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

STATES OF WEST VIRGINIA; **NORTH DAKOTA**; **GEORGIA**; and **IOWA**; *et al.*, Plaintiffs, and **AMERICAN FARM BUREAU FEDERATION**, *et al.*, Intervenor-Plaintiffs, v. **U.S. ENVIRONMENTAL PROTECTION AGENCY**, *et al.*, Defendants, and **CHIKALOON VILLAGE TRADITIONAL COUNCIL**, *et al.*, Intervenor-Defendants.	Case No. 3:23-cv-00032-DLH-ARS Hon. Daniel L. Hovland

PLAINTIFF STATES' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Just last year, this Court enjoined the Final Rule with a clear message: the Environmental Protection Agency and the Army Corps of Engineers held far too broad a view of their jurisdiction under the Clean Water Act. For starters, the Agencies' foundation was wrong. By leaning heavily on a broad reading of the significant-nexus test from a lone Supreme Court concurrence in 2006, the Agencies drew "unlimited" "boundaries"—which is to say, no boundaries at all—and offered regulated parties "little guidance" through "murky" and "unintelligible" definitions. Beyond that, the rule ran roughshod over safeguards imposed by Congress and the Constitution. The rule raised a "litany" of "other statutory and constitutional concerns"—from stretching out every category of waters the rule purported to cover, to leaving the regulated public in the dark as to how the Agencies would apply their hazy standards. These were the problems (among others) that propelled the Plaintiff States' claims for injunctive relief from the start. It was no surprise, then, that this Court held that the States' claims were likely to succeed.

Six weeks later, the Supreme Court weighed in—and confirmed it. All nine justices unanimously rejected the significant-nexus test on which the Agencies' rule partly rested. And the high court's majority dislodged load-bearing premises of the Agencies' expanded WOTUS definition; among other things, the Agencies' broad view was "inconsistent with the text and structure of the CWA" and bucked key principles of statutory construction. One might have expected the Agencies to return to the drawing board and undertake a full revision.

Instead, they shrugged. Before the ink of the Supreme Court's rebuke had dried (and without going through notice and comment), the Agencies put out a six-page rule purporting to "conform" the enjoined rule. In this "Conforming Rule," the Agencies at least excised their heavy reliance on the significant-nexus standard. But they did little to explain what was left of the

enjoined rule, much less how they plan to apply it. Beyond that, they adopted a reading different from the one the Supreme Court had *just* prescribed. And they offered nothing to fix the "litany" of "statutory and constitutional concerns" that justified this Court's injunction months earlier. The resulting Amended Final Rule, for example, still categorically includes *all* the country's interstate waters. It still leans on overbroad and confusing categories of other regulated waters like wetlands, tributaries, impoundments, and the fraught "other waters" catch-all category. And it does not mention (much less remedy) the procedural problems and constitutional flaws that plagued the enjoined rule.

In these ways, the Amended Final Rule rehashes the long-rejected 2015 Rule *and* ignores recent rulings from this Court and the Supreme Court. The Amended Final Rule does not exist within a regulatory vacuum. If it were to stand, the Plaintiff States and their citizens will pay the price. Indeed, the regulated public knows all too well the Agencies' penchant for issuing orders under threat of crushing fines and jail time for noncompliance. But when it was the Agencies' turn to comply with orders correcting their mistakes, they doubled down on them. The only thing that can drive the message home, it seems, is what the Plaintiff States seek here: an order vacating the Amended Final Rule as unlawful and remanding it to the Agencies with instructions to try again—this time within the bounds of the CWA, the APA, the Constitution, and Supreme Court precedent.

STATEMENT OF UNCONTESTED MATERIAL FACTS

1. "For most of this Nation's history, the regulation of water pollution was left almost entirely to the States and their subdivisions." *Sackett v. EPA*, 598 U.S. 651, 659 (2023). So when Congress passed the Clean Water Act, it circumscribed the Agencies' regulatory authority with a command to "recognize, preserve, and protect" the States' "primary responsibilities and rights"

over their "land and water resources." 33 U.S.C. § 1251(b). Thus, only *some* of the country's waters could fall within that authority: "navigable waters," defined as "waters of the United States," or WOTUS, "including the territorial seas." *Id.* § 1362(7), (12).

WOTUS's legal meaning has led to "decades of litigation" in the courts and headaches for "a staggering array of landowners." *Sackett*, 598 U.S. at 670-71. That's because it is "often difficult to determine whether a particular piece of property contains" WOTUS. *Id.* at 669. If even the most "mundane [of landowners'] activities" affect WOTUS on their property, they must trudge through a long and expensive administrative process to obtain complex jurisdictional determinations and federal permits or "risk [] criminal prosecution or onerous civil penalties." *Id.* at 669-70; *cf.* 33 U.S.C. §§ 1311(a), 1342, 1344 (regulating material discharge, dredge, and fill from or to WOTUS).

2. Recognizing these high stakes, the Supreme Court has been careful not to allow too broad an interpretation of WOTUS, and it has often rebuked the Agencies for trying to sweep too many waters into the CWA's bucket. In 1985, the Court "expressed concern" about agency assertion of authority over "wetlands [that] seemed to fall outside 'traditional notions of 'waters.'" *Sackett*, 598 U.S. at 665 (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33 (1985)). And in 2001, the Court barred the Agencies from regulating at "the outer limits of Congress' power" and "encroach[ing] upon a traditional state power" by reaching a migratory-bird habitat in "nonnavigable, isolated, intrastate waters." *Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs*, 531 U.S. 159, 166, 171-74 (2001) (*SWANCC*). But the Agencies responded by "expanding their interpretations" of their authority and "minimizing [the] impact" of the Court's rulings. *Sackett*, 598 U.S. at 665-66.

"It was against this backdrop" that the Court took up *Rapanos v. United States* in 2006. *Sackett*, 598 U.S. at 666. In *Rapanos*, the Court rejected the Agencies' jurisdictional grab for intrastate wetlands too far removed from navigable, interstate waters. 547 U.S. 715 (2006). A four-justice plurality held that only "relatively permanent, standing or continuously flowing bodies of water" and secondary waters with a "continuous surface connection" to them are WOTUS; an "intermittent, physically remote hydrologic connection" is not enough. *Id.* at 739-42 (plurality op.). Writing for himself alone, Justice Kennedy thought the test should turn on whether the disputed waters have a "significant nexus" to navigable waters, which meant they had a significant effect on the "chemical, physical, and biological integrity" of navigable waters. *Id.* at 779-80 (Kennedy, J., concurring in the judgment). The dissenters thought either test could apply. *Id.* at 810 (Stevens, J., dissenting).

3. In the 17 years since *Rapanos*, the Agencies issued non-binding guidance and several rules. Their 2008 guidance claimed jurisdiction if *either* the *Rapanos* plurality or concurrence test applied. *See* ECF No. 176 at ¶¶ 89-91. A 2015 Rule assumed "a muscular approach that would subject the vast majority of the nation's water features to a case-by-case jurisdictional analysis," *Sackett*, 598 U.S. at 668 (cleaned up), until this Court (and others) stayed its implementation, and another court remanded it to the Agencies for "read[ing] the term navigability out of the" CWA, ECF No. 176 at ¶¶ 93-95 (quoting *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1358 (S.D. Ga. 2019)). And in 2020, the Agencies issued the "Navigable Waters Protection Rule" ("2020 NWPR"), which adopted the *Rapanos* plurality's test alone, only to later ask that it be remanded. *See id.* at ¶¶ 96-97 (citing 85 Fed. Reg. 22,250 (Apr. 21, 2020) and *Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949 (D. Ariz. 2021) (vacating rule)).

In December 2021, the Agencies published a new proposed rule. 86 Fed. Reg 69,372 (Dec. 7, 2021). Seven weeks later, the Supreme Court granted certiorari in *Sackett v. EPA*, 142 S. Ct. 896 (2022), a case that put the definition of WOTUS again before the Court. Yet, even with the *Sackett* ruling on its way, the Agencies finalized and published their proposal on January 18, 2023, and set the Final Rule to take effect on March 20, 2023. *See* 88 Fed. Reg. 3004 (Jan. 18, 2023) ("Final Rule"). With limited exceptions, the Final Rule reached five categories of land and water:

(1) traditional navigable waters, territorial seas, and interstate waters;
(2) impoundments of WOTUS;
(3) tributaries of waters in the first category that meet either *Rapanos* test;
(4) wetlands adjacent to primary waters or many impoundments or tributaries; and
(5) a catch-all bucket of other intrastate waters that meet either *Rapanos* test.

Id. at 3142. The Agencies said the Final Rule was "founded on the familiar framework of the longstanding 1986 regulations," and the "familiar pre-2015 definition" of WOTUS. *Id.* at 3005, 3007. But really, it (again) expanded the Agencies' regulatory authority. ECF No. 176 at ¶¶ 106-110 (detailing the Final Rule's similarities to the 2015 Rule).

Citing these and other issues, the Plaintiff States and others around the country sued to declare the Final Rule unlawful and moved to preliminarily enjoin its enforcement. *See* ECF Nos. 1, 44-1; *see also* ECF No. 176 at ¶¶ 104-111. The Court granted the Plaintiff States' motion and enjoined the Agencies from enforcing the Final Rule in those states during the suit. *See* ECF No. 131. Just days earlier, a federal court in Texas had granted a similar motion filed by the States of Texas and Idaho. *See* ECF No. 176 at ¶ 112. Both courts held that the Plaintiff States are likely to succeed on the merits of their claims because of problems related to (1) the Final Rule's "purported use of the significant-nexus test from Justice Kennedy's *Rapanos* concurrence," and (2) "critical statutory, notice, and constitutional concerns." *Id.* ¶ 113; *see also id.* at ¶¶ 114-125.

4. In May 2023, the Supreme Court decided *Sackett*. The Court unanimously rejected the significant-nexus test. *See* ECF No. 176 at ¶ 129 (citing *Sackett*, 598 U.S. at 679 & 684 (majority opinion), 715-76 (concurrence in the judgment)). And the Court's majority held that the *Rapanos* plurality's relatively-permanent test was the proper standard. *Id.* at ¶¶ 130-131 (citing *Sackett*, 598 U.S. at 671-78). The majority also singled out and rejected the Agencies' position on covered wetlands in the Final Rule; it was "inconsistent with the text and structure of the CWA" and "clash[ed] with background principles of construction that apply to the interpretation of the relevant statutory provisions." *Id.* at ¶ 132 (quoting *Sackett*, 598 U.S. at 679-84 (cleaned up)).

