IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
EASTERN DIVISION

STATE OF WEST VIRGINIA; STATE OF NORTH DAKOTA; STATE OF GEORGIA; STATE OF IOWA; STATE OF ALABAMA; STATE OF ALASKA; STATE OF ARKANSAS; STATE OF FLORIDA; STATE OF INDIANA; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF MISSISSIPPI; STATE OF MISSOURI; STATE OF MONTANA; STATE OF NEBRASKA; STATE OF NEW HAMPSHIRE; STATE OF OHIO; STATE OF OKLAHOMA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF TENNESSEE; STATE OF UTAH; COMMONWEALTH OF VIRGINIA; and STATE OF WYOMING, Plaintiffs, CASS COUNTY FARM BUREAU and NORTH DAKOTA FARM BUREAU, Intervenor-Plaintiffs, v. U.S. ENVIRONMENTAL PROTECTION AGENCY; MICHAEL S. REGAN, in his official capacity as Administrator of the U.S. Environmental Protection Agency; U.S. ARMY CORPS OF ENGINEERS; MICHAEL L. CONNOR, in his official capacity as Assistant Secretary of the Army for Civil Works; LTG SCOTT A. SPELLMON, in his official capacity as Chief of Engineers and Commanding General, U.S. Army Corps of Engineers,	Civil Action No. 3:23-cv-00032-ARS

Defendants,)
)
and)
)
CHICKALOON VILLAGE TRADITIONAL COUNCIL, RAPPAHANNOCK TRIBE, TOHONO O'ODHAM NATION, and WHITE EARTH BAND OF MINNESOTA CHIPPEWA TRIBE,)
)
Intervenor-Defendants.)

INTERVENOR PLAINTIFFS' AMENDED COMPLAINT FOR DECLARATORY RELIEF

Intervenor Plaintiffs CASS COUNTY FARM BUREAU and NORTH DAKOTA FARM BUREAU (collectively, the "Plaintiffs"), for their Complaint against Defendants U.S. ENVIRONMENTAL PROTECTION AGENCY ("EPA"); MICHAEL S. REGAN, in his official capacity as Administrator of the U.S. Environmental Protection Agency; U.S. ARMY CORPS OF ENGINEERS ("Corps"); MICHAEL L. CONNOR, in his official capacity as Assistant Secretary of the Army for Civil Works; and LTG SCOTT A. SPELLMON, in his official capacity as Chief of Engineers and Commanding General, U.S. Army Corps of Engineers (collectively, the "Defendants"),[1] allege, by and through their attorneys of record, on knowledge as to Plaintiffs, and on information and belief as to all other matters, as follows:

INTRODUCTION

1. This is a lawsuit for declaratory judgment challenging the legality of the final administrative rule titled "Revised Definition of 'Waters of the United States'" (the "2023 Rule") as amended on September 8, 2023 (the "Amended Rule"). The 2023 Rule was signed by

[1] The U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers are collectively referred to as the "Agencies."

Administrator Regan on December 29, 2022, and by Assistant Secretary Connor on December 28, 2022, and was published in the Federal Register at 88 Fed. Reg. 3004 on January 18, 2023. On September 8, 2023, the Agencies amended the Code of Federal Regulations purportedly to conform the definition of "waters of the United States" to the United States Supreme Court decision in *Sackett v. EPA*, 598 U.S. 651, 143 S. Ct. 1322 (2023). The Amended Rule was published in the Federal Register at 88 Fed. Reg. 61964.

2. With limited exceptions, the Clean Water Act ("CWA") prohibits "discharg[ing] . . . any pollutant" without a permit issued under Section 402 of the CWA for discharges covered by the National Pollution Discharge Elimination System ("NPDES") or a Section 404 permit allowing discharges of dredged or fill material. 33 U.S.C. § 1311(a). The CWA defines the term "discharge of a pollutant" as the "addition of any pollutant to navigable waters from any point source." *Id*. at § 1362(12). "Navigable waters," in turn, are defined to mean "the waters of the United States, including the territorial seas." *Id.* at § 1362(7).

3. The 2023 Rule purported to "clarify" the Agencies' definition of "waters of the United States" ("WOTUS") within the meaning of 33 U.S.C. § 1362(7) (88 Fed. Reg. at 3139), which demarcates the geographic reach of not only the CWA's two permitting schemes, but also of "the entire statute." *Rapanos v. United States*, 547 U.S. 715, 742 (2006) (plurality).

4. Instead of providing much-needed clarity to the regulated community, however, the 2023 Rule made clear that the Agencies were determined to exert CWA jurisdiction over a staggering range of dry land and water features—whether large or small; permanent, intermittent, or ephemeral; flowing or stagnant; natural or manmade; interstate or intrastate; and no matter how remote from or lacking in a physical connection to actual navigable waters. Under the 2023 Rule, Plaintiffs' members would have been constantly at risk that any sometimes-wet feature on their

property would be deemed WOTUS by the Agencies using vague and unpredictable standards—making normal business activities in that area subject to criminal and civil penalties.

5. The Supreme Court considered the definition of WOTUS as articulated in the 2023 Rule in *Sackett*, taking up the question of "the proper test for determining whether wetlands are 'waters of the United States.'" 598 U.S. at 663. It rejected the 2023 Rule's definition of WOTUS as covering "adjacent wetlands . . . if they 'possess a "significant nexus" to' traditional navigable waters." *Id.* at 679 (citation omitted). And it rejected the 2023 Rule's definition of "adjacent" as "bordering, contiguous, or neighboring." *Id.* In doing so, the Court emphasized that it had consistently "refused to read 'navigable' out of the statute," that an "overly broad interpretation of the CWA's reach would impinge on" traditional state authority over land and water use, and that the 2023 Rule "g[ave] rise to serious vagueness concerns." *Id.* at 672, 679-80. The "significant nexus" test, the Court reasoned, was "particularly implausible" and the problems associated with that test were exacerbated by the fact that "the test introduces another vague concept—'similarly situated' waters." *Id.* at 680-81.

6. The Court concluded that "the CWA extends to only those wetlands that are 'as a practical matter indistinguishable from waters of the United States.'" *Id.* at 678 (quoting *Rapanos*, 547 U.S. at 755). This test "requires the party asserting jurisdiction over adjacent wetlands to establish 'first, that the adjacent body of water constitutes waters 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.'" *Id.* at 678-79 (quoting *Rapanos*, 547 U.S. at 742) (cleaned up). In other words, the Court "conclude[d] that the *Rapanos* plurality was correct: the CWA's use of 'waters' encompasses 'only those relatively permanent, standing or

continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" *Id.* at 671 (quoting *Rapanos*, 547 U.S. at 739) (alteration in original).

