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

AMENDED COMPLAINT

Plaintiff States of West Virginia, North Dakota, Georgia, Iowa, Alabama, Alaska, Arkansas, Florida, Indiana, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, and Wyoming, and the Commonwealth of Virginia, for their Amended Complaint, allege as follows:

INTRODUCTION

1. All States—including the 24 States here—have a sovereign interest in managing, protecting, and caring for their land and water resources. In fact, when Congress passed the Clean Water Act (CWA) in 1972, it simultaneously sought to "recognize, preserve, and protect the *primary* responsibilities and rights of States" as to pollution mitigation and "the development and use … of land and water resources." 33 U.S.C. § 1251(b) (emphasis added).

2. For good reason, then, courts have recognized the waters within a State's borders are that "State's legitimate legislative business." *S.D. Warren Co. v. Me. Bd. of Env't Prot.*, 547 U.S. 370, 386 (2006).

3. Even so, two federal agencies—the Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (the Corps) (together, the Agencies)—seem intent on pushing the States aside and seizing control over the nation's water management, even after direct rebukes from both this Court and the Supreme Court of the United States.

4. Most recently, the Agencies have sought to expand their own authority by broadly defining "waters of the United States," a key jurisdictional provision in the CWA. 33 U.S.C. § 1362(7). Colloquially known as WOTUS, the phrase "waters of the United States" is used to define the scope of "navigable waters," *id.*, which in turn prescribes the Agencies' jurisdictional reach under the Act. If "WOTUS" is defined more broadly, then more waters and lands are subject to rigorous federal permitting requirements, potential criminal penalties for discharges, and much more.

5. This suit concerns the Agencies' most recent effort to reinterpret WOTUS in an unlawfully aggressive way. That effort began when the Agencies published a Proposed Rule with a "Revised Definition" of WOTUS near the end of 2021. *See* 86 Fed. Reg. 69372 (Dec. 7, 2021).

It continued when they rushed to publish a Final Rule broadening that definition in January 2023, *see* 88 Fed. Reg. 3004 (Jan. 18, 2023) (Ex. A), even though the Supreme Court was expected to issue a key decision on the scope of WOTUS just a few months later, *see Sackett v. EPA*, 8 F.4th 1075 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 896 (2022). And it persists still to this day when, even after this Court preliminarily enjoined enforcement of the Final Rule, *see* ECF No. 131, and after the Supreme Court rebuked the Agencies' overreach and rejected a test around which the Final Rule was built, *see Sackett v. EPA*, 598 U.S. 651 (2023), the Agencies issued a Conforming Rule that purported to amend their definition of WOTUS to address the *Sackett* decision, *see* 88 Fed. Reg. 61,964 (Sept. 8, 2023) (Ex. B).

6. The Amended Final Rule—that is, the Final Rule as modified by the Conforming Rule—remains riddled with problems. As the States further explain below, the Amended Final Rule still violates the CWA, 33 U.S.C. §§ 1251-1387, the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, and the United States Constitution. It "exce[eds] [the Agencies'] statutory jurisdiction [and] authority" under the CWA by encompassing waters with no reasonable connection to "navigable waters." 5 U.S.C. § 706(2)(C). It is arbitrary and capricious because—among many things—it embraces vague standards with little justification and minimal consideration of costs. *See* 5 U.S.C. § 706(2)(A). The Agencies promulgated the Amended Final Rule in violation of multiple procedural obligations. *See* 5 U.S.C. § 706(2)(D). And the Amended Final Rule runs "contrary to constitutional right, power, privilege, or immunity," by offending the Commerce Clause, Due Process Clause, and the Tenth Amendment of the U.S. Constitution. *See* 5 U.S.C. § 706(2)(B).

7. The Amended Final Rule's serious problems produce equally serious harms for States and their residents.

8. By implementing and persisting with an overbroad and hopelessly vague scheme, the Agencies have toppled the cooperative federalism regime that Congress intended to protect in the CWA. Core state sovereign interests can be subjugated to the desires of two federal administrative agencies, even as to remote, non-navigable, intermittent, ephemeral, and purely intrastate waters. At the same time, States will be saddled with substantial compliance costs. Yet the Agencies have concluded that Amended Final Rule has no federalism implications at all. *See* 88 Fed. Reg. at 3141 (Final Rule); *see also* 88 Fed. Reg. at 61,967 (Conforming Rule).

