IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CONSERVATION LAW FOUNDATION, et al.,

Plaintiffs,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,

Defendants,

CHANTELL SACKETT; MICHAEL SACKETT,

Defendant-Intervenors.

Civil Action No. 1:20-cv-10820-DPW

DEFENDANT-INTERVENORS THE SACKETTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Defendant-Intervenors Chantell and Michael Sackett (the Sacketts) oppose Plaintiffs' motion for summary judgment on all three of the claims in the First Amended Complaint. Plaintiffs' claims rest on the proposition that the Federal Defendants (together the "Agencies") engaged in discretionary decision-making when they adopted the Navigable Waters Protection Rule (Rule), and that they abused that discretion in so acting. This is incorrect, at least as to that Rule's revised definition of "adjacent wetlands." A plain reading of the text of the Clean Water Act, as authoritatively interpreted by the Supreme Court, precludes the Agencies from regulating wetlands that do not directly abut other regulable water bodies. The Agencies have no discretion to extend their regulations defining "navigable waters" beyond that limit, and so their decision not to include most non-abutting wetlands in the Rule was compelled by the statute, and not a discretionary decision. Since, as to "adjacent wetlands" it was not a discretionary decision, that provision of the Rule is not subject to remand, vacatur, or injunction based on the claims in the First Amended Complaint.

STATEMENT OF THE CASE

Statutory Background and the Navigable Waters Protection Rule

The Clean Water Act (the Act), 33 U.S.C. § 1251, *et seq.*, regulates discharges of "pollutants" from "point sources" to "navigable waters." 33 U.S.C. §§ 1311(a), 1362(12). The Act defines "navigable waters" as "waters of the United States, including the territorial seas." *Id.* § 1362(7). The Act defines "territorial seas," but does not otherwise define "waters of the United States." *Id.* § 1362(8).

Under the Act, nonexempt discharges into "navigable waters" require a permit from either EPA or the Army, such as a "dredge and fill" permit under 33 U.S.C. § 1344. Dredge and fill permits substantially limit the use of property. *See* Daniel R. Mandelker, *Practicable Alternatives*

for Wetlands Development Under the Clean Water Act, 48 Envtl. L. Rep. News & Analysis 10894 (Oct. 2018).

Those engaged in unpermitted, nonexempt discharges into "navigable waters" face citizen suits, administrative cease-and-desist and compliance orders, administrative penalties, civil actions for monetary civil penalties and injunctive relief, and criminal prosecution. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 52-53 (1987). These severe burdens make it critically important that the regulated public knows what "navigable waters" means.

There have been multiple attempts to define "navigable waters" over the years. In 1986, the Army adopted a regulatory definition that stretched the term "navigable waters" to include all interstate and some intrastate waters, all non-navigable tributaries of such waters, and all non-navigable wetlands "adjacent" (broadly defined as "bordering, contiguous, or neighboring") to regulated waters. *See* 33 C.F.R. § 328.3(a)(7) & (c) (1987) (defining "adjacent wetlands").

The 1986 Regulations were challenged as beyond the authority of the Clean Water Act, leading to the Supreme Court decision in *Rapanos v. United States*, 547 U.S. 715 (2006). In *Rapanos*, a divided Court held that the tributary and adjacent wetlands provisions of the 1986 Regulations exceeded the scope of the statutory term "navigable waters." *Id.* at 715. A four-Justice plurality determined that the language, structure, and purpose of the Clean Water Act restrict federal authority over non-navigable tributaries to only those that are "relatively permanent, standing or continuously flowing bodies of water," commonly recognized as "streams, oceans, rivers and lakes." *Id.* at 739 (cleaned up). The plurality limited regulation of wetlands to those that physically abut relatively permanent and continuously flowing waters, with an immediate surface water connection making the wetland and water body "indistinguishable." *Id.* at 755.

Justice Kennedy joined the plurality in the judgment. But his concurrence proposed a

broader interpretation of "navigable waters" than the plurality: the "significant nexus" test. *Id.* at 759 (Kennedy, J., concurring). Under this test, the government can regulate a wetland that does *not* abut relatively permanent waters if the wetland "significantly affect[s] the chemical, physical, and biological integrity" of a navigable-in-fact waterway. *Id.* at 779-80 (Kennedy, J., concurring). In Justice Kennedy's view, such wetlands can be regulated standing alone or combined with "similarly situated lands" within an undefined "region." *Id.* at 780 (Kennedy, J., concurring).

