No. 19-35469

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL SACKETT; CHANTELL SACKETT,

Plaintiffs – Appellants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY;
STEVEN L. JOHNSON, Administrator,

Defendants – Appellees.

On Appeal from the United States District Court
for the District of Idaho
No. 2:08-cv-00185-EJL
Honorable Edward J. Lodge, District Judge

APPELLANTS' OPENING BRIEF

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JURISDICTION

The District Court had jurisdiction under 5 U.S.C. § 702 to review the United States Environmental Protection Agency (EPA)'s administrative compliance order issued against Appellants, as final agency action. *Sackett v. EPA*, 566 U.S. 120 (2012). This Court has jurisdiction under 28 U.S.C. § 1291; the appeal is from the final judgment of the district court which disposes of all parties' claims. Judgment was entered on April 4, 2019. ER I:1. Appellants Chantell and Michael Sackett filed their Notice of Appeal on May 30, 2019. ER II:51 Their appeal is timely under Fed. R. App. P. 4(a)(1)(b)(ii); the Appellee EPA is an agency of the United States.

ISSUES PRESENTED FOR REVIEW

A. Whether the *Rapanos* plurality is the rule of law establishing the extent of EPA's regulatory authority under the Clean Water Act.

This issue was preserved below in Plaintiff's Notice of Supplemental Authority, below on August 4, 2016, Docket No. 113. The District Court ruled on this issue in its Order dated March 31, 2019, Docket No. 120 (Opinion), at p. 24. This question of law is reviewed *de novo*. *Mull for Mull v. Motion Picture Industry Health Plan*, 865 F.3d 1207, 1209 (9th Cir. 2017).

B. Whether EPA's administrative record fails as a matter of law to establish the presence of wetlands on the Sacketts' vacant lot because EPA failed to use the criteria required by statute in the 1987 Wetlands manual.

This issue was preserved below in Plaintiffs Michael and Chantell Sackett's Motion and Notice of Motion for Summary Judgment on the Administrative Record,

filed in the District Court below on September 4, 2015, Docket No. 103 (Summary Judgment Motion), at pp. 6, 14-16. The District Court ruled on this issue in its Opinion dated March 31, 2019, Docket No. 120, at pp. 16-19. The court of appeals reviews a district court's grant of summary judgment *de novo*. *Defenders of Wildlife v. Zinke*, 856 F.3d 1248, 1256 (9th Cir. 2017). Appellate review of the underlying agency decision is under the arbitrary and capricious standard. *Id*. at 1256-57. Under that standard, the agency must articulate a rational connection between the facts found and the conclusions made. *Wildwest Institute v. Kurth*, 855 F.3d 995, 1002 (9th Cir. 2017). And, the agency must rely only on factors Congress intended it consider. *Zinke*, 856 F.3d at 1257.

C. Whether the District Court erred in allowing EPA to include a post-decisional memo stating the government's litigation position in the Administrative Record.

This issue was preserved below in the Plaintiff's Motion to Strike, filed April 5, 2013, Docket No. 70. The District Court ruled on this issue in its Order, at pp. 4-12. This is a mixed question of law and fact that is reviewed *de novo* because there is no dispute as to the facts or the rule of law, and the only question is whether the facts satisfy the legal rule. *Lim v. City of Long Beach*, 217 F.3d 1050, 1054 (9th Cir. 2000).

D. Whether EPA's Administrative Record fails as a matter of law to establish that the Sacketts' vacant lot is a "navigable water" subject to regulation under the Clean Water Act.

This issue was preserved below in the Summary Judgment Motion, at pp. 18-24. The District Court ruled on this issue in its Order, at pp. 19-27. This issue is reviewed under the same standard as issue B above.

An addendum follows the main body of this brief, which includes the pertinent constitutional provisions, statutes, and regulations.

STATEMENT OF THE CASE

Michael and Chantell Sackett purchased a vacant lot to build a home in a residential subdivision near Priest Lake, Idaho, in 2004. On May 3, 2007, the Sacketts prepared for building by removing unsuitable material and placing sand and gravel on the lot to create a stable grade. Two EPA employees came to the lot, asserted that it contained regulated wetlands under the Clean Water Act, and told the Sacketts' crew to cease work. The Sacketts obtained all necessary Bonner County permits to build their home but were never told they needed a Clean Water Act permit.

For months, the Sacketts asked the EPA for the basis on which it claimed authority over the lot. Despite false assurances from EPA staff to the contrary, no explanation came. Instead, EPA issued an Administrative Compliance Order to the Sacketts on November 26, 2007 (Order).

The Order found the vacant lot contains a wetland subject to federal regulation under the Act, and threatened the Sacketts with daily fines unless they restored the site, fenced it off for three years, and built their home elsewhere.

The Sacketts responded on April 1, 2008, objecting to the EPA's assertion of authority over their lot and demanding a hearing. The EPA never provided a hearing.

The Sacketts filed this case on April 28, 2008. Docket No. 1. The EPA slightly revised the Order on May 15, 2008 (Amended Order). The Amended Order's findings and conclusions are identical to the Order's as to the lot being a regulated wetland under the Act.

EPA moved to dismiss, which motion was ultimately resolved in the Sacketts' favor by the Supreme Court. *Sackett*, 566 U.S. 120.

Following remand, the Sacketts filed their First Supplemental Complaint on March 27, 2015. Docket No. 98, ER II:101 The First Supplemental Complaint states a claim against the EPA under the Administrative Procedure Act, challenging the agency's finding that the Sacketts' vacant lot contains wetlands subject to regulation under the Clean Water Act.

The EPA filed a 375-page administrative record (Record) containing 39 documents. Docket No. 62, ER II:113 (index of the Record). The Record consists generally of documents related to the May 3, 2007, site inspection by EPA, the issuance of and subsequent amendments to the Order, and a post-decisional July 1,

2008 memo relating to EPA's May 15, 2008, site inspection. The Sacketts moved to strike the July 1, 2008, memo and related materials, which post-date the Amended Order and were not before the EPA official when the Amended Order was issued. Docket No. 70.

The parties filed cross motions for summary judgment, which the District Court decided in EPA's favor on March 31, 2019. ER II:2. In that opinion, the District Court also denied the Sacketts' motion to strike the July 2008 memo and related materials.

The Sacketts timely filed this Appeal on May 30, 2019. ER II:51

SUMMARY OF THE ARGUMENT

The basic issue in this case is whether the Sacketts' vacant lot is a "navigable water" under the Clean Water Act. A textual analysis of the Act, with the canon of constitutional avoidance in mind, indicates a narrow reading of the term that would not extend far beyond actually navigable waterways. *Rapanos v. United States*, 547 U.S. 715, 723 (2006) is the applicable Supreme Court precedent on whether wetlands that don't abut actually navigable waterways are regulated by the Act. The *Rapanos* plurality opinion is the holding of the case. This Court's recent en banc decision in *United States v. Davis*, 825 F.3d 1014 (9th Cir. 2016) fatally undermines prior circuit authority stating that Justice Kennedy's lone opinion is the holding. Per *Rapanos*, no valid regulations interpret the Act to apply to wetlands that do not at

least abut non-navigable tributaries. And, EPA must demonstrate that the Sacketts' property contains wetlands in the first place using the Army's 1987 Wetlands Manual.

