* 33 C.F.R. § 328.3(a)(4)[1] (proposed) (adjacent wetlands regulated); *id*. at § 328.3(c)(1) (proposed) (adjacent wetlands defined to exclude wetlands not abutting or flooded by other regulated features, or not separated from such features only by natural or permeable artificial barriers); 85 Fed. Reg. 22,250, 25,338-39 (Apr. 21, 2020). This is because the Agencies' reduction in the geographic footprint of Clean Water Act wetland regulation was not an exercise of agency discretion. Rather, it was compelled by a plain reading of the Act, under the controlling plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). That opinion holds that the plain text of the Act limits Clean Water Act regulation of wetlands to those that directly abut other regulated water bodies, to the degree that the end of one and the beginning of the other cannot be clearly discerned. *Rapanos*, 547 U.S. at 755.

For this reason, Plaintiffs' objections to alleged deficiencies in the Agencies' decision-making process under the Administrative Procedures Act are unavailing. *Koyo Seiko Co. v. United States*, 95 F.3d 1094, 1099-1102 (D.C. Cir. 1996) (affirming a Department of Commerce antidumping proceeding in which the "plain language of the statute compel[led] the conclusion."). *See generally* Kevin M. Stack, *The Constitutional Foundations of* Chenery, 2017 Yale L.J. 952, 965-66; *id*. at 966 ("As Judge Friendly put it, "[W]hen agency action is statutorily compelled, it does not matter that the agency which reached the decision required by law did so on a debatable or even a wrong ground, for remand in such a case would be but a useless formality.""") (citing Henry J. Friendly, Chenery *Revisited: Reflections on the Reversal and Remand of Administrative Orders*, 1969 Duke L.J. 199, 210).

Since the Agencies' removal of the class of wetlands they formerly regulated was compelled by the statute, Plaintiffs have no likelihood of success on the merits as to that issue, and the Court may neither stay nor enjoin the Navigable Waters Protection Rule.

[1] References to the Code of Federal Regulations without a date are to the version of the CFR adopted by the Navigable Waters Protection Rule.

II. The *Rapanos* Plurality Opinion Is the Controlling Supreme Court Interpretation of the Clean Water Act's Application to Wetlands

The controlling Supreme Court authority on whether wetlands, that do not abut navigable-in-fact rivers and lakes, are federally protected "navigable waters" under the Clean Water Act, is *Rapanos v. United States*, 547 U.S. 715 (2006).

Army regulations issued in 1986 defined "navigable waters" to include all non-navigable tributaries to navigable-in-fact waters, and all wetlands "adjacent to" (meaning "bordering, contiguous, or neighboring") navigable-in-fact waters and their non-navigable tributaries. 33 C.F.R. § 328.3(a)(5) (2005); *id*. at § 328.3 (a)(7) (2005); *see also id*. at § 328.3(c) (2005). In *Rapanos*, the Supreme Court invalidated these provisions, as beyond the scope of the statutory term "navigable waters" and exceeding the Commerce Power.

The issue in *Rapanos* was how to interpret whether "navigable waters" include wetlands that do not physically abut navigable-in-fact waterways. 547 U.S. at 728; *id*. at 759 (Kennedy, J., concurring). The judgment remanded the case because the lower courts and the Agencies had not properly interpreted that term. *Id*. at 757. The five Justices supporting the judgment adopted two different interpretations.

The plurality determined that the language, structure, and purpose of the Act all limit federal authority over non-navigable tributaries to "relatively permanent, standing or continuously flowing bodies of water" commonly recognized as "streams[,] . . . oceans, rivers, [and] lakes" connected to traditional navigable waters. *Id*. at 739. The plurality limited wetlands to only those physically abutting such waters, where wetland and water are "indistinguishable." *Id*. at 755.

The plurality sharply critiqued "the breadth of the Corps' determinations in the field" and especially its continued reliance on an expansive interpretation of "adjacent" waters. *Id*. at 727. It emphasized that the term "waters of the United States" did not include all "water of the United States" but instead could only refers to "continuously present, fixed bodies of water." *Id*. at 732-33. The plurality explained that the definition of "waters of the United States" must be rooted in the traditional understanding of "navigable waters." *Id*. at 734. The plurality concluded that "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,'" are regulated by the Act. *Id*. at 742.