7. In light of *Sackett*, the Agencies published the Amended Rule on September 8, 2023. 88 Fed. Reg. 61964. The Agencies explained that the purpose of the Amended Rule was to "remove the significant nexus standard and to amend its definition of 'adjacent' as these provisions are invalid under the Supreme Court's interpretation of the Clean Water Act in *Sackett*." *Id.* at 61966. In addition, the Agencies removed the term "interstate wetlands" from the 2023 Rule to conform with the Supreme Court's conclusion in *Sackett* that "the predecessor statute to the Clean Water Act covered and defined 'interstate waters' as 'all *rivers, lakes, and other waters* that flow across or form a part of State boundaries.'" *Id.* (quoting *Sackett*, 598 U.S. at 673) (emphasis in original). Thus, the Agencies reasoned, "under *Sackett*, the provision authorizing wetlands to be jurisdictional simply because they are interstate is invalid." *Id.*

8. The Amended Rule incorporated the following revisions:

A. Removed the phrase "including interstate wetlands" from 40 CFR 120.2(a)(1)(iii) and 33 CFR 282(a)(1)(iii);

B. Removed the significant nexus standard from the tributaries provisions in 40 CFR 120.2(a)(3) and 33 CFR 328.3(a)(3);

C. Removed the significant nexus standard from the adjacent wetlands provision in 40 CFR 120.2(a)(4) and 33 CFR 328(a)(4);

D. Removed the significant nexus standard and streams and wetlands from the provision for intrastate lakes and ponds, streams, or wetlands not otherwise identified in the definition in 40 CFR 120.2(a)(5) and 33 CFR 328.3(a)(5);

E. Revised the definition of "adjacent" in 40 CFR 120.2(c)(2) and 33 CFR 328.3(c)(2); and

F. Removed the term "significantly affect" and its definition from 40 CFR 120.2(c)(6) and 33 CFR 328.3(c)(6).

88 Fed. Reg. 61966.

9. The Amended Rule failed, however, to address numerous other significant flaws in the 2023 Rule. As one example, the Agencies' definition of WOTUS applies the "relatively permanent standard" to "tributaries to traditional navigable waters, the territorial seas, interstate waters or [impoundments of 'waters of the United States']," "intrastate lakes and ponds, streams, or wetlands," "wetlands adjacent to and with a continuous surface connection to relatively permanent [impoundments of 'waters of the United States']," and "wetlands adjacent to tributaries that meet the relatively permanent standard." But the relatively permanent standard, like the now-invalidated significant nexus standard, is not adequately defined and is unconstitutionally vague.

10. Significantly, although the preamble to the Amended Rule noted that the Court in *Sackett* held that the CWA's "use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' *that are described in ordinary parlance as 'streams, oceans, rivers, and lakes*,'" 88 Fed. Reg. 61966 (citations omitted) (emphasis added), the Amended Rule is not so limited.

11. Further, the Amended Rule omits a key part of the *Sackett* ruling: that "the CWA extends to only those 'wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right,' so that they are 'indistinguishable' from those waters." 598 U.S. at 684 (quoting *Rapanos*, 547 U.S. at 742). Although the Amended Rule defines WOTUS as covering "wetlands with a continuous surface connection" to a covered water, it fails to include

the requirement that such wetlands be "indistinguishable" from those waters, as *Sackett* requires. This omission renders the definition of wetlands covered by the CWA unclear and impermissibly broad.

12. The Amended Rule, like the 2023 Rule, thus uses an unworkable definition of WOTUS that conflicts with the CWA, the Constitution, and Supreme Court precedent. Among its many defects, the Amended Rule:

- effectively reads the term "navigable waters" out of the CWA, contrary to *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) ("*SWANCC*"), replacing it with a too-vague "relatively permanent" standard with no basis in the CWA;
- asserts improperly vague and malleable jurisdiction over "relatively permanent, standing or continuously flowing waters connected to [traditional navigable waters, the territorial seas, and interstate waters], and waters with a continuous surface connection to such relatively permanent waters or to traditional navigable waters, the territorial seas, or interstate waters," 88 Fed. Reg. at 3006, a description that provides insufficient practical guidance to the regulated community;
- improperly "alters the federal-state framework by permitting federal encroachment upon [the] traditional state power" over land and water (*SWANCC*, 531 U.S. at 173), which Congress expressly protected, *see* 33 U.S.C. § 1251(b) (it is "the policy of Congress" "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources"), and which the Court in *Sackett* reaffirmed, 598 U.S. at 679-80;

- exceeds the Agencies' delegated authority under the Commerce Clause, *SWANCC*, 513 U.S. at 172; and
- as a result of its vagueness and expansive reach, violates due process, the rule of lenity applied to statutes creating criminal penalties (*see*, *e.g.*, *McDonnell v. United States*, 136 S. Ct. 2355, 2373 (2016)), the "major questions" doctrine (*see*, *e.g.*, *West Virginia v. EPA*, 142 S. Ct. 2587, 2607–08 (2022)), and the nondelegation doctrine (*see*, *e.g.*, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)).

13. The Amended Rule fails to remedy the vagueness concerns in the 2023 Rule, and thus imposes impossible—and unpredictable—burdens on land owners, users, and purchasers. It requires them to assess not only their own land, but also vast expanses of land beyond their own holdings, using multiple vaguely defined connections to potentially remote features, in an effort to determine if their land is regulated under the CWA. Those burdens result from the Agencies' predicating jurisdiction over enormous swaths of the country on their misreading of *Rapanos* and *Sackett*. The consequence is a sweeping and unwieldy regulation that leaves the identification of jurisdictional waters so opaque, uncertain, and all-encompassing that Plaintiffs and their members and clients cannot determine whether and when the most basic activities undertaken on land will subject them to drastic criminal and civil penalties. The Amended Rule also strips the States of their primary authority and traditional powers over land and waters that Congress intended them to retain.

14. This action arises under, and alleges violations of, the Administrative Procedure Act ("APA"). In particular, the Defendants' actions in promulgating the 2023 Rule and Amended Rule were "arbitrary, capricious, an abuse of discretion," and "otherwise not in accordance with

law" under 5 U.S.C. § 706(2)(A); "contrary to constitutional right, power, privilege, or immunity" under 5 U.S.C. § 706(2)(B); "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" under 5 U.S.C. § 706(2)(C); and beyond the Agencies' authority under the "major questions" doctrine, *see W. Virginia*, 142 S. Ct. at 2608-09; *Nat'l Fed'n of Indep. Bus.* v. *Dep't of Labor*, 142 S. Ct. 661 (2022) ("*NFIB*").

15. Plaintiffs seek a declaration from the Court that the 2023 Rule and Amended Rule violate the APA, contravene the plain text of the CWA, and violate the United States Constitution, including but not limited to the Commerce Clause of Article I, Section 8 and the Due Process Clause of the Fifth Amendment. Plaintiffs further seek an order remanding the 2023 Rule, as amended by the Amended Rule, to the Agencies for further rulemaking consistent with its opinion.