9. Meanwhile, if the Amended Final Rule is left in place, then ranchers, farmers, miners, homebuilders, and other landowners across the country will struggle to undertake even the simplest of activities on their own property without fear of drawing the ire of the federal government. Landowning Americans of all stripes will thus be left with a choice: (a) fight their way through an expensive and lengthy administrative process to obtain complex jurisdictional determinations and permits or (b) face substantial civil and criminal penalties. *See Sackett*, 598 U.S. at 669-71 (describing the enormous challenges facing a "staggering array of landowners" because of the Agencies' ambiguous approach). The Amended Final Rule's ambiguous environmental benefits do not justify any of this.

10. Not so long ago, this Court stepped in to enjoin a similar effort to reinterpret WOTUS in an unlawful way. *See North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015) (preliminarily enjoining the 2015 WOTUS rule after finding that it likely violated the CWA's grant of authority to the Agencies, was arbitrary and capricious because it offered tests not supported by evidence, and violated procedural requirements because it was not a "logical outgrowth" of the proposed rule).

11. Earlier this year, this Court intervened again to enjoin the Agencies' attempt to once more step beyond their statutory authority with an overbroad WOTUS definition. *See* ECF No. 131 (preliminarily enjoining the Final Rule after finding it "neither understandable nor 'intelligible,'" and "its boundaries [] unlimited," among a "a litany of other statutory and constitutional concerns").

12. And just weeks after that ruling from this Court, the Supreme Court of the United States issued an opinion rejecting many of the central premises on which the Final Rule rested (and on which the Amended Final Rule still rests). *Sackett*, 598 U.S. 651.

13. The States now ask this Court, once more, to prevent an improper federal power grab from clamping back down over state waters. The States respectfully request that the Court issue a final order that the Amended Final Rule is unlawful and vacate it. Alternatively, they request that the Court enjoin Defendants from enforcing the Final Rule within the Plaintiff States. Only then can the States reassume their "primary" authority over these important waters, 33 U.S.C. § 1251(b), and Americans can resume enjoyment of their property unencumbered by the possible imposition of the Agencies' over-intrusive federal authority.

JURISDICTION AND VENUE

14. The Court has subject-matter jurisdiction under 28 U.S.C. § 1331 because this action arises under the APA, 5 U.S.C. §§ 701-706, and the Constitution and laws of the United States. The Court may grant declaratory and injunctive relief under the APA, 5 U.S.C. §§ 705-706, as well as under 28 U.S.C. §§ 2201-2202 and Federal Rules of Civil Procedure 57 and 65.

15. This suit is not a challenge to any of the "seven categories of EPA actions for which review lies directly and exclusively in the federal courts of appeals." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 623 (2018) (citing 33 U.S.C. § 1369(b)(1)).

16. Venue is proper under 28 U.S.C. § 1391(e) because Plaintiff State of North Dakota resides in this district and Defendants are agencies of the United States or officers thereof acting in their official capacity. Further, the Agencies will make jurisdictional determinations under the Amended Final Rule within this district. *See id.* § 1391(e)(1)(B).

PARTIES

17. Plaintiff States are sovereign entities that regulate land use, water quality, and water resources within their borders through duly enacted state laws administered by state officials and constituent agencies. Plaintiff States also directly administer certain provisions of the CWA, *see* 33 U.S.C. §§ 1251-1387, and each (with the exception of New Hampshire) has been delegated authority to implement additional programs under 33 U.S.C. § 1342(b).

18. Defendant EPA is an agency of the United States within the meaning of the APA. *See* 5 U.S.C. § 551(1). Defendant Michael S. Regan is Administrator of EPA and named as a party in his official capacity. EPA and its Administrator are charged with administering many provisions of the CWA on behalf of the federal government. *See* 33 U.S.C. §§ 1251-1387.

19. Defendant Corps is an agency of the United States within the meaning of the APA. *See* 5 U.S.C. § 551(1). Defendant Michael L. Connor is the Assistant Secretary of the Army for Civil Works and named as a party in his official capacity. Defendant Lieutenant General (LTG) Scott A. Spellmon is the Chief of Engineers and Commanding General for the Corps and named as a party in his official capacity. The Corps, the Secretary of the Army for Civil Works, and the Chief of Engineers and Commanding General of the Corps are charged with administering many provisions of the CWA on behalf of the federal government. *See* 33 U.S.C. §§ 1251-1387.