Justice Kennedy joined in the judgment but interpreted the Act more broadly: the "significant nexus" test, under which the government can regulate a non-abutting wetland if it significantly affects the physical, chemical, and biological integrity of a navigable-in-fact waterway. *Id*. at 759, 779 (Kennedy, J., concurring).

Justice Kennedy shared the plurality's concern that an overly broad interpretation of the Act would read "navigable" out of the text, and disagreed that the Act covers "wetlands [that] lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters." *Id*. at 778 (Kennedy, J., concurring). Instead, non-navigable waters must have a "significant nexus with navigable waters." *Id*. at 779. Wetlands are regulable if "either alone or in combination with similarly situated lands in the region, [they] significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id*. at 780. This connection can't be "speculative or insubstantial." *Id*.

Since *Rapanos* has no majority opinion, this Court must determine which opinion, if any, is the holding, in order to rule on Plaintiffs' Motion for Preliminary Injunction.

A. The Supreme Court's Subsequent Application of *Rapanos* in Clean Water Act Cases Establishes That the *Rapanos* Plurality Controls

In April of 2020, the Supreme Court clearly showed that it reads the plurality as the controlling opinion in *Rapanos*. In *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020), the Court addressed the question of whether, under the Clean Water Act, the movement of a pollutant from an injection well (a point source) through groundwater (not a point source) to the ocean (a navigable water) is a regulated "discharge." 140 S. Ct. at 1468. The Court issued a six-Justice majority opinion authored by Justice Breyer, *id*. at 1468-478, a concurrence by Justice Kavanaugh, *id*. at 1478-79 (Kavanaugh, J., concurring), and two separate dissents by Justices Thomas (joined by Justice Gorsuch), *id*. at 1479-1482 (Thomas, J., dissenting) and Alito, *id*. at 1482-1492 (Alito, J., dissenting). All four of these opinions cite the *Rapanos* plurality for its discussion of point sources under the Act, see *Rapanos*, 547 U.S. at 743-44, and apply that

discussion in disparate ways to whether pollutants moving through groundwater are "added" to the receiving ocean waters so as to constitute a discharge. *See* 140 S. Ct. at 1475 (citing *Rapanos*, 547 U.S. at 743) (nothing in statute requires that a pollutant move "directly" or "immediately" from its origin to navigable waters); *id*. at 1478 (Kavanaugh, J., concurring) (majority reading of "discharge" "adheres to the interpretation set forth in Justice Scalia's plurality opinion in *Rapanos*"); *id*. at 1482 (Thomas, J., dissenting) (*Rapanos* plurality does not decide the issue in this case); *id*. at 1487 n.5 (Alito, J., dissenting) (*Rapanos* plurality supports "daisy chaining" point sources). Every member of the Supreme Court joined one of these four opinions elaborating on the *Rapanos* plurality, with Justice Kavanaugh both joining the majority and writing separately to underline the role of the *Rapanos* plurality in the Court's *Maui* decision.

While the four judicial authors in *County of Maui* disagree about the meaning of the *Rapanos* plurality as it applies to the definition of "discharge," they all agree that the plurality is the opinion in *Rapanos* that bears on their decision. The *Rapanos* plurality is the precedent that the Supreme Court looked to in making its decision in *County of Maui*. No opinion in *County of Maui* cites the *Rapanos* concurrence.

This is consistent with, and grows organically from, the Supreme Court's prior citations to *Rapanos*. Before *County of Maui*, the Supreme Court cited *Rapanos* in nine cases. In *all* of those cases, the Court cited the plurality. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 706 (2006) (Scalia, J., dissenting) (citing *Rapanos*, 547 U.S. 715); *Exxon Shipping v. Baker*, 554 U.S. 471, 508 n.21 (2008) (citing *Rapanos*, 547 U.S. at 749); *Kucana v. Holder*, 558 U.S 233, 253 (2010) (citing *Rapanos*, 547 U.S. at 752); *PPL Montana, LLC v. Montana*, 566 U.S. 576, 592 (2012) (citing *Rapanos*, 547 U.S. at 730-31); *Sackett v. EPA*, 566 U.S. 120, 123 (2012) (citing *Rapanos*, 547 U.S. 715); *id*. at 133 (Alito, J., concurring) (citing *Rapanos*, 547 U.S. at 732-39); *Abramski v. U.S.*, 573 U.S. 139, 198 (2014) (Scalia, J., dissenting) (citing *Rapanos*, 547 U.S. at 752); *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 268 (2015) (citing *Rapanos*, 547 U.S. at 757); *Army Corps v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1811-12, 1815 (2016) (citing *Rapanos*, 547 U.S. at 721-22); *National Ass'n of Mfrs. v. Department of Defense*, 138 S. Ct. 617, 625 (citing *Rapanos*, 547 U.S. at 723); *id*. (citing *Rapanos*, 547 U.S. at 729, 757); *id*. at 633 (citing *Rapanos*, 547 U.S. at 729). By