16. Alternatively, unless the definition in 33 U.S.C. § 1362(7) is interpreted to provide clear guidance to the Agencies in implementing the CWA—as the plurality of the Supreme Court interpreted it in *Rapanos*, 547 U.S. at 731-39 (plurality op. of Scalia, J.), and as the Agencies interpreted it in their 2020 Navigable Waters Protection Rule[2]—Section 1362(7) fails to state an intelligible principle constraining agency action. It therefore violates Article I, section 1 of the Constitution and the nondelegation doctrine. *See*, *e.g.*, *A.L.A. Schechter Poultry*, *supra*; *Gundy v. United States*, 139 S. Ct. 2116, 2140 (2019) (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.); *id*. at 2031 (Alito, J., concurring); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J. respecting the denial of certiorari). Thus, if the Court concludes Section 1362(7) is so standardless as to permit the Amended Rule, the Rule should be declared invalid and vacated because the statutory provision it interprets is unconstitutional.

[2] The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250 (Apr. 21, 2020) ("NWPR" or "2020 Rule").

JURISDICTION AND VENUE

17. This Court has federal question jurisdiction over this action under 28 U.S.C. § 1331. It has the authority to issue declaratory and other relief pursuant to 28 U.S.C. §§ 2201, 2202; 5 U.S.C. §§ 705, 706(1), 706(2)(A)(B)(C) & (D).

18. The APA provides a cause of action for parties adversely affected by final agency action when "there is no other adequate remedy in a court." 5 U.S.C. § 704. That condition is met in this case because the Amended Rule is a final agency action and Plaintiffs have no other adequate remedy available in any other court.

19. This Court has subject matter jurisdiction to review the 2023 Rule, as amended by the Amended Rule, because this challenge is not one of the actions that Section 509(b) of the CWA, 33 U.S.C. § 1369(b)(1) deems to fall within the exclusive jurisdiction of the courts of appeals. *See Nat'l Ass'n. of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 623 (2018).

20. Venue is proper in this Court under 28 U.S.C. § 1391(e)(1)(B) because the Defendants are officers or agencies of the United States and because WOTUS jurisdictional determinations under the 2023 Rule, as amended by the Amended Rule, will be made in the district; and it is proper under 28 U.S.C. § 1391(e)(1)(C) because one or more Plaintiffs reside in the district within the meaning of 28 U.S.C. § 1391(d).

THE PARTIES

A. Plaintiffs

21. Plaintiff **Cass County Farm Bureau** ("CCFB") is an independent, non-governmental, voluntary organization whose purpose is to promote and develop agriculture in Cass County, North Dakota. CCFB is a member of the North Dakota Farm Bureau, and has a membership of nearly 6,000 members. The member family farmers and ranchers of Cass County are directly and adversely impacted by the Amended Rule.

22. Plaintiff **North Dakota Farm Bureau** ("NDFB") was established in 1942 as a non-profit, grassroots, agricultural association representing family farmers and ranchers in North Dakota. NDFB is committed to the advancement of agriculture and prosperity for rural North Dakota and is a member of the American Farm Bureau Federation. NDFB has over 27,000 members in North Dakota and 50 organized county farm bureaus in the state. Its member farmers and ranchers work their land and rely on water resources and thus are directly and adversely impacted by the Amended Rule.

B. Defendants

23. Defendant U.S. Environmental Protection Agency is the agency of the United States government with primary responsibility for implementing the CWA. Along with the Corps, the EPA promulgated the Amended Rule.

24. Defendant Michael S. Regan is the Administrator of the EPA, acting in his official capacity.

25. Defendant U.S. Army Corps of Engineers has responsibility for implementing the CWA. Along with the EPA, the Corps promulgated the Amended Rule.

26. Defendant Lieutenant General Scott A. Spellmon is the Chief of Engineers and Commanding General for the U.S. Army Corps of Engineers, acting in his official capacity.

27. Defendant Michael L. Connor is the Assistant Secretary of the Army for Civil Works, acting in his official capacity.

STANDING

28. As the Court found (Dkt. 171 at 5), because Plaintiffs do not pursue relief not requested by plaintiff States, they do not need to show independent Article III standing in this case. See *Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433, 435, 439-40 (2017).

29. And as the Court further found (Dkt. 171 at 5-6), Plaintiffs have standing to intervene in any event because they and their members "are the direct object of the challenged regulation" and they are injured by the regulation. Independently, Plaintiffs have standing because they and their members are the direct object of the 2023 Rule and Amended Rule and they are injured by those Rules.

30. Because the 2023 Rule, as amended by the Amended Rule, is both vague and expansive in describing features that are purportedly WOTUS, and often requires time-consuming, costly, and unpredictable case-by-case determinations by landowners and by the Agencies, each Plaintiff's members do not and cannot know which features on the lands they own or use are covered by the CWA's permitting requirements and which are not. Uncertainty as to which features are jurisdictional under the vague and extremely broad terms of the Amended Rule (including "tributary," "relatively permanent," "continuous surface connection," "interstate waters," "impoundment," and "intrastate lakes and ponds, streams, or wetlands not identified" in other sections of the WOTUS definition ("other jurisdictional intrastate waters")) deprives each Plaintiff's members of notice of what the law requires of them and makes it impossible for them to make informed decisions concerning the operation, logistics, and finances of their businesses.

31. The costs of making a wrong decision under the CWA are harsh. *See Sackett*, 598 U.S. at 660 ("The CWA is a potent weapon. It imposes what have been described as 'crushing' consequences 'even for inadvertent violations'"). A first-time criminal offense for negligently discharging into a WOTUS without a permit is punishable by criminal penalties of up to $25,000 per violation per day, and up to one year in prison per violation. 33 U.S.C. § 1319(c)(1). A first-time criminal offense for knowingly discharging into a jurisdictional water without a permit is punishable by criminal penalties of up to $50,000 per violation per day, and up to three years in

prison per violation. 33 U.S.C. § 1319(c)(2). The EPA may also impose civil penalties of up to $64,618 per discharge, per day, per offense, without regard to any knowledge (or lack of knowledge) of the jurisdictional status of a particular feature. 33 U.S.C. § 1319(g)(2)(A); 40 C.F.R. § 19.4.

32. Additionally, the CWA authorizes citizen suits by any "person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). Regardless of whether they are ultimately found liable, the regulated public can incur substantial costs defending against citizen suits, and the broad and vague definition of WOTUS under the 2023 Rule, as amended by the Amended Rule, places the regulated community at greater risk of having to defend against such actions.

33. Law-abiding members of each of the Plaintiffs have incurred or will imminently incur continuing economic costs as they alter their activities (in particular, by abstaining from certain activities in certain areas of land) to accommodate the possibility that their activities will be deemed discharges into land features that are later determined by the Agencies to be jurisdictional waters.

