No. 19-35469

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL SACKETT, et al.,
Plaintiffs / Appellants,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,
Defendants / Appellees.

Appeal from the United States District Court for the District of Idaho
No. 2:08-cv-00185 (Hon. Edward J. Lodge)

SUPPLEMENTAL BRIEF FOR DEFENDANTS/APPELLEES

JEAN E. WILLIAMS
Acting Assistant Attorney General
BRIAN C. TOTH
Attorney
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 305-0639
brian.toth@usdoj.gov

Of Counsel:

KARYN WENDELOWSKI
Attorney
U.S. Environmental Protection Agency

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ISSUE PRESENTED 1

SUPPLEMENTAL STATEMENT OF THE CASE 1

ARGUMENT 4

CONCLUSION 10

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

Cases

CFPB v. Gordon,
819 F.3d 1179 (9th Cir. 2016)....................5

Ditullio v. Boehm,
662 F.3d 1091 (9th Cir. 2011)....................5

Ghorbani v. INS,
686 F.2d 784 (9th Cir. 1982)....................6

Headwaters, Inc. v. Talent Irrigation District,
243 F.3d 526 (9th Cir. 2001)....................2

Hughes Aircraft Co. v. United States,
520 U.S. 939 (1997)....................5

Landgraf v. USI Film Products,
511 U.S. 244 (1994)....................5

Native Ecosystems Council v. Tidwell,
599 F.3d 926 (9th Cir. 2010)....................6

Northern California River Watch v. City of Healdsburg,
496 F.3d 993 (9th Cir. 2007).................... 3, 5, 8

Northern Idaho Community Action Network v. U.S. Department of Transportation,
545 F.3d 1147 (9th Cir. 2008)....................6

Sierra Club v. TVA,
430 F.3d 1337 (11th Cir. 2005)....................6

United States v. Lucero,
989 F.3d 1088 (9th Cir. 2021).................... 1, 5, 7

United States v. Rapanos,
547 U.S. 715 (2006).................... 2, 3, 7

Statutes

33 U.S.C. § 1311(a)..1

33 U.S.C. § 1362(7) 1

Regulations

33 C.F.R. § 328.3 (2014)..2

33 C.F.R. § 328.3(a) (2014)..2

33 C.F.R. § 328.3(a)(5) (2014)..3

33 C.F.R. § 328.3(b) (2014)..2

33 C.F.R. § 328.3(c) (2014) 2

33 C.F.R. § 328.3(c)(1)..4

33 C.F.R. § 328.3(c)(12)..4

33 C.F.R. § 328.3(c)(16)..4

40 C.F.R. § 232.2(q) (2014)..2

51 Fed. Reg. 41,206 (Nov. 13, 1986)..1

53 Fed. Reg. 20,764 (Jun. 16, 1988)..2

80 Fed. Reg. 37,054 (Jun. 29, 2015)..3

84 Fed. Reg. 56,626 (Oct. 22, 2019).. 3, 4, 9

Navigable Waters Protection Rule
85 Fed. Reg. 22,250 (Apr. 21, 2020).. 1, 4, 8

Executive Order 13990
86 Fed. Reg. 7,037 (Jan. 25, 2021).. 9, 10

Other Authorities

Fact Sheet: List of Agency Actions for Review, https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/ 10

U.S. EPA and U.S. Army Corps of Engineers, "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*" (Dec. 2, 2008) https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf 7

ISSUE PRESENTED

Pursuant to the Court's order of March 8, 2021, the United States Environmental Protection Agency (EPA) submits this supplemental brief addressing the relevance, if any, of the Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250 (Apr. 21, 2020) (2020 Rule), to the merits of this appeal. The regulation is not relevant because it does not apply retroactively, as this Court recently held in *United States v. Lucero*, 989 F.3d 1088, 1104-05 (9th Cir. 2021).