contrast, the Court has only cited Justice Kennedy's *Rapanos* concurrence once, in Justice Kennedy's opinion in *PPL Montana*, immediately following his citation to the plurality. *See* 566 U.S at 592 (citing *Rapanos*, 547 U.S. at 761 (Kennedy, J., concurring in judgment)).

This pattern of adopting the concurrence is clearest in the Supreme Court's post-*Rapanos* cases that address questions arising under the Clean Water Act. *See Sackett v. EPA*, 566 U.S. 120, 123 (2012) (citing *Rapanos*, 547 U.S. 715); *id*. at 133 (Alito, J., concurring) (citing *Rapanos*, 547 U.S. at 732-39); *Army Corps v. Hawkes Co., Inc.*, 136 S.Ct. 1807, 1811-12, 1815 (2016) (citing *Rapanos*, 547 U.S. at 721-22); *National Ass'n of Mfrs. v. Department of Defense*, 138 S. Ct. 617, 625 (citing *Rapanos*, 547 U.S. at 723); id. (citing *Rapanos*, 547 U.S. at 729, 757); id. at 633 (citing *Rapanos*, 547 U.S. at 729). And this pattern culminates in *County of Maui*, in which all four opinions debate whether the *Rapanos* plurality (contains precedent or dicta as to the definition of "discharge"). None of the Supreme Court's post-*Rapanos* Clean Water Act cases cite Justice Kennedy's concurrence; they all cite the plurality.

The Supreme Court has established that the plurality is the precedential holding of *Rapanos*. But even absent this clear and progressively more robust adoption of the *Rapanos* plurality by the Supreme Court, lower courts can identify the plurality as the holding of *Rapanos* by applying *Marks v. United States*, 430 U.S. 188 (1977).

B. This Court Must Apply *Rapanos* Using the *Marks* Framework as Clarified by the Ninth Circuit's Decision in *United States v. Davis*

Marks holds that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks*, 430 U.S. at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

The Ninth Circuit recently provided definitive guidance for applying *Marks* in *United States v. Davis*, 825 F.3d 1014 (9th Cir. 2016) (en banc), which examined a 4-1-4 split decision in *Freeman v. United States*, 564 U.S. 522 (2011). *Davis*, 825 F.3d at 1019. *Freeman* addressed whether a defendant who entered into a plea agreement could take advantage of a sentence reduction under the Sentencing Reform Act. *Davis*, 825 F.3d at 1019. Four Justices in the *Freeman*

plurality held the defendant could almost always take advantage of the sentence reduction, so long as the sentence imposed reflected the Sentencing Guidelines then in effect. *Id*. Justice Sotomayor separately concurred, arguing that a defendant could only take advantage of the sentence reduction when the plea agreement incorporates or uses the Sentencing Guidelines. *Id*. at 1019-20. Four dissenting Justices would have held a defendant relying on a plea agreement could never take advantage of the sentence reduction under the Sentencing Reform Act. *Id*. at 1019. To determine the controlling *Freeman* opinion, the Ninth Circuit started with *Marks*:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.

Davis, 825 F.3d at 1020 (quoting *Marks*, 430 U.S. at 193).

The Ninth Circuit observed that after forty years, the courts are still struggling "to divine what the Supreme Court meant by 'the narrowest grounds,'" with two approaches emerging. *Id*. (quoting *Marks*, 430 U.S. at 193). One is the reasoning-based approach, which seeks common reasoning among the concurring opinions to see if one is a logical subset of the other, broader opinion. *Id*. at 1021. "In essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment." *Id*. at 1020 (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc)). The other approach is results-based and defines "narrowest grounds" as "the rule that 'would necessarily produce results with which a majority of the Justices from the controlling case would agree.'" *Id*. at 1021.