In 2015, after years of effort to address *Rapanos*, EPA and the Army adopted new regulations (the 2015 Regulations) redefining "navigable waters." 33 C.F.R. § 328.3 (2016); 80 Fed. Reg. 37,054 (June 29, 2015). Several lawsuits challenged the 2015 Regulations. On August 21, 2019, the U.S. District Court for the Southern District of Georgia ruled on summary judgment that the 2015 Regulations violated the Clean Water Act. *Georgia v. Wheeler*, 418 F. Supp. 3d 1336 (S.D. Ga. 2019). A short time later, partially in response to the decision in *Georgia v. Wheeler*, EPA and the Army published a regulation that repealed the 2015 Regulations and readopted the 1986 Regulations. 84 Fed. Reg. 56,626 (Oct. 22, 2019).

On April 21, 2020, EPA and the Army again redefined "navigable waters" by publishing the regulation at issue in this case, the Navigable Waters Protection Rule. 85 Fed. Reg. 22,250 (Apr. 21, 2020). The Rule redefines "adjacent wetlands," 33 C.F.R. § 328.3(a)(4), as only those wetlands that abut or are flooded by other regulated waters, or that are physically separated from such waters only by natural barriers or by permeable artificial barriers. 33 C.F.R. § 328.3(c)(1).[1]

ARGUMENT

The essence of Plaintiffs' claims is that between the narrow reading of the Act's term

[1] Subsequent references to 33 C.F.R. § 328.3 and its subdivisions are, unless indicated otherwise, to the version published in the Federal Register on April 21, 2020, at 85 Fed. Reg. at 22,338-39, and the identical provisions at 40 C.F.R. § 120.2, published the same date at 85 Fed. Reg. at 22,340-41. 40 C.F.R. § 120.2(3)(i) corresponds to 33 C.F.R. § 328.3(c)(1).

"navigable waters" adopted by the *Rapanos* plurality and Justice Kennedy's broader reading of the term, the broader reading is a legally available interpretation of the Act, and that the Agencies' preference for the plurality in the Rule is a discretionary choice between the two approaches. Then, so the argument goes, the Agencies were required to comply with the reasoned decision-making standards of the APA and to consult under the ESA.

The error in this approach is that the *Rapanos* plurality is controlling, and Justice Kennedy's broader reading (which is textually, constitutionally, and precedentially suspect) is not available to the Agencies or the courts as a valid interpretation of the Act. Since the *Rapanos* plurality controls, and at least as to non-abutting wetlands the plurality compels the changes made to the Rule's definition of "adjacent wetlands." As to the portion of the Rule, no discretionary decision was made, and no relief is available to the Plaintiffs.

I. THE CLEAN WATER ACT ONLY REGULATES WETLANDS THAT DIRECTLY ABUT OTHER REGULABLE WATER BODIES

Plaintiffs assert that the terms "navigable waters" and "waters of the United States, including the territorial seas" are to be interpreted as broadly as possible. This is incorrect, as the text of the Act itself shows, as the Constitution requires, and as Supreme Court precedent dictates.

A. The Act's Text Limits "Navigable Waters" to Navigable-in-fact Waterways

The Sacketts offer this brief textual analysis of the term "navigable waters" in the Act, and refer the Court to the more extensive analysis submitted by their counsel during the public comment period on the Rule. *See* François Decl. Exh. A.

The proper interpretation of "navigable waters" begins with prior use of the phrase in relevant statutes. *See Rapanos*, 547 U.S. at 723. 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 . . . [and] form . . . 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.

In 1972, Congress adopted significant amendments to the Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et seq.*, since called the Clean Water Act. The Act prohibits unpermitted discharges to navigable waters. 33 U.S.C. §§ 1342(a)(1), 1344(a). 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." 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 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*, 77 U.S. 557, 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 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*).[2] In contrast, when Congress has intended to extend its

[2] Plaintiffs fail to acknowledge the significant constitutional limits that *SWANCC* imposes on the reading of the Clean Water Act, and that decision's rejection of a broad reading of the Act based on legislative history.

reach to waters that are not navigable, it has said so expressly. For instance, the Flood Control Act of 1936 claimed jurisdiction over "navigable waters or their tributaries, including watersheds thereof." Pub. L. No. 74-738, Sec. 1, 49 Stat. 1570 (June 22, 1936).