Applying these principles to EPA's Record in this case, the EPA failed to perform a wetland delineation under the 1987 Manual. Absent a proper delineation, there is no evidence in the record that there is a federally regulated wetland to start with. Next, the Record demonstrates that the Sacketts' property is not under Clean Water Act regulation under the *Rapanos* plurality because it has no direct surface water connection with any other waterway. Nor, if the *Rapanos* concurrence applies, does the Record support EPA's conclusion that the vacant lot has a significant nexus with Priest Lake, or that it is adjacent to Priest Lake. The District Court erred in denying the Sacketts' motion to strike a post-decisional memorandum from EPA's proffered record, but even if properly part of the Record, it fails to cure the defects in EPA's pre-decisional administrative record.

ARGUMENT

I. THE CLEAN WATER ACT DOES NOT REGULATE WETLANDS THAT DON'T DIRECTLY ABUT NAVIGABLE WATERS OF THE UNITED STATES OR THEIR RELATIVELY PERMANENT AND CONTINUOUSLY FLOWING TRIBUTARIES

A. The text of the Act generally limits the term "navigable waters" to navigable-in-fact waterways.

Proper interpretation of "navigable waters" begins with prior use of the phrase in relevant statutes. *See Rapanos v. United States*, 547 U.S. 715, 723 (2006). For over a century, Congress regulated the obstruction of navigation on rivers and lakes through statutes that applied to "navigable waters of the United States." *See id*. In *The Daniel Ball*, the Supreme Court of the United States interprets this term to refer to

> [t]hose rivers . . . which are navigable in fact[, i.e.] . . . when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

77 U.S. 557, 563 (1870); *see also Rapanos*, 547 U.S. at 723.

The phrase "navigable waters of the United States" was then used in Section 10 of the Rivers and Harbors Act ("Section 10") when that statute was first adopted in 1899, and remains in use today. 33 U.S.C. § 403. Section 10 prohibits obstructions of "the navigable capacity of the waters of the United States" unless authorized by

Congress. *Id*. Section 10 lists several types of water bodies in addition to the channels of the "navigable waters of the United States" that the Army also regulates: "port[s], roadstead[s], haven[s], harbor[s], canal[s], lake[s], harbor[s] or refuge[s], or inclosure[s] within the limits of any breakwater[.]" *Id*.

In 1972, Congress adopted significant amendments to the Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et seq.*, which has since been called the Clean Water Act (the Act). The Act prohibits unpermitted discharges to navigable waters. 33 U.S.C. §§ 1311(a), 1362(12). The Act authorizes the Army to permit discharges of dredged or fill material, and EPA to permit all other discharges. 33 U.S.C. §§ 1342(a)(1), 1344(a). The Act defines "navigable waters" to "mean[] the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

The Act's words "navigable waters" and "waters of the United States, including the territorial seas," are very close to the predecessor statutes' words "navigable waters of the United States" and the expression "navigable capacity of the waters of the United States" that have appeared since 1899 in Section 10 of the Rivers and Harbors Act. This evinces a congressional intent that the terms in the two statutes be interpreted in a closely related way. The only material variation is the Clean Water Act's introduction of the term "the territorial seas." This indicates that the Act applies to navigable-in-fact waters as defined in *The Daniel Ball* and

referenced in Section 10 of the Rivers and Harbors Act, plus downstream waters to and including the territorial seas.

Nothing in the Act's definition or use of "navigable waters" extends the term to non-navigable waters of any sort (*e.g.*, non-navigable tributaries and "adjacent waters") that are upstream of or isolated from navigable-in-fact waters. Nothing in the legislative history of the Act shows that Congress "intended to exert anything more than its commerce power over navigation." *Solid Waste Agency of N. Cook Cty. v. Army Corps of Eng'rs*, 531 U.S. 159, 168 n.3 (2001) (*SWANCC*). In contrast, when Congress has intended to extend its reach to waters that are not navigable, it has said so expressly. For instance, with the Flood Control Act of 1936, Congress claimed jurisdiction over "navigable waters or their tributaries, including watersheds thereof." P.L. 74-738, Sec. 1, 49 Stat. 1570 (June 22, 1936). *See generally* Daniel E. Boxer, *Every Pond and Puddle—or, How Far Can the Army Corps Stretch the Intent of Congress*, 9 Nat. Resources Law. 467, 470 (1976) ("Congress . . . did not intend . . . that the scope of regulatory activity by the Army Corps [of Engineers] . . . take the direction of the [revised] regulations.").

The Supreme Court has identified only one provision of the Act, 33 U.S.C. § 1344(g)(1) ("Section 404(g)(1)"), as the basis for reading "navigable waters" to include any non-navigable waters upstream of navigable rivers or lakes. *See United States v. Riverside Bayview Homes Inc.*, 474 U.S. 121, 135-39 (1985), *SWANCC*,

531 U.S. at 171 (Section 404(g)(1) not dispositive of meaning of "navigable waters"); *id.* at 169 n.5 (Section 404(g)(1) falls short of congressional acquiescence in agency practice). However, the Supreme Court has never ruled on the precise meaning of the "other waters" provision of Section 404(g)(1), other than to hold in *Riverside Bayview* that it reasonably includes wetlands immediately abutting navigable-in-fact creeks, 474 U.S. at 134, in *SWANCC* that it does not include isolated ponds, 531 U.S. at 171-72, and to rule in *Rapanos* that the Act does not reasonably encompass all non-navigable tributaries or broadly defined adjacent wetlands, 547 U.S. at 734; *id.* at 787 (Kennedy, J., concurring in judgment).

Section 404 (g)(1) provides evidence that the Act defines "navigable waters" to mean "waters of the United States, including the territorial seas" in order to gather within one term those waters that are navigable-in-fact and two categories of waters downstream of them: waters subject to the ebb and flow of the tide, and the territorial seas. Waters subject to the ebb and flow of the tide were expressly not covered by *The Daniel Ball* definition. 77 U.S. at 563. And, the tides are not mentioned in Section 10 of the Rivers and Harbors Act. Particular waters subject to the ebb and flow of the tide might be navigable-in-fact and thus within *The Daniel Ball*'s definition, but the role of the tide is neither here nor there in whether they were navigable-in-fact. But the Clean Water Act, by referencing waters subject to the ebb and flow of the tide in Section 404(g)(1), clearly expands on navigable-in-fact waters

by adding these tidal waters, which are generally seaward (or are the seaward portion) of rivers and lakes that are navigable-in-fact.

As mentioned, Section 10 does not cover waters subject to the ebb and flow of the tides, and its collection of "other waters" (*i.e.*, "ports" to "inclosures") are the best available textual candidate to be "other than" the specific waters called out in Section 404(g)(1): navigable-in-fact waters and waters subject to the ebb and flow of the tide. That is to say, the "other than" waters for which Section 404 permitting is delegable to the states under Section 404(g)(1) are precisely the specific water bodies listed in Section 10 ("ports" to "inclosures").

The territorial seas were never expressly included within the scope of *The Daniel Ball*'s definition. This stands to reason since congressional statutes to prevent states from interfering with the transport of goods in interstate and foreign commerce would not have been concerned with state efforts to place fill three miles out to sea. Appellants are aware of no Supreme Court decision citing *The Daniel Ball* that deals with the oceans. The Clean Water Act's definition of "navigable waters" includes the territorial seas, but Section 404(g)(1) does not, since they would not be within the jurisdiction of any state. This also reinforces the reading of the Act's definition of "navigable waters" and Section 404(g)(1) in concert with Section 10 of the Rivers and Harbors Act, that the only non-navigable waters regulated by the Clean Water

Act are the list of waters, from "ports" to "inclosures," listed in Section 10 of the Rivers and Harbors Act.