Of the two, *Davis* rejected the results-based approach and held that this Circuit is to use the reasoning-based approach:

> To foster clarity, we explicitly adopt the reasoning-based approach to applying *Marks*. . . . A fractured Supreme Court decision should only bind the federal courts of appeal when a majority of the Justices agree upon a single underlying rationale and one opinion can reasonably be described as a logical subset of the other. When no single rationale commands a majority of the Court, only the specific result is binding on lower federal courts.

Id. at 1021-22.

Shortly after *Davis*, the Ninth Circuit held that only opinions supporting the judgment can be examined as potential logical subsets of each other in determining a holding of the Supreme Court under *Marks*. *Cardenas v. United States*, 826 F.3d 1164, 1171 (9th Cir. 2016) ("narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices *who support the judgment*") (emphasis added) (quoting *Davis*, 825 F.3d at 1020)). While a dissent may be useful in assessing the reasoning of the opinions supporting the judgment and identifying which is the logical subset of the other, a dissent itself cannot be either the broader or narrower opinion for determining the holding.

1. Under *Davis*, the *Rapanos* Plurality is the Narrowest Ground for the Decision and is the Holding

The key to the question "what is the narrowest opinion" in *Rapanos* is identifying what the judgment did. The Court remanded the case to the Sixth Circuit for further proceedings, after determining that the Agencies and the lower courts had not properly defined "navigable waters." 547 U.S at 757. The Supreme Court arrived at this judgment through two different interpretations of 'navigable waters.' As such, the "narrowest opinion" is the one with the narrowest meaning of "navigable waters."

The plurality and concurrence show this. 547 U.S. at 729 ("In these consolidated cases, we consider 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" within the meaning of the Act."); *id.* (addressing landowners' contentions about the meaning of "navigable waters" and "waters of the United States"); *id.* at 739 (rejecting Army's "expansive interpretation" as an "[im]permissible construction of the statute") (quoting *Chevron v. N.R.D.C., Inc.*, 467 U.S. 837, 843 (1984)); *see also* 547 U.S. at 759 (Kennedy, J., concurring) ("These consolidated cases require the Court to decide whether the term 'navigable waters' in the Clean Water Act extends to wetlands that do not contain and are not adjacent to waters that are navigable in fact."); *id.* at 759 ("The word 'navigable' in the Act must be given some effect.").

And the judgment in *Rapanos* confirms that the only issue in the case is how to interpret the Act. "We vacate the judgments of the Sixth Circuit . . . and remand both cases for further

proceedings." 547 U.S. at 757. Both opinions which supported this judgment did so because of an interpretation of the statute which differed from that applied by the Sixth Circuit. *Id*. ("Because the Sixth Circuit applied the wrong standard to determine if these wetlands are covered 'waters of the United States . . . .'"); *id*. at 757 (Kennedy, J., concurring) ("navigable waters" must have "significant nexus" to navigable in fact waters, supports remand "for proper consideration of the nexus requirement"). The only direction that the Sixth Circuit got from the Supreme Court in its further proceedings were the two opinions supporting remand, and the only legal rules on offer in either of those opinions is the meaning of "navigable waters." So, which of these two opinions is a logical subset of the other depends on how each interpreted the statute.

This accords with *Marks*, which applied the Supreme Court's prior fractured decision in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). *Marks*, 430 U.S. at 193-94 (discussing *Memoirs*, 383 U.S. 413). *Memoirs* was a split decision, with three Justices stating that the First Amendment protected pornographic material unless it met three tests. 383 U.S. at 418. Two other Justices would read the First Amendment more broadly to protect all obscene material without limit. *Id.* at 421, 424 (Black and Douglas, JJ., concurring). *Marks* says that the narrower reading of the applicable constitutional provision controlled. Similarly, a reasoning-based approach to applying *Marks* to *Rapanos* must look at how broadly or narrowly the two opinions supporting the judgment interpret the applicable statutory provision.