The Agencies responded by publishing a six-page final rule that purported to "conform" the Final Rule to "the Supreme Court's interpretation of the Clean Water Act in the [*Sackett*] decision" by "amend[ing] the provisions of the agencies' definition of [WOTUS] that are invalid under" that ruling. 88 Fed. Reg. 61,964 (Sept. 8, 2023). According to the Agencies, "the implementation guidance and tools in the [Final Rule] preamble that address the regulatory text that was not amended by the conforming rule … generally remain relevant to implementing the [Final Rule], as amended." *See* Joint Coordination Memo. to the Field Between the U.S. Dep't of the Army, U.S. Army Corps of Eng'rs & the U.S. Env't Prot. Agency (Sept. 27, 2023), https://bit.ly/3SDQ4yi; *cf.* ECF No. 176 at ¶ 144.

But because the "handful of revisions" the Conforming Rule made to the Final Rule did not resolve the Plaintiff States' claims, the Plaintiff States were forced to file an amended complaint and continue their challenge. ECF No. 176 at ¶ 142; *see also id.* at ¶¶ 141-229.

ARGUMENT

The Administrative Procedure Act empowers the Court to look at "the [existing] administrative record," *Camp v. Pitts*, 411 U.S. 138, 142 (1973), and "decide all relevant questions

of law, interpret constitutional and statutory provisions, and determine" terms to "hold unlawful and set aside" the Amended Final Rule on each claim raised in the Plaintiff States' amended complaint. 5 U.S.C. § 706. The Court has already said the Plaintiff States are likely to succeed on the merits of those claims as they applied to the Final Rule. *See* ECF No. 131 at 16-29. And even as to the Amended Final Rule, that was still surely right. The tweaked rule continues to violate the CWA by applying an ill-defined standard and doubling down on all the statutory and constitutional concerns that plagued the Final Rule. *See* 5 U.S.C. § 706(2)(C). It offends the APA by importing whole cloth all the flawed findings, rationales, and process errors from the enjoined rule. *See id.* § 706(2)(A), (D). And it proceeds with so broad and vague a scope that it runs roughshod over the Commerce Clause and two constitutional amendments. *See id.* § 706(2)(B). The Court should finish what it started (and what the Agencies refused to end). It should hold, vacate, and set aside the Amended Final Rule as unlawful.

I. The Amended Final Rule Violates the Clean Water Act.

The Court can and should deem the Amended Final Rule unlawful and set it aside for "exce[eding] [the Agencies'] statutory jurisdiction [and] authority" granted to it under the CWA. 5 U.S.C. § 706(2)(C). This provision guards an important separation-of-power principle: "An agency … literally has no power to act—including under its regulations—unless and until Congress authorizes it to do so by statute." *FEC v. Cruz*, 142 S. Ct. 1638, 1649 (2022) (cleaned up). So, an agency can never issue a regulation that contradicts statutory text. *See Brown v. Gardner*, 513 U.S. 115, 122 (1994). And "analysis of the statutory text"—and thus the scope of the agency's authority—must also be read against "established principles of interpretation." *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 112 (2014).

The key text here is Congress's limitation on the Agencies' authority over only "navigable waters," meaning "the waters of the United States, including the territorial seas." 33 U.S.C.

§ 1362(7). Congress used the word "navigable" to "show[] that [it] was focused on 'its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made,'" that is, "bodies of navigable water like rivers, lakes, and oceans." *Sackett*, 598 U.S. at 672 (quoting *SWANCC*, 531 U.S. at 172 and citing *Rapanos*, 547 U.S. at 734 (plurality op.)). And, as the Supreme Court recently confirmed, Congress meant for "waters" to "encompass[] only those relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams, oceans, lakes, and rivers." *Id.* at 671 (cleaned up). That reading tracks both the way Congress has used "waters" in other parts of the U.S. Code, and the way the Supreme Court has viewed "waters" in the CWA over the years—including in *Riverside Bayview* and *SWANCC*. *Id.* at 672-73.

Many parts of the Amended Final Rule run headlong into this statutory text—even (and, in some ways, especially) after the Agencies' purported attempt to "conform" the enjoined rule to the Supreme Court's *Sackett* decision. Any one of these problems provides good reason to hold, vacate, and set aside the Amended Final Rule as unlawful.

A. The Agencies Have Misapplied Clear Supreme Court Precedent.

While the Conforming Rule claims to bring the Final Rule in line with the Supreme Court's ruling in *Sackett*, it fails on that front in two ways.

First, the Amended Final Rule does not lawfully define the "relatively permanent" standard that drives the jurisdictional analysis, much less disavow the Final Rule's openly hostile understanding of that test pre-*Sackett*. The Supreme Court in *Sackett* emphasized the centrality of the relatively permanent standard in defining WOTUS: "[T]he CWA's use of 'waters,'" held the Court, "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."'" *Sackett*, 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739 (plurality op.)). As applied to wetlands, for example, this standard means that the CWA requires the Agencies to "establish 'first, that the adjacent [body of water constitutes] ... [WOTUS] (*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). But the Conforming Rule barely mentions the relatively-permanent standard—and only in passing. *See* 88 Fed. Reg. at 61,965-66. By failing to articulate the contours of this standard, much less confirm any planned adherence to them, the Agencies betray their view of that standard as an obstacle to their expansive view of jurisdiction, not a limit on it.

That omission is critical here. Without offering anything about what relative permanence really means, the Amended Final Rule remains as problematic as the rule the Court enjoined last year. *See, e.g.*, ECF No. 176 at ¶¶ 107 (discussing problems with the Final Rule's treatment of "relatively permanent" tributaries), 124 (citing this Court's concerns with the Final Rule's use of the *Rapanos* plurality's "relatively permanent standard," including Agencies' failure to define it). Taking the Conforming Rule at its word, the Agencies still offer a circular, faux definition of "relatively permanent" that covered "waters that are relatively permanent, standing, or continuously flowing." 88 Fed. Reg. at 3038; *see also id.* at 3066 (same). The Final Rule refused to provide useful benchmarks like minimum flow durations or references to sources. *See id.* at 3085-87. It suggested that "relatively permanent flow" can result merely from a few intense storms. *Id.* at 3086; *see also id.* at 3113 (suggesting that waters are relatively permanent whenever there is "continuously [flowing water] during certain times of the year for more than a short duration in direct response to precipitation"). And it did not mention the "geographical features"

described in both *Rapanos* and *Sackett*, which are supposed to help define relative permanence. *Sackett*, 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739 (plurality op.)). Instead, the Final Rule proposed to rely—in some ill-defined way—on complicated mapping, modelling, and "geomorphic indicator[]" assessment to determine relative permanence. 88 Fed. Reg. at 3087-88.

What the Agencies have said about the test only complicates the matter further. Remember: in the Final Rule, the Agencies harshly criticized the 2020 NWPR—and "the [*Rapanos*] plurality's limitation of jurisdiction to 'relatively permanent' waters and those with a 'continuous surface connection' to those waters [that] pervade[d] the 2020 NWPR"—as "restrict[ive] [to] the scope of the statute using limitations Justice Kennedy viewed as anathema to the purpose and text of the [CWA]." 88 Fed. Reg. at 3042. The most they could say about the relatively permanent test is that it can sometimes be "administratively useful." *Id.* at 3007, 3034, 3038, 3042, 3090. But ultimately, they provided a host of reasons why they reject that interpretation of WOTUS as "insufficient as the sole standard for geographic jurisdiction under the" CWA and "inconsistent with the objective of the [CWA], the science, and the case law." *Id.* at 3090. This puts in a whole new light the Agencies' claimed justification for promulgating the Conforming Rule after *Sackett* in the way they did—especially their statement that the Conforming Rule "does not involve the exercise of the agencies' discretion" whatsoever. 88 Fed. Reg. at 61,965, 61,967, 61,968.

The Agencies have thus exchanged one set of "murky" and "unintelligible" definitions for another—again "provid[ing] little guidance to parties impacted by the regulations." ECF No. 131 at 23. Assuming the Conforming Rule leaves in place the openly hostile understanding of "relatively permanent" that existed in the Final Rule, then that definition is inconsistent with the CWA (as construed by the *Sackett* majority opinion and the *Rapanos* plurality opinion). Among

other things, the Amended Final Rule would apply to intermittent, ephemeral, perennial, seasonal, and other flows that cannot be called "relatively permanent" under any ordinary understanding of that phrase. For members of the regulated public facing "crushing consequences even for inadvertent [CWA] violations," *Sackett*, 598 U.S. at 660 (cleaned up), this is a nightmare scenario.

Second, and similarly, the Amended Final Rule does not clearly or lawfully define the "continuous surface connection" standard that, working with relative permanence, drives the jurisdictional analysis. Here again, the Conforming Rule contains no analysis of that critical phrase. And if the Amended Final Rule means to leave in place the understanding from the Final Rule, then that understanding is fatally flawed, relying as it does on connections through non-jurisdictional features, connections that *lack water*, and connections that are not "continuous" based on any ordinary understanding of that word. *See, e.g.*, 88 Fed. Reg. at 3095 (refusing to require a hydrologic connection or connection through jurisdictional waters and instead permitting connection through any discrete feature, like a pipe); *id.* at 3096 ("A continuous surface connection is not the same as a continuous surface water connection."); *contra Sackett*, 598 U.S. at 678 (contemplating a water surface connection except for "temporary interruptions … because of phenomena like low tides or dry spells"). The CWA's text, as interpreted in *Sackett* and the *Rapanos* plurality opinion, demands more.

Under the Amended Final Rule as it now stands, landowners and the States must brace themselves for the Agencies' application of the Rule to reach entire categories of waters and lands that ought to be excluded under both *Rapanos* and *Sackett*, including perennial, intermittent, and ephemeral flows, isolated waters, and mostly dry land features. This outcome cannot stand.

B. The Agencies Still Seek to Regulate with Vague and Overbroad Categories.

The above flaws spoil each defined category of covered waters in the Amended Final Rule, which are just as problematic and just as unlawful as the enjoined rule before it.