Additional textual indications that "navigable waters" should be read similarly to "navigable waters of the United States" are in the Clean Water Act's purpose section. 33 U.S.C. § 1251. Section 1251(a) sets forth the federal water quality purposes of the Act and articulates the overarching objective to "restore and maintain the . . . integrity of the Nation's waters." Section 1251(a)(1), in order to achieve that objective, declares "the national goal that the discharge of pollutants into the navigable waters be eliminated[.]" But Section 1251(b) establishes the Act's federalism purpose to "recognize, preserve, and protect the primary responsibilities and rights of States to . . . plan the development and use (including restoration preservation, and enhancement) of land and water resources."

These terms ("Nation's waters," "navigable waters," and "water resources") in close proximity show that "navigable waters" should be given a relatively narrow reading compared to all-encompassing terms like the "Nation's waters" (the integrity of which is to be restored and maintained through a wide range of methods, only one of which is regulation of discharges to "navigable waters") and "water resources" (over which the primary authority of the states is recognized and protected).

And, the Act's purpose section protects water rights recognized under state law, which broadly allow diversion of water from its natural course for beneficial

use elsewhere, whether under riparian or appropriative legal regimes. 33 U.S.C. § 1251(g). Such water rights frequently involve dams or other diversion works in non-navigable tributaries and the use of substantially all of the flow of those tributaries during the irrigation season or longer. The protection of these rights by the Act also indicates a reading of "navigable waters" as not including non-navigable tributaries from which significant amounts of water can be diverted under state law.

In sum, a textual analysis of the Clean Water Act term "navigable waters" meaning "the waters of the United States, including the territorial seas," shows that the waters that the Act regulates are closely related to those defined in *The Daniel Ball* and specified in Section 10 of the Rivers and Harbors Act, with the addition of downstream waters subject to the ebb and flow of the tide and the territorial seas. The only indication in the text of the Act that "navigable waters" includes non-navigable waters upstream of "navigable waters of the United States" is Section 404(g)(1), whose "other waters" provision is best understood as allowing states to regulate the specific types of water bodies enumerated in Section 10 of the Rivers and Harbors Act. Nothing in the text of the Act supports the inclusion of non-navigable tributaries, within the meaning of "navigable waters." *See SWANCC*, 531 U.S. at 168 (no "persuasive evidence that [Army Corps] mistook Congress' intent in 1974" when it initial defined "navigable waters" consistently with *The Daniel Ball*).

While Section 404(g)(1) brings adjacent wetlands into the ambit of the Act, that inclusion is limited to wetlands adjacent to (1) navigable-in-fact waters used or susceptible to use to transport goods in interstate commerce, and (2) waters subject to the ebb and flow of the tide. By negative implication, the Act forecloses the regulation of other wetlands, regardless of their relationship to tributaries and other non-navigable water bodies. Accord *Riverside Bayview*, 474 U.S. at 131 (wetland at issue adjacent to "Black Creek, a navigable waterway"); *id.* at 131 n.8 (opinion limited to wetlands "adjacent to open bodies of water").

B. The Constitution prevents use of the Clean Water Act to regulate local land use decisions like building a house in a built-out subdivision.

The interpretation of "navigable waters" is also subject to constitutional constraints. Under the canon of constitutional avoidance, this Court should interpret the Act to avoid giving it a constitutionally suspect meaning. Any interpretation that would extensively regulate a wide range of non-navigable tributaries or non-abutting wetlands raises issues under the Commerce Clause, the Tenth Amendment, and the Non-Delegation Doctrine.

The Supreme Court held in *SWANCC* that the Act lacks a "clear statement" of congressional intent to exercise the Commerce Power to its outer limits. 531 U.S. at 172-74. Reading the statute broadly would authorize federal regulation over a wide range of local decisions involving water resources and closely regulate land use and planning, all traditionally state and local government functions which are

explicitly protected from invasion by Section 1251(b). Reading the Act to allow this would violate the Clear Statement Rule and is impermissible. *SWANCC*, 531 U.S. at 174; *Rapanos*, 547 U.S. at 737-38.

Further, the legislative history of the Act only supports the exercise of the Commerce Power over its traditional object: the transport of goods in interstate commerce through navigation. 531 U.S. at 168; *id.* at 168 n.3. Any reading of "navigable waters" that authorizes regulation substantially beyond waters used to transport interstate commerce would violate the Clear Statement Rule and *SWANCC*.

Similarly, a broad reading of "navigable waters" would violate the Tenth Amendment's reservation of powers to the states, including the states' traditional authority over land use and water resource allocation which are expressly recognized and protected in the Act. 33 U.S.C. § 1251(b). *See* Gary E. Parish & J. Michael Morgan, *History, Practice and Emerging Problems of Wetlands Regulation: Reconsidering Section 404 of the Clean Water Act*, 17 Land & Water L. Rev. 43, 84 (1982) ("The existing [regulation] looks and has an effect similar to a program of federal land use control. There should be little doubt that Congress did *not* intend such a result.").

These constitutional concerns are at their height in this case. The Sacketts' vacant lot has no connection to any use of Priest Lake for the transport of goods in interstate commerce. EPA's regulation of building on the lot directly conflicts with

local land use administration. The Sacketts obtained all required local authorization to build; EPA's action directly countermands that decision, by deciding that no home would be allowed there. This federal veto of local land use permitting is exactly what *SWANCC* says the Clean Water Act may not be interpreted to allow.

C. The *Rapanos* plurality opinion is the controlling Supreme Court interpretation of "navigable waters."

The best Supreme Court authority on whether a purported wetland across the street from a road-side ditch is federally protected "navigable waters" is *Rapanos*. But since *Rapanos* has no majority opinion, this Court must determine which opinion is the holding.

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) (1986 Tributary Subsection); *id*. at § 328.3(a)(7) (1986 Adjacent Wetland Subsection); *see also id*. at § 328.3(c) (1987).

In *Rapanos*, the Supreme Court invalidated the 1986 Tributary and Adjacent Wetlands Subsections, 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 of the Court remanded the case because the lower courts had not properly interpreted that term. *Id*. at 757. The five Justices supporting the judgment adopted two different interpretations of "navigable waters."

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 federal regulation of wetlands to only those physically abutting such waters, where the wetland and water body 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 refer 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 proposed a broader interpretation of the Act: 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*.

This Court previously held 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, the subsequent intervening authority of *United States v. Davis*,

825 F.3d 1014 (9th Cir. 2016), (en banc), fatally undermines the results-based approach of *Healdsburg*, and establishes that the plurality is the holding.

1. Any three-judge panel of this Court can hold that *Davis* fatally undermines *Healdsburg*.

Three-judge panels may reexamine circuit precedent in light of intervening en banc decisions. *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 three-judge panel 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* this Court 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 a

subsequent en banc decision of the Ninth Circuit 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 what standard should apply was consistent, and noted 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 reexamine *Healdsburg* in light of the en banc Ninth Circuit's holding in *Davis*, and should conclude that *Healdsburg* is no longer controlling, because the reasoning-based application of *Marks v. United States*, 430 U.S. 188 (1977), as required by *Davis*, is clearly irreconcilable with and fatally undermines *Healdsburg*.

2. This Court must apply *Rapanos* using the *Marks* framework as clarified in *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) (opinion of Stewart, Powell, and Stevens, JJ.)).

The Ninth Circuit recently provided definitive guidance for applying *Marks* in its 2016 en banc decision in *Davis*, 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 Court 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.

*S*hortly after *Davis*, this Court 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). So 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.

3. *Healdsburg* uses the now forbidden results-based approach.