SUPPLEMENTAL STATEMENT OF THE CASE

As the answering brief explained (pp. 8-9), EPA issued Plaintiffs an administrative order charging them with violating 33 U.S.C. § 1311(a), a provision of the Clean Water Act that prohibits discharges into waters of the United States without a permit. *See* 1-ER-33–35. The principal issue before the district court was whether Plaintiffs' property contains "waters of the United States" within the meaning of the Act, 33 U.S.C. § 1362(7). At the time of the administrative order, the scope of the statutory phrase "waters of the United States" was interpreted and defined by regulations that were promulgated in the 1980s and implemented over time in accordance with judicial decisions. *See* 51 Fed. Reg. 41,206, 41,250 (Nov. 13, 1986) (U.S. Army Corps of Engineers'

regulations, codified at 33 C.F.R. § 328.3(a) (2014)); 53 Fed. Reg. 20,764, 20,774 (Jun. 6, 1988) (EPA's regulations, codified at 40 C.F.R. § 232.2(q) (2014)).

Although that regulatory definition encompassed several categories of waters, two were relevant to the order here: (1) "tributaries" of traditional navigable waters; and (2) wetlands "adjacent" to traditional navigable waters or their tributaries. *See* 33 C.F.R. § 328.3 (2014). The regulations did not define "tributaries," which this Court has recognized as a "stream which contributes its flow to a larger stream or other body of water." *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526, 533 (9th Cir. 2001). The regulations then in effect did, however, define both "wetlands" and "adjacent." "Adjacent" was defined to mean "bordering, contiguous, or neighboring," and the term included wetlands separated from other waters of the United States by manmade dikes or barriers. 33 C.F.R. § 328.3(c) (2014). "Wetlands" are "areas that are inundated or saturated by surface or ground water 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." *Id.* § 328.3(b).

Since the 1980s, several Supreme Court cases have affected the scope of Clean Water Act jurisdiction under this regulatory definition. *See* Answering Brief 3-7. Notably, the Supreme Court held in *United States v. Rapanos*, 547 U.S. 715 (2006), that the Act did not extend its protections to certain kinds of

wetlands—but the Justices disagreed over which kinds. This Court subsequently held that the standard for Clean Water Act jurisdiction articulated by Justice Kennedy in *Rapanos* can be applied to determine the extent of waters of the United States in this Circuit. *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007). Under that standard, jurisdiction depends upon "the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense." *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring). EPA and the district court here applied that standard. *See*, *e.g.*, 1-ER-17 (noting that EPA's administrative order premised jurisdiction upon the "significant nexus" standard (citing 1-ER-30–38)); 1-ER-23–28.

Seven years after the administrative order was issued, EPA and the U.S. Army Corps of Engineers ("Agencies") revised the rule defining "waters of the United States" using Justice Kennedy's "significant nexus" standard as the touchstone. *See* 80 Fed. Reg. 37,054 (Jun. 29, 2015) (2015 Rule). The 2015 Rule differed from the prior regulations in several respects, for example, by specifying additional criteria for identifying a "tributary." *Compare id.* at 37,124 *with* 33 C.F.R. § 328.3(a)(5) (2014). The 2015 Rule was challenged, and it was stayed or enjoined at various times. *See* 84 Fed. Reg. 56,626, 56,630-31 (Oct. 22, 2019).

In 2017, the Agencies began reconsidering the 2015 Rule through a new notice-and-comment rulemaking. The Agencies repealed that Rule and

reinstated the pre-2015 definition of "waters of the United States," effective on December 23, 2019. *See* 84 Fed. Reg. at 56,626. Then the Agencies promulgated a new definition in the 2020 Rule, which became effective on June 22, 2020. The 2020 Rule retained the same definition of "wetlands" that had existed prior to 2015, *see* 85 Fed. Reg. at 22,339 (33 C.F.R. § 328.3(c)(16)), but it further defined the term "tributary" and revised the definition of "adjacent." In particular, the 2020 Rule defined "tributary" to mean a river, stream, or surface water channel that contributes surface water flow to other waters of the United States and that is either perennial or intermittent in a typical year. *Id.* at 22,339 (33 C.F.R. § 328.3(c)(12)). Tributaries may be naturally occurring or "constructed in an adjacent wetland." *Id.* Under the 2020 Rule, wetlands are "adjacent" to other jurisdictional waters, and thus "categorically jurisdictional," if they touch traditional navigable waters or tributaries, or if they are separated from such waters by "an artificial dike, barrier or similar artificial structure" that "allows for a direct hydrological surface connection . . . such as through a culvert, flood or tide gate, [or] pump." *Id.* at 22,309, 22,338 (33 C.F.R. § 328.3(c)(1)).