STANDING

20. The Plaintiff States have standing to challenge the Amended Final Rule and to seek injunctive and declaratory relief.

21. The Amended Final Rule subjects the Plaintiff States to many different injuries, each of which is "concrete and particularized," "actual or imminent," "fairly traceable" to the Amended Final Rule, and "likely" to be "redressed by a favorable decision" from this Court. *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560-61 (1992) (cleaned up).

22. *First*, the Amended Final Rule offends the Plaintiff States' traditional "power to control navigation, fishing, and other public uses of water," which "is an essential attribute of [their] sovereignty." *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 631 (2013) (cleaned up); *see also Kansas v. Nebraska*, 574 U.S. 445, 480 (2015) (Thomas, J., concurring in part) ("Authority over water is a core attribute of state sovereignty."). Plaintiff States' rights over rivers and other intrastate waters are "obvious, indisputable," and "omnipresent." *Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 349, 356 (1908). And "[f]or most of this Nation's history, the regulation of water pollution was left almost entirely to the States and their subdivisions." *Sackett*, 598 U.S. at 659.

23. Congress has honored this sovereign prerogative, too. It has shown "purposeful and continued deference to state water law," *California v. United States*, 438 U.S. 645, 653 (1978), including an "almost invariabl[e] defer[ence] to" it when addressing "whether federal entities must abide by" it, *United States v. New Mexico*, 438 U.S. 696, 702 (1978). When possible, Congress has also confirmed its "policy … to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control." 33 U.S.C. § 701-1; *see also Sporhase v. Nebraska ex rel. Douglas*,

458 U.S. 941, 959 (1982) (describing "37 statutes and the interstate compacts [that] demonstrate Congress' deference to state water law").

24. The CWA itself recognizes the primacy of the States' interests. When Congress created new federal mechanisms to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), it simultaneously "recognize[d], preserve[d], and protect[ed] the *primary* responsibilities and rights of States" when it comes to pollution mitigation and "the development and use … of land and water resources," *id.* § 1251(b) (emphasis added).

25. This commitment manifests as a robust program of "cooperative federalism," *New York v. United States*, 505 U.S. 144, 167 (1992), or a deep partnership between "the States and the Federal Government," *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992).

26. Like the Final Rule before it, the Amended Final Rule destroys this partnership, empowering the Agencies to subject lands and waters within the States to federal jurisdiction based on subjective and ill-defined criteria that place no meaningful boundaries on the Agencies' discretion to assert jurisdiction.

27. By expanding the definition of WOTUS, the Amended Final Rule will harm the States in their capacity as owners and regulators of the waters and lands of their States.

28. West Virginia law, for example, provides that "[t]he waters of the State of West Virginia are claimed as valuable public natural resources held by the state for the use and benefit of its citizens." W. VA. CODE § 22-26-3. Consistent with this mandate, West Virginia holds many waters and lands. It is also "the public policy of the state of West Virginia and a responsibility of the state of West Virginia, … to maintain, preserve, protect, conserve and in all instances possible to improve the purity and quality of water within the state." *Id.* § 22C-1-2. And the State must

"manage and protect its waters effectively for present and future use and enjoyment and for the protection of the environment." *Id.* § 22-26-3. The State has carried out these statutory duties diligently, enacting numerous laws to protect the State's waters, both on public and private lands. *See generally Id.* §§ 22-11-1 to -15.

29. In North Dakota, "[a]ll flowing streams and natural watercourses shall forever remain the property of the state for mining, irrigating and manufacturing purposes." N.D. CONST. art. XI, § 3; *see* N.D. CENT. CODE § 61-01-01 (surface and ground waters "belong to the public and are subject to appropriation for beneficial use"). It is the State's policy to "act in the public interest to protect, maintain, and improve the quality of the waters in the state for continued use as public and private water supplies, propagation of wildlife, fish and aquatic life, and for domestic, agricultural, industrial, recreational, and other legitimate beneficial uses." *Id.* § 61-28-01. To implement this policy, the State has enacted numerous laws protecting its waters. *See generally* N.D. CENT. CODE ch. 61-28 and N.D. ADMIN. CODE art. 33.1-16.