34. Some of Plaintiffs' members will need to retain engineers and consultants and obtain jurisdictional determinations, NPDES permits, or Section 404 permits from the Agencies in order to comply or mitigate the risk of noncompliance with the Amended Rule. Obtaining jurisdictional determinations and permits entails ongoing costs, including having to retain consultants, engineers, and lawyers over the course of years. *See Sackett*, 598 U.S. at 661 (the "costs of obtaining . . . a permit are 'significant'"; "both agencies have admitted that the permitting process can be arduous, expensive, and long'"); D. Sunding & D. Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland*

Permitting Process, 42 Nat. Res. J. 59, 74, 76 (2002) (an "individual permit application" costs on average "over $271,596 to prepare"; "the cost of preparing a nationwide permit application averages $28,915"; nationwide permits "took an average of 313 days to obtain"; "it took an average of 788 days (or two years, two months) from the time they began preparing the application to the time they received an individual permit"); *Rapanos*, 547 U.S. at 721 (similar).

35. As explained in greater detail below, many land and water features covered by the 2023 Rule, as amended by the Amended Rule, are not within the scope of any reasonable interpretation of the CWA and exceed the Agencies' statutory and constitutional authority. Thus the Rule has caused or will cause each Plaintiff's members economic and non-economic harm by unlawfully inhibiting their productive use, enjoyment, and improvement of land and water features on their lands.

36. The 2023 Rule, as amended by the Amended Rule, purports to establish the Agencies' jurisdiction over a wide range of features that are not properly WOTUS under the CWA or under the Supreme Court's interpretations of the Agencies' jurisdiction. That includes many "waters" that are "relatively permanent" as deemed by the Agencies, or bear a "continuous surface connection" to such "relatively permanent" waters. Accordingly, the Rule unlawfully requires Plaintiffs' members either to alter their land use to avoid discharges to these features or to obtain costly permits for discharges.

37. Each Plaintiff has members who would have standing to sue in their own right as parties regulated under the CWA.

38. Neither the claims asserted nor the relief requested require individual members' participation in this lawsuit.

39. Plaintiffs' affiliated national organization, the American Farm Bureau Federation ("AFBF"), has been deeply involved with the development of the CWA for decades, including with the promulgation of the WOTUS definition.[3] The AFBF submitted comments to the earlier 2015 and 2020 iterations of the proposed WOTUS definition, and has participated in roundtables and other conversations with government regulators over many years to explain the costs and impacts of the proposed rules.

40. Plaintiffs, directly and through their affiliation with AFBF, invest resources in a range of activities designed to protect and promote property rights and to assist their members with the gainful use of their land, including developing and defending uniform water quality standards and other accredited standards designed to ensure compliance with the CWA and other environmental laws. Plaintiffs devote resources toward lobbying and other efforts to advocate for a reasonable scope of federal jurisdiction under the CWA. And Plaintiffs advise and counsel their members when changes to the CWA are proposed or implemented. The Amended Rule frustrates and impairs those advocacy and advisory activities and consequently will consume the Plaintiffs' resources. Plaintiffs accordingly have suffered remediable injuries in their own right. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982).

41. Contrary to the Agencies' assertions in the explanation of the Amended Rule, the Amended Rule does not conform the 2023 Rule to the Supreme Court's decision in *Sackett*. *See* 88 Fed. Reg. 61985. Instead, it fails to implement key aspects of the Court's holding—including the requirement that "relatively permanent" waters be those that would in "ordinary parlance" be described as "streams, oceans, rivers, and lakes," as well as the requirement that wetlands that have a continuous surface connection to WOTUS are "indistinguishable" from WOTUS such that "there

[3] *See Comments of the American Farm Bureau Federation on the Revised Definition of "Waters of the United States," 86 Fed. Reg. 69,372 (Dec. 7, 2021)*, Dkt. No. EPA-HQ-OW-2021-0602 (Feb. 7, 2022).

is no clear demarcation between 'waters' and 'wetlands,'" 598 U.S. at 671, 678—and fails to address crucial aspects of the Court's reasoning, namely, that the word "navigable" be given effect, that the federal government refrain from an overly broad interpretation of the CWA that would impinge on States' authority over land and water use, and that the meaning of WOTUS be clear enough to assuage vagueness concerns.

42. Nor does the Amended Rule remedy the myriad of flaws in the 2023 Rule, which are preserved in the Amended Rule. Despite the Agencies' assertions in the explanations of the Amended Rule, the Amended Rule does not simply restore the Agencies' approach to WOTUS set forth in rules and guidance promulgated prior to 2015.[4] Take the post-*Rapanos* 2008 guidance: *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States* ("2008 Guidance").[5] To start, the Amended Rule codifies elements of that guidance, giving *binding legal force* to guidelines that previously had none. *See* 2008 Guidance at 4, n. 17 (stating that the 2008 Guidance has no legal effect).[6]

43. Additionally, the Amended Rule substantively differs from the Agencies' pre-2015 position in important ways. Some examples of these differences are: (1) the Amended Rule

[4] The Agencies admit that the Amended Rule goes beyond the pre-2015 regime when they describe the Amended Rule as "the agencies' pre-2015 definition of 'waters of the United States,' implemented consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience." 88 Fed. Reg. at 3006 n.6.

[5] *Available at* https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.

[6] The 2008 Guidance specifically states

> The CWA provisions and regulations described in this document contain legally binding requirements. This guidance does not substitute for those provisions or regulations, nor is it a regulation itself. **It does not impose legally binding requirements on EPA, the Corps, or the regulated community**, and may not apply to a particular situation depending on the circumstances. **Any decisions regarding a particular water will be based on the applicable statutes, regulations, and case law**. Therefore, interested persons are free to raise questions about the appropriateness of the application of this guidance to a particular situation, and EPA and/or the Corps will consider whether or not the recommendations or interpretations of this guidance are appropriate in that situation based on the statutes, regulations, and case law.

2008 Guidance at 4, n.17 (emphasis added).

significantly broadens the reach of the Agencies' authority compared to the pre-2015 regime by using an overbroad interpretation of the "relatively permanent" standard that underpinned the 2015 Rule, not the pre-2015 guidance;[7] and (2) the Amended Rule includes a catch-all category of "other intrastate lakes and ponds," which applies the "relatively permanent" standard to currently non-jurisdictional water features that are outside of any stream network. 88 Fed. Reg. at 3029; 88 Fed. Reg. at 61968.