ARGUMENT

1. The 2020 Rule does not apply to this case. Plaintiffs challenged EPA's 2008 administrative order, which was issued when the pre-2015 regulations were in force. The record reflects that EPA applied the regulatory

definitions of "tributaries" and "adjacent" wetlands in place at that time, as interpreted by Justice Kennedy's *Rapanos* opinion, which this Court has held to provide a controlling rule of decision regarding "waters of the United States." Answering Brief 5-6, 32-35 (discussing *City of Healdsburg,* 496 F.3d at 999-1000).

In a recent decision, the Court confirmed that the 2020 Rule's definition of "waters of the United States" does not apply to allegations that an individual placed unpermitted fill material in a jurisdictional area at a time when the pre-2015 regulations were in force. *See Lucero*, 989 F.3d at 1104. There, a criminal defendant appealed from his conviction under regulations in place at the time of his unlawful conduct in 2014. The Court held that the "2020 Rule represents a change in the law, which applies prospectively only and not to [this] case." *Id.* In other words, the 2020 Rule "does not apply retroactively." *Id*. at 1105.

Lucero's conclusion follows from the general presumption that the legal effect of conduct is assessed "under the law that existed when the conduct took place." *See Ditullio v. Boehm*, 662 F.3d 1091, 1099 (9th Cir. 2011) (quoting *Hughes Aircraft Co. v. United States*, 520 U.S. 939, 946 (1997)); *accord Landgraf v. USI Film Products*, 511 U.S. 244, 268 (1994); *CFPB v. Gordon*, 819 F.3d 1179, 1196-97 (9th Cir. 2016) (applying presumption to regulations). That presumption is reinforced here by established principles of administrative law: when undertaking judicial review of agency action, courts generally apply the

regulation determined to be in effect at the time of the challenged final agency action. *See*, *e.g.*, *Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 932 (9th Cir. 2010) (assessing compliance with "[r]egulations implementing the statute" that were "in effect at the time the Forest Service issued its final decision"); *Northern Idaho Community Action Network v. U.S. Department of Transportation*, 545 F.3d 1147, 1159 n.7 (9th Cir. 2008) (applying "regulations [that] were in effect at the time of the Agencies' decision in this case"); *Ghorbani v. INS*, 686 F.2d 784, 787 n.3 (9th Cir. 1982) (citing but not applying an otherwise pertinent regulation that "was not in effect at the time of the District Director's [challenged] decision").

Lucero's conclusion is further reinforced by the fact that the 2020 Rule expressly includes an effective date: June 22, 2020. 85 Fed. Reg. at 22,250. The preamble expressly stated that the Rule would "replace the recodified pre-2015 regulations, upon its effective date," *id.* at 22,260, and it preserved jurisdictional determinations that had been recently made under the prior rules, *id.* at 22,331-32. Other courts have held that the inclusion of an effective date is ample evidence that a regulation is not intended to have retroactive effect. *See*, *e.g.*, *Sierra Club v. TVA*, 430 F.3d 1337, 1351 (11th Cir. 2005) ("There is no point in specifying an effective date if a provision is to be applied retroactively.").

There is no dispute that the pre-2015 regulations were in effect in 2008, the date of EPA's challenged administrative order, 1-ER-30–38, as well as at the

time of the handwritten, unsigned form that Plaintiffs now contend remains an operative agency "action," 2-ER-206–12. The same rule was also in effect in 2007, when Plaintiffs placed fill material on their property. 1-ER-34. That should be the end of the matter: the pre-2015 regulations apply to the question of whether Plaintiffs' placement of fill material on their property occurred in "waters of the United States." *See Lucero*, 989 F.3d at 1104.

2. Plaintiffs contend that the 2020 Rule is relevant to the Court's review of EPA's 2008 administrative order in three ways, by demonstrating: (1) that the order is arbitrary and capricious because the 2020 Rule rescinds an agency guidance document on which EPA relied, *see* Supplemental Brief 1-2; (2) that the pre-2015 regulations are ultra vires due to statements in the 2020 Rule's preamble, *id.* at 2-3; and (3) that EPA presently agrees that Plaintiffs' property is not covered by the Act, *id.* at 3. All of those arguments should be rejected.