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 non-navigable wetlands abutting 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). 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*[3] that it reasonably includes wetlands immediately abutting and intermingling with 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 encompass all non-navigable tributaries or adjacent wetlands broadly defined, 547 U.S. at 734; *id.* at 787 (Kennedy, J., concurring in judgment).

The analysis attached as Exhibit A to the François Declaration further shows that reading Section 404(g)(1) in conjunction with Section 10 of the Rivers and Harbors Act precludes a broad reading of the Act as allowing regulation of non-abutting wetlands. The analysis further reinforces this conclusion by noting the uses of different terms for various sets of waters that the Act treats in different ways, the Act's protection of water rights established under state law, and the Supreme Court's reading of the Act in *Riverside Bayview*, *SWANCC*, and *Rapanos*.

[3] Plaintiffs are incorrect that *Riverside Bayview* held that the Act must be read broadly. Despite the decisions discussion of the issue, its actual holding is limited to affirming the Army's decision, under *Chevron*, to regulate shoreline wetlands that directly abutted navigable in fact creeks where it was difficult to say where the creek ended and the wetland began. *See Riverside Bayview*, 474 U.S. at 132-34, 139.

This narrow textual reading is far closer to that of the *Rapanos* plurality, which limited regulation of non-navigable tributaries to relatively permanent and continuously flowing water bodies which a person of ordinary experience would call a "stream." The plurality also limits regulation of "adjacent wetlands" to those affirmed in *Riverside Bayview*, and emphasized that the necessary connection to meet this standard was intermingling, to the point where it is difficult to say where the creek ends and the wetland begins. *Rapanos*, 547 U.S. at 741-42.

B. The Constitution Requires a Narrow Reading of "Navigable Waters"

The cannon of constitutional avoidance also weighs heavily on the scales in favor of the *Rapanos* plurality's narrow reading of the Act.

1. The Commerce Clause and Tenth Amendment Limit Agency Regulation of Non-abutting Wetlands

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-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' property is claimed by EPA to be within the reach of the Agencies' prior regulatory definition of "adjacent wetlands." Sackett Decl. ¶ 7, Exhs. A & B. But the Sacketts' vacant lot has no connection to any use of Priest Lake for the transport of goods in interstate commerce. *Id.* ¶¶ 3-4. 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. *Id.* ¶¶ 3-6. This federal veto of local land use permitting is exactly what *SWANCC* says the Act may not be interpreted to allow. The Rule, however, more fully respects the Commerce Power and Tenth Amendment limits on federal control over land use, by abandoning the Agencies' previously illegal assertion of regulatory authority over non-abutting wetlands. *Id.* ¶¶ 14-16.

2. The Non-Delegation Doctrine Also Limits Agency Regulation of Non-abutting Wetlands

A broad interpretation of "navigable waters" also raises non-delegation issues that this Court should avoid by interpreting the Act narrowly. The principal legal argument about the scope of "navigable waters" is how broadly it encompasses non-abutting wetlands and other non-navigable waters, including whether in the Sacketts' case, it stretches so far as to include a vacant lot in a built out subdivision entirely separated from any other surface waters by permanent roads.

If Plaintiffs have correctly interpreted the Act as allowing the Agencies to regulate some ill-defined collection of non-abutting wetlands, then this is not a legal question, but a policy debate. It has roiled the Agencies, the courts, the academy, the regulated public, and NGOs since the mid-1970s. The Supreme Court has held that immediately abutting wetlands are included, that isolated ponds are not, and (if the *Rapanos* concurrence controls) that some—but not all—non-navigable tributaries and some—but not all—non-abutting wetlands may be.

The difficulty in determining where along the continuum from "navigable-in-fact only" to "all waters, no matter how remote or insignificant," is that the Act is utterly silent on that question. Not one word in the Act offers any direction or principle to determine how small or remote or slightly connected a non-navigable non-abutting wetland may be and still be regulated.

As a result, to the extent that "navigable waters" is interpreted to include an extensive catalog of different categories non-navigable waters (including some but not all non-abutting wetlands and ephemeral drainages), the Act standing alone provides no intelligible principle for determining which non-navigable waters are included. This violates the non-delegation doctrine.