1. Interstate waters.

The Agencies remain intent on pressing their "categorical inclusion and extension to all interstate waters" in a way that reads "navigability out of the Act." ECF No. 131, at 17-18, 20. To hear them say it, the Agencies are conforming the Final Rule "with the decision in *Sackett*" by "removing 'interstate wetlands'" and recognizing that "the provision authorizing wetlands to be jurisdictional simply because they are interstate is invalid." 88 Fed. Reg. at 61,966. But the only change the Conforming Rule made to this category in the CFR was to cut off the phrase "including interstate wetlands" at the end of "interstate waters." *See* ECF No. 176 at ¶ 143. And they made no changes at all to the CFR as to any other category of interstate waters. This narrow editing is problematic for at least two reasons.

First, the change the Agencies made regarding interstate wetlands is incoherent. The sweeping interstate-waters category the Agencies originally included in the Final Rule (and the corresponding CFR provision) deployed the phrase 'including interstate wetlands' not as an "all-embracing definition, but [] simply an illustrative application of the general principle" that all interstate waters are per se jurisdictional WOTUS. *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941). And even though the category was unlawful, the Agencies interpreted it consistent with their expansive view of jurisdiction. *See* 2A N. Singer & J. Singer, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 47.23, p. 417 (7th ed. 2007) ("When 'include' is utilized, it is generally improper to conclude that entities not specifically enumerated are excluded."); *see Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577-78 (1994) ("The text employs the term[] 'including' … to indicate the 'illustrative and not limitative'

function of the examples given."); *see generally Include*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("To contain as a part of something. The participle *including* typically indicates a partial list.").

But therein lies the problem: Simply dropping the nonessential illustrative phrase "including interstate wetlands" from the CFR does nothing to narrow the scope of the Agencies' authority over interstate waters. Elsewhere in the Conforming Rule, the Agencies say that they have "amended [paragraph (a)(1)(iii)] … to no longer include interstate wetlands." 88 Fed. Reg. at 61,967. Yet if the Agencies had truly intended to exclude interstate wetlands from the interstate waters category, they could have done so—by *excluding* them explicitly. They did not. So according to the plain text of the CFR, interstate wetlands are still open to per se regulation. The Agencies' actions here are, at best, confusing, and, at worst, duplicitous—and all cold comfort to the Plaintiff States and their citizens who face "criminal penalties and steep civil fines," *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1489 (2020) (Alito, J., dissenting), "even for inadvertent violations," *Sackett*, 598 U.S. at 660 (quoting *Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 602 (2016) (Kennedy, J., concurring)).

Second, the Conforming Rule portends problems far graver than confusion over the regulation of interstate wetlands: the Agencies largely fail to even *mention* navigability in laying out their future authority over *any* interstate waters, much less factor it in. *See* 88 Fed. Reg. at 61,964-69 (passively mentioning navigability in brief summaries of past legislation, the Supreme Court's *Rapanos* decision, and the Final Rule). So the Agencies still plan to treat *any* "rivers, lakes, and other waters that flow across or form a part of State boundaries" as necessarily jurisdictional regardless of their navigability or their connection with an interstate navigable water. Under the recent rulings from this Court and the Supreme Court, this omission (and the broad

category of interstate waters it leaves in place) is equal parts unlawful, impractical, and unacceptable.

In *Sackett*, the Supreme Court went out of its way to highlight that, "[w]hile its predecessor encompassed 'interstate or navigable waters,' … the CWA prohibits the discharge of pollutants into *only* 'navigable waters,' which it defines as 'the waters of the United States, including the territorial seas.'" 598 U.S. at 661 (quoting and comparing 33 U.S.C. § 1160(a) (1970 ed.) with 33 U.S.C. §§ 1311(a), 1362(7), (12)(A) (2018 ed.)) (emphasis added). This change confirms that the Agencies, as "part[ies] asserting jurisdiction," must establish both (1) that a body of water is "a relatively permanent body of water connected to traditional interstate navigable waters," and (2) that the former body of water "has a continuous surface connection with [the latter] water, making it difficult to determine where the [latter] 'water' ends and the [former water] begins." *Id.* at 678-79 (quoting *Rapanos*, 547 U.S. at 742, 755 (plurality op.)). The link between navigability and interstate waters, therefore, is inextricable. And any regulation—like the Amended Final Rule—that purports to regulate interstate waters without seriously addressing it is, by default, dead on arrival.

This Court got right at this issue, too, when rejecting the Final Rule's "categorical extension of federal jurisdiction over all interstate waters, regardless of navigability." ECF No. 131 at 27; *see also id.* at 17. Citing the analysis from a Texas district court opinion issued just weeks earlier, the Court agreed that the Final Rule's attempt to "regulate 'interstate waters, regardless of their navigability'"—much less "any limiting principle"—essentially "reads 'navigability out of the [CWA].'" *Id.* at 17-18 (quoting *Texas v. EPA*, 662 F. Supp. 3d 739, 755 (S.D. Tex. 2023), *appeal dismissed*, No. 23-40306, 2023 WL 8295928 (5th Cir. Oct. 6, 2023)).

Such a sweeping regulation, held the Court, "is of significant constitutional import" and triggers "serious constitutional concerns." *Id.* at 27.

All the Court's concerns are alive as ever in the Amended Final Rule.

For one, the Amended Final Rule made no attempt to answer the Court's question of how anything close to a "permissible construction of the [CWA's]" text could "support making every wetland, stream, tributary or other water traversing a border subject" to the sort of "unrestrained federal jurisdiction" the Agencies want to wield. ECF No. 131 at 20. Try as they might to rehash their appeal to CWA "predecessors" that referred to interstate waters, the Agencies cannot ignore that Congress did *not* include that language in the CWA, and thus did not intend those waters to be automatically covered. *See Planned Parenthood, Minn., N.D., S.D. v. Rounds*, 686 F.3d 889, 896 (8th Cir. 2012). And where, as here, "the words of" the CWA "differ from those of" its predecessor statute "on the same or related subject," it is presumed that "Congress must have intended them to have a different meaning." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444 (D.C. Cir. 1988). As the Supreme Court noted specifically, "[w]hile its predecessor encompassed 'interstate or navigable waters,' … the CWA prohibits the discharge of pollutants into only 'navigable waters.'" *Sackett*, 598 U.S. at 661 (contrasting 33 U.S.C. § 1160(a) (1970 ed.) with 33 U.S.C. §§ 1311(a), 1362(7), (12)(A) (2018 ed.)).

For another, the Amended Final Rule "raises [the same] serious federalism questions" as the Final Rule before it. ECF No. 131 at 18. Although "federally regulating some interstate waters may be necessary to carry out Congress's intent to protect the nation's waters," the "plain text of [the CWA] indicates that Congress anticipated that federal jurisdiction over at least some interstate waters would not be consistent with the Act and its 'purpose' to preserve the 'primary state responsibility for ordinary land-use decisions.'" *Id.* (quoting *Texas*, 662 F. Supp. 3d at 755). By

asking the Court to bless their categorical jurisdiction over all interstate waters, regardless of navigability, the Agencies force the Court to ignore the CWA's text—a choice courts are charged with avoiding. *See Texas*, 662 F. Supp. 3d at 755.

The Court's other concerns with the interstate-waters category went unaddressed in the Amended Final Rule, too. "Due-process concerns" still plague the rule because it subjects unwitting landowners to crushing penalties for a wrong guess at solving the Agencies' jurisdictional riddle. ECF No. 131 at 17-18. The Commerce Clause issue remains live given the limits to "the exercise of Commerce Clause authority under the [CWA]" and the requirement that "regulations must in some manner be tied to navigability to withstand a constitutional challenge." *Id.* at 28. And it remains "constitutionally troublesome" that the Agencies have made "such [a] major policy decision[]" as to "exercise [] jurisdiction over all rivers, lakes, and other waters that flow across state boundaries, no matter how small or isolated and regardless of navigability"—that is, a "significant portion of American land mass, water, and economy"—"without clear authorization by Congress" to do so. *Id.* at 28-29. By ignoring these problems and trying again to regulate with a "categorical extension of federal jurisdiction over all interstate waters, regardless of navigability" as the Final Rule did (and now the Amended Rule does), the Agencies have betrayed a sharp disregard for the law as written and the Court's interpretation of it in this case.

* * * *

At bottom, the Conforming Rule marks the third time the Agencies have promulgated a rule that featured this deficient categorical inclusion. The Agencies first tried and failed with the 2015 Rule. *See Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1360 (S.D. Ga. 2019) (an attempt to include all interstate waters as WOTUS "extends beyond [the Agencies'] authority under the CWA"). They tried again with the Final Rule, only to have this Court (and one other) be rightly

skeptical of it. *See* ECF No. 131 at 17-18 (citing *Texas*, 662 F. Supp. 3d at 755 ("This is not the first time the Agencies have read navigability out of the Act.")). And here we are again with the Conforming Rule. 88 Fed. Reg. at 61,966 (excising only the phrase "including interstate wetlands"). It seems they must be told once again—and this time through a grant of summary judgment and a vacatur-and-remand of the Amended Final Rule.

2. Impoundments.

The Amended Final Rule still unlawfully extends its jurisdiction over impoundments. As it did for the other categories of regulated waters, the Agencies failed to address in the Conforming Rule any of the conflicts between the Final Rule's "treatment of impoundments … and the text of the [CWA]" identified by the Court. ECF No. 131 at 20-21. And the Agencies never tried to assuage the Court's doubt "that Congress intended the [CWA] to empower the EPA to regulate impounded waters merely because they were once [WOTUS]." *Id.* at 21. While impoundments "typically do have a hydrologic connection to a navigable water, [] that is not always the case." *Id.* And it certainly is no *more* the case now than it was when the Court's injunction order issued last year, or than it was when another court rejected a similar flaw that plagued the 2015 Rule. *See Georgia*, 418 F. Supp. 3d at 1363-64 (finding that rule violated the CWA when it "categorically cover[ed] all adjacent waters to all tributaries").

The Court need look no further than the text of the Conforming Rule to see that the same flaws that doomed the impoundments category for the Final Rule made their way into the Amended Final Rule. *See* 88 Fed. Reg. at 61,965 (mentioning the word "impoundments" a single time in a summary of the Final Rule); *cf.* 88 Fed. Reg. at 3075 (declaring that the Agencies will assert jurisdiction over impounded waters that were "jurisdictional under [the Final Rule]'s definition at the time the impoundment was created"), 3077-78 (allowing to be jurisdictional waters with "no outlet or hydrologic connection to the tributary network" if they would have previously qualified).