First, the relevance of EPA's 2008 *Rapanos* guidance to this appeal is unclear. The guidance is dated December 2, 2008, six months after the issuance of the challenged administrative order. *See* U.S. EPA and U.S. Army Corps of Engineers, "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*" (Dec. 2, 2008) https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf. For that reason, EPA did not cite

the guidance in the administrative order. In any event, the guidance concludes that the presence of "waters of the United States" on a property may be established by using the standard from either the *Rapanos* plurality opinion or from Justice Kennedy's *Rapanos* concurrence. *Id.* at 3. EPA defended the 2008 administrative order by relying on the latter standard without relying on the guidance. Answering Brief 32-43. Because this Court has determined that Justice Kennedy's *Rapanos* concurrence provides a controlling standard, *see Northern California River Watch*, 496 F.3d at 999-1000; Answering Brief 32-35, resorting to the guidance is unnecessary to uphold EPA's administrative order. For the same reason, the Court need not decide if the guidance was "rescinded."[1]

Next, Plaintiffs' contention that the 2020 Rule preamble "cast[s] serious doubt on the legality" of the pre-2015 regulations is incorrect. Supplemental Brief 2. At the time of that Rule, the Agencies simply believed that they were adopting a regulation that was "superior," as a matter of that Administration's policy, to the pre-2015 rules. 85 Fed. Reg. at 22,271. Nothing in the preamble, however, implies that those prior regulations were unlawful. Had EPA believed

---

[1] The 2020 Rule's preamble is, at worst, equivocal on that point. C*ompare* 85 Fed. Reg. at 22,281 (stating that the guidance would be "rendered inoperative" after the 2020 Rule becomes effective because it "will no longer be necessary or material, and . . . may in fact create confusion") *with id.* at 22,272-73 n.34 (stating that to the extent that the pre-2015 regulations remain legally effective after June 22, 2020 due to litigation, "the agencies intend to use the guidance documents relevant to those regulations," if necessary to inform their implementation).

that the pre-2015 regulations were unlawful, it would not have reinstated them in 2019 pending finalization of the 2020 Rule. *See* 84 Fed. Reg. at 56,626.

Finally, Plaintiffs contend that the 2020 Rule demonstrates that EPA believes that their property is not covered by the Act. Supplemental Brief 3. That contention cannot be squared with *Lucero*: whether Plaintiffs' property is considered to contain "waters of the United States" under the 2020 Rule makes no difference because the 2020 Rule does not apply retroactively. The administrative order was brought against Plaintiffs, not their property. *See* 1-ER-32, 1-ER-35–37. *Lucero* controls, and the regulations in effect at the time of Plaintiffs' conduct and EPA's challenged action govern the merits of the appeal.

3. Reliance on the 2020 Rule would also be misplaced for prudential reasons: the Agencies have begun reviewing the Rule pursuant to an Executive Order issued after the change in Administration. The order declares it "the policy of [the] Administration to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; . . . [and] to bolster resilience to the impacts of climate change." Executive Order 13990, 86 Fed. Reg. 7037, § 1 (Jan. 25, 2021). The order directs federal agencies "to immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict with these important national objectives, and

to immediately commence work to confront the climate crisis." *Id.* § 2(a). "For any such actions identified by the agencies, the heads of agencies shall, as appropriate and consistent with applicable law, consider suspending, revising, or rescinding the agency actions." *Id.*

Pursuant to the order, agencies are to submit to the Office of Management and Budget a list of actions that they are considering pursuant to the Executive Order. *Id.* at 7038, § 2(b) (applying to actions that are subject to review by the Office of Management and Budget). In conformance with the Executive Order, the Agencies are reviewing the 2020 Rule. *See* "Fact Sheet: List of Agency Actions for Review," https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/.

CONCLUSION

For the foregoing reasons, the 2020 Rule does not apply to the 2008 administrative order and is not otherwise relevant to the merits of the appeal.

Respectfully submitted,

s/ *Brian C. Toth*
JEAN E. WILLIAMS
Acting Assistant Attorney General
BRIAN C. TOTH
Attorney
Environment and Natural Resources Division
U.S. Department of Justice

Of Counsel:

KARYN WENDELOWSKI
Attorney
Office of General Counsel
U.S. Environmental Protection Agency

April 2021
90-5-1-4-18292

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) 19-35469

I am the attorney or self-represented party.

This brief contains 10 pages, 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)*:

[ ] 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.

[X] complies with the length limit designated by court order dated **March 8, 2020**__.

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

Signature s/ *Brian C. Toth*

Date April 9, 2020