The Act provides no guidance on the policy question of how many or what type of non-abutting wetlands should be regulated under the Act. It does not identify any facts that the Agencies should investigate or determine in order to address that policy question, nor does it provide any direction on how those facts should be determined or weighted. *See Gundy v. United States*, 139

S. Ct. 2116, 2135-42 (2019) (Gorsuch, J., dissenting); *id.* at 2130-31 (Alito, J., concurring); *Paul v. United States*, 140 S. Ct. 342 (2019) (statement of Kavanaugh, J., respecting denial of certiorari).

II. IN *RAPANOS*, A DIVIDED COURT LIMITED THE CLEAN WATER ACT'S APPLICATION TO WETLANDS

Rapanos is the best Supreme Court authority on whether wetlands that do not abut navigable-in-fact rivers and lakes are federally protected "navigable waters" under the Clean Water Act. Since *Rapanos* has no majority opinion, this Court must determine which opinion controls. Subsequent Supreme Court precedent identifies the plurality as the correct answer.

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; *see also id*. at 759 (Kennedy, J., concurring). The Supreme Court's judgment vacated and remanded the case because the lower courts and the Agencies had not properly interpreted that term. *Id*. at 757. However, the five Justices supporting the judgment adopted different but concentric interpretations.

The four-Justice plurality determined that the language, structure, and purpose of the Act 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 then limited regulation of wetlands under the Act to only those wetlands that physically abut such waters, where wetland and water are "indistinguishable." *Id*. at 755.

The plurality sharply critiqued "the breadth of the [Army] Corps' determinations in the field" and especially its continued reliance on an expansive interpretation of "adjacent" waters. *Id*. at 727. It emphasized that in defining "navigable waters" as "*waters* of the United States," the Clean Water Act 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 further explained that

the definition of "waters of the United States" must be rooted in the traditional understanding of "navigable waters." *Id*. at 734. As for wetlands, the plurality reiterated that the Act regulates "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters and wetlands.'" *Id*. at 742.

Justice Kennedy concurred in the judgment but interpreted the Act more broadly than the plurality. He shared the plurality's concern that an overly broad interpretation of the Act would read "navigable" out of the text, and he 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, he proposed that to be regulated under the Act, non-navigable waters must have a "significant nexus with navigable waters." *Id*. at 779. Under this "significant nexus" test, 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. He emphasized that this connection must not be "speculative or insubstantial." *Id*.

III. THE SUPREME COURT HAS ADOPTED THE *RAPANOS* PLURALITY AS THE CONTROLLING OPINION IN *COUNTY OF MAUI*

In April 2020, the Supreme Court clearly showed that it reads the *Rapanos* plurality as the controlling opinion. In *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020), the Court addressed the question of whether, under the Clean Water Act, the movement of a pollutant from an injection well (a point source) through groundwater (not a point source) to the ocean (a navigable water) is a regulated "discharge." 140 S. Ct. at 1468. Although that question does not directly bear on this case, the Court's application of *Rapanos* is determinative here.

In deciding *County of Maui*, the Court issued four separate opinions: a six-Justice majority opinion authored by Justice Breyer, *id*. at 1468-78, a concurrence by Justice Kavanaugh, *id*.

at 1478-79 (Kavanaugh, J., concurring), and two separate dissents, one by Justice Thomas (joined by Justice Gorsuch), *id*. at 1479-82 (Thomas, J., dissenting), and one by Justice Alito, *id*. at 1482-92 (Alito, J., dissenting). All four opinions cite the *Rapanos* plurality, and all four opinions apply its discussion of point sources under the Act in evaluating whether pollutants moving through groundwater to the ocean constitute a discharge. *See* 140 S. Ct. at 1475 (citing *Rapanos*, 547 U.S. at 743) (stating that nothing in the Clean Water Act requires that a pollutant move "directly" or "immediately" from its origin to navigable waters); *id*. at 1478 (Kavanaugh, J., concurring) (concluding that the majority reading of "discharge" "adheres to the interpretation set forth in Justice Scalia's plurality opinion in *Rapanos*"); *id*. at 1482 (Thomas, J., dissenting) (concluding that the *Rapanos* plurality opinion does not decide the precise issue presented in *County of Maui*); *id*. at 1487 n.5 (Alito, J., dissenting) (concluding that the *Rapanos* plurality opinion supports "daisy chaining" point sources). Every Justice joined at least one of these four opinions elaborating on the *Rapanos* plurality, with Justice Kavanaugh both joining the majority and writing separately to underline the role of the *Rapanos* plurality in the Court's *County of Maui* decision.