Once again, the CWA does not empower the Agencies to regulate isolated waters merely because they were once "waters of the United States" in the near or distant past. *Cf. Carr v. United States*, 560 U.S. 438, 448 (2010) (explaining that statutes written in the present tense generally do not embrace the past). And the Supreme Court recently confirmed it. *Cf. Sackett*, 598 U.S. at 678 n.16 (noting that, once a barrier is constructed that separate wetlands from covered "waters," the wetlands are no longer jurisdictional waters if the barrier was lawfully erected).

The Agencies will no doubt seek to shield this unlawful category using footnote dictum from *S.D. Warren Co. v. Me. Bd. of Env't Prot.*, 547 U.S. 370, 379 n.5 (2006) to argue (again) "that impounding covered waters does not make them non-jurisdictional." ECF No. 92 at 13. And once again they will have missed the point. The issue in this case does not turn on whether private control can take water outside the scope of the CWA—citing the prospect of "private ownership" of "running water in a great navigable stream" from another case, the Supreme Court made clear that it is "inconceivable." *S.D. Warren Co.*, 547 U.S. at 379 n.5 (quoting *United States v. Chandler–Dunbar Water Power Co.*, 229 U.S. 53, 69 (1913)). The point, however, is that the CWA provides no textual basis to justify what the Agencies are attempting to do here: conclude that impounded waters forever remain WOTUS if they were once so in the past. That remains just as wrongheaded as it was when the Court enjoined enforcement of any decisions based on that flawed reasoning last year. The Court was right then to be "skeptical that Congress intended the [CWA] to empower" that kind of reading. ECF No. 131 at 20-21. And it will be right again here to declare the same reading unlawful and set it aside under the APA.

3. Tributaries.

Like each of the other categories in the Final Rule, the Court found the Agencies' broad-brush "treatment of tributaries … suspect," too. *See* ECF No. 131 at 21. And as they did for each of the other categories in the Amended Final Rule, the Agencies did nothing in the Conforming

Rule to calm this Court's fears about those problems; instead, they ignored the Court's holding and pressed onward to regulate tributaries as if nothing changed. It remains the case that the Agencies deem a watercourse a tributary if it "eventually" makes its way, "directly or indirectly," to a traditional navigable water, territorial sea, or interstate water by any wet *or dry* waterway (even excluded ones), such as wetlands, ditches, or waste treatment centers. 88 Fed. Reg. at 3080; *see also id.* at 3084 (describing how a "tributary" could include one that flows through "another stream" that in turn flows "only in direct response to precipitation").

According to the Agencies, waters declared as tributaries need only some "relatively permanent" connection to a navigable water, territorial sea, interstate water, or impoundment to qualify as WOTUS—even if they "may run dry [for] years." 88 Fed. Reg. at 3085; *contra* BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "tributary" to mean "[a] stream flowing directly or indirectly into a river"). But as the Court has already pointed out: the Final Rule never defined "relatively permanent." ECF No. 131 at 22; *see also* ECF No. 176 at ¶¶ 107 (discussing problems with the Final Rule's treatment of "relatively permanent" tributaries), 124 (citing this Court's concerns with the Final Rule's use of the "relatively permanent standard" from the *Rapanos* plurality opinion, including the failure to define it). And as a clear reading of the Conforming Rule shows, the Agencies offered the Court nothing to explain how the Agencies see it fitting in with the 141-page Final Rule—the vast majority of which the Agencies refused to revisit.

Leaving this convoluted arrangement in place has first-order consequences beyond just the category itself; it also muddies the waters as to the "when" and "how" exclusions for, say, certain ditches and swales will operate with any sort of meaning. *See* 88 Fed. Reg. at 3112-17. A manmade ditch, for example, may appear to fit squarely within the exemption provided right up until the moment an on-the-ground federal official somehow determines that it was "excavated

wholly in and draining only dry land," "do[es] not carry a relatively permanent flow of water," or somehow "contribute[s] to a tributary's surface hydrology," and is thus now jurisdictional WOTUS. *Id.* at 3087, 3144; *cf.* Exs. B, ¶ 14; E, ¶ 11; H, ¶ 5 (discussing confusion over the Amended Final Rule's treatment of ditches). The same can be said for other categories in many of the Plaintiff States—from the "thousands of miles of ephemeral and intermittent waters present in West Virginia," Ex. H, ¶¶ 5, 10, to the Amended Final Rule's "woefully inadequate" consideration of "Alaska-specific conditions," Ex. A, ¶¶ 6, 9-12, to the "prairie pothole region … which cover[s] a significant portion of the North Dakota landscape" and other "geographic features … which must be cross to construct … pipeline infrastructure," Ex. C, ¶ 7-10, 15; *see also* Ex. D, ¶ 8; Ex. E, ¶ 11, to the mere discovery of "water-stained leaves" or stitched-together waters from the same catchments across any number of the Plaintiff States, 88 Fed. Reg. at 3087-88. *See, e.g.*, *Treacy v. Newdunn Assocs., LLP*, 344 F.3d 407, 417 (4th Cir. 2003) (describing Agencies' view that roadside ditch was a tributary).

What does this mean for the Plaintiff States and the rest of the regulated public? Nothing good (or even predictable). It means the Agencies may still try to sweep up ephemeral and intermittent streams as WOTUS. It means that "nonnavigable, isolated, intrastate waters," generally, may be considered WOTUS. *SWANCC*, 531 U.S. at 169; *see North Dakota*, 127 F. Supp. 3d at 1056 (the "breadth of the definition of a tributary … allows for regulation of any area that has a trace amount of water so long as the physical indicators of a bed and banks and an ordinary high water mark exist" (cleaned up)); *Georgia*, 418 F. Supp. 3d at 1361-62. And it means that the Court's earlier holding—that it is not enough that "water [may] eventually get[] to a traditional navigable water, territorial sea, or interstate water" to qualify as jurisdictional WOTUS, ECF No. 131 at 21 (citing *North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015) as standing

for the same proposition)—will be ignored. With a new rule, the Agencies could have at least tried to track the Supreme Court's paring down of this jurisdictional category following *Sackett*, but they did no such thing. *Cf. Sackett*, 598 U.S. at 678 n.16 (noting that, once a barrier is constructed that separate wetlands from covered "waters," the wetlands are no longer jurisdictional waters if the barrier was lawfully erected).

4. Wetlands.

The Amended Final Rule does no better when deciding which wetlands should be considered jurisdictional WOTUS. That category already started out on shaky footing under the Final Rule. The Court described it as "plagued with uncertainty," ECF No. 131 at 21-22, and for good reason. By "redefin[ing] 'continuous surface connection' to cover waters that lack even minimal 'constant hydrologic connection,'" the Agencies have rendered even the most "remote" of wetlands "arguably [] covered under the [Final Rule]." *Id.* at 22; *see* 88 Fed. Reg. at 3095 (deeming "adjacent" wetlands covered if they bear a "continuous surface connection" with "relatively permanent" impoundments or tributaries, but redefining "continuous surface connection" to cover waterbodies that lack even the most minimal "constant hydrologic connection"). And that cannot do.

Like the Agencies' other categories of regulated waters, the chaos and confusion over the definition of qualified wetlands was avoidable. That is especially given the *Sackett* ruling on this exact category under the CWA—a ruling the Agencies knew was coming almost a *year* ahead of the date they decided to press ahead and publish the Final Rule. *See Sackett*, 142 S. Ct. 896; 88 Fed. Reg. 3004 (Jan. 18, 2023). Yet, instead of waiting for *Sackett* to come—or even taking *Sackett* to heart and making it the centerpiece of a regulatory redo once it issued—the Agencies tossed a two-paragraph severability provision in the Final Rule, *id.* at 3135, and then published a

six-page "conforming" addendum with minor revisions that treated *Sackett* as a speedbump, *see* ECF No. 176 at ¶¶ 143-144. That is nowhere near adequate.

To make matters worse, even the revisions do not accurately reflect *Sackett*'s holding—specifically as to the proper definition of "adjacent." While the Conforming Rule rightly "conform[ed] [the Final Rule] with *Sackett*" by "remov[ing] the significant nexus standard," its "amend[ed] []definition of 'adjacent'" did not. 88 Fed. Reg. at 61,966. It is not enough to define "adjacent" wetlands in the negative by saying that they must be more than just "bordering, contiguous, or neighboring ... [or] separated from other [WOTUS] by man-made dikes or barriers, natural river berms, beach dunes and the like." *Id.* Under *Sackett*, they must be "indistinguishably part of a body of water that itself constitutes 'waters' under the CWA." 598 U.S. at 676. "Wetlands that are separate from traditional navigable waters [therefore] cannot be considered part of those waters, even if they are located nearby." *Id.*

Thus, *only* wetlands that are "as a practical matter indistinguishable from waters of the United States" are WOTUS (and jurisdictional), which is to say, "it is 'difficult to determine where the 'water' ends and the 'wetland' begins.'" *Sackett*, 598 U.S. at 678, 684 (quoting *Rapanos*, 547 U.S. at 742, 755 (plurality op.)). "That occurs when wetlands have 'a continuous surface connection to bodies that are [WOTUS] in their own right, so that there is no clear demarcation between 'waters' and wetlands.'" *Id.* (quoting *Rapanos*, 547 U.S. at 742 (plurality op.)).

The Agencies continue to overlook this key limitation on their permissible authority, especially by continuing to embrace the overbroad definition of "continuous surface connection" that was first conceived in the Final Rule. *See, e.g.*, 88 Fed. Reg. at 3095 (refusing to require a hydrologic connection or connection through jurisdictional waters and instead permitting connection through any discrete feature, like a pipe); *id.* at 3096 ("A continuous surface connection

is not the same as a continuous surface water connection."); *contra Sackett*, 598 U.S. at 678 (contemplating a water surface connection except for "temporary interruptions … because of phenomena like low tides or dry spells"). And in refusing to specify that they will assess their jurisdiction over wetlands in the way the Supreme Court ordered in *Sackett*, the Agencies leave the door open for them to once again make standardless determinations that wetlands are WOTUS even in the absence of a continuous surface water connection. The only way left to fix this serious problem is for the Court to vacate the Amended Final Rule and remand it to the Agencies with specific instructions to do so.