In *Rapanos*, the Supreme Court ruled that the term "navigable waters" in the Act was narrower than the Agencies then-applicable regulations defining the term. 547 U.S. at 734 ("The plain language of the statute simply does not authorize this 'Land Is Waters' approach to federal jurisdiction."); *id*. at 759 (Kennedy, J., concurring) (lower court did not apply proper standard to determine whether wetlands not abutting navigable waters were jurisdictional). The Justices supporting the judgment adopted concentric rationales for the judgment. The plurality interprets "navigable waters" narrowly, while Justice Kennedy interprets it more broadly.

The point of departure between them is the plurality's narrow reading of the term "significant nexus" (as describing only the type of physical intermingling that prevents a clear distinction between the waters and the wetlands) and Justice Kennedy's broad reading of it (as

categorically encompassing abutting wetlands, in accord with the plurality, and also including others on a case-by-case basis, with which the plurality disagreed). *Compare Rapanos*, 547 U.S. at 754-55 (disagreement with Kennedy's broad reading of "significant nexus"), *with id*. at 774 (Kennedy, J., concurring) (prior Supreme Court decisions allow regulation of wetlands not physically abutting tributaries).

The plurality summed up this way:

> [E]stablishing that wetlands . . . are covered by the Act requires two findings: first, that the adjacent channel contains a 'wate[r] 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.

Rapanos, 547 U.S. at 742.

Justice Kennedy agreed with important aspects of this. *Rapanos*, 547 U.S. at 759-60. "The plurality's opinion begins from a correct premise." That being that the Act regulates "at least some waters that are not navigable in the traditional sense." *Rapanos*, 547 U.S. at 767. But, "[f]rom this reasonable beginning the plurality proceeds to impose two *limitations* on the Act[.]" *Id*. at 768 (emphasis added). These "limitations" are the two elements of the plurality's rule: that "navigable waters" are only "relatively permanent, standing or flowing bodies of water" and that wetlands are only subject to the Act if they have a "continuous surface connection" to relatively permanent, standing, or flowing bodies of water. *Id*. at 768-69.

On relative permanence ("the plurality's first requirement," *id.* at 769), Justice Kennedy said the plurality's reading of *Riverside Bayview Homes* was too narrow. *Rapanos*, 547 U.S. at 771. Justice Kennedy concluded that the Army could read "waters" more broadly to include "impermanent streams." *Id*. at 770.

On "[t]he plurality's second limitation," Justice Kennedy disagreed that *Riverside Bayview Homes* limits regulated wetlands to just those which abut navigable waters so closely that they cannot be distinguished, or even that there be a continuous surface connection, however close. *Rapanos*, 547 U.S. at 772-73. Justice Kennedy also disagreed with the plurality's reading of *SWANCC* as requiring a surface connection between wetlands and navigable waters. *Rapanos*, 547

U.S. at 774. Justice Kennedy concluded that the Army's broader definition of "adjacent" would be reasonable if limited to those wetlands with a significant nexus. *Id*. at 775.

In short, Justice Kennedy's view is that the plurality reads "navigable waters" in the statute, the holding of *Riverside Bayview Homnes*, and the term "significant nexus" used in *SWANCC*, too narrowly. By Justice Kennedy's own critique of the plurality, he thinks it narrower than his reasoning.

At the same time, he agrees that those waters the plurality generally considers "navigable" are covered by the Act. Justice Kennedy reads the Act as applicable to both permanent and "impermanent streams." *Id*. at 770. So, the relatively permanent tributaries which the plurality reads the Act as covering are a logical subset of the broader category of both permanent and impermanent streams which the concurrence recognizes.

Justice Kennedy also agreed with the plurality that wetlands which cannot easily be distinguished from covered tributaries are categorically covered by the Act. *Id*. at 780. The plurality would limit covered wetlands to this category, which is a subset of the broader group of adjacent waters to which Justice Kennedy reasons the Act may apply on a case-by-case basis. And Justice Kennedy's reasoning as to directly abutting wetlands is that they categorically have the "significant nexus" that his rule requires. *Id*. Both opinions categorically include this class of wetlands.

The relatively permanent tributaries and directly abutting wetlands covered by the plurality's rule are a logical subset of Justice Kennedy's broader reading of "navigable waters," and Justice Kennedy sees these waters as a subset of those his rule would include.