30. Under Georgia law, "[t]he people of the State of Georgia are dependent upon the rivers, streams, lakes, and subsurface waters of the state for public and private water supply and for agricultural, industrial, and recreational uses." GA. CODE ANN. § 12-5-21(a). The law goes on to declare as state policy that "the water resources of the state shall be utilized prudently for the maximum benefit of the people, in order to restore and maintain a reasonable degree of purity in the waters of the state and an adequate supply of such waters, and to require where necessary reasonable usage of the waters of the state." *Id.* In connection with these statutes, the State has enacted a range of laws regulating the State's waters. *See generally id.* § 12-5-20, *et seq*.

31. The situation is similar in Iowa. Iowa law explains that "the citizens of Iowa have built and sustained their society on Iowa's air, soils, waters, and rich diversity of life." IOWA CODE

§ 455A.15. The state broadly defines "water of the state" to include any "stream, lake, pond, marsh, watercourse, waterway, well, spring, reservoir, aquifer, irrigation system, drainage system, and any other body or accumulation of water." *Id.* § 455B.171(41). Those waters are the "public wealth of the state and subject to use in accordance" with state law. *Id.* § 455B.1262. To that end, "the control and development and use of water for all beneficial purposes is vested in the state." *Id.* Indeed, every water of the state is regulated. In accord, the State has enacted a range of statutes regulating the use of the State's waters. *See generally id.* §§ 455.1, *et seq.* The Amended Final Rule puts those State policies at risk.

32. The Alabama Legislature has recognized that "[p]roper management of the watersheds of the state is necessary to insure the health, safety and welfare of our citizens." ALA. CODE § 9-10A-1. The State has enacted laws "for the purpose of developing and executing plans and programs relating to any phase of conservation of water, water usage, flood prevention, flood control, water pollution control, wildlife habitat protection, agricultural and timberland protection, erosion prevention and control of erosion, flood-water and sediment damages." *Id.* § 9-10A-3. And the State has enacted the Alabama Water Pollution Control Act "to conserve the waters of the state and to protect, maintain and improve the quality thereof for public water supplies, for the propagation of wildlife, fish and aquatic life and for domestic, agricultural, industrial, recreational and other legitimate beneficial uses; to provide for the prevention, abatement and control of new or existing water pollution; and to cooperate with other agencies of the state, agencies of other states and the federal government in carrying out these objectives." *Id.* § 22-22-2.

33. In Alaska, the State owns the natural resources within its navigable waters and it holds the "right and power to manage, administer, lease, develop, and use [submerged] lands and natural resources all in accordance with applicable State law." Submerged Lands Act of 1953, 43

U.S.C. § 1311(a), incorporated by reference in, Alaska Statehood Act, Pub. L. No. 85-508, § 6(m), 72 Stat. 339 (1958). The State holds surface and groundwaters for the people for their common use, subject to appropriation, beneficial use, and reservation under State law. Alaska Const. Art. VIII, §§ 3, 13; Alaska Stat. § 46.15.030. Alaska is home to a staggering quantity and diversity of waters, with over three million lakes, more than 900,000 navigable rivers and streams, and more than 63 percent—174 million acres—of the Nation's wetlands. Indeed, in *Rapanos v. United States*, the Supreme Court's plurality recognized that the Agencies' "immense expansion of federal regulation of land use" within "swampy lands" extended to over "half of Alaska." 547 U.S. 715, 722 (2006) (plurality op.). The Agencies' most recent interpretation has again cast regulatory uncertainty over much of Alaska's lands and waters, including within unique features such as its vast permafrost regions and forested wetlands. Additionally, it exposes much of these areas to EPA's power under CWA § 404(c) to prohibit, deny, or restrict the specification of WOTUS for disposal sites for discharges of dredged or fill material. 33 U.S.C. § 1344. EPA recently exercised its CWA § 404(c) power over 309 square miles of primarily State-owned land in Alaska. *See* Final Determination to Prohibit the Specification of and Restrict the Use for Specification of Certain Waters Within Defined Areas as Disposal Sites; Pebble Deposit Area, Southwest Alaska, 88 Fed. Reg. 7441, 7443 (Feb. 3, 2023).

34. Plaintiff State of Arkansas is a sovereign state of the United States of America. Arkansas sues to vindicate its sovereign, quasi-sovereign, and proprietary interests, including its interests in protecting its state waters "for wildlife habitat, recreation, industry, agriculture, and commerce." ARK. CODE ANN. § 15-22-201(c)(1). Indeed, Arkansas law has long recognized "the vital importance of water to the prosperity and health of both people and their natural surroundings" and the need to properly manage Arkansas's water resources to ensure Arkansas

continues "to be known both as a natural state and a land of opportunity where agriculture, industry, tourism, and recreation will remain strong for future generations." *Id.* § 15-22-201(a)-(b). Arkansas brings this suit through its Attorney General, Tim Griffin. He is the chief legal officer of the State of Arkansas and has the authority to represent the State in federal court. *See id.* § 25-16-703(a).