Healdsburg, summarily concludes that the 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. Gammie*, *Healdsburg* is no longer the law of this Circuit.

4. Under *Davis*, Justice Kennedy's lone concurrence cannot be the holding of R*apanos*.

In rejecting Justice Sotomayor's lone concurrence in *Freeman*, *Davis* notes that both the plurality and dissent strongly criticized it. *Davis*, 825 F.3d at 1020 (citing *Freeman*, 564 U.S. at 533, 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 544 (Roberts, C.J., dissenting)).

It is difficult to see how any single-Justice opinion of the Supreme Court could be the holding under *Davis*, if all other Justices criticize its reasoning. As with *Freeman*, both the *Rapanos* plurality and dissent criticized Justice Kennedy's reasoning.

The plurality broadly critiques the concurrence. *Rapanos*, 547 U.S. at 753-57. It starts by rejecting Justice Kennedy's broad reading of the expression "significant nexus" as irreconcilable with *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"). "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 Justice Kennedy's failed to read *Riverside Bayview* and *SWANCC* with the text of the Act in mind. *Rapanos*, 547 U.S. at 754-55. And, the plurality adds, Justice Kennedy based his interpretation on the purpose rather than the text of the Act, without addressing federalism, a coequal purpose. *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 "[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).

As with the plurality, the dissent objected to Justice Kennedy's 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 to misread *Riverside Bayview*. *Rapanos*, 547 U.S. at 807-09 (Stevens, J., dissenting). And the dissent rejected Justice Kennedy's refusal to defer to the government's regulations. *Id*. at 810 (Stevens, J., dissenting).

As in *Davis*, 825 F.3d at 1020, which held that Justice Sotomayor's lone concurrence could not be the holding of *Freeman* because all of the other Justices rejected its reasoning, Justice Kennedy's lone concurrence—the reasoning of which was roundly rejected by all of the other Justices—cannot be the controlling opinion in *Rapanos*.

5. 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 lower courts had not properly defined "navigable waters." 547 U.S at 757. The Court arrived at this judgment

through two different interpretations of 'navigable waters.' So 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 765 (Kennedy, J., concurring) ("Twice before the Court has construed the term 'navigable waters' in the Clean Water Act."); *id.* at 779 ("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 759 (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*, a fractured majority of the Supreme Court ruled that the term "navigable waters" in the Act was narrower than agency regulations defining the term. *Id*. 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 interpreted the term 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 in *Riverside Bayview* prevented a clear distinction between the waters and the wetlands) and Justice Kennedy's broad reading of it (as categorically encompassing *Riverside Bayview*-type 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) (*Riverside Bayview* and *SWANCC* do not limit regulated wetlands to those physically abutting regulated 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. The term "body of water" is limited to lakes, streams, and rivers. *Id*. at 732-33.

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, as *Riverside Bayview* holds, 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* was too narrow. *Rapanos*, 547 U.S. at 771. Justice Kennedy concluded that the Army could reasonably read "waters" more broadly to include "impermanent streams." *Id*. at 770.

On "[t]he plurality's second limitation," Justice Kennedy disagreed that *Riverside Bayview* 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*, 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*. So 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 would generally see these waters as a subset of those his rule would include.

The concurrence does state that some waters that would meet the plurality's test might not have a "significant nexus." *Id*. at 776. However, 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 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 isn't. *Rapanos*, 547 U.S. at 810 n.14 (Stevens, J., dissenting). Similarly, no example of such a case is offered.

So, 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 addressed in *Rapanos* (*i.e.*, what does "navigable waters" mean), the plurality is the narrower opinion and is the holding.

C. No valid regulation interprets "navigable waters" to include vacant lots in built-out subdivisions.

EPA's assertion that the Sacketts' lot is a "navigable water" relies on agency regulations extending Clean Water Act control over all tributaries and all bordering, contiguous, or neighboring wetlands. These are the 1986 Tributary and Adjacent

Wetland Subsections discussed above—the same regulations that the Supreme Court invalidated in *Rapanos*.

EPA is barred by issue preclusion from asserting the validity of these Subsections against the Sacketts. Issue preclusion prevents a party from relitigating an issue decided in a previous action if four requirements are met:

> (1) there was a full and fair opportunity to litigate the issue in the previous action; (2) the issue was actually litigated in that action; (3) the issue was lost as a result of a final judgment in that action; and (4) the person against whom collateral estoppel is asserted in the present action was a party or in privity with a party in the previous action.

United States Internal Revenue Serv. v. Palmer (In re Palmer), 207 F.3d 566, 568 (9th Cir. 2000). Issue preclusion can be invoked by any third party against a party in privity to the parties in the prior decision. *Park Lake Resources Ltd. Liability v. United States Dep't of Agric.*, 378 F.3d 1132, 1138 (10th Cir. 2004) (citing cases). Issue preclusion applies in this case against EPA.

The issue in this case is identical to that in *Rapanos*: EPA's authority under the Clean Water Act to regulate activity on a particular property based on the 1986 Tributary and Adjacent Wetland Subsections. *Rapanos*, 547 U.S. at 724-25. *Rapanos* was adjudicated on the merits at the Supreme Court of the United States. Nothing could be more final in the federal courts. The United States was the respondent in *Rapanos*; federal agencies are in privity with the United States. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-03 (1940). Finally, the

United States had a full and fair opportunity to litigate *Rapanos*. *See Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 331-32 (1979) (appeal to circuit court after trial before district court affords full and fair opportunity).

The Sacketts can invoke issue preclusion against the federal government in this case despite *United States v. Mendoza*, 464 U.S. 154, 162 (1984) (nonmutual offensive issue preclusion does not run against the government in certain cases). In *Mendoza*, the Supreme Court decided that the United States could not be precluded from litigating a constitutional issue it had lost in a decision of the Northern District of California, which the government elected not to appeal. *Id*. at 157. The Supreme Court focused its analysis in *Mendoza* on the long practice of allowing important constitutional issues to percolate through the circuit courts before final resolution in the Supreme Court. *Id*. at 160. Estopping the government with unappealed district court decisions would prevent this percolation. *Id*. The Court further emphasized the significance of the Solicitor General's discretion whether to appeal district court decisions, and which circuit court decisions to petition to the Supreme Court. Precluding relitigation of issues based on district court decisions would upend the Solicitor General's decision making. *Id*. at 161.

None of these concerns apply to Supreme Court decisions, and *Mendoza* correspondingly limits its holding to "relitigation of issues such as those involved in this case," *id*. at 162, *i.e.*, issues resolved by a lower court which could still be

percolated through the courts of appeal and which implicate the Solicitor General's discretion in filing appeals and petitions for certiorari.

EPA is barred under issue preclusion from asserting or defending the validity of the 1986 Tributary and Adjacent Wetlands Subsections. Without them, there are no valid regulations on which EPA can rely to establish its regulatory authority over the Sacketts' vacant lot.

As a result, the only tool at this Court's disposal to interpret whether a vacant lot in a built out subdivision bounded on either end by permanent roads and with no surface connection to any other water body, is *Rapanos*—either the plurality or concurrence.