5. The catch-all category.

Lastly, the Conforming Rule reups with minor modifications the broad (and novel) catch-all category in the Final Rule of purely intrastate waters that are purportedly "relatively permanent" and bear a "continuous surface connection" with a traditionally navigable water. *See* 88 Fed. Reg. at 61,966 & n.2. But this catch-all imports the overbroad understandings of those two operative phrases from previous categories of waters, 88 Fed. Reg. at 3098, both of which the Court has already deemed problematic. *See* ECF No. 176 at 22-23; *cf.* ECF No. 131 at ¶¶ 122-124. And it expressly covers "standing water" that "do[es] not have a flowing outlet to the tributary system." 88 Fed. Reg. at 3102. Meaning that an isolated "oxbow pond" can be deemed jurisdictional so long as it is "near" a "traditional navigable water" and connected to a dry swale land form. *Id.* at 3102.

This Court has already once rebuked the Agencies for moving forward with a rule that "allows for case-specific assertions of jurisdiction … over a broad category of 'waters,'" which was sure to "encompass[] intrastate, non-navigable features that were previously considered to be 'isolated' and not within the [CWA's] jurisdiction." ECF No. 131 at 23 (citing 88 Fed. Reg. 3024 and quoting *SWANCC*, 531 U.S. at 167, 171). And once again, the Agencies decided not to heed

that warning. Without a final judgment from the Court, the Agencies are spring-loaded to regulate as jurisdictional WOTUS water and land that is not a part of any stream network at all. *Contra SWANCC*, 531 U.S. at 171 (explaining that WOTUS does not embrace "nonnavigable, isolated, intrastate waters"). That cannot stand.

C. The Agencies Still Violate Key Principles of Statutory Interpretation

Just as they were in the Final Rule, all these category-based problems are amplified by other problems baked into the regulation. This Court identified some of them when it pointed out the "serious federalism questions and concerns" endemic to the Final Rule—especially as to the Final Rule's "inclu[sion] [of] all interstate waters irrespective of any limiting principle." ECF No. 131 at 28; *see also Texas*, 662 F. Supp. 3d at 755 (same). And the Supreme Court in *Sackett* explained how the Final Rule's heavy reliance on the significant nexus test "clashes with background principles of construction that apply to the interpretation of the relevant statutory provisions," including the federalism canon. *Sackett*, 598 U.S. at 679. The Agencies tried to address the Supreme Court's concerns by removing the significant-nexus test. But by leaving untouched and unaddressed the rest of the problems in the regulation, key problems persist.

1. The federalism clear statement canon.

The Amended Final Rule still offends the federalism canon. Congress must provide a "clear statement" if it wants to shift the "usual constitutional balance of federal and state powers." *Bond v. United States*, 572 U.S. 844, 858 (2014) (cleaned up); *see also Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (requiring "exceedingly clear language" before construing a statute to alter the balance of federal and state power); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (requiring "clear and manifest purpose" to override the "historic police powers of the States"). Specifically, this clear-statement requirement is triggered when Congress tries to "legislate in areas traditionally regulated by the States" or

"impose its will" on them. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Anything short of an "exceedingly clear" or "unmistakably clear" direction is insufficient. *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849-50 (2020); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989).

No one disputes that land and water resources fall within one of the States' traditional areas of regulation. The States' authority to regulate intrastate lands and waters "is perhaps *the* quintessential state activity," *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982) (emphasis added), and it is as old as the Republic itself. *See also City of Edmonds v. Oxford House*, 514 U.S. 725, 744 (1995) ("land-use regulation is one of the historic powers of the States"); *cf.* ECF No. 131 at ¶¶ 28-52 (detailing land and water regulations in each of the Plaintiff States). Put simply: Waters within a State's borders are that "State's legitimate legislative business." *S.D. Warren Co.*, 547 U.S. at 386. That is why, for decades now, Congress has given "purposeful and continued deference to state water law," and it has repeatedly "recognized," "encouraged," and "protect[ed]" the States' rights over their own waters. *California v. United States*, 438 U.S. 645, 653-54 (1978). The CWA adheres to this recognition: It "recognize[s], preserve[s], and protect[s] the primary responsibilities and rights of States" when it comes to pollution mitigation and "the development and use … of land and water resources," 33 U.S.C. § 1251(b). The Supreme Court has, too. *See SWANCC*, 531 U.S. at 174 ("[R]egulation of land use [is] a function traditionally performed by local governments."); *Sackett*, 598 U.S. at 659 ("For most of this Nation's history, the regulation of water pollution was left almost entirely to the States and their subdivisions.").

Here, the Amended Final Rule upsets the present federal-state balance as to land and water issues without any clear statement from Congress permitting it—and it does so with impunity, just as the Final Rule did before it. *See* 88 Fed. Reg. at 3141 (the Agencies concluding no federalism

implications arise from the Final Rule); *see also* 88 Fed. Reg. at 61,967 (same for the Conforming Rule). The "serious federalism questions and concerns" in the Amended Final Rule abound, ECF No. 131 at 18: from categorically treating interstate waters as jurisdictional WOTUS "regardless of navigability" and "irrespective of any limiting principle" and with no textual blessing, *id.* at 18, 27-28, to "[p]ermitting [the Agencies] to claim federal jurisdiction over ponds and mudflats" and other isolated, intrastate waters, and everything in between, the Amended Final Rule amounts to "a significant impingement of the States' traditional and primary power over land and water use," *SWANCC*, 531 U.S. at 174, with no textual hook in the CWA to hang it on. *See, e.g.*, Ex. A, ¶ 18 (quoting letter from the Corps recently advising an Alaska resident that "all waters are assumed to be under the jurisdiction of the US Army Corps of Engineers" until the Corps says otherwise in an approved jurisdictional determination); *cf. Sackett*, 598 U.S. at 678 ("the party asserting jurisdiction" bears the burden of proof). Only an order from this Court can restore the federal-state balance the Amended Final Rule has upset and ensure that "States can and will continue to exercise their primary authority to combat water pollution by regulating land and water use." *Sackett*, 598 U.S. at 683.

2. The major-questions doctrine.

The Court also recognized that the Final Rule likely ran afoul of the major-questions doctrine by regulating "a significant portion of American land mass, water, and economy." ECF No. 131 at 29. As the Court recognized, "federal agencies are not permitted to exercise regulatory power 'over a significant portion of the American economy' or 'make a radical or fundamental change to a statutory scheme' through rulemaking without clear authorization by Congress." *Id.* (quoting *West Virginia v. EPA*, 597 U.S. 697, 722 (2022) (when an agency asserts great power, "the history and the breadth of the authority that the agency has asserted," along with the "economic and political significance of that assertion," require a "clear statement" from Congress

that it meant for the agency to wield its purported power)). That's because courts presume that "Congress intends to make major policy decisions itself, and not leave those decisions to agencies." *Id.* (citing *West Virginia*, 597 U.S. at 723). It is not enough, then, that an agency lay claim to a mere "colorable" or "plausible" basis in the text for their claimed power. *West Virginia*, 597 U.S. at 722-23.

All this is what doomed the Final Rule—and what should doom the Amended Final Rule here. "[S]erious questions" remain about "whether Congress intended to allow the EPA to make [the] major policy decisions" the Amended Final Rule implicates. ECF No. 131 at 29. Overbroad categories, undefined terms, outright confusing standards—together, this amounts to an "unchecked definition" of WOTUS that will subject "a staggering array of landowners" to expensive compliance efforts whenever their property might implicate navigable or interstate waters in the most distant way. *Sackett*, 598 U.S. at 669-70. The landowners could never have fully anticipated these restraints when first purchasing their land. And the Amended Final Rule still does so with the teeth "of criminal prosecution or onerous civil penalties" of the CWA loaded and waiting to clamp down should they fail to comply. *Id.* at 671. Forced to pick from the "unappetizing menu" of "an uphill battle" against the Agencies in the courts, or "acquiesce[ing] and seek[ing] a permit" that "can take years and []an exorbitant amount of money" to obtain from the Agencies, "[m]any landowners" will "simply choose to build nothing" at all. *Id.* And "[e]ven if the Corps is willing to provide a jurisdictional determination, a property owner may find it necessary to retain an expensive expert consultant who is capable of putting together a presentation that stands a chance of persuading the Corps," with low chances of succeeding still, as "the Corps finds jurisdiction approximately 75% of the time." *Id.* at 670; *see, e.g.*, Ex. A, ¶ 18 (Corps letter to a resident stating that "all waters are assumed to be under the jurisdiction of the US Army Corps

of Engineers" until the Corps says otherwise in an approved jurisdictional determination); *cf. Sackett*, 598 U.S. at 678 ("the party asserting jurisdiction" bears the burden of proof). This reordering of control is a huge impact by any measure. Barring scores of farmers, ranchers, energy producers, miners, builders, and others from using their land as they prefer is not an acceptable exercise of regulatory authority. And it is not one that Congress has endorsed—or even "would have been likely to" endorse—through "modest words," "vague terms," or "oblique or elliptical language," *West Virginia*, 597 U.S. at 722-23 (cleaned up), like "waters of the United States."

3. Other canons.

The Court has already pointed out the "litany of [] statutory and constitutional concerns" raised by the Final Rule. ECF No. 131 at 19. And the Plaintiff States have shown here that all have carried over to the Amended Final Rule. Each of these places the canon of constitutional avoidance front and center. "[I]t is incumbent on [the Court] to determine whether the agency's interpretation" of the CWA "would give rise to serious constitutional questions." *Union Pac. R.R. Co. v. U.S. Dep't of Homeland Sec.*, 738 F.3d 885, 893 (8th Cir. 2013). If it would, and the CWA can be fairly read another way, then the Court should favor the constitutional path. *See Almendarez-Torres v. United States*, 523 U.S. 224, 237-38 (1998) (where "fairly possible," courts should construe a statute to avoid any "grave doubts" about its constitutionality).