35. Under the Florida Constitution, it is "the policy of the state to conserve and protect its natural resources and scenic beauty." Fla. Const. art. II, § 7. Florida law recognizes that "water constitutes a public resource benefiting the entire state." § 373.016, Fla. Stat. In connection with these policies, Florida has enacted a variety of laws regulating the State's waters including protection and regulation of the Everglades, one of the largest wetlands in the United States. *See, e.g.*, § 373.4592, Fla. Stat. (Everglades improvement and management); § 373.013 et seq. (Florida Water Resources Act of 1972).

36. In Indiana, "natural stream[s], natural lake[s]," and other "natural bod[ies] of water … that may be applied to a useful and beneficial purpose" are "natural resource[s] and public water of Indiana." IND. CODE § 14-25-1-2(a); *see id.* §§ 14-26-2-5(c)-(d), 14-26-2.1-3. Indiana holds and manages those waters "for the public welfare." *Id.* § 14-25-1-2(a)(2); *see, e.g.*, *id.* § 14-25-1-1, *et seq.*; *id.* § 14-26-1-1, *et seq.*; *id.* § 14-27-1-1, *et seq.*; *id.* § 14-29-1-1, *et seq.* Additionally, Indiana seeks to "preserve, protect, and enhance" other waters through a variety of regulatory programs. *Id.* § 13-12-3-1; *see, e.g.*, *id.* § 13-18-2-1, *et seq.*; 327 IND. ADMIN. CODE § 1-1-1, *et seq.* Waters subject to regulation generally include "accumulations," and any "part of the accumulations," of "water, surface and underground, natural and artificial, public and private, ... that are wholly or partially within, flow through, or border upon Indiana." IND. CODE § 13-11-2-265(a).

37. Kansas has "dedicated" "[*a*]*ll* water within the [S]tate . . . to the use of the people of the [S]tate" and has subjected its waters "to . . . [State] control and regulation." Kan. Stat. Ann. § 82a-702 (emphasis added). Correspondingly, Kansas has enacted numerous laws to regulate its waters. *See, e.g.*, KAN. STAT. ANN. § 2-1908; §§ 74-2606 to -2623; §§ 82a-101 to -2420. Such laws were enacted to effectuate State legislative policies including that of providing "for the conservation, use and development of the soil and water resources of th[e] [S]tate[.]" *Id.* § 2-1902(D). The purpose of that policy, and others related to it, is "to preserve natural resources, control floods, prevent impairment of dams and reservoirs, assist in maintaining the navigability of rivers and harbors, preserve wild life, protect the tax base, protect public lands, and protect and promote the health, safety, and general welfare of the people of this state." *Id.*

38. The Louisiana Constitution provides that "[t]he natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people," and "[t]he legislature shall enact laws to implement this policy." LA CONST. Art. IX Sec. 1. Further, "[t]he legislature shall neither alienate nor authorize the alienation of the bed of a navigable water body, except for purposes of reclamation by the riparian owner to recover land lost through erosion," although the State may lease state "water bottoms for mineral or other purposes." LA. CONST. Art. IX Sec. 3. Consistent with these provisions, the Louisiana legislature has enacted numerous laws governing its land and waters and providing for the orderly development of Louisiana's natural resources.

39. In Mississippi, "[a]ll water, whether occurring on the surface of the ground or underneath the surface of the ground, is … among the basic resources of [the] state," "belong[s] to the people of [the] state," and "is subject to regulation" by the State government. MISS. CODE.

ANN. § 51-3-1. "The control and development and use of water for all beneficial purposes shall be in the state, which, in the exercise of its police powers, shall take such measures to effectively and efficiently manage, protect and utilize the water resources of Mississippi." *Id.*; *see also id.* ("[T]he general welfare of the people of the State of Mississippi requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable."). To carry out this responsibility, Mississippi has enacted numerous laws governing the State's waters and water resources. *See, e.g.*, *id.* tit. 51.