44. The Agencies repeatedly but incorrectly assert that "their interpretations [of WOTUS] remained largely unchanged between 1977 and 2015" and that the Amended Rule "is founded on that familiar pre-2015 definition that has bounded the Clean Water Act's protections for decades, has been codified multiple times, and has been implemented by every administration in the last 45 years." 88 Fed. Reg at 3005. To the contrary, "the outer boundaries of the [CWA's] geographical reach have been uncertain from the start," and "[f]or more than a half century, the agencies responsible for enforcing the [CWA] have wrestled with the problem and adopted varying interpretations." *Sackett*, 598 U.S. at 658. Moreover, the 1977 regulations defined WOTUS to include "isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters . . . the degradation or destruction of which could affect interstate commerce" (33 CFR 323.2(a)(5) (1978)), but the Supreme Court in *SWANCC* rejected that basis of jurisdiction over isolated features, stating that what Congress "had in mind as its authority for enacting the CWA" was not this "affects commerce" head of interstate commerce, but the transport of goods and people using the navigable waters. 531 U.S. at 172. The Agencies' claims of consistency, and their expectation of deference, carry no weight when their regulations rested on a view of the CWA and its Commerce Clause roots rejected in *SWANCC*, when the "significant nexus" that

[7] *The Clean Water Rule: Definition of "Waters of the United States,"* 80 Fed. Reg. 37,054 (June 29, 2015) ("2015 Rule").

appeared in agency guidance and regulations until after *Rapanos* was firmly rejected by the Supreme Court in *Sackett*, when the Supreme Court indeed has consistently rejected the Agencies' interpretations of the CWA as to both substance and procedure (*SWANCC*, *Rapanos*, *Sackett I*, *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 600 (2016), *NAM*, *Sackett II*), and when courts have held the 2015, 2020, and January 2023 rules to be unlawful. That history shows that the Agencies' flip-flopping rules and guidance have lacked any firm basis in the CWA, making it critical for the courts to step in to provide the "durable" definition of jurisdiction that the Agencies have so spectacularly failed to provide since 1972.

BACKGROUND

A. Procedural Background

45. Following the Supreme Court's decision in *Rapanos*, the Agencies promulgated the 2008 Guidance interpreting WOTUS.[8] After members of the regulated community complained that this non-binding guidance was unworkably vague and requested a rulemaking to provide a clear definition, the Agencies promulgated the 2015 Rule.[9] Far from providing the requested clarity, the 2015 Rule left WOTUS just as (if not more) vague and uncertain—indeed unbounded—and relied on arbitrary factors with no basis in the CWA. Many representatives of the regulated community (including affiliates of the Plaintiffs here) challenged the 2015 Rule, which two district courts held to be procedurally and/or substantively unlawful, remanding it to the Agencies.[10]

[8] 2008 Guidance, *available at* https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.

[9] 2015 Rule, 80 Fed. Reg. 37,054.

[10] *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1344 (S.D. Ga. 2019); *Tex. v. U.S. Envtl. Prot. Agency*, 389 F. Supp. 3d 497, 499 (S.D. Tex. 2019).

Thereafter, the Agencies withdrew the 2015 Rule[11] and promulgated a new rule, the 2020 Rule,[12] which in turn was challenged.[13] That 2020 Rule was vacated.[14]

46. Following the vacatur of the 2020 Rule, the Defendants on December 7, 2021, published a new Proposed Rule defining WOTUS.[15]

47. Many members of the regulated business community submitted joint comments on the Proposed Rule on February 7, 2022, and many also submitted individual comments.

48. On December 28 and 29, 2022, Defendants signed the 2023 Rule defining WOTUS.

49. On January 18, 2023, the 2023 Rule was published in the Federal Register. 88 Fed. Reg. 3004. The effective date of the 2023 Rule was March 20, 2023. *Id.*

50. This Court preliminarily enjoined the 2023 Rule. (Dkt. 131).

51. On May 25, 2023, the Supreme Court issued its decision in *Sackett*, invalidating the definition of WOTUS as articulated in the 2023 Rule. 598 U.S. 651.

52. After the decision in *Sackett* was issued, Plaintiffs filed a motion for entry of summary judgment, vacatur of the 2023 Rule, and an order requiring the Agencies to apply the decision in *Sackett* as the operative framework for approved jurisdictional determinations and permits pending prompt promulgation of a new rule. (Dkt. 145).

53. The Agencies issued the Amended Rule on September 8, 2023. 88 Fed. Reg. 61964. The Agencies stated that a public notice and comment process was unnecessary because "the sole purpose of [the Amended Rule] is to amend the[] specific provisions of the 2023 Rule to conform

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[11] Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56,626 (Oct. 22, 2019) ("Repeal Rule").

[12] 2020 Rule, 85 Fed. Reg. 22,250.

[13] *See Colorado v. EPA*, 1:20-cv-01461 (D. Colo. 2020); *Envtl. Integrity Project v. Regan*, 1:20-cv-01734 (D.D.C. 2020); *S.C. Coastal Conservation League v. Regan,* 2:20-cv-01687 (D.S.C. 2020).

[14] *Pascua Yaqui Tribe v. U.S. Envtl. Prot. Agency*, 557 F. Supp. 3d 949, 956 (D. Ariz. 2021), appeal dismissed sub nom. *Pasqua Yaqui Tribe v. U.S. Envtl. Prot. Agency*, No. 21-16791, 2022 WL 1259088 (9th Cir. Feb. 3, 2022).

[15] Proposed Rule, 86 Fed. Reg. 69,372.

with *Sackett*, and such conforming amendments do not involve the exercise of the agencies' discretion." *Id.* at 61964-65.

54. The Amended Rule is a "final agency action" within the meaning of 5 U.S.C. § 704 and is therefore immediately subject to challenge in this Court.

B. Supreme Court Precedent Cabins the Permissible Scope of the Agencies' Rulemaking

55. The Amended Rule is the Agencies' most recent attempt to define WOTUS. The Agencies' efforts were undertaken against the backdrop of four Supreme Court cases addressing the meaning of WOTUS. The Supreme Court first addressed the interpretation of "waters of the United States" within the meaning of 33 U.S.C. § 1362(7) in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). That case concerned a wetland that "was adjacent to a body of navigable water," because "the area characterized by saturated soil conditions and wetland vegetation extended beyond the boundary of respondent's property" to "a navigable waterway." *Id.* at 131. Noting that "the Corps must necessarily choose some point at which water ends and land begins" (*id*. at 132), the Court upheld the Corps's interpretation of "the waters of the United States" to include a wetland that is directly connected to, and thus "actually abuts on a navigable waterway." *Id.* at 135.

56. The Supreme Court next addressed the interpretation of WOTUS in *SWANCC*, 531 U.S. 159 (2001). Following the Court's decision in *Riverside Bayview*, the Corps had "adopted increasingly broad interpretations of its own regulations under the Act." *Rapanos*, 547 U.S. at 725. At issue in *SWANCC* was the so-called Migratory Bird Rule, which purported to extend the Agencies' jurisdiction under the CWA to any intrastate waters "[w]hich are or would be used as habitat" by migratory birds. 51 Fed. Reg. 41217. In *SWANCC*, the Supreme Court considered the application of that rule to "an abandoned sand and gravel pit" in northern Illinois. 531 U.S. at 162.