The Agencies' view of their authority through the Amended Final Rule also shoves the CWA into troubling waters with the non-delegation doctrine. Article I, Section 1 of the U.S. Constitution vests Congress with the legislative power. And "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-30 (1935). So to delegate its power to another branch, Congress must (at a minimum) "lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to

conform." *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (cleaned up). But after what have now been *two* bites at the apple, the Agencies *still* lay claim to sweeping power to regulate lands and waters far and wide: Carried over from the Final Rule is the disclaimer on any suggestion that "navigable" is a limit, 88 Fed. Reg. at 3073; the Agencies' refusal to confine their reach to moist land, let alone "waters," *id.* at 3111-12 (clarifying that jurisdictional "waters" are not "dry land" even though they may "lack water at a given time"); and even confusion over the phrase "of the United States" stirred up by the Agencies' insistence that their jurisdiction can reach *all* activities affecting some ecological function of water, *id.* at 3073. This determination is a legislative one in the purest sense. But "Congress alone controls [an agency]'s jurisdiction." *Union Pac. R.R. Co. v. Bhd. Of Locomotive Eng'rs & Trainmen Gen. Comm. Of Adjustment, Cent. Region*, 558 U.S. 67, 71 (2009). And Congress has not given the Agencies any intelligible standards to apply; "waters of the United States" "was not a term of art with a known meaning; and the words themselves are hopelessly indeterminate." *Sackett v. EPA*, 566 U.S. 120, 133 (2012) (Alito, J., concurring); *accord Sackett*, 598 U.S. at 681 (explaining how the meaning of WOTUS "under the EPA's interpretation remains hopelessly indeterminate"). If the Agencies were right about the CWA's effectively limitless reach, then Congress would have needed to say more. After all, the "degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Tiger Lily, LLC v. HUD*, 5 F.4th 666, 672 (6th Cir. 2021); *see also Schechter Poultry*, 295 U.S. at 521-22. Untethered from any intelligible principles, the CWA would violate the non-delegation doctrine. *See, e.g.*, Sean G. Herman, *A Clean Water Act, If You Can Keep It*, 13 GOLDEN GATE U. ENV'T L.J. 63, 77-78 (2021) (explaining how the phrase "waters of the United States" violates the doctrine).

Lastly, the rule of lenity further counsels for a narrower understanding of WOTUS than the one the Agencies press forward in the Amended Final Rule. This "time-honored interpretive guideline serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability." *Crandon v. United States,* 494 U.S. 152, 158 (1990) (cleaned up). And "[b]ecause [courts] must interpret the statute consistently," the rule of lenity applies to any statute, like the CWA, that "has both criminal and noncriminal applications," no matter whether the rule is raised in the civil or criminal context. *Leocal v. Ashcroft,* 543 U.S. 1, 11 n.8 (2004).

The Agencies will likely try to dodge the rule of lenity altogether by rehashing their argument that it is only "relevant … in an as-applied challenge to criminal penalties," and that the presence of WOTUS "does not by itself subject a person to criminal liability." ECF No. 92 at 24-25. The first argument is wrong, and the second is misleading. Lenity applies equally "in a civil setting" when the challenged statute "has criminal applications." *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517-18 (1992). And a WOTUS jurisdictional determination imposes "legal consequences" by "warn[ing] [landowners] that if they discharge pollutants onto their property without obtaining a permit from the Corps, they do so at the risk of significant criminal and civil penalties." *Hawkes*, 578 U.S. at 600; *see also Sackett*, 566 U.S. at 129 (rejecting argument that "a compliance order [i]s a step in the deliberative process" "rather than" "a coercive sanction"). The Amended Final Rule offends the rule of lenity by construing any ambiguities in the statute in some of the broadest possible ways. And it does so as the latest chapter in a long, destabilizing saga of changes to the way the Agencies interpret the CWA. *See Guedes v. ATF*, 140 S. Ct. 789, 790 (2020) (statement of Gorsuch, J.) (questioning how "ordinary citizens [can] be

expected to keep up" when "it sometimes seems agencies change their statutory interpretations almost as often as elections"). The Court should right this wrong.

II. The Amended Final Rule Violates the Administrative Procedure Act.

A. The Amended Final Rule is Still Arbitrary and Capricious.

Next, the Court should hold that the Amended Final Rule is unlawful and set it aside as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Plaintiff States explained in their original complaint, their preliminary-injunction motion, and their Amended Complaint why the Agencies have acted arbitrarily and capriciously as to their regulatory authority under the CWA. *See* ECF No. 1 at ¶¶ 145-159; ECF No. 44 at 15-16; ECF No. 176 at ¶¶ 182-197. And the Court, too, recognized that the Final Rule fell far short of offering the sort of "understandable findings and rationales" necessary "[t]o survive an arbitrary-and-capricious review," so the Agencies' actions in promulgating it "[a]re [a]rguably [a]rbitrary and [c]apricious." ECF No. 131 at 24 (quoting *Associated Gas Distribs. v. FERC*, 893 F.2d 349, 361 (D.C. Cir. 1989)). Each of the concerns raised and addressed in the Court's order is present in the Amended Final Rule—entirely unchanged.

First, "the multi-step 'guidance for landowners' that the [Final] Rule provides for landowners who question whether they need a [CWA] permit" remains "of little assistance" in the Amended Final Rule for those who need it. ECF No. 131 at 24. Repeating the problems from the Final Rule, it still provides only vagaries and "resources," with a final suggestion to contact the Agencies to confirm jurisdiction and permitting requirements. 88 Fed. Reg. at 3130-35. And it does not account for updates needed following the *Sackett* decision. As the Plaintiff States show here and in their Amended Complaint, the Amended Final Rule (1) contravenes *Sackett* and extends to waters that Congress never intended the CWA to cover, ECF No. 176 at ¶ 186 (comparing the rule to *Sackett*); (2) provides no explanation of how *Sackett* changed the scientific

calculus, *id.* at ¶ 187; (3) offers a "contradictory and implausible discussion of their engagement with relevant Supreme Court precedent," *id.* at ¶ 188; and (4) burdens the Plaintiff States and the regulated public by "refusing to offer concrete standards or guidelines for determining when a water is a jurisdictional water," *id.* at ¶ 189. The rule is the sort that "become[s] simply a cloak for agency whim—or worse." *LeMoyne-Owen Coll. v. NLRB*, 357 F.3d 55, 61 (D.C. Cir. 2004) (Roberts, J.).

Second, having made no changes to it with the Conforming Rule, the Agencies have, by default, arbitrarily and capriciously mishandled the cost-benefit analysis in the Amended Final Rule. The Agencies thought the Final Rule would lead to only "de minimis costs" generally, 88 Fed. Reg. at 3007, while imposing no "new costs or other requirements [as to] states," *id.* at 3141. The Agencies so concluded because they thought the Final Rule was consistent with the pre-2015 enforcement regime that was reinstated just before the Final Rule's promulgation. The Plaintiff States refuted this assertion in both their preliminary injunction briefing and earlier complaint, explaining how the Final Rule went even further than the pre-2015 regulatory framework. ECF No. 1 at ¶¶ 145-159; ECF No. 44 at 15-16. And the Court agreed in its order enjoining the Final Rule, holding that "the 2023 Rule and the EPA's pre-2015 practice are at odds in several key ways." ECF No. 131 at 25.

In response to the Court's order, the Agencies offered nothing to address these problems, saying only that the Conforming Rule "does not by itself impose cost savings or forgone benefits." 88 Fed. Reg. at 61,967; *see also id.* at 61,968 ("these amendments on their own do not result in any cost savings or forgone benefits not directed by the operation of law"). In this way, the Agencies still miss the myriad specific costs and consequences identified in the many comments that recommended scrapping the Final Rule, including compliance, mitigation, and in-lieu-fee

costs. Likewise, the Agencies were required (yet failed) to address comments from cost-bearing small businesses. 88 Fed. Reg. at 3139.

The Agencies also continue to misconstrue and overestimate the purported benefits of the Amended Final Rule. One example is the Agencies' inconsistent and contradictory treatment of the purpose of potentially covered waters. For example, the Agencies excluded certain "artificial reflecting or swimming pools or other small ornamental bodies of water" from the definition of jurisdictional waters. 88 Fed. Reg. at 3111. Similarly, the Agencies excluded certain "waterfilled depressions created incidental to construction activity." *Id.*; *see also id.* at 3144 (excluding certain "lakes or ponds" that are "used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing"). Other than noting that the Agencies have applied them in prior iterations of CWA regulations, the Agencies do not explain why these purpose-based exclusions are appropriate. Yet excepting these and a few other minor exclusions, outside of navigable-in-fact waters, the Agencies arbitrarily failed to consider a water's purpose when classifying it as a water of the United States. So a channel used in agricultural operations, for example, could be deemed a covered water even though it serves the same purpose as those waters described in the very narrow purpose-based exclusions.

Likewise, the Agencies offered a contradictory and implausible discussion of the assumed benefits of federal jurisdiction. Through the Amended Final Rule, the Agencies assumed that the maximum lawful degree of federal jurisdiction was the preferred outcome. State and local rules are most often treated by the Agencies as insufficient or beside the point; for instance, the Agencies criticize States for not immediately passing additional water-management laws during the brief year that the NWPR was implemented. 88 Fed. Reg. at 3065. At the same time, however, the Agencies are forced to acknowledge "that a lack of federal jurisdiction does not necessarily mean

that a water body is completely unprotected." U.S. Env't Prot. Agency & U.S. Dep't of the Army, *Section 2 – Legal Arguments*, at 23, *in* REVISED DEFINITION OF "WATERS OF THE UNITED STATES" RESPONSE TO COMMENTS DOCUMENT (2022), *available at* https://bit.ly/3I3GCNP. "States can and will continue to exercise their primary authority to combat water pollution by regulating land and water use." *Sackett*, 598 U.S. at 683. And beyond that, the Agencies do not articulate why a reduction of regulation will in every case lead to an undesirable degradation of water resources that is inconsistent with the broader objectives of the CWA. Lacking coherency and reasoning, the Amended Final Rule's treatment of state regulation is arbitrary and capricious.

Third, the Amended Final Rule inherited the arbitrary and capricious treatment of "environmental justice" that plagued the Final Rule, too. According to the Agencies themselves, "impacts on communities with environmental justice concerns are not a basis for determining the scope of the definition of 'waters of the United States.'" 88 Fed. Reg. at 3018; *see also* 88 Fed. Reg. at 61,968. Even so, the Agencies determined to revise or replace the NWPR's construction of "waters of the United States" in part because of "environmental justice" concerns. 88 Fed. Reg. at 3018, 3142. Thus, by the Agencies' own admission, they have rejected a potential alternative to the Amended Final Rule because of "factors which Congress has not intended [the Agencies] to consider." *In re Operation of Missouri River Sys. Litig.*, 421 F.3d 618, 628 (8th Cir. 2005). This is not reasoned judgment.

As explained here and in the Amended Complaint, the Plaintiff States raised all these problems as to the Final Rule, and the Amended Final Rule included all of them—without comment or correction. *See* ECF No. 176 at ¶¶ 182-197. They all justify an order from this Court vacating the rule.