The concurrence does state that some waters meeting the plurality's test might lack a "significant nexus." *Id*. at 776. But this is not a fair reading of the plurality. The plurality limits its coverage of non-navigable tributaries to relatively permanent waters that can properly be described as lakes, rivers, and streams. *Id*. at 742. Justice Kennedy asserts that some of these waters might not have a significant nexus, without explaining how. *Id*. at 776-77 (Kennedy, J., concurring).

The concurrence never gives examples of relatively permanent tributaries that would not be covered by his rule, and misreads the plurality as applying the Act to "wetlands (however remote)" so long as there is a surface connection, however minor. *Id*. at 776. But the plurality is limited to

those relatively permanent waters that would be called lakes, rivers, or streams "in normal parlance." *Id*. at 742. One using "normal parlance" would not call a mere trickle a stream.

Nor does the plurality admit regulation of wetlands based on a mere surface connection, "however remote." The plurality specifically rejects this. *Id*. at 742. Justice Kennedy's misreading of the plurality's reasoning cannot stand in for its actual reasoning. And that actual reasoning is a logical subset of Justice Kennedy's.

The *Rapanos* dissent also opines that "Justice Kennedy's approach . . . treats more of the Nation's waters as within the Corps' jurisdiction" than the plurality, and that it would be a rare case when the plurality test is met and Justice Kennedy's is not. *Rapanos*, 547 U.S. at 810 n.14 (Stevens, J., dissenting). No example is offered by the dissent either of a feature that would meet the plurality standard but lack a "significant nexus."

Following the reasoning-based approach to applying *Marks*, as required under *Davis*, the proper reading of *Rapanos* is that the plurality opinion is a logical subset of Justice Kennedy's reasoning, and on the question of what "navigable waters" means in the Clean Water Act, the plurality is the narrower opinion and is the holding.

2. Under *Davis*, Justice Kennedy's Lone Concurrence Cannot Be the Holding of *Rapanos*

In holding that Justice Sotomayor's lone concurrence in *Freeman* cannot be the case's holding under *Marks*, *Davis* notes that both the plurality and dissent strongly criticized Justice Sotomayor's concurrence. *Davis*, 825 F.3d at 1020 (citing *Freeman*, 564 U.S. at 533; *Id.* at 550 (Roberts, C.J., dissenting). "The dissenting opinion accurately stated that the plurality and concurrence "agree on very little except the judgment."" *Davis*, 825 F.3d at 1020 (quoting *Freeman*, 564 U.S. at 554 (Roberts, C.J., dissenting)).

Following on this analysis, and applying the reasoning-based approach of *Davis*, it is difficult to see how any single-Justice opinion of the Supreme Court could be considered the holding under *Marks*, where all eight other Justices criticize the one Justice's reasoning. *See Reyes v. Lewis*, 833 F.3d 1001, 1007-09 (9th Cir. 2016) (Judge Callahan, dissenting from denial of

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rehearing in banc). "Under the reasoning-based *Marks* rule, reasoning expressly rejected by at least seven Justices cannot be elevated to the status of controlling Supreme Court law." *Id.* at 1008.

As with *Freeman*, both the plurality and the dissent in *Rapanos* criticized Justice Kennedy's reasoning.

The plurality opinion broadly critiques Justice Kennedy's concurring opinion. *Rapanos*, 547 U.S. at 753-57. It starts by rejecting Justice Kennedy's broad reading of the expression "significant nexus" (allowing a case-by-case determination as to non-abutting wetlands, which may be jurisdictional based on ecological as well as hydrological connections) as being irreconcilable with both *Riverside Bayview* and *SWANCC*. *Rapanos*, 547 U.S. at 753-54 (*Riverside Bayview* rejected case-by-case determinations, and *SWANCC* rejected mere ecological connection for "physically unconnected ponds"). From this, the plurality states: "In fact, Justice Kennedy acknowledges that neither *Riverside Bayview* nor *SWANCC* required, for wetlands abutting navigable-in-fact waters, the case-by-case ecological determination that he proposes for wetlands that neighbor nonnavigable tributaries." *Id.* at 754.