Observing that "[i]t was the significant nexus between the wetlands and 'navigable waters' that informed [the Court's] reading of the CWA in *Riverside Bayview*," the Court held that these "nonnavigable, isolated, intrastate waters," which did not "actually abut[] on a navigable waterway," were not "waters of the United States." *Id.* at 167, 171.

57. In so ruling, as relevant here, the Court in *SWANCC* held that (1) the term "navigable waters" had to be given some meaning, (2) "Congress had in mind as its authority for enacting the CWA" its "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made," (3) "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power," the agency must be able to point to "a clear indication that Congress intended that result," (4) this clear statement rule "is heightened where the administrative interpretation alters the federal-state framework" through "a significant impingement of the States' traditional and primary power over land and water use," (5) the CWA is to be read "to avoid . . . significant constitutional and federalism questions," (6) "the text of the [CWA] will not allow" the Agencies to "exten[d jurisdiction] to ponds that are not adjacent to open water," and (7) CWA § 404(g) is "unenlightening" as to the scope of jurisdictional waters beyond traditional navigable waters. *Id.* at 171, 173-74.

58. In *Rapanos*, the Court "consider[ed] 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 [CWA]." 547 U.S. at 729. Prior to *Rapanos*, "the Corps [had] interpreted its own regulations to include 'ephemeral streams' and 'drainage ditches' as 'tributaries' that are part of the 'waters of the United States.'" *Id.* at 725 (citing 33 C.F.R. § 328.3(a)(5)). "This interpretation [had] extended 'the waters of the United States' to virtually any land feature over which rainwater or drainage passes and leaves a visible mark." *Id.*

Writing for a four-Justice plurality, Justice Scalia, focusing on the usual understanding of the word "waters," rejected that interpretation, holding that WOTUS "does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id*. at 739. Instead, the "only plausible interpretation" of WOTUS is as a reference to "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'" *Id.*

59. Five justices of the Court, including the four-justice plurality and Justice Kennedy, agreed on certain aspects of the WOTUS definition: (1) the word "navigable" in the CWA must be given some effect, *Rapanos*, 547 U.S. at 778 (Kennedy, J., concurring); *see id*. at 731 (plurality); (2) WOTUS includes some waters and wetlands not navigable-in-fact but which bear a substantial connection to navigable waters, *id*. at 739, 742 (plurality); *id*. at 784-85 (Kennedy, J.); (3) environmental concerns cannot override the statutory text, *id*. at 778 (Kennedy, J.); and (4) WOTUS cannot include drains, ditches, streams remote from navigable-in-fact water and carrying only a small volume water toward navigable-in-fact water, or waters or wetlands that are alongside a drain or ditch, *id*. at 733-34, 742 (plurality), *id*., at 778-91 (Kennedy, J.). Those are conclusions about the core meaning of WOTUS that the Agencies cannot override in their subsequent rulemaking.

60. Finally, in *Sackett*, the Supreme Court majority rejected the "significant nexus" standard, and clarified the definition of certain terms used to define WOTUS. First, it "conclude[d] that the *Rapanos* plurality was correct: the CWA's use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'"" *Id.* at 671

(citations omitted) (alterations in original). Second, it agreed with the *Rapanos* plurality's formulation of when wetlands are part of WOTUS: when wetlands have "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 678. Third, it pointed out that "[w]hile its predecessor encompassed 'interstate or navigable waters,' 33 U.S.C. § 1160(a) (1970 ed.), the CWA prohibits the discharge of pollutants into only 'navigable waters.'" *Id*. at 661.

C. The Amended Rule

61. The Amended Rule interprets the term "waters of the United States" to include:

- traditional navigable waters, the territorial seas, and interstate waters ("paragraph (a)(1) waters");
- impoundments of "waters of the United States" ("paragraph (a)(2) impoundments");
- tributaries to traditional navigable waters, the territorial seas, interstate waters, or impoundments when the tributaries meet the relatively permanent standard ("jurisdictional tributaries" or "paragraph (a)(3) tributaries");
- wetlands adjacent to paragraph (a)(1) waters, wetlands adjacent to and with a continuous surface connection to relatively permanent paragraph (a)(2) impoundments or (a)(3) tributaries; and
- intrastate lakes and ponds not identified in paragraphs (a)(1) through (4) that meet the relatively permanent standard and have a continuous surface connection to (a)(1) or (a)(3) waters ("other intrastate jurisdictional waters" or "paragraph (a)(5) waters").

88 Fed. Reg. at 3005–06; 88 Fed. Reg. at 61968-69.

62. "Traditional navigable waters" are "all waters that 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." 88 Fed. Reg. at 3070; 33 CFR 328.3(a)(1) (2014); 40 CFR 122.2, 230.3(s)(1) (2014).

63. "Interstate waters" are "all rivers, lakes, and other waters that flow across, or form a part of, state boundaries," which need not be navigable and "need not meet the relatively

permanent standard." 88 Fed. Reg. at 3073–74; *see id.* at 3012 (33 C.F.R. 328.3(a)(2) ("All interstate waters" are deemed WOTUS)). *Sackett* explained that WOTUS are "interstate waters that [are] either navigable in fact and used in commerce or readily susceptible to being used this way." 143 S. Ct. at 1330. But the 2023 Rule as amended by the Amended Rule still reaches waters merely because they cross State lines, regardless of whether they are traditional navigable waters. And to compound the Rule's illegal reach, it also defines WOTUS to include wetlands and relatively permanent waters merely because they have a continuous surface connection to interstate, non-navigable waters, and to include impoundments of interstate, non-navigable waters.

64. "Territorial seas" are "the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles." 88 Fed. Reg. at 3072; CWA § 502(8).

65. For "impoundment," the Amended Rule provides examples of when an "impoundment" may qualify as a "water," but the Amended Rule does not define what constitutes an "impoundment." 88 Fed. Reg. at 3075. Moreover, the Amended Rule notes that jurisdictional impoundments include both "impoundments created by impounding one of the 'waters of United States' that was jurisdictional under this rule's definition at the time the impoundment was created"—regardless of whether the impounded water remains jurisdictional—and "impoundments of waters that at the time of assessment meet the definition of 'waters of the United States' under the [R]ule . . . regardless of the water's jurisdictional status at the time the impoundment was created." *Id*.

66. A jurisdictional "tributary" "includes natural, human-altered, or human-made water bodies that flow directly or indirectly through another water or waters to a traditional navigable

water, the territorial seas, or an interstate water," or impoundments of jurisdictional waters. 88 Fed. Reg. at 3083. Tributary also includes "the entire reach" of the stream that is "of the same Strahler stream order (i.e., from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream)." *Id.* at 3086.