While the four opinions disagreed about how the *Rapanos* plurality opinion applied to the issue in *County of Maui* (namely, the definition of "discharge"), they all agreed that it was the only *Rapanos* opinion that mattered. None of the *County of Maui* opinions cited or relied on either the *Rapanos* concurrence or the dissent. Thus, when deciding the scope of the Act in *County of Maui*, every member of the Supreme Court looked only to the *Rapanos* plurality opinion.

This is consistent with and grows organically from the Supreme Court's prior citations to *Rapanos*. Before *County of Maui*, *Rapanos* was cited in opinions in nine Supreme Court cases. In *all* of those opinions, the author cited the *Rapanos* plurality opinion. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 706 (2006) (Scalia, J., dissenting); *Exxon Shipping v. Baker*, 554 U.S. 471, 508 n.21

(2008); *Kucana v. Holder*, 558 U.S 233, 253 (2010); *PPL Montana, LLC v. Montana*, 565 U.S. 576, 592 (2012); *Sackett v. EPA*, 566 U.S. 120, 123 (2012); *id*. at 133 (Alito, J., concurring); *Abramski v. United States*, 573 U.S. 169, 198 (2014) (Scalia, J., dissenting); *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 268 (2015); *Army Corps v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1811-12, 1815 (2016); *National Ass'n of Mfrs. v. Department of Defense*, 138 S. Ct. 617, 625, 633 (2018). By contrast, the Court has only cited Justice Kennedy's *Rapanos* concurrence once, in an opinion by Justice Kennedy—and even then the citation immediately followed a citation to the plurality opinion. *See PPL Montana*, 565 U.S at 592 (citing *Rapanos*, 547 U.S. at 730-31 and *id.* at 761 (Kennedy, J., concurring in judgment)). The Sacketts' research reveals no Supreme Court citation to the *Rapanos* dissent.

This pattern of adopting and relying on the *Rapanos* plurality opinion can be seen most clearly in the Supreme Court's post-*Rapanos* cases that address questions arising under the Clean Water Act. *See Sackett*, 566 U.S. at 123; *id*. at 133 (Alito, J., concurring); *Hawkes Co.*, 136 S. Ct. at 1811-12, 1815; *National Ass'n of Mfrs.*, 138 S. Ct. at 625, 633. And as noted above, this pattern culminated in *County of Maui*, in which all four opinions debated how the *Rapanos* plurality opinion applies to the definition of "discharge." Notably, *none* of the Supreme Court's post-*Rapanos* Clean Water Act cases cite either Justice Kennedy's concurrence or the dissent.

Based on the Supreme Court's consistent adoption of the *Rapanos* plurality, the Rule's exclusion of wetlands that do not abut regulated waters was not simply an exercise of agency discretion, but is required by the unambiguous text of the Clean Water Act. *Rapanos*, 547 U.S. at 741 (excluding non-navigable wetlands from Clean Water Act authority unless they abut regulated tributaries so closely that the end of one and the beginning of the other cannot be clearly discerned).

IV. *COUNTY OF MAUI* SUPERSEDES FIRST CIRCUIT *RAPANOS* AUTHORITY

In 2006, almost immediately after the *Rapanos* decision, the First Circuit held that the *Marks* framework for applying fractured Supreme Court decisions could not be applied to *Rapanos*, and that the Agencies were therefore free to establish regulatory authority under the Act using either the plurality or the concurrence. *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006). *But see id*. at 66-67 (Turruella, J., concurring in part and dissenting in part) (would hold that plurality is the controlling *Rapanos* opinion).