The plurality insists that the primary error in Justice Kennedy's analysis is what they find to be his failure to read *Riverside Bayview* and *SWANCC* with the text of the Act in mind. *Rapanos*, 547 U.S. at 754; *id.* at 755 ("Only by ignoring the text of the statute and by assuming that the phrase of *SWANCC* ("significant nexus") can properly be interpreted in isolation from that text does Justice Kennedy reach the conclusion that he has arrived at."). According to the plurality, Justice Kennedy bases his interpretation on the purpose rather than the text of the Act, but in doing so also fails to address federalism, which is the second coordinate purpose along with water quality. *Id.* at 755-56.

The plurality views Justice Kennedy's interpretation of "navigable waters" as narrower than the dissent's but broader than theirs. *Id.* at 756 ("Justice Kennedy's disposition would disallow some of the Corps' excesses, and in that respect is a more moderate flouting of the statutory command than Justice Stevens'.").

In short, the plurality rejects Justice Kennedy's reasoning on two grounds: too broad a reading of the phrase "significant nexus," and too broad a reading of the statute due to focusing on one of its two purposes to the exclusion of its other purpose and its text.

The dissent for its part "[did] not share [Justice Kennedy's] view that we should replace regulatory standards that have been in place for over 30 years with a judicially crafted rule distilled from the term 'significant nexus' as used in *SWANCC*." *Rapanos*, 547 U.S. at 807 (Stevens, J., dissenting). Further, the dissent objected to the fact that Justice Kennedy's case-by-case "approach will have the effect of creating additional work for all concerned parties." *Id.* at 809 (Stevens, J., dissenting). Finally, "[u]nlike Justice Kennedy, [the dissent saw] no reason to change *Riverside Bayview*'s approach—and every reason to continue to defer to the Executive's sensible, bright-line rule." *Id.* (Stevens, J., dissenting).

Hence, as with the plurality, the dissent objected to the Kennedy case-by-case approach, and considered his broad reading of "substantial nexus" to go beyond the meaning of the term as used in *SWANCC* and as a misreading of the Court's holding in *Riverside Bayview*. *Rapanos*, 547 U.S. at 807-09 (Stevens, J., dissenting). And fundamentally, the dissent rejected Justice Kennedy's refusal to defer to the government's regulations. *Id.* at 810 (Stevens, J., dissenting).

As in *Davis*, which held that Justice Sotomayor's lone concurrence could not be the holding of *Freeman* under a reasoning-based approach to *Marks*, Justice Kennedy's lone concurrence—the reasoning of which was roundly rejected by all eight of the other Justices—cannot be the controlling opinion in *Rapanos*.

C. The Ninth Circuit's Superseded Decision in *City of Healdsburg* Does Not Control the *Marks* Analysis of *Rapanos*

In arguing that Justice Kennedy's concurring opinion in *Rapanos* is binding on the agencies in this rulemaking, see Motion for Preliminary Injunction at 21-24, id. at 39:13-18, ECF 30, California does not cite the Ninth Circuit's decision in *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007), that Justice Kennedy's concurrence is the holding of *Rapanos*. However, it is nevertheless worth noting here, that the subsequent intervening authority of *Davis* fatally undermines the results-based approach of *Healdsburg*, which is no longer precedent in the Ninth Circuit.

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1. Any District Court in This Circuit Can Hold That *Davis* Fatally Undermines *Healdsburg*

District courts may reexamine circuit precedent in light of intervening en banc decisions of the Ninth Circuit. *Miller v. Gammie*, 335 F.3d 889, 892-93 (9th Cir. 2003) (en banc) (Supreme Court decisions); *Overstreet v. United Brotherhood of Carpenters and Joiners of Am., Local Union No. 1506*, 409 F.3d 1199, 1205 n.8 (9th Cir. 2005) (citation omitted) (en banc Ninth Circuit decisions)).

> We hold that . . . where the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled.

Miller v. Gammie, 335 F.3d at 893. The issues decided by the higher court need not be identical to allow a district court to dispense with prior circuit authority. "Rather, the relevant court . . . must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Id*. at 900.