67. The "ordinary high water mark" ("OHWM") "defines the lateral limits of jurisdiction in non-tidal waters, provided the limits of jurisdiction are not extended by adjacent wetlands." 88 Fed. Reg. at 3119. OHWM is defined broadly and vaguely as "that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, and other appropriate means that consider the characteristics of the surrounding areas." *Id.*; 33 C.F.R. 328.3(c)(6). The Rule explains that "field indicators, remote sensing, and mapping information can also help identify an OHWM." 88 Fed. Reg. at 3083.

68. The use of remote sensing and mapping tools is not limited to identifying traditional navigable waters. Instead, the Amended Rule authorizes using these tools to "determine whether waters are connected or sufficiently close to 'waters of the United States'" to be WOTUS, allowing regulators to make determinations remotely without ever viewing the "water feature" in person. 88 Fed. Reg. at 3137.

69. The Amended Rule allows for case-specific assertions of jurisdiction over a broad category of "intrastate lakes and ponds." 88 Fed. Reg. at 61968-69. And this (a)(5) category encompasses intrastate, non-navigable water features that were previously considered to be "isolated" and thus not within the CWA's jurisdiction. *See SWANCC*, 531 U.S. at 167, 171; 88

Fed. Reg. at 3033. The Amended Rule provides no clear guidance on how the Agencies will interpret this overbroad category of WOTUS, other than the vague relatively permanent and continuous surface connection requirements, leaving Plaintiffs and their members exposed to an undeterminable liability.

70. Under the Amended Rule, "relatively permanent standard" means "waters that are relatively permanent, standing or continuously flowing waters connected to paragraph (a)(1) waters, and waters with a continuous surface connection to such relatively permanent waters or to paragraph (a)(1) waters." 88 Fed. Reg. at 3038. The Amended Rule does not define "relatively permanent." Further complicating application of this standard, the Amended Rule notes a "continuous surface connection does not require a constant hydrologic connection." *Id.* at 3102.

71. For example, the Amended Rule leaves the jurisdictional status of prairie potholes—a feature common in North Dakota—highly vague and uncertain. The preamble to the 2015 Rule stated that "Prairie potholes can be highly connected to other Prairie potholes via . . . surface hydrologic connections during the wet season. They can also be connected to the stream network via surface . . . connections. Intense precipitation events or high cumulative precipitation over one or more seasons can result in temporary hydrologic connectivity between Prairie potholes and from Prairie potholes to the tributary system via 'fill-and-spill' events." 80 Fed. Reg. at 37071-72. It is unclear whether that description makes prairie potholes potentially jurisdictional, and if so under what conditions, given the uncertainty of the Amended Rule's "relatively permanent" and "continuous surface connection" requirements.

D. The Amended Rule is Unlawful

72. The Amended Rule violates the Constitution, the CWA, and the APA for multiple reasons, including but not limited to the following:

a) The Amended Rule expands Defendants' CWA jurisdiction far beyond the bounds of the Commerce Clause and the federalism limits embodied in the Constitution, the authority delegated to the Agencies by the CWA, and governing Supreme Court precedent.

b) The Amended Rule concerns an issue of "vast 'economic and political significance.'" Yet Congress provided no "clear statement" that the Agencies' have authority to regulate that expansively. Accordingly, the Amended Rule violates the "major questions" doctrine.

c) The Amended Rule impermissibly asserts CWA jurisdiction over all interstate waters (and all waters related to interstate waters in ways specified in the Amended Rule), for which there is no constitutional or statutory basis. *See Wheeler*, 418 F. Supp. 3d at 1360 ("[T]he Agencies' inclusion of all interstate waters within the definition of waters of the United States in the WOTUS Rule extends beyond their authority under the CWA."). Moreover, the Amended Rule fails to limit the foundational waters to "traditional interstate navigable waters." *Sackett*, 143 S. Cr. 1341.

d) The Amended Rule fails to revise the definition of "relatively permanent" in the 2023 Rule to limit it to those "bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes,'" as required by *Sackett*. 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739) (alteration in original). Moreover, it fails to revise the requirement that wetlands have "a continuous surface connection" to waters of the United States to include the additional requirement that the connection be such "that there is no clear demarcation between 'waters' and 'wetlands,'" in other words, that the wetlands are "as a practical matter indistinguishable from waters on the United States." *Id.* at 678 (quoting *Rapanos*, 547 U.S. at 742).

e) The Amended Rule is unconstitutionally vague and violates Due Process because it fails to put regulated parties on notice of when their conduct violates the law. Plaintiffs and their

members cannot reasonably determine based on the face of the Amended Rule what is required of them. The lack of a clear regulatory definition of the relatively permanent, continuous surface connection, and adjacency standards, among other key terms, and the vague and the expansive description of those standards in the preamble, invites "freewheeling inquir[ies]" that "provid[e] little notice to landowners of their obligations under the CWA" and therefore violate due process. *Sackett*, 143 S. Ct. at 1342; see *ibid*. ("Due process requires Congress to define penal statutes with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement"). For example, the Amended Rule's relatively permanent test, which is contrary to the Court's holding in *Sackett*, is hopelessly vague. Regulated parties have no way to know, *ex ante*, which waters are "relatively permanent." Instead of bringing clarity and certainty to the Agencies' jurisdiction under the CWA, the Amended Rule leaves the definition of "waters of the United States" subjective and unpredictable. Regulated parties are wholly dependent on the Agencies', courts', and citizen-activists' subjective *ex post* evaluations and cannot know on the face of the Amended Rule what conduct is prohibited.

f) Under the Amended Rule's definition of tributary, it is impossible to know whether particular features qualify as jurisdictional "tributaries" without a case-specific and subjective determination by the Agencies. The criteria set by the Amended Rule require subjective determinations such as whether the feature at issue possesses the relevant indicia of a bed, bank, and OHWM. And the Amended Rule explains that the Agencies may rely on "remote sensing and mapping information," (88 Fed. Reg. at 3083), meaning that the Agencies can make determinations remotely from a desk, using satellite images and estimation software unavailable to the public,

without actually ever viewing the "water feature" in person, and regardless of whether the purported physical characteristics are in fact observable or even present in the field.

g) To be "adjacent" to a jurisdictional water, not only must a wetland have a continuous surface connection to such water, but that connection must be such that it is "difficult to determine where 'water' ends and the 'wetland' begins." *Sackett*, 143 S. Ct. at 1341, quoting *Rapanos*, 547 U.S. at 742 (plurality). In omitting this additional limitation from the Amended Rule, the Agencies unlawfully claim the authority to deem wetlands jurisdictional because they are adjacent to jurisdictional features even though the continuous surface connection does not satisfy this limitation. *See* 88 Fed. Reg. at 3089 (adjacency may be established by a "non-jurisdictional physical feature such as a pipe, culvert, non-jurisdictional ditch, or flood gate"). Making matters worse, the preamble states that "[a] continuous surface connection does not require a constant hydrologic connection": it is only a "'physical connection' requirement." 88 Fed. Reg. at 3095; *see id.* at 3096 (continuous surface connection test "does not require surface water to be continuously present between the wetland and the tributary").