However, *Johnson* is "unmistakably . . . cast into disrepute by supervening authority," i.e. the Supreme Court's long subsequent history of treating the *Rapanos* plurality as the precedential opinion in the case, culminating in its recent decision in *County of Maui* detailed above. *See Federal Energy Regulatory Commission v. Silkman*, 359 F. Supp. 3d 66, 120 (D. Me. 2019) (quoting *Sarzen v. Gaughan*, 489 F.2d 1076, 1082 (1st Cir. 1973). *Johnson* was one of the federal courts' earliest efforts to make heads or tails of *Rapanos*, and the only question it really asks is which of the *Rapanos* opinions is controlling. *County of Maui* answers that question clearly, by extensively surveying how the *Rapanos* plurality bears on a related Clean Water Act issue before the Supreme Court. It does not matter that *County of Maui* dealt with a different issue than *Rapanos*. *County of Maui* dealt with the same issue as *Johnson* (i.e. which *Rapanos* opinion is precedential for future Clean Water Act cases) and resolved it contrary to *Johnson*.

Nor does recognizing that *County of Maui* supersedes *Johnson* disrupt First Circuit precedent or practice under the Clean Water Act. *Johnson* has only been cited in one subsequent First Circuit decision dealing substantively with the Clean Water Act, and its treatment of the *Rapanos* opinions was not germane to the resolution of that case because it dealt with a "traditionally navigable water." *See United States v. Agosto-Vega*, 617 F.3d 541, 550-51 (1st Cir. 2010) (river in question actually navigable from Atlantic Ocean to site of sewer discharges).

Beyond that, *Johnson* has been cited in a handful of cases in this court without ever providing a rule of decision in those cases. *See*, *e.g.*, *Conservation Law Found. v. Longwood Venues*, 422 F. Supp. 3d 435 (D. Mass. 2019) (whether discharges to groundwater are regulated under the Act); *Toxics Action Center v. Casella Waste Systems*, 347 F. Supp. 3d 67 (D. Mass. 2018) (landfill not point source under the Act, so consideration of whether receiving water met *Rapanos* standards not necessary and not decided); *Vander Salm v. Bailin & Associates*, No. 11–40180–TSH, 2014 WL 1117017 (D. Mass. Mar. 18, 2014) (summary judgment under *Rapanos* plurality standard denied due to factual disputes in record). So this Court's recognition that *Johnson* has been superseded by *County of Maui* will have little impact beyond the present case in terms of Circuit precedent.

The net result of these mutually reinforcing arguments is that the *Rapanos* plurality is the controlling opinion from that decision, that the plurality forecloses the Agencies from regulating non-abutting wetlands like those on the Sacketts' property, and that the Agencies were therefore not engaged in discretionary decision-making when, in the Navigable Waters Protection Rule, they revised the definition of "adjacent wetlands" to exclude most non-abutting wetlands.

V. PLAINTIFFS' APA AND ESA CLAIMS ARE UNAVAILING

Plaintiffs argue that because the Agencies did not provide a "reasoned explanation" for excluding non-abutting wetlands from the Rule, and did not consider water quality impacts in doing so, the rule is arbitrary and capricious under the APA. Plaintiffs further argue that the Agencies failed to consult with the U.S. Fish and Wildlife Service and the National Marine Fisheries, in violation of Section 7 of the ESA. As to the Rule's definition of "adjacent wetlands," objections to these alleged deficiencies in the Agencies' decision-making are unavailing.

Under the controlling plurality opinion in *Rapanos*, the Act limits the regulation of

wetlands to those that directly abut other regulated water bodies. *Rapanos*, 547 U.S. at 755. The Agencies' exclusion of non-abutting wetlands was statutorily and Constitutionally compelled. As such, the definition of adjacent wetlands was not an exercise of agency discretion but was instead compelled by the plain language of the Act, Supreme Court precedent, and the U.S. Constitution. Any procedural deficiencies in the rulemaking process could not have affected the Agencies' decision on this point. For this reason, Plaintiffs' arguments that the Rule was promulgated in violation of the procedural requirements of the APA and ESA must fail.

A. Procedural Deficiencies in Agency Decision-Making Are Not Grounds To Reverse a Non-discretionary Decision Under the APA[4]

Plaintiffs' claim that the Agencies violated the APA in promulgating the Rule cannot succeed on the merits. Procedural/factual infirmities in agency decision-making will not affect the lawfulness of non-discretionary action. *See* Kevin M. Stack, *The Constitutional Foundations of Chenery*, 2007 Yale L.J. 952, 965-66 ("As Judge Friendly put it, '[W]hen agency action is statutorily compelled, it does not matter that the agency which reached the decision required by law did so on a debatable or even a wrong ground, for remand in such a case would be but a useless formality.'") (quoting Henry J. Friendly, Chenery *Revisited: Reflections on the Reversal and Remand of Administrative Orders*, 1969 Duke L.J. 199, 210). This general principle applies within the broader context of administrative law, as illustrated by three examples.