In *Overstreet* the Ninth Circuit examined its prior holding in *Nelson v. Int'l Brotherhood of Elec. Workers, Local Union No. 46, AFL-CIO*, 899 F.2d 1557 (9th Cir. 1990) (NLRB entitled to injunction under Section 10(l) of the National Labor Relations Act under "reasonable cause" standard), and concluded that its subsequent en banc decision interpreting a different provision of the Act relating to injunctions, *Miller v. Cal. Pac. Med. Ctr.*, 19 F.3d 449, 455 (9th Cir. 1994) (en banc) (Section 10(j) of the Act requires the application of ordinary standards for issuance of injunctions), had overruled the prior panel decision in *Nelson* as to Section 10(l). *Overstreet*, 409 F.3d at 1204-05. In analyzing whether *Nelson*'s holding on Section 10(j) overruled *Miller*'s holding on Section 10(l), the Court focused on whether the reasoning of the two cases regarding the standard was consistent, and decided that the later en banc decision had undermined the reasoning of the earlier panel decision. *Overstreet*, 409 F.3d at 1205-06.

This Court must reassess *Healdsburg* under the en banc Ninth Circuit's holding in *Davis*, and should conclude that *Healdsburg* no longer controls, because the reasoning-based approach to *Marks*, as required by *Davis*, is clearly irreconcilable with and fatally undermines *Healdsburg*.

2. *Healdsburg* Uses the Now Forbidden Results-Based Approach

Healdsburg summarily concluded that the *Rapanos* concurrence controls, with little discussion beyond a cursory citation to *Marks*: "Justice Kennedy, constituting the fifth vote for reversal, concurred only in the judgment" and, therefore, "provides the controlling rule of law." *Healdsburg*, 496 F.3d at 999-1000 (quoting *Marks*, 430 U.S. at 193). This is well short of the *Marks* analysis required by *Davis*. *See Davis*, 825 F.3d at 1024 (dismissing other circuit authorities that "engage with *Marks* only superficially, quoting its language with no analysis"). *Healdsburg* gives no reason why it adopted the concurrence other than to cite *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006), itself a brief opinion concluding without substantive application of *Marks* that the concurrence controls.

Fatally for *Healdsburg*, it states that the "concurrence is the narrowest ground to which a majority of the Justices would assent if forced to choose in almost all cases." 496 F.3d at 999. This is the results-based approach which *Davis* rejected. *Healdsburg* also relies on Justice Stevens' dissent in *Rapanos* to say that Justice Kennedy's concurrence is a narrower subset of the dissent. 496 F.3d at 999. But this is rejected by *Cardenas*. And *Cardenas*' rejection of dissents for *Marks* analysis, following *Davis*, is further demonstration that the Ninth Circuit has moved on from the cursory and results-oriented *Marks* analysis used in *Healdsburg*.

Also fatally, *Healdsburg* relies almost exclusively on the Seventh Circuit's decision in *Gerke*. That in turn explicitly uses the results-based approach in selecting the concurrence:

> Thus, any conclusion that Justice Kennedy reaches in favor of federal authority over wetlands in a future case will command the support of five Justices (himself plus the four dissenters), and in *most* cases in which he concludes that there is no federal authority he will command five votes (himself plus the four Justices in the *Rapanos* plurality)[.]

Gerke, 464 F.3d at 725 (emphasis in original).

Healdsburg is fatally undermined in two ways. It uses the results-based approach which *Davis* definitively rejects. And it uses the dissent as the broader opinion of which it concludes the concurrence is the narrower subset, in violation of *Cardenas*. *See also Gibson v. American Cyanamid Co.*, 760 F.3d 600, 621 (7th Cir. 2014) (*Gerke* provides no authority for using dissenting opinions in *Marks* analysis). Under *Miller v. Gamie*, *Healdsburg* is no longer the law of this Circuit.

III. CONCLUSION

The *Rapanos* plurality is the controlling opinion of that decision, and holds that the Clean Water Act does not allow regulation of non-abutting wetlands. Because of this, the Agencies were legally compelled by the statute to eliminate from regulation the class of wetlands that are excluded in the Navigable Waters Protection Rule. Since this aspect of the Rule is legally compelled, Plaintiffs cannot demonstrate any likelihood of success on the merits, and are not eligible for preliminary injunctive relief. Absent any likelihood of success on the merits, the Court may neither stay nor enjoin the Rule. The Motion must be denied.

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Respectfully submitted,

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