D. EPA may only regulate wetlands meeting the criteria of the Army's 1987 Wetlands Manual.

Federal statute requires EPA to use the Army's 1987 Wetlands Delineation Manual (Manual). *Fairbanks Northstar Borough v. United States Army Corps of Eng'rs*, 543 F.3d 586, 590 (9th Cir. 2008) (citing *Energy and Water Development Appropriations Act*, Pub. L. No. 102-377, 106 Stat. 1315, 1324 (1992)). The Manual explains that wetlands have the three "general diagnostic environmental characteristics" of vegetation, soil, and hydrology. Manual ¶ 26(b). Generally, "evidence of a minimum of one positive indicator from each parameter (hydrology, soil, and vegetation) must be found in order to make a positive wetland

determination." *Id*. ¶ 26(c)." *Fairbanks*, 543 F.3d at 590; s*ee also Rapanos*, 547 U.S. at 762 (Kennedy, J., concurring) ("wetlands are not merely moist patches of earth.").

This requirement is not affected by *Tin Cup, LLC v. United States Army Corps of Eng'rs*, 904 F.3d 1068 (9th Cir. 2018). *Tin Cup* answered whether the Army could substitute provisions of its Alaska Regional Supplement for the 1987 Manual. *Id*. at 1072. In this case, EPA has not asserted the use of the Western Mountains Regional Supplement. Further, the Order and Amended Order both rely on the 1987 Manual to conclude that the vacant lot is a wetland. AR 23 (Order) at ¶ 1.4, ER I:41; AR 32 (Amended Order) at ¶ 1.4, ER I:33. Having explained its conclusion using the Manual, the Record must demonstrate use of the Manual's methodology. *Vista Hill Foundation, Inc. v. Heckler*, 767 F.2d 556, 559 (9th Cir. 1985); *id.* at 560-63 (refusing to affirm agency decision on grounds the agency relied upon).

II. THE DISTRICT COURT ERRED IN ALLOWING EPA TO SUPPLEMENT ITS SPARSE RECORD WITH POST-DECISIONAL MATERIALS REFLECTING ITS LITIGATION POSITION

EPA's Record comprises thirty-nine documents totaling a mere 375 pages. Of these, seven documents, comprising 188 pages, are general references providing no site-specific information about the vacant lot. AR 1, 2, 5-7, 30, 34. An additional document, AR 35, is John Olson's memorandum (Olson Report) written six weeks after the Amended Order was issued. ER II:213. The Sacketts moved to strike all eight of these documents below.

Five short items in the Record document the May 3, 2007, EPA site inspection of the lot. AR 9-11, 15, 21. AR 15 is a brief memo summarizing the inspection and attaching several photos. ER II:174. Three documents memorialize communications from May through October of 2007, internal to EPA and between the Sacketts, the EPA, and the Army. AR 12-14. Eight additional documents relate to the November 2007 Order and two subsequent minor amendments. AR 18, 20, 22, 23-28. The Order is at AR 23. ER I:39. Together, these show:

The Sacketts' lot sits between Kalispell Bay Road (Road) on the North and Old Schneider Road to the South. AR 20 (Sackett Response to EPA CWA 308 Letter), ER II:200. The lot is bordered by existing homes in a built-out residential subdivision near the shore of Priest Lake (Lake). AR 10 (aerial photo). ER II:119. The lot is about 300 feet from the Lake, and separated from it by Old Schneider Road and a line of homes. *Id*. The Sacketts obtained all necessary permits from Bonner County to build in May of 2007. AR 20, ER II:196. *See also* AR 14 (Fromm notes of conversation with County staff) ER II:146.

North of Kalispell Bay Road sits the Kalispell Bay Fen (Fen). AR 15, ER II:152; AR 21, ER II:203. Kalispell Bay Fen drains via a roadside ditch (drainage ditch) to Kalispell Creek (Creek), which then flows to Priest Lake. *Id*. There are no culverts connecting the Sacketts' lot to Kalispell Bay Fen or any other waterway that drains to Priest Lake. *Id*.

On May 1, 2007, the Sacketts broke ground by clearing the site and removing about 1,000-cubic yards of dirt that was unsuitable for sub-base or foundation. They replaced this with approximately 1,700-cubic yards of material suitable for a building pad. AR 20 (Sackett Response to EPA CWA Section 308 Letter), ER II:195.

On May 3, 2007, EPA staff John Olson and Carla Fromm visited the lot, asked the crew whether they had an Army permit, and "suggested" they cease work until they got one. AR 15 (June 1, 2007, Inspection Report), ER II:174; AR 21 (July 22, 2007, CWA Inspection Report), ER II:203. Olson and Fromm inspected the site, took photographs, and looked for but found no culverts connecting the lot to the Fen beyond the Road. AR 15, ER II:174, 176;[1] AR 21, ER II:203. They were onsite under 90 minutes. AR 15, p 00187 (arrived about 2 p.m., left to inquire at Sackett Construction office for permit, returned to look for culverts, left about 3:30 p.m.), ER II:174.

Conversations followed between Chantell Sackett and Fromm, and with Dean Hilliard of the Army. AR 12 (May 23, 2007, facsimile to Hilliard), ER II:133. On May 4, Olsen told Chantell that he was "working on finding out if [the lot] is

[1] AR 15, catalogs 16 photographs, ER II:176 but only 15 are appended. The photo identified as "11. Another view of the east side of the lot that shows the lot had been excavated prior to filling" does not appear anywhere in the record. AR 11, ER II:125, is another set of the photos that appear in AR 15, uncaptioned and uncropped. AR 10, ER II:117, contains a subset of five of these photos, along with topographic maps and an aerial photo identifying the vacant lot.

wetlands." AR 12, ER II:134. That day, in a different conversation, Chantell asked Fromm if EPA had authority over the lot. Fromm responded "that the site looked suspicious and that she is not sure if the EPA has jurisdiction over the site." *Id*.

Then on May 29, 2007, Fromm told Chantell that "we've" determined the vacant lot contains wetlands, that details could not be provided yet, and that wetlands on the site were connected by groundwater either to Priest Lake or to adjacent wetlands. AR 14, ER II:145. On May 31, Fromm informed Chantell that EPA would never issue the Sacketts a permit to build on the lot. Fromm expected the Sacketts to build their home elsewhere. AR 14, ER II:146-47. Chantell asked again for a written explanation of the EPA's authority over the lot. Fromm replied that EPA would be sending the Sacketts information, which "could include something in that possibility." AR 14, ER II:147.

On June 1, 2007, Fromm prepared AR 15, Sackett Site Inspection Report (Fromm Report), ER II:152. EPA then sent the Sacketts a request for information on June 8, 2007. AR 18, ER II:185. Despite Fromm's statement to Chantell the prior week, *see* AR 14, ER II:147, the information request contains no explanation of EPA's authority over the lot. The Sacketts responded on or about July 3, 2007. AR 20, ER II:195. On July 22, 2007, Fromm completed AR 21, Clean Water Act § 404 Inspection Report, ER II:203. This one-page memo restates the text of the

Fromm Report and identifies the "Follow-Up Actions" as "Determine if we have jurisdiction over the wetlands on the site."

On August 24, 2007, Chantell Sackett wrote to Fromm asking again for information from EPA on the basis for assertion of jurisdiction under the Act. AR 22, ER II:204. EPA did not respond to this request.

On November 26, 2007, EPA issued the Administrative Compliance Order (Order). AR 23, ER I:39. The Order finds that the lot contains wetlands under 33 C.F.R. § 328.4(b)(8) and the 1987 Manual. Order, ¶¶ 1.4; AR 23, ER I:41. The Order directs the Sacketts to remove the imported material no later than April 15, 2008, and re-plant the Site by April 30, 2008. Order, ¶¶ 2.2, 2.6; AR 23, ER I:43.

The Sacketts commenced this lawsuit on April 28, 2008, Docket No. 1.