First, the *Chenery* doctrine, that an agency may not defend an administrative decision on

[4] This is not a *Chevron* Step Two case, and the Agencies' decision to exclude non-abutting wetlands was therefore not merely "reasonable." The Rule's exclusion of non-abutting wetlands was compelled. So, any *Chevron* analysis will end at Step One. *See Penobscot Air Servs., Ltd. v. Fed. Aviation Admin.*, 164 F.3d 713, 719 (1st Cir. 1999) ("if the legislative intent is clear, we do not defer to the agency and we end the *Chevron* analysis at step one"). The claim that decisions deemed "reasonable" under *Chevron* Step Two might still be arbitrary and capricious, is inapplicable. *Id.*; *see also Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984).

different grounds than on those which the decision was originally based, is inapplicable where the decision was compelled by law. *See Koyo Seiko Co. v. United States*, 95 F.3d 1094, 1099-1102 (Fed. Cir. 1996) (citing *Securities and Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 87 (1943)). In *Koyo Seiko*, the Federal Circuit declined to apply *Chenery*, and affirmed a Commerce Department antidumping proceeding on grounds other than those in the agency's record, concluding that the decision was compelled by statute. *Id*. There can be no application of the *Chenery* doctrine where the "the sole issue is one of statutory construction," the "plain language of the statute compels the conclusion," and the conclusion does not "implicate the exercise of agency discretion." *Id*. at 1101; *see also Ark. AFL-CIO v. Fed. Commc'ns Comm'n.*, 11 F.3d 1430, 1440 (8th Cir. 1993) (court may find additional bases "for a correct legal result" beyond those offered by the agency; "the Supreme Court clearly limited *Chenery* to situations in which the agency failed to make a necessary determination of fact or of policy." (citing *Chenery*, 318 U.S. at 88)). The Rule's definition of adjacent wetlands is likewise correctly resolved as a pure question of non-discretionary statutory compulsion as opposed to a policy determination. As such, the adjacent wetlands provision of the Rule must be upheld under the text of the Clean Water Act, irrespective of the reasoning set forth by the Agencies during the decision-making process.

Second, in reviewing ALJ decisions, several courts have held that remand "is unnecessary . . . '[w]here application of the correct legal standard could lead to only one conclusion.'" *Zabala v. Astrue*, 595 F.3d 402, 409 (2d Cir. 2010) (affirming an agency decision in a social security appeal despite factual errors in the ALJ's conclusions (quoting *Schaal v. Apfel*, 134 F.3d 496, 504 (2d Cir. 1998))); *Kang v. Attorney General*, 611 F.3d 157, 167-68 (3d Cir. 2010) (refusing to remand to the Board of Immigration Appeals where "application of the correct legal principles" would not alter the legal conclusions reached by the court). Remanding the Rule to the Agencies

would likewise lead to an identical result: the exclusion of non-abutting wetlands, as required by the Act and the Constitution.

Third, under the arbitrary and capricious standard, "[w]hen an agency legally errs by acting outside its statutory authority, a remand would be futile and improper." *Union Pacific R.R. Co. v. U.S. Dep't of Homeland Sec.*, 738 F.3d 885, 901 (8th Cir. 2013). In *Union Pacific* the Eighth Circuit refused to remand a Customs and Border Protection decision, because the agency had plainly exceeded its statutory authority, and a court "simply will not remand '[w]here application of the correct legal standard could lead to only one conclusion.'" *Id*. (quoting *Zabala*, 595 F.3d at 409). Although *Union Pacific* involved reversing rather than upholding an agency decision, it stands for the same fundamental principle: remand to the agency to correct procedural infirmities is inappropriate where the matter is resolved by a legally compelled conclusion.

The general principle established in these examples recognizes that it is inappropriate to set aside and remand a non-discretionary decision to the administrative process. Therefore, Plaintiffs' APA claims fail as to the Rule's non-discretionary definition of adjacent wetlands.