h) The Rule's expansive approach to "impoundments," which captures impoundments that are no longer navigable but that once were or that impounded waters that once were navigable but that no longer are, is contrary to *Sackett* because it removes the requirement of navigability from the test for jurisdiction, does not depend on any continuous surface connection to a jurisdictional water, and contradicts *Sackett's* holding that "a barrier separating a wetland from a water of the United States would ordinarily remove that wetland from federal jurisdiction." *Sackett*, 598 U.S. at 678, n.16.

i) The Rule excludes from WOTUS "[d]itches (including roadside ditches)" only if they are "excavated wholly in and draining only dry land and that do not carry a relatively

permanent flow of water." 88 Fed. Reg at 3142, §328.3(b)(3); *see* 88 Fed. Reg. at 3113 ("all three criteria . . . must be satisfied for a ditch to be excluded"). But ditches must be excluded from WOTUS under *Sackett* if they are not relatively permanent bodies of water described in general parlance as streams or rivers. The Rule, however, makes it impossible for Plaintiffs' members reliably to distinguish between covered tributaries and excluded ditches, and includes ditches with an insufficient connection to navigable waters to qualify as jurisdictional under *Sackett*. *See* 88 Fed. Reg at 3084 ("Tributaries are not required to have a surface flowpath all the way down to" navigable waters).

j) The Amended Rule disregards the federalism restraints on the Agencies' assertions of jurisdiction, embodied in Congress's statement in the CWA that it intended the CWA to preserve and protect the primary authority of States over the use of land and water.

k) The Amended Rule fails to establish the precision and guidance necessary so that those enforcing this law, which carries both criminal and civil penalties, do not act in an arbitrary or discriminatory way.

l) Because a violation of the CWA carries significant criminal and civil penalties, "waters of the United States" must be narrowly defined to comport with the Amended Rule of lenity—not vaguely and expansively defined as in the Amended Rule;

73. Alternatively, the Amended Rule should be vacated because 33 U.S.C. § 1362(7) fails to supply an intelligible principle to guide the Agencies' rulemaking, and thus violates Article I, section 1 of the Constitution, which vests legislative authority exclusively in Congress.

CLAIMS FOR RELIEF

First Cause of Action: Violation of 5 U.S.C. § 706(2)(A)

74. Plaintiffs incorporate by reference the preceding allegations of this Complaint.

75. The Amended Rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" in violation of 5 U.S.C. § 706(2)(A) because, among other things, the Amended Rule is unsupported by law, unsupported by the scientific and economic evidence that was before the Agencies, and is inconsistent with the plain language of the CWA.

Second Cause of Action: Violation of 5 U.S.C. § 706(2)(B)

76. Plaintiffs incorporate by reference the preceding allegations of this Complaint.

77. The Amended Rule is "contrary to constitutional right, power, privilege, or immunity" in violation of 5 U.S.C. § 706(2)(B) because, among other things, the Amended Rule exceeds the Agencies' authority under the Commerce Clause of Article I, Section 8 insofar as it regulates waters that are not channels of interstate commerce and otherwise bear no connection to interstate commerce; and violates the Due Process Clause of the Fifth Amendment to the United States Constitution insofar as it fails to give fair notice of what conduct is forbidden under the criminal provisions of the CWA and grants impermissible ad hoc discretion to the Defendants, guaranteeing arbitrary enforcement.

Third Cause of Action: Violation of 5 U.S.C. § 706(2)(C)

78. Plaintiffs incorporate by reference the preceding allegations of this Complaint.

79. The Amended Rule was promulgated "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" in violation of 5 U.S.C. § 706(2)(C) because the definition of "waters of the United States" in the Amended Rule is inconsistent with, and in excess of, the Defendants' statutory authority under the CWA.

Fourth Cause of Action: Violation of the Major Questions Doctrine

80. Plaintiffs incorporate by reference the preceding allegations of this Complaint.

81. Before an agency can decide an issue of major national significance, the agency's action must be supported by clear statutory authorization. In applying this "major questions" doctrine, the Supreme Court has denied agency claims of regulatory authority when (1) the underlying claim of authority concerns an issue of "vast 'economic and political significance,'" and (2) Congress has not clearly empowered the agency. *Util. Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014).

82. The Amended Rule regulates private conduct, requiring land owners and users to obtain permits or face severe civil and criminal liability for ordinary uses of their land, over enormous swaths of the United States, and under regulations of uncertain scope and that effectively operate as a national, federal land-use law that displaces local authority. The Amended Rule thus concerns an issue of "vast 'economic and political significance.'" As a result, the Amended Rule violates the major questions doctrine.

Fifth Cause of Action: Violation of Art. I, Sec. 1 of the Constitution, the Nondelegation Doctrine, and 5 U.S.C. § 706(2)(A), (B), and (C)

83. Plaintiffs incorporate by reference the preceding allegations of this Complaint.

84. The Amended Rule was promulgated "not in accordance with law," "contrary to constitutional . . . power," and "in excess of statutory . . . authority" because Congress failed in 33 U.S.C. § 1362(7) to supply an intelligible principle to constrain the Agencies' rulemaking, and thereby unlawfully delegated legislative powers to the Agencies that Article I, section 1 of the Constitution reserves exclusively to Congress.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

(1) declare that the Amended Rule is unlawful because its promulgation was arbitrary, capricious, an abuse of discretion, and not in accordance with law;

(2) declare that the Amended Rule is unlawful because it exceeds the government's authority under the Commerce Clause, violates the Due Process Clause of the Fifth Amendment, and is otherwise contrary to constitutional rights and powers;

(3) declare that the Amended Rule is unlawful because it is inconsistent with, and in excess of, the Defendants' statutory authority under the CWA and constitutional authority under Article I, section 1 of the Constitution;

(4) declare that the Amended Rule is unlawful because it violates the "major questions" doctrine;

(5) declare that the Amended Rule is unlawful because Congress did not delegate to the Agencies the authority to promulgate it;

(6) enter an order remanding the Amended Rule to the Agencies for further rulemaking consistent with this Court's opinion;

(7) award Plaintiffs their reasonable fees, costs, expenses, and disbursements, including attorneys' fees, associated with this litigation under the Equal Access to Justice Act, 28 U.S.C. § 2412(d); and

(8) grant Plaintiffs such additional and further relief as the Court may deem just, proper, and necessary.

Dated: November 13, 2023

Respectfully submitted,

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