EPA amended the Order on May 15, 2008. AR 32, ER I:30. The Amended Order extends the deadline for removal of fill to October 31, 2008, and omits the original requirement to re-plant the Site. Amended Order, ¶¶ 2.2; AR 32, ER I:35. Otherwise, the Amended Order restates the original findings that the lot contains regulated wetlands. Amended Order, ¶¶ 1.4, 1.5; AR 32, ER I:33-34. On the same day, John Olson went back to the vacant lot to re-investigate in support of EPA's litigation position. Olson prepared a report six weeks later documenting his re-inspection. AR 35, ER II:213. This report, and various references cited in that report, were the subject of the Sacketts' denied motion to strike.

Information improperly included by the agency in the administrative record should be stricken if it causes prejudice to the opposing party. 5 U.S.C. § 706; *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993). An agency may not "supplement the Administrative Record submitted to the district court with post hoc rationalizations for its decision." *Id*. (citing *Am. Textile Mfrs. Inst., Inc., v. Donovan*, 452 U.S. 490, 539 (1981) and *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971)). "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). Prejudicial post-hoc materials offered as part of the administrative record of any agency decision should be stricken from that record. *MK Ranches*, 994 F.2d at 740.

The Olson Report, AR 35, ER II:213, is dated July 1, 2008. This is six weeks after EPA issued the Amended Order on May 15 of that year; the report did not exist when the decision was made. And, the original Order was issued November 26, 2007. The Order and Amended Order offer the same conclusion on the key issue in this case—that any wetlands on the Sacketts' vacant lot are adjacent to the Fen across Kalispell Road to the North. *Compare* AR 23 (Order) at ¶ 1.5 *with* AR 32 (Amended Order) at ¶ 1.5, ER I:33 and I:41. The only decision made in the Amended Order was to rescind the portion of the Order requiring the Sacketts to revegetate their property. *Compare* AR 23 (Order) at ¶¶ 2.1, 2.6, 2.8 (re-planting requirements) *with*

AR 32 (Amended Order) at ¶¶ 2.1-2.10 (no re-planting requirements), ER I:43-44 and I:35-37. So the two portions of the decision challenged in this lawsuit, that the Sacketts' lot contains wetlands and that EPA has authority over them under the Clean Water Act, were decided in the Order and not subsequently changed in the Amended Order. Further, the Amended Order itself post-dates the filing of this lawsuit and is accordingly a litigation position.

The documents which the Sacketts moved to strike below are dated even six weeks later on July 1, 2008. None of these were before the EPA when it concluded on November 26, 2007, that the Sacketts' lot is a federally regulated wetland, or when it issued the Amended Order on May 15, 2008.

These materials are also prejudicial to the Sacketts. Absent the July 1, 2008 Olson Report, the only materials in the Record that even relate to EPA's conclusion in the Order that the Sacketts' lot is a regulated wetland are:

- Carla Fromm's six paragraph report on EPA's May 3, 2007 visit to the Sackett property, AR 15, and nearly identical § 404 Inspection Report, AR 21;
- Handwritten notes by Carla Fromm, AR 9 (one page), and AR 14 (9 pages);
- 15 photographs, appearing in AR 11 and 15; and
- 2 maps and an aerial photo, appearing in AR 10.

None of these materials has any discussion of the facts necessary to establish significant nexus. The only material EPA offered on the point of significant nexus are the improperly included July 1, 2008 Olson Report and materials cited therein.

The District Court below erred in not striking the Olson Report and other materials cited in it, and this Court should not consider the Olson Report in deciding this appeal.

III. THE RECORD FAILS TO DEMONSTRATE THAT THE SACKETTS' VACANT LOT IS A WETLAND, BECAUSE EPA NEVER USED THE 1987 WETLAND MANUAL TO ASSESS THAT QUESTION

"To identify wetlands under this regulation, the Corps uses its 1987 Wetlands Delineation Manual (Manual). *See Energy and Water Development Appropriations Act*, Pub. L. No. 102-377, 106 Stat. 1315, 1324 (1992)." *Fairbanks*, 543 F.3d at, 590 (citation omitted). "The Manual explains that wetlands have the three "general diagnostic environmental characteristics" of vegetation, soil, and hydrology. Manual ¶ 26(b). Generally, 'evidence of a minimum of one positive indicator from each parameter (hydrology, soil, and vegetation) must be found in order to make a positive wetland determination.' *Id*. ¶ 26(c)." *Id*. In enforcement actions, the government must demonstrate the existence of all three parameters according to the 1987 Manual. *Rapanos*, 547 U.S. at 764 (Kennedy, J., concurring in judgment).

But EPA never even tried to establish that the lot is a wetland under the 1987 Manual. The Fromm Report documents the hour or so that Olson and Fromm spent

on the lot on May 3, 2007, including pictures. ER II:174. It has no data sheets, reports no methodology for observing the site or collecting data, no sample collections, and no analysis of any data whatsoever. The Fromm Report merely reports Olson and Fromm's opinion that the Site contains wetlands, based solely on the observation of water on the surface.

This violates the 1987 Manual. "Except in certain circumstances defined in this manual, evidence of a minimum of one positive indicator from each parameter (hydrology, soil, and vegetation) must be found in order to make a positive wetland determination." Manual, ¶ 26(c). Even a routine determination involving an onsite inspection under the 1987 Manual requires the user to prepare a base map of the project site, the use of standard data forms, a compass, soil augur or spade, 300-foot tape, and Munsell Color Charts for soils determinations. Manual, ¶¶ 63-64. The procedures, especially where vegetation has been disturbed, require digging soil pits to determine whether hydric soils are present, with observations and data to be recorded on standard data sheets. Manual, ¶ 65, Steps 13-15. *See also* Manual, ¶ 71a (describing suspected unauthorized activities as an atypical situation requiring these special procedures).

Olson and Fromm dug no soil pits, took none of the prescribed steps to determine the presence of hydric soils, and recorded no observations or data on standard forms. The complete record of the May 3, 2007, inspection of the lot

occupies roughly one page on AR 15, and less than a page on AR 21. Absent such observations, data, records, and analysis, the finding in the Order and in the Amended Order that the Sacketts' vacant lot is a wetland is arbitrary and capricious, and must be set aside under the APA.

Nor does the Olson Report, prepared in support of EPA's litigation position,[2] if the Court were to consider it as part of the Record, add anything to cure this defect in the Order or Amended Order. The Olson Report may have the superficial advantage over the Fromm Report of being roughly eight pages instead of one. But the Olson Report fails to disclose the digging of any soil pits, data collection, preparation of data forms, or analysis necessary to determine the existence of hydric soils. Manual, ¶ 65, Steps 13-15. So, even if the Olson Report is properly part of the Record, it still fails to provide the rudimentary site investigation, observation and data collection, record keeping, and analysis necessary to determine the presence of hydric soils.

Similarly, the document titled Approved Jurisdictional Determination (JD Form), AR 33, documents that EPA did not do a jurisdictional determination of the Site. Section III.B.2. of the JD Form is supposed to provide characteristics of the lot, but fails to indicate wetland type and quality, chemical characteristics, or biological

[2] No deference is owed when an agency has not formulated an official position, but is merely advancing a litigation position. *United States v. Able Time, Inc.*, 545 F.3rd 824, 836 (9th Cir. 2008).

characteristics, asserting in place of data on these topics that the wetland was eliminated through excavation and fill. AR 33, p 00334. Section IV, Data Sources, confirms that no data sheets were prepared or used to determine whether the lot contains a wetland, and that the only information used was a USGS quad map, a similar scale map from the National Wetlands Inventory, and an 87-year-old aerial photograph. AR 33, ER II:212. The 1987 Manual requires that some investigation, data collection, and analysis be done to verify the existence of all three wetland parameters, and provides techniques for doing so when a site has been disturbed. The Fromm Report and Olson Report document EPA's failure to do any such thing. The JD Form confirms that no wetland delineation was performed.