40. Under Missouri law, it is "the public policy of this state to conserve the waters of the state and to protect, maintain, and improve the quality thereof for public water supplies and for domestic, agricultural, industrial, recreational and other legitimate beneficial uses and for the propagation of wildlife, fish and aquatic life." MO. REV. STAT. § 644.011 (2015). Missouri law holds that "the pollution of the waters of this state constitutes a menace to public health and welfare" and seeks to achieve clean water goals "while maintaining maximum employment and full industrial development of the state." *Id.* The waters of the state are broadly defined as "all waters within the jurisdiction of this state, including all rivers, streams, lakes and other bodies of surface and subsurface water lying within or forming a part of the boundaries of the state which are not entirely confined and located completely" on private land. *Id.* § 644.016. Missouri has enacted a comprehensive statutory scheme to regulate its waters. *See generally id.* § 644.006, *et seq.*; see also 10 CSR 20-7.010-7.050.

41. The Montana Constitution charges the state to "maintain and improve a clean and healthful environment in Montana for present and future generations." Mont. Const. art. IX, §1(1). To that end, Montana comprehensively regulates water quality through the Montana Water Quality Act. *See generally* Mont. Code. Ann. § 75-5-101, et seq. It is, therefore, "the public policy" of

Montana to "(1) conserve water by protecting, maintaining, and improving the quality and potability of water for public water supplies, wildlife, fish and aquatic life, agriculture, industry, recreation, and other beneficial uses; (2) provide a comprehensive program for the prevention, abatement, and control of water pollution; and; (3) balance the inalienable rights to pursue life's basic necessities and possess and use property in lawful ways with the policy of preventing, abating, and controlling water pollution." Mont. Code. Ann. §. 75-5-101(1)-(3). Montana broadly defines "state waters" as "a body of water, irrigation system, or drainage system, either surface or underground." Mont. Code. Ann. § 75-5-103(32)(a). The Amended Final Rule puts those policies at risk.

42. In Nebraska, "ownership of water is held by the state for the benefit of its citizens," NEB. REV. STAT. § 46-702, and "[t]he use of the water of every natural stream within the State of Nebraska is hereby dedicated to the people of the state for beneficial purposes," NEB. CONST. art. XV, § 5. The state defines its waters broadly to include "all waters within the jurisdiction of the state, including all streams, lakes, ponds, impounding reservoirs, marshes, wetlands, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and all other bodies or accumulations of water, surface or underground, natural or artificial, public or private, situated wholly or partly within or bordering upon the state." NEB. REV. STAT. § 81-1502(21). Using that definition, Nebraska has enacted robust environmental statutes to protect the purity and integrity of its waters, including but not limited to the Nebraska Environmental Protection Act and the Livestock Waste Management Act. *See* NEB. REV. STAT. § 81-1501 *et seq.* (declaring in Neb. Rev. Stat. § 81-1501 that "the water, land, and air of this state are among its most precious resources and the pollution thereof becomes a menace to the health and welfare of each person, and the

public in general, in this state" and "pollution of these resources in this state is likewise a concern in adjoining states."); *id.* § 54-2416 *et seq.*

43. New Hampshire law provides that New Hampshire's "lakes," "rivers and streams" are among its "most important natural resources," vital to "commerce, industry . . . tourism," "recreation" and "the quality of life of New Hampshire people," and, as such it is the policy of the state of New Hampshire "to ensure the continued viability of New Hampshire rivers as valued ecologic, economic, public health and safety, and social assets for the benefit of present and future generations" and to "insure the continued vitality of New Hampshire lakes as key biological, social, and economic assets, while providing that public health is ensured for the benefit of present and future generations." N.H. REVISED STATUTES ANNOTATED § 483:1 and 483-A:1. New Hampshire has enacted multiple statutes and promulgated numerous administrative regulations to "prevent pollution in the surface and groundwaters of the state," to "maintain the integrity of public waters," and to "protect and preserve its submerged lands … and its wetlands." N.H. REVISED STATUTES ANNOTATED § 482-A:1; *see generally* N.H. REVISED STATUTES ANNOTATED §§ 481 to 489-C and N.H. CODE ADMIN. R. CH. ENV-WQ 300, *et seq.*

44. Ohio claims as "waters of the state" "all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and other bodies or accumulations of water, surface and underground, natural or artificial, that are situated wholly or partly within, or border upon, this state or are within its jurisdiction, except those private waters that do not combine or effect a junction with natural surface or underground waters." OHIO REV. CODE § 6121.01(D); *see also id.* §§ 939.01(L); 1521.01(E); 6111.01(H); 6112.01(H); 6119.011(E). It is Ohio public policy "[t]o preserve, protect, upgrade, conserve, develop, utilize, and manage the water resources of the state; … [t]o prevent or abate the pollution of water resources; [and] [t]o

promote the beneficial use of waters of the state for the protection and preservation of the public health, safety, convenience, and welfare[.]" *Id.* § 6121.03(A)(1)-(3). Ohio empowers state agencies to regulate the range of state interests from water pollution, *id.* § 6111.03, to conservation, *id.* § 939.02, and drainage, *id.* § 1521.03.

