No. 19-35469

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL SACKETT; CHANTELL SACKETT,

Plaintiffs – Appellants,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY;
MICHAEL S. REGAN, 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' SUPPLEMENTAL BRIEF

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Appellants the Sacketts file this supplemental brief in response to the Court's March 8, 2021, Order Requesting Supplemental Briefing, Dkt # 50 (Order), addressing the relevance of the Navigable Waters Protection Rule, 85 Fed. Reg. 22,250 (Apr. 21, 2020) (Navigable Waters Rule or Rule) to this appeal. Per the Order, the Sacketts assume that the Navigable Waters Protection Rule does not moot the appeal, and do not address that issue in this brief.

The Navigable Waters Rule is relevant to this appeal in three ways. First, in adopting the Rule, Appellee the Environmental Protection Agency (EPA) rescinded a prior agency guidance document generally known as the *Rapanos* Guidance.[1] 85 Fed. Reg. at 22,281 (rescinding the *Rapanos* Guidance). The agency's record in this appeal demonstrates that the *Rapanos* Guidance was the basis for the jurisdictional determination made in May 2008. Since the jurisdictional determination can only be upheld on the legal basis advanced by the agency in the record, *see Railway Labor Executives' Ass'n v. I.C.C.*, 784 F.2d 959, 969

[1] 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), *available at* https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.

(9th Cir. 1986), and the agency has rescinded the guidance which provided both the legal rule and factual analysis by which it determined that the Sacketts' vacant lot is a federally protected water body, then the jurisdictional determination cannot be upheld in this action, and should be vacated and remanded under the Administrative Procedure Act. *Id.*

Second, also in the Federal Register Notice adopting the Navigable Waters Rule, EPA made statements that cast serious doubt on the legality of the regulations, adopted in 1986 and in effect at the time that it made the jurisdictional determination in May of 2008. *See* 85 Fed. Reg. at 22,271 (Navigable Waters Rule "superior to the 1986 regulation"); *id.* at 22,272 (Navigable Waters Rule "preferable to the pre-existing regulatory regime"). The jurisdictional determination was made two years after the Supreme Court concluded in *Rapanos* that the regulatory definition of "adjacent wetlands" was too broad and therefor ultra vires under the Clean Water Act. Because the regulations under which EPA determined in May 2008 that the Sacketts' vacant lot is regulated under the Clean Water Act are now conceded by EPA to have been inadequate under *Rapanos*, the jurisdictional determination at issue in this appeal is based on an error of law and is therefore per se "contrary to law" under

the APA. 5 U.S.C. § 706(2)(A) ("court shall . . . set aside agency action . . . found to be . . . not in accordance with law"); *cf. Akopyan v. Barnhart*, 296 F.3d 852, 856 (9th Cir. 2002) ("An error of law necessarily constitutes an abuse of discretion."). On that basis, the determination must also be vacated and remanded to the agency.

Third, the Navigable Waters Rule defines "adjacent wetlands" in a manner that excludes the Sacketts' property (which is demonstrable on the record in this case as discussed in the Sacketts' Opening Brief and thus far uncontested by EPA). The Navigable Waters Rule also interprets the Act consistently with the Sacketts' arguments in this appeal that EPA may only regulate their property as a wetland if the lot meets the standard put forth by the *Rapanos* plurality. That is, that the Act reaches only "shoreline wetlands," *i.e.*, those non-navigable wetlands which directly abut navigable-in-fact rivers, creeks, or lakes and which are so closely connected as to make it difficult to determine where the water body ends and the wetland begins.

While the definition of "adjacent wetlands" in the Navigable Waters Rule does take in a few categories of wetlands that lack the closeness of connection required by the *Rapanos* plurality, it does not encompass the

Sacketts' lot. The Rule properly declines to regulate wetlands separated from other regulated water bodies by non-permeable artificial barriers. 85 Fed. Reg. at 22,338. As discussed in the Sacketts' Opening and Reply Briefs, EPA's record of the jurisdictional determination demonstrates conclusively that the Sacketts' lot is separated from Priest Lake and from Kalispell Bay Fen and Kalispell Creek by paved roads, that there is no surface water connection between their lot and these water bodies, and that there are no culverts under Kalispell Bay Road which would connect their lot with the Fen or Creek across the Road. Hundreds of feet of roads and homesites separate the Sacketts' lot from the Lake, and there is no surface connection to the Lake. The Sacketts' property is not regulated under the Navigable Waters Rule.