B. The Agencies Continue to Flout Key Procedural Requirements.

The Court should also hold the Amended Final Rule unlawful and set it aside because the Agencies promulgated it "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). These errors are glaring here for the same reason as practically all the others: the Agencies committed them, the Plaintiff States and the Court pointed them out, and the Agencies pressed ahead anyway.

As they did for the Final Rule's other flaws, the Agencies promulgated the Conforming Rule without mentioning their earlier failure to comply with the Regulatory Flexibility Act (RFA). They say the Conforming Rule "is not subject" to the act because it "applies only to rules subject to notice and comment rulemaking requirements under the APA," and the Conforming Rule "is not subject" to those requirements. 88 Fed. Reg. at 61,967. But even if the Agencies are correct on that front, they miss the point: the Amended Final Rule incorporates key aspects of the enjoined rule that required a regulatory flexibility analysis in the first place; namely, "the rule's 'significant economic impact on small entities' and the steps the agency has taken to minimize that impact." *Northport Health Servs. of Ark., LLC v. U.S. Dep't of Health & Hum. Servs.*, 14 F.4th 856, 876 (8th Cir. 2021) (quoting 5 U.S.C. § 604). The Agencies tried to skirt this requirement by claiming that the Final Rule would have "no significant impact" due to the supposed "de minimis" differences between the Final Rule and the pre-2015 state of play. 88 Fed. Reg. at 3139-40. But the Court saw through that ploy: "the [Final] Rule and the EPA's pre-2015 practice," it held, were "at odds in several key ways," and "the declarations filed in this case by state officials" made it clear that the Final Rule "directly affects many States/landowners who now find themselves potentially subject to federal jurisdiction and permitting requirements" and such that they "will need to undertake expensive assessments or forego their activities." ECF No. 131 at 25.

That is still the case with the Amended Final Rule—if not more so. It still uses "the wrong comparator" of "the 1986 regulations." ECF No. 44 at 17 (citing 88 Fed. Reg. at 3102-03). It still directly affects the Plaintiff States and many landowners who may or do find themselves facing down the brutal costs of time and treasure from being under the Agencies' thumb. *Id.* at 17-18 (citing 88 Fed. Reg. at 3139); *see Sackett*, 598 U.S. at 670 (calling out the need for a "property owner … to retain an expensive expert consultant" just to "stand[] a chance [at] persuading the Corps," or else just "simply acquiesce and seek a permit" no matter how "exorbitant" the cost). And now, the Amended Final Rule introduces more confusion than before by failing to track *Sackett* and by improperly defining both the "relatively permanent" and "continuous surface connection" standards that drive their jurisdictional analysis. *See supra* Section I; *cf.* Exs. A, ¶¶ 14-15; B, ¶¶ 11-16; C, ¶¶ 8, 12, 15-17; E, ¶ 7, 11, 17, 19; F, ¶ 9; H, ¶¶ 4, 7 (describing the confusion caused by the Amended Final Rule's unclear definitions).

Compounding these failures is the Agencies' failure to explain their earlier refusal to comply with the APA's notice requirement for the Final Rule. To satisfy that requirement, the notice of proposed rule making "and the final rule need not be identical[;]" however, a final rule must be "a 'logical outgrowth' of its notice." *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079 (D.C. Cir. 2009). This requirement prevents previously unannounced (and sometimes more expansive) definitions from appearing for the first time in final rules. *See, e.g.*, *North Dakota*, 127 F. Supp. at 1058 (finding that definition of "neighboring" in 2015 WOTUS rule was not a logical outgrowth of proposed rule); *see also Texas v. EPA*, 389 F. Supp. 3d 497, 504-06 (S.D. Tex. 2019) (detailing the 2015 Rule's violations of notice-and comment requirements); *Georgia*, 418 F. Supp. 3d at 1372-78 (same). The Final Rule already raised "serious concerns about whether proper procedures were followed," especially because it included certain "terms and definitions"

that "were not included in the proposed rule." ECF No. 131 at 26. With the Conforming Rule, the Agencies failed to even mention any of them, much less address them. Instead, with no notice and comment at all, they amended the rule by reincorporating the undeveloped definitions and standards that got them in hot water with the Court last year—standards that now run contrary to recent Supreme Court precedent. The Agencies must be held accountable for these failures. *See Northport Health*, 14 F.4th at 877-78 (finding an agency's cursory analysis violated the RFA).

III. The Amended Final Rule Violates the Constitution.

The Court should also deem the Amended Final Rule unlawful and set it aside as "contrary to constitutional right, power, privilege, or immunity," 5 U.S.C. § 706(2)(B), as established by the Commerce Clause, U.S. CONST. art. I, § 8, the Due Process Clause, U.S. CONST. amend. V, and the Tenth Amendment, U.S. CONST. amend. X. The Court already considered these grounds as to the Final Rule and concluded that its "implementation" "triggered" "serious constitutional concerns." ECF No. 131 at 27. Nearly every source of the Court's concerns—from the "categorical extension of federal jurisdiction over all interstate waters, regardless of navigability," to "ignor[ing] the 'navigable waters' requirement under the Clean Water Act," to using "definitions of WOTUS [that] involve the regulation of a significant portion of American land mass, water, and economy"—is present still in the Amended Final Rule.

A. The Amended Final Rule Violates the Commerce Clause.

The Commerce Clause problems remain in full force. *See* U.S. CONST. art. I, § 8; *accord United States v. Morrison*, 529 U.S. 598, 608-09 (2000) (cleaned up) (Congress may regulate "channels," "instrumentalities," "persons or things," in or of—or activities that substantially affect—interstate commerce); *Goldberg v. Wade Lahar Const. Co.*, 290 F.2d 408, 415 (8th Cir. 1961) ("commerce among the States" is a "practical" conception). And when it comes to the CWA, Congress's authority over WOTUS is tied to navigable channels of interstate commerce.

SWANCC, 531 U.S. at 172; *see Sackett*, 598 U.S. at 672 ("At a minimum, … the use of 'navigable'" in the text "signals that the definition" of WOTUS "principally refers to bodies of navigable water like rivers, lakes, and oceans"). "[F]or decades," the Agencies "have issued substantively identical regulatory definitions of [WOTUS] that completely ignore navigability and instead expand the CWA's coverage to the outer limits of the [Supreme] Court's New Deal-era Commerce Clause precedents." *Sackett*, 598 U.S. at 705 (Thomas, J., with whom Gorsuch, J. joins, concurring). With the Amended Final Rule, the Agencies are back at it again.

With not so much as a mention (much less a resolution) of the Final Rule's Commerce Clause problems in the Conforming Rule, the Agencies again stretch their authority beyond what is constitutionally permissible—to land and waters with no direct connection to navigable waters or a substantial relationship with interstate commerce, and to many subsurface waters despite Congress's intent for "groundwater pollution and nonpoint source pollution" to be the "substantial responsibility" of the States. *Cnty. of Maui*, 140 S. Ct. at 1471. The Amended Final Rule again *removes* portions of the 1986 Regulations that spoke directly to interstate commerce, replacing it with the catch-all "other waters" category that lacks any meaningful connection with commerce. It did so even though CWA "jurisdiction is not co-extensive with Congress' Commerce Clause authority." *Am. Petroleum Inst. v. Johnson*, 541 F. Supp. 2d 165, 183 (D.D.C. 2008). And it extends the Agencies' reach to nonnavigable, isolated, intrastate waters, even though the Supreme Court has warned that regulating those kinds of places raises serious Commerce Clause concerns. *SWANCC*, 531 U.S. at 173.

B. The Amended Final Rule Offends the Fifth Amendment Due Process Clause.

The Amended Final Rule violates the Due Process Clause, just as the Final Rule did before it. The Due Process Clause dooms an unduly vague law, including one that "forbids or requires

the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Const. Co*, 269 U.S. 385, 391 (1926). A law is unconstitutionally vague if it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits." *Chicago v. Morales*, 527 U.S. 41, 56 (1999) (internal quotation omitted). Vagueness concerns are especially acute where, as here, the law at issue involves a criminal prohibition. *See Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015). So "[d]ue 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.'" *Sackett*, 598 U.S. at 680-81 (quoting *McDonnell v. United States*, 579 U.S. 550, 576 (2016)).

In *Sackett*, the Supreme Court detailed just how "potent [a] weapon" the CWA can be, with spring-loaded provisions that "impose[] what have been described as crushing consequences even for inadvertent violations," including "severe criminal penalties including imprisonment" for "[p]roperty owners who negligently discharge 'pollutants' into covered waters," and "penalties [that] increase for knowing violations." *Sackett*, 598 U.S. at 660, 681 (quoting 33 U.S.C. § 1319(c)). "And because the CWA can sweep broadly enough to criminalize mundane activities like moving dirt," an "unchecked definition of" WOTUS—the "hopelessly indeterminate" meaning of which has sourced litigation for decades—"means that a staggering array of landowners are at risk of criminal prosecution or onerous civil penalties." *Id.* at 669-70.

In its preliminary-injunction order, the Court highlighted how the Final Rule's significant-nexus standard "poses important due process concerns which may not be clarified until" the *Sackett* decision. ECF No. 131 at 27-28. A few weeks later, the Supreme Court highlighted them in *Sackett*, too. *See* 598 U.S. at 680 ("[T]he EPA's interpretation gives rise to serious vagueness

concerns in light of the CWA's criminal penalties."). But the Amended Final Rule is still rife with the sort of administrative jargon that would confuse an intelligent reader: "adjacent," "certain times of year," "interstate waters," "continuous surface connection," "impoundments," "relatively permanent," "seasonally," and "tributaries" are but a few examples that the Agencies' Conforming Rule carried forward *despite* the Supreme Court's clarifying ruling in *Sackett*. And it is replete with categories of regulated waters that leave so much wiggle room for the regulators interpreting them that even the most "expensive [of] expert consultant[s]" would not "stand[] a chance of persuading" them. *Sackett*, 598 U.S. at 670.

All this points to one obvious conclusion: despite *specific directives* from this Court and the Supreme Court, the Agencies have yet again promulgated an interpretation of WOTUS so vague and "essentially limitless," *Rapanos*, 547 U.S. at 757 (Roberts, C.J., concurring), that it cannot survive constitutional scrutiny. And just as it was before, the regulated public will pay the price. Indeed, it remains next to impossible for the typical landowner to know what to do on his own land, with all the same consequences for guessing wrong: "severe criminal penalties," or "civil penalties [that] can be nearly as crushing." *Id.* at 660; *see also Hawkes*, 578 U.S. at 594 ("The [CWA] imposes substantial criminal and civil penalties."). All this ambiguity—paired with serious bite—renders the Amended Final Rule void for vagueness. *See* Paul J. Larkin, *The Clean Water Act and the Void-for-Vagueness Doctrine*, 20 GEO. J.L. & PUB. POL'Y 639, 659-62 (2022).