45. Under Oklahoma law, waters of the state broadly include "all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, storm sewers and all other bodies or accumulations of water, surface and underground, natural or artificial, public or private, which are contained within, flow through, or border upon this state or any portion thereof, and shall include under all circumstances the waters of the United States which are contained within the boundaries of, flow through or border upon this state or any portion thereof." OKLA. STAT. tit. 27A, § 1-1-201(20) (defining "waters of the state" under the Oklahoma Environmental Quality Act); *see also* OKLA. STAT. tit. 82, § 1084.2(3) (defining "waters of the state" under Oklahoma Statutes Title 82, Waters and Water Rights). Furthermore, Oklahoma has declared it to be "the public policy of this state to conserve the waters of the state and to protect, maintain and improve the quality thereof for public water supplies, for the propagation of wildlife, fish and aquatic life and for domestic, agricultural, industrial, recreational and other legitimate beneficial uses ... ." OKLA. STAT. tit. 27A, § 2-6-102; *see also* OKLA. STAT. tit. 82, § 1084.1. Accordingly, Oklahoma has enacted numerous laws to regulate the State's waters. *See generally*, OKLA. STAT. tit. 27A, §§ 2-6-101 *et seq.*; OKLA. STAT. tit. 82, §§ 1020.1 *et seq.*; OKLA. STAT. tit. 82, §§ 1084.1 *et seq.*

46. South Carolina has numerous laws to protect its waters. For example, South Carolina's Pollution Control Act, provides that it is "the public policy of the State [is] to maintain reasonable standards of purity of the air and water resources of the State, consistent with the public

health, safety and welfare of its citizens ... [and] the protection of terrestrial and marine flora and fauna ... . [T]he Department of Health and Environmental Control shall have authority to abate, control and prevent pollution." S.C. CODE ANN. § 48-1-20. South Carolina law further provides that "[a] person who discharges organic or inorganic matter into the waters of this State ... to the extent that the fish, shellfish, aquatic animals, wildlife, or plant life indigenous to or dependent upon the receiving waters or property is damaged or destroyed is liable to the State for the damages. *Id.* § 48-1-90. "A person affected by the provisions of this chapter or the rules and regulations adopted by the department desiring to ... discharge ... sewage, industrial waste or other wastes, or the effluent therefrom, or air contaminants, into the waters or ambient air of the State, first shall make an application to the department for a permit to construct and a permit to discharge from the outlet or source." *Id.* § 48-1-100. The importance of South Carolina waters to the State is further demonstrated by its Constitution which provides that "[a]ll navigable waters shall forever remain public highways free to the citizens of the State ..." S.C. CONST. art. XIV, §4. Similarly, S.C. Code Ann. §49-1-10 states that "all navigable watercourses and cuts are hereby declared navigable streams and such streams shall be common highways and forever free, as well to the inhabitants of this State."

47. In South Dakota, "the people of the state have a paramount interest in the use of all the water of the state and that the state shall determine what water of the state, surface and underground, can be converted to public use or controlled for public protection." SDCL § 46-1-1. Under South Dakota law, "the protection of the public interest in the development of the water resources of the state is of vital concern to the people of the state and that the state shall determine in what way the water of the state, both surface and underground, should be developed for the greatest public benefit." *Id.* § 46-1-2. Pursuant to both statute and decisions of the South Dakota

Supreme Court, "all water within the state is the property of the people of the state" and held in the public trust. *Id.* § 46-1-3; *Parks v Cooper*, 2004 S.D. 27, ¶ 53, 676 NW2d 823, 841 (2004).

48. The sovereign State of Tennessee "has an obligation to take all prudent steps to secure, protect, and preserve th[e] right" of its people "to unpolluted waters." Tenn. Code Ann. § 69-3-102(a). The State thus holds "the waters of Tennessee . . . in public trust for the use of" Tennesseans. *Id.* And in its role as sovereign trustee, Tennessee has established and continues to maintain a comprehensive regime for regulating Tennessee waters. *See* Tenn. Code Ann. tit. 69.