As the Sacketts argue in this appeal, EPA's current interpretation of the Act as to adjacent wetlands is legally compelled insofar as it declines to regulate properties like theirs. It is compelled because it is required by the *Rapanos* plurality's interpretation of the Act as to non-navigable wetlands, and that aspect of the plurality is the holding of *Rapanos* under *United States v. Davis* and *County of Maui*, as argued in the Sacketts' Opening and Reply Briefs and their June 16, 2020, Notice

of Supplemental Authority, Dkt # 27. To be sure, EPA does not concede that the Rule is a statutorily compelled reading of the Act, but for now the Rule is the agency's official reading of the Act. So while its route to its current interpretation is different from the Sacketts', the interpretation itself is, so far as the facts and record of this appeal are concerned, identical to the one the Sacketts advance.

In short, speaking officially as it presently does through the Navigable Waters Rule, EPA agrees with the Sacketts that their vacant lot is not regulated under the Clean Water Act.

EPA might argue that the Navigable Waters Rule has no or reduced relevance to this appeal for two reasons. First, that the Rule was not in effect when it determined in May 2008 that the Sacketts' vacant lot is a federally regulated wetland. Second, that it is in the process of reviewing the Rule under a presidential executive order, and that the Rule should not be relied upon at this time because the Agency may change it in the future.

Both of these arguments are unavailing if the Court agrees with the Sacketts that the Rule's definition of adjacent wetlands is compelled by

the *Rapanos* plurality. But they are also unpersuasive even if the Court affirms *City of Healdsburg* in light of *Davis* and *Maui*.

As to the "law in effect at the time" of the 2008 jurisdictional determination, that is the same law as today: the Clean Water Act and its troublesome definition of "navigable waters" as "waters of the United States, including the territorial seas." EPA faces a problem arguing that the law in 2008 includes the regulations then in-effect and the *Rapanos* Guidance, because it rescinded the Guidance and acknowledged the dubious legality of the 1986 Regulations when it adopted the Navigable Waters Rule. Since those regulations and guidance form the legal basis for the jurisdictional determination, and both have been abandoned by the agency, EPA cannot now be heard to argue that the Court must nonetheless pretend that they are actually the correct legal interpretation of the Act today.

Nor is this a question of whether the Sacketts as natural persons were on notice of the law's requirements in 2008. EPA has withdrawn its compliance order and, for now, does not contend that the Sacketts violated the Act in 2007. The agency only clings to the May 2008

jurisdictional determination that the Sacketts' property is and remains subject to their authority.

Land does not act and cannot be "on notice" of anything. The question is whether it is or is not, based on the administrative record, within the ambit of the Act. The issue in this appeal is a status question, not a conduct question. For EPA to argue that the land was regulated in 2008, is not now, but may be again at an unknown time in the future, it would have to argue that Congress did not bother to decide that question in the Act, but instead left it to the agency to decide such a major question without any clear standards, criteria, and even guidance. This would raise significant non-delegation and other constitutional questions, and would underline the ongoing judicial debate over the role and scope of the *Chevron* doctrine. *See generally Gundy v. United States*, 139 S. Ct. 2117, 2131-2142 (2019) (Gorsuch, J., dissenting). The fact that EPA is presently reviewing the Navigable Waters Rule and may revise the regulation in the future to "toggle" the lot back into the regulatory vice of the Act merely heightens this concern, and raises the importance of this Court deciding this appeal in the Sacketts' favor on the statutory or constitutional grounds advanced.

The Court should vacate EPA's May 2008 jurisdictional determination. The Court should also hold that the plurality is the holding of *Rapanos* and that as a matter of law and based on the record before EPA, the agency lacks authority over the Sacketts' property under the Clean Water Act.

DATED: March 26, 2021.

Respectfully submitted,

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This brief contains 8 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).

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Signature s/ Anthony L. François **Date**: March 26, 2021
ANTHONY L. FRANÇOIS

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