Since the Record discloses that EPA did not perform a wetland delineation of the Sacketts' lot, the Order and Amended Order are arbitrary and capricious in finding the lot to be a wetland, and the Court must set the Order and Amended Order aside under the APA.

IV. THE EPA LACKS AUTHORITY OVER THE SACKETTS' VACANT LOT BECAUSE THE LOT IS PHYSICALLY SEPARATED FROM ANY OTHER SURFACE WATER BY PERMANENT ROADS

The Sacketts' lot is bounded by permanent roads on both ends, with no surface water connection to any other water body, ER II:174, 203, 206, 209, 211, 214, 216.

The *Rapanos* plurality limits Clean Water Act authority to wetlands that have a direct and continuous surface water connection to otherwise regulated tributaries.

547 U.S. at 742. The Sacketts' vacant lot has no such connection in any direction, despite EPA's fruitless search for culverts under Kalispell Bay Road to find such a connection, ER II:174.

Nor is there any such direct connection to Priest Lake. ER II:214. (Olson Report, speculating in the absence of a surface connection to Priest Lake that there may be a subsurface connection).

Thus, the Sacketts' vacant lot cannot fall within the ambit of the Clean Water Act under the *Rapanos* plurality.

Nor can the Order and Amended Order be upheld on the post-hoc rationale that the Sacketts' lot is directly adjacent to Priest Lake, since EPA's Record provides no explanation of how it would have arrived at such a conclusion. *Vista Hill Foundation*, 767 F.2d at 559. No predecisional materials offer any explanation for how EPA would have reached this conclusion.

The Amended Order cannot be sustained on this basis either. The JD Form, AR 33, disclaims any assertion that the lot is directly adjacent to Priest Lake. The document has an option for "Adjacent to a TNW" in section IIB1a, on page 2, but that box is not selected. ER II:206. Nor is the supporting analysis section for this option in section IIIA2 on page 3 completed. ER II:207. And the determination of jurisdictional findings at section IIID on page 6 doesn't conclude that the lot is

adjacent to Priest Lake. ER II:210. The Amended Order was not issued on this rationale and cannot be sustained on it. *Vista Hill Foundation*, 767 F.2d at 559.

The District Court erred in affirming EPA's determination on this ground. The opinion below depends entirely on the 2008 Post-*Rapanos* Guidance to interpret the definition of "adjacent" in the agency regulations. Opinion, at 19-22, ER I:20-23. But this Guidance is ineligible for deference from this Court. First, the Guidance does not interpret regulations, it interprets *Rapanos*. Executive interpretations of judicial decisions are not entitled to deference. Nor, see above, is there any valid adjacent wetland regulation for EPA to interpret. Second, the Guidance does not bind the public or the agency. Guidance at 4, n.17. Third, the Guidance is dated December 2008 a year after the Order was issued and six months after the Amended Order. It cannot have formed the basis for either. Fourth, EPA has changed its positions on the Guidance twice. 84 Fed. Reg. 56,626, 56,642 (October 22, 2019) (2015 regulation redefining "navigable waters" modified Guidance, EPA abandons 2015 interpretation in favor of interpretation in Guidance); *Kisor v. Wilke*, 139 S. Ct. 2400, 2417-18 (2019) (courts not to defer to agency guidance that disclaims binding effect, post-dates the conduct charged, or does not reflect a consistent agency position).

V. THE EPA LACKS AUTHORITY OVER THE SACKETTS' VACANT LOT BECAUSE IT HAS NO SIGNIFICANT NEXUS WITH ANY "NAVIGABLE WATER."

The Record must disclose enough physical evidence to support both the existence of a nexus, and its significance. *Precon Development Corp., Inc., v. United States Army Corps of Eng'rs*, 633 F.3d 278, 294 (4th Cir. 2011) (citing *Rapanos*, 547 U.S. at 780). The evidence of significance must relate to Priest Lake itself; evidence of significance to an intervening non-navigable tributary is inadequate. *Id*. at 296.

The Fromm Report does nothing to establish that any wetland on the Sacketts' lot has a significant relationship to Priest Lake. The entire text of the Fromm Report fills one printed page. AR 15, ER II:152-153, *see also* AR 21, ER II:203. Nothing in the Fromm Report provides physical evidence of any nexus between the Sacketts' lot and Kalispell Bay Fen, the drainage ditch from there to Kalispell Creek, or to Priest Lake. Instead, it says:

> We … look[ed] for culverts connecting the wetland to either the wetland on the north side of Kalispell Bay Road or connecting the wetland to ditches or another waterway draining into Priest Lake to the south. We did not see culverts under either Kalispell Bay Road or Old Snyder [sic] Road which is between the wetland and Priest Lake.

AR 15, ER II:52.

These observations are the only evidence properly in the Record prior to the Order. And following these observations, the "Follow-Up Actions" are "Determine if we have jurisdiction over the wetlands on the site." AR 21, ER II:203. No evidence appears in the Record up to the issuance of the Amended Order in May, 2008, to

support any conclusion that there is any nexus between any wetlands on the Sacketts' lot and Priest Lake, much less establish that any such nexus is significant. No evidence is provided to show how any wetland on the lot would affect the chemical, physical, and biological integrity of Priest Lake. No information about Priest Lake is provided at all. AR 15, ER II:52, AR 21, ER II:203.

If the Court considers it, the Olson Report also fails to provide any evidence of the significance of any connection between the Sacketts' lot and Priest Lake. AR 35, p 00346, ER II:217. The Olson Report discusses hydrologic connection between the lot and the Fen north of Kalispell Bay Road on pages 4 and 8. AR 35, pp 00345 and 00349, ER II:216, 220. These discussions show that any possible shallow groundwater connection runs from the Fen south under the Road to the Sacketts' lot, and not in the other direction. AR 35, ER II:220.

The Olson Report posits a "possible" connection between the Sacketts' lot and the outlet channel which drains the Fen "if the flow and water level north of Kalispell Bay Road is so low . . . that the outlet channel would act to carry flow from wetlands both north and south of Kalispell Bay Road through shallow subsurface flows." *Id*. Speculation about possible connections under ideal conditions cannot establish a nexus. *San Francisco BayKeeper v. Cargill Salt Div.*, 481 F.3d 700, 708 (9th Cir. 2007). The Sacketts' lot contributes no water to the Fen or the ditch that

drains the Fen. With these facts established by the Record, we review the Olson Report's attempt to show nexus.

In boiler plate fashion, pages 5 through 8 discuss the ecological functions which the lot purportedly provides to other waters: (a) water quality benefits to Kalispell Creek and Priest Lake, (b) base flow to Kalispell Creek, (c) flow attenuation, (d) aquatic food base, and (e) fish movement to and from Priest Lake. AR 35, ER II:217-220. But the Olson Memo provides little evidence for nexus under any of these functions and no evidence for the significance of the lot to Priest Lake.

Water quality benefits are discussed at page 5, AR 35, ER II:217-218. There, Olson states that the Fen can capture sediment and nutrients before they enter the drainage ditch and ultimately Kalispell Creek. There are two problems with this. First, the Olson Report fails to explain how the Sacketts' lot, which contributes no surface flow to the Fen and is physically isolated from the Fen by a major road, would trap any sediment or nutrients from water moving through the Fen to the drainage ditch. Both the Fen and its drainage ditch are on the north side of the Road. Since the lot contributes no flow to either, it could not trap sediments or nutrients that were moving through the Fen to the drainage ditch on the way to the Creek. The lot cannot serve any function to capture sediment moving south through the Fen to the Creek, because it does not connect the Fen with the Creek.