C. The Amended Final Rule Violates the Tenth Amendment.

The Amended Final Rule also runs afoul of the Tenth Amendment. That amendment says that "[t]he powers not delegated to the United States by the Constitution ... are reserved to the States respectively, or the people." U.S. CONST. amend. X. Under it, a challenged federal action must be set aside where, as here, it regulates the "state as a state," regulates "matters that are

indisputable 'attribute[s] of state sovereignty,'" triggers state compliance that "directly impair[s] the state's 'ability to structure integral operations in areas of traditional governmental functions,'" and advances a weighty federal interest that "is not so great that it justifies state submission to the federal action." *Johnson Controls, Inc. v. City of Cedar Rapids, Iowa*, 713 F.2d 370, 376 (8th Cir. 1983) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 286-88 (1981)).

For starters, the Amended Final Rule tries to regulate the Plaintiff States as States. Remember: cooperative federalism sits at the heart of the CWA. *See* 33 U.S.C. § 1251(b) ("recogniz[ing], preserv[ing], and protect[ing]" the States' "primary responsibilities and rights" over their "land and water resources."). The Plaintiff States have major obligations as part of this arrangement under the CWA. Among other things, the States develop, review, and report on water quality standards for federal jurisdictional waters within their borders; develop complicated total maximum daily loads for any water not meeting those standards; issue water-quality certifications for permits the federal government issues within their borders; and take on additional permitting responsibilities. *See* ECF No. 176 at ¶¶ 56-60 (citing 33 U.S.C. §§ 1311, 1313, 1315, 1341, 1342).

Balancing out this arrangement, however, is the reality that all waters that fall outside the scope of federal jurisdiction remain subject to state regulations. *See, e.g.*, ECF No. 176 at ¶¶ 28-52. So the issue at the heart of this Tenth Amendment inquiry is whether the Amended Final Rule "invades the province of state sovereignty" by throwing off that crucial balance. *New York v. United States*, 505 U.S. 144, 155 (1992). The Plaintiff States' authority to regulate intrastate land use and water resources is one such province. *See, e.g.*, *SWANCC*, 531 U.S. at 174 ("[R]egulation of land use [is] a function traditionally performed by local governments."); *Sackett*, 598 U.S. at 659, 683 ("For most of this Nation's history, the regulation of water pollution was left almost entirely to the States and their subdivisions" and "States can and will continue to exercise their

primary authority to combat water pollution by regulating land and water use."). And the Amended Final Rule strikes at the heart of the States' reserved power over land and water with just as much force as the Final Rule did before it.

Specifically, by sweeping far too many land and water resources under the umbrella of the Agencies' authority, the Amended Final Rule eliminates the State's primacy to regulate and protect those resources under the State's standards. *See* Exs. A, ¶¶ 3-4; B, ¶¶ 3-5; D, ¶¶ 4-6; E, ¶¶ 12-15, 18; F, ¶¶ 8-14; G, ¶¶ 9-12; *see also* Ex. A, ¶ 18 (quoting letter from the Corps recently advising an Alaska resident that "*all waters* are *assumed* to be under the jurisdiction of the US Army Corps of Engineers" until the Corps says otherwise in an approved jurisdictional determination (emphasis added)); *cf. Sackett*, 598 U.S. at 678 ("the party asserting jurisdiction" bears the burden of proof). On top of losing their sovereignty, the States then face significant federal burdens from having to shift attention and resources to the federal scheme to the disadvantage of local, state-based programs and projects. *See* Exs. A, ¶¶ 5-9. 13-19; C, ¶¶ 6-14; D, ¶¶ 6-13; E, ¶¶ 11, 19-20; F, ¶¶ 10-16; G, ¶¶ 13-14; H, ¶¶ 6-12 (explaining how the Amended Final Rule swells state obligations under CWA programs and raises costs to the detriment of projects and development). And by keeping in place the Final Rule's opaque case-by-case determination approach, the Amended Final Rule practically guarantees that the Plaintiff States will take a hit to their "ability 'to structure integral operations in areas of traditional governmental functions.'" *Johnson Controls*, 713 F.2d at 376 (quoting *Hodel*, 452 U.S. at 286-88); *see* Exs. A, ¶¶ 6, 9-12; B, ¶¶ 10-16; C, ¶¶ 10, 12, 17; H, ¶ 7.

In all of these cases, state regulation necessarily plays a secondary role when a state water becomes a "water of the United States." And States remain secondary regulatory players as to a variety of purely intrastate waters with only the most tenuous connections to waters imbued with some national interest. Federal standards will now become the *de facto* rule for environmental

regulation. And those standards will in turn dictate how States and their residents employ their own property, making land and water development a *de facto* federal issue, too. Despite all that, the Agencies concluded that the regulation has no federalism implications at all. *See* 88 Fed. Reg. at 61,967 (Conforming Rule). The Plaintiff States do not dispute that enforcement of the CWA amounts to a "weighty" federal interest. *Johnson Controls*, 713 F.2d at 376 (quoting *Hodel*, 452 U.S. at 286-88). But it is not one "so great that it justifies state submission to the federal action," *id.*—especially when Plaintiff States stand ready and willing to enforce a broad suite of state regulations, a suite for which the federal Agencies attempting to expand their authority show such open disdain.

The Court can restore the balance of cooperative federalism that Congress put at the heart of the CWA. It can elevate to its rightful place the "State's legitimate legislative business" of regulating the lands and waters within their own borders. *S.D. Warren Co.*, 547 U.S. at 386.

IV. The Court Should Vacate and Remand the Amended Final Rule for These Violations.

The Court should grant the States' motion; hold, vacate, and set aside the Amended Final Rule as unlawful; and remand the matter to the Agencies with instructions to try again.

The Court should vacate the Amended Final Rule in full—preventing its application as to all, not merely the parties to this lawsuit. *See* 5 U.S.C. § 706(2) (explaining that courts can "hold unlawful *and set aside* agency action" (emphasis added)). "[W]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998); *see also, e.g.*, *E. Bay Sanctuary Covenant v. Garland*, 994 F.3d 962, 987 (9th Cir. 2020) ("Vacatur of an agency rule prevents its application to all those who would otherwise be subject to its operation."); *Data Mktg. P'ship, LP v. U.S. Dep't of Lab.*, 45 F.4th 846, 859 (5th Cir. 2022) ("The default rule is that vacatur is the appropriate

remedy."). Vacatur in full addresses the problem in an "intellectually honest manner"—because it is not really possible to "vacate[] a rule only as to one state, one district, or one party." *N.M. Health Connections v. U.S. Dep't of Health & Hum. Servs.*, 340 F. Supp. 3d 1112, 1183 (D.N.M. 2018). On the other hand, if the Court were to limit relief to only the parties before it, then "it would be 'legally sanctioning an agency's disregard of its statutory or regulatory mandate.'" *Comite' De Apoyo A Los Trabajadores Agricolas v. Perez*, 774 F.3d 173, 191 (3d Cir. 2014); *see also generally* Mila Sohoni, *The Power to Vacate A Rule*, 88 GEO. WASH. L. REV. 1121 (2020) (further examining why vacatur is the appropriate form of relief in APA actions).

The entire Amended Final Rule should fall. The Agencies often touted the Final Rule as a "durable" option moving forward, 88 Fed. Reg. at 3020, and framed the Conforming Rule as allowing courts the chance to 'take or leave' any parts they wished without having to toss the whole thing out. *See, e.g.*, 88 Fed. Reg. at 61,967. But unlawful rules must be stricken in their entirety unless the lawful remainder is "fully operative as law" *and* it is clear the Agencies would have adopted the remainder even without the stricken parts. *Minn. Citizens Concerned for Life, Inc. v. FEC*, 936 F. Supp. 633, 642 (D. Minn. 1996). Even if one assumes that the latter requirement is met here, the former one certainly isn't. Several of the problems described above infect the *entire* rule, such that lawful pieces can't be plucked out and saved. And were the Court to find fault with only one specific part or category—say, the interstate waters provision—this statutory scheme is meant to work together as a comprehensive definition, making it hard to knock one out by itself. *See, e.g.*, *Mayor & City Council of Baltimore v. Azar*, 439 F. Supp. 3d 591, 615 (D. Md. 2020) (looking to the "functional independence of the [problematic] section [of the rule] to determine whether it is an 'integral' part of the whole"). Leaving some parts of the rule in place while leaving others in limbo would only increase the ambiguity that makes the present situation

so problematic. *See, e.g.*, *Kissick v. Huebsch*, 956 F. Supp. 2d 981, 1007 (W.D. Wis. 2013) ("[C]ourts hesitate to sever if doing so would produce an unclear regulatory scheme that most likely would represent a greater problem than an unabridged version of the ordinance." (cleaned up)).

Remand without vacatur is not an option here. *See* 5 U.S.C. § 706(2)(A). Courts have sometimes remanded while leaving the agency action intact where the agency's errors were not especially serious and a vacatur would be unduly disruptive. *See Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). But here, both those factors counsel for total vacatur. As described above, the Amended Final Rule reflects a "cascade of … failures." *Elbert v. USDA*, No. CV 18-1574, 2022 WL 2670069, at *6 (D. Minn. July 11, 2022). And it looks impossible for the Agencies to rehabilitate the Amended Final Rule without taking new action. *United Food & Com. Workers Union, Loc. No. 663 v. USDA*, 532 F. Supp. 3d 741, 779 (D. Minn. 2021). Further, allowing the rule to stand would be far more disruptive than vacating it, as neither the Final Rule nor the Amended Final Rule have ever been fully implemented. In contrast, vacating the rule would return the Agencies to the long-standing status quo (as modified by the Supreme Court's understandings in *Sackett*). While far from perfect, that status quo was at least better understood than the problematic understandings imposed in the Amended Final Rule.

CONCLUSION

The Court should grant the States' motion; hold, vacate, and set aside the Amended Final Rule as unlawful; and remand the matter to the Agencies with instructions to try again.

Respectfully submitted,

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D	Declaration of L. David Glatt Director North Dakota Department of Environmental Quality
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