B. Section 7 of the ESA Does Not Apply to the Agencies' Non-discretionary Decision To Exclude Non-abutting Wetlands from Federal Authority

Plaintiffs' claim that the Agencies violated Section 7 of the ESA must fail for similar reasons. Non-discretionary agency actions—such as the Agencies' statutorily compelled removal of non-abutting wetlands from federal authority—do not trigger Section 7's requirements.

Section 7 of the Endangered Species Act requires that federal agencies consult with the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service, as to the effects of agency action on endangered and threatened wildlife. 16 U.S.C. § 1536(a)(2); *see also Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 652 (2007). However, an agency's duties under Section 7 only extend to discretionary actions. *See* 50 C.F.R. § 402.03 ("Section 7 and the

requirements of this part apply to all actions in which there is discretionary Federal involvement or control."); *Nat'l Ass'n of Home Builders*, 551 U.S. at 669 ("§ 7(a)(2)'s no-jeopardy duty covers only discretionary agency action[] and does not attach to action . . . that an agency is required by statute to undertake."). This rule is grounded in the recognition that Section 7 does not act as an "implied repeal" of other "mandatory statutory duties," *id*. at 669, and the reality that where agencies retain "no discretion to act . . . then consultation would be a meaningless exercise," *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 340 F.3d 969, 974 (9th Cir. 2003) (citing *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995)).

The Rule's new definition of adjacent wetlands was mandated by Congress and not an exercise of discretionary authority. Plaintiffs' ESA claim must fail.

VI. THE SACKETTS HAVE STANDING TO DEFEND THE RULE

The Sacketts have standing to defend the adjacent wetlands provision of the Rule. A defendant-intervenor may demonstrate standing via the standard standing inquiry—by proving injury-in-fact, fair traceability, and redressability. *See Sea Shore Corp. v. Sullivan*, 158 F.3d 51, 55 (1st Cir. 1998) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992)).

The D.C. Circuit has "generally found a sufficient injury in fact where a party benefits from agency action, the action is then challenged in court, and an unfavorable decision would remove the party's benefit." *Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 317 (D.C. Cir. 2015). That is precisely the injury that what will occur to the Sacketts should the Plaintiffs prevail. Since 2008 EPA has claimed regulatory authority over the Sacketts' residentially zoned vacant lot on the grounds it contains features regulated as "adjacent wetlands" under the 1986 Regulations. *See* Sackett Decl. ¶¶ 7-13, Exhs. A & B. As a result, the Sacketts have been unable to build a home on their lot for the last thirteen years. Sackett Decl. ¶¶ 11-13. Under

the Rule's revised definition of "adjacent wetlands," the Sacketts' property is excluded from agency authority under the Act. *See* 33 C.F.R. § 328.3(c)(1); Sackett Decl. ¶¶ 3-4; 14-15, Exhs. A & B (establishing that the Sacketts' lot has no surface water connection to any other surface water and is separated from the closest surface water by an impermeable artificial barrier). The Rule has afforded the Sacketts significant regulatory relief. *See* Sackett Decl. ¶ 16.

But the Plaintiffs' challenge to the Rule, if successful, would remove that relief and reinitiate the Sacketts' injuries anew. Should the Rule be vacated, the regulations in effect in 2008 would be immediately revived, returning the Sacketts' property to EPA's asserted regulatory dominion. And as EPA's jurisdictional determination remains in effect, this injury is certain and immediate. Sackett Decl. ¶ 13. The revival of the prior rules would therefore have an immediate negative effect on the Sacketts' ability to use their property. *See* Sackett Decl. ¶¶ 17-19.

These injuries are directly traceable to the Plaintiffs' lawsuit and would be redressed through a judgment in favor of Defendants, which would permit the regulatory relief afforded the Sacketts by the Rule to remain in effect. *See Crossroads Grassroots Policy Strategies*, 788 F.3d at 316 (under similar circumstances, if a defendant-intervenor "can prove injury, then it can establish causation and redressability.").

CONCLUSION

Plaintiffs' motion must be denied.

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Respectfully submitted,

/s/ Anthony L. François

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CERTIFICATE OF SERVICE

I hereby certify that, on December 3, 2020, I filed and thereby caused the foregoing document to be served via the CM/ECF system in the United States District Court for the District of Massachusetts on all parties registered for CM/ECF in the above-captioned matter.

/s/ Anthony L. François
ANTHONY L. FRANÇOIS