Second, the Olson Report identifies Kalispell Creek as impaired for sediment, but concedes that Priest Lake's water quality is "currently very good." Nothing in the Olson Report explains what the significance of sediment retention from the roughly 2/3 acre vacant lot is to a lake with 62 miles of shoreline and 36.5 square miles of surface area. AR 35, ER II:217.

The Olson Report discusses base flow contribution to the Creek at pages 6 and 7. AR 35, ER II:218-219. But again, the vacant lot contributes no flow to the Fen or drainage ditch, and thus no flow to the Creek or to the Lake via the Creek. The Olson Report fails to provide evidence for any nexus as to this attribute, and says nothing of the significance of any flow that a 2/3 acre lot would provide to Priest Lake's 36.5=square mile surface area. The Olson Report identifies the relative sizes of the Fen (35 acres), the watershed that drains to the Fen (1.36 square miles = 870 acres), and the watershed drained by the Creek (39.4 square miles = 25,216 acres) but fails to discuss how the half acre of allegedly filled wetlands on the Sacketts' lot (respectively, 1.4% the size of the Fen, .1% the size of the watershed that drains to the Fen, and .002% the size of the Creek's watershed) is significant in relation to any of these drainages, let alone to Priest Lake. Nor is the Olson Report's analysis of watershed size relevant in the first place, because the Sacketts' lot is not *in* the watershed of the Fen or the Creek—it does not drain to them.

The Olson Report then discusses base flow attenuation at page 7. AR 35, ER II:219. As with base flow contribution, the Report fails to even establish a nexus to Priest Lake using this function. It provides no physical evidence of how the Sacketts' lot, with no surface water connection to the Fen, can attenuate any flows moving through the Fen to the drainage ditch and on to the Creek and the Lake. And, Olson says nothing of the significance of the vacant lot to this function in relation to the Lake.

The next function is provision of food base through invertebrate production, discussed in the Report at page 7. AR 35, ER II:219. This brief discussion does not establish any invertebrate production on the Sacketts' lot, or explain how it would provide food sources to fish living in the Fen or drainage ditch across the Road, and similarly fails to even address the significance of any such invertebrate production on the vacant lot to Priest Lake at all.

Fish movement is the final function which the Olson Report addresses, at pages 7 and 8. AR 35, p 00348-49, ER II:219-220. To a greater degree even than the prior functions, the Report fails to establish a nexus between the Sacketts' lot (which has no surface water connection to the Fen or drainage ditch), and Priest Lake for the purpose of fish migration. It may be true that the surface water connection between the Creek and the upstream drainage ditch is valuable for any fishery in the Creek, but this completely fails to demonstrate how the vacant lot across the road

relates to these waters—fish cannot move between the Sacketts' lot and any other surface water. Nor does Olson even address how the Sacketts' lot could be significant to fish migration to or from Priest Lake.

Similarly, the JD Form, AR 33, fails to provide any evidence of the significance of any nexus between the Sacketts' lot and Priest Lake. Section III.B.3 of the JD Form states that 35 acres of wetlands (the Fen north of the Road) which directly abut the drainage ditch are being considered as part of a cumulative analysis, and Section III.C. on page 6 makes the bare assertion that taken together, these wetlands have various effects on Priest Lake. AR 33, p 00334-35, ER II:209-210. But the JD Form provides no data on which to draw a conclusion that the vacant lot is similarly situated to the Fen. The Sacketts' lot performs none of the same functions for the drainage ditch and Creek as the Fen does north of the Road where it actually connects with and drains to the ditch, creek, and eventually the Lake. This section of the JD Form adds nothing to the Olson Report, and does not even attempt to show the significance of the nexus it proposes. And fatally for the EPA, the JD Form offers no conclusions or findings as to chemical nexus for Kalispell Creek. AR 33, ER II:208. *Rapanos*, 547 U.S. at 780 (concurrence requires significant physical, chemical, *and* biological nexus).

This demonstrates two points. First, the EPA's treatment of the Sacketts' vacant lot and the Kalispell Bay Fen as similarly situated is arbitrary and capricious,

because the relationship of the Fen to Priest Lake is entirely based on the surface water connection between the Fen and the Lake, a connection which does not exist with the Sacketts' lot. Second, the Olson Report fails to provide physical evidence of a nexus between the vacant lot and the Lake as to most if not all of the discussed functions, and never even addresses the significance of any nexus as to any function.

This Record is analogous to that considered by the court of appeals in *Precon Development Corp*. As in this case, the court in *Precon* reviewed an administrative record that failed to provide any physical evidence of the significance of the nexus between wetlands and downstream navigable waters, and held that such a record is inadequate to establish jurisdiction under the Act. 633 F.3d at 281, 294. *See also Jones Creek Investors, LLC, v. Columbia County, Ga.*, 98 F. Supp. 3d 1279, 1307-08, (N.D. Ga. 2015); *See also Foster v. EPA*, No. 14-16744, 2017 WL 3485049, *22-23 (S.D.W.V. Aug. 14, 2017) (EPA record too cursory to establish that three ephemeral headwater drainages had significant nexus to downstream river). As in *Precon*, *Jones Creek Investors*, and *Foster*, this Court should rule that the EPA has failed to establish that any wetlands that may exist on the Sacketts' vacant lot have a significant nexus with Priest Lake.

CONCLUSION

This Court should reverse the District Court's denial of the Sacketts' motion to strike, vacate EPA's Order and Amended Order, and remand to the agency.

DATED: December 11, 2019.

Respectfully submitted,

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ADDENDUM

Constitutional Provisions

Article I, Section 8, Clause 3: "The Congress shall have the Power . . . To regulate Commerce . . . among the several States[.]"

Amendment X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Statutory Provisions

33 U.S.C. § 1311(a): "Except in compliance with . . . section 1344 of this title, the discharge of any pollutant by any person shall be unlawful."

33 U.S.C. § 1344(a): "The Secretary may issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites."

33 U.S.C. § 1362(12): "The term "discharge of a pollutant" . . . means . . . any addition of any pollutant to navigable waters from any point source[.]"

33 U.S.C. § 1362(7): "The terms "navigable waters" means waters of the United States, including the territorial seas."

Regulatory Provisions

33 C.F.R. § 328.3 (2007):

(a) The term "waters of the United States" means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a) (1) —(4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1) – (6) of this section. (b) The term "wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas."

(c) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

STATEMENT OF RELATED CASES

Under Circuit Rule 28-2.6(c), Appellants identify the following pending cases as related to this one, because they also raise the issue of which of the *Rapanos* opinions is the holding of the case:

Oregon Cattlemen v. EPA, Ninth Circuit Case No. 19-35792. *United States v. Lucero*, Ninth Circuit Case No. 19-10074 (Appellants filed a brief *amici curiae* in this case).

CERTIFICATE OF COMPLIANCE FOR BRIEFS

Case No. 19-35469

I am the attorney or self-represented party.

This brief contains 13,953 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[X] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

DATED: December 11, 2019.

s/ Anthony L. François
ANTHONY L. FRANÇOIS

CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2019, I electronically filed the foregoing **APPELLANTS' OPENING BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Anthony L. François
ANTHONY L. FRANÇOIS