49. Utah law provides that "[a]ll waters in this state, whether above or under the ground, are hereby declared to be the property of the public, subject to all existing rights to the use thereof." UTAH CODE ANN. § 73-1-1(1). Consistent with this statutory provision, the State of Utah directly owns many waters and lands. The State of Utah also has a statutory duty to productively use this property for the public good, as its "Legislature shall govern the use of public water for beneficial purposes, as limited by constitutional protections for private property." *Id.* § 73-1-1(3). The State has carried out this statutory duty diligently, by enacting numerous laws to protect the State's waters, both on public and on private lands. *See generally* UTAH CODE ANN. § 73-1-1 et seq.

50. In Virginia, "the Commonwealth's water resources" are of "crucial importance" to preserve "the health and welfare of the people of Virginia" and "to assure further industrial growth and economic prosperity for the Commonwealth." VA. CODE § 62.1-44.36. Indeed, Virginia's Constitution declares it the "Commonwealth's policy to protect its … waters … for the benefit, enjoyment and general welfare of the people of the Commonwealth." VA. CONST. art. XI, § 1. Virginia's General Assembly has charged the Commonwealth's officers with the duty to "protect[] and preserve[] [water rights] subject to the principle that all of the state waters belong to the public

for use by the people for beneficial purposes without waste," and that the Commonwealth's water resources must be "balanced [for] multiple uses," including "human consumption," the "protection of wildlife" and "maximum economic development … for the benefit of the Commonwealth as a whole." *Id.* The Commonwealth has carried out this statutory duty diligently, enacting numerous laws to protect the State's waters. *See generally* VA. CODE tit. 62.1, ch. 3.1.

51. In Wyoming, the "water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state" is State property. WYO. CONST. art. VIII, § 1. It is also the State of Wyoming's policy that "water is one of Wyoming's most important natural resources, and the protection, development and management of Wyoming's water resources is essential for the long-term public health, safety, general welfare and economic security of Wyoming and its citizens." WYO. STAT. ANN. § 35-11-309. The State's constitutional and statutory provisions charge the State Engineer and the State Board of Control with the supervision, appropriation, distribution, and diversion of surface and groundwater use within Wyoming. WYO. CONST. art. VIII, §§ 2, 5; *see also* WYO. STAT. ANN. §§ 41-4-502 through -511. Consistent with these obligations, the State of Wyoming has enacted laws providing for the regulation of its water resources. *See, e.g.*, WYO. STAT. ANN. §§ 41-3-101; 35-11-302. The State of Wyoming also submitted comments to the Agencies expressing its concerns about the draft proposal and then the Final Rule on February 7, 2023.

52. As these laws show, state authority to regulate local lands and waters "is perhaps *the* quintessential state activity." *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982) (emphasis added). This centrality means that "except where the reserved rights or navigation servitude of the United States are invoked, [a] State has total authority over its internal waters." *California*, 438 U.S. at 662.

53. But under the Amended Final Rule, once a water is determined to fall within the Agencies' authority, this determination eliminates the State's primacy to regulate and protect that water under the State's standards. The Amended Final Rule imposes significant federal burdens upon the States by forcing them to shift attention and resources to the federal scheme to the disadvantage of local, state-based programs. In all cases, state regulation necessarily plays a secondary role when a state water becomes a "water of the United States."

54. The States' use and management of the waters and lands they own or regulate will be subject to greater federal regulation under the Amended Final Rule. Moreover, the Amended Final Rule's additional regulatory burden imposes a direct economic impact on the States, including by increasing the permitting costs associated with state-funded infrastructure projects or forcing the States to alter their plans for the affected land and water. It also imposes an indirect economic impact on the States by expanding federal regulatory authority over businesses within the States whose operation will see higher permitting costs, thereby reducing taxes, royalties, and other payments to the States.

55. The need for federal jurisdictional findings and permits also places significant burdens upon farmers, ranchers, homeowners, miners, energy providers, airports, business owners, and others within each of the Plaintiff States. The Amended Final Rule forces them to pay costly consultant and other fees merely to continue to conduct ordinary activities on their lands—even in cases where those activities could have no significant impact on navigable, interstate waters. *See* 33 U.S.C. §§ 1342, 1344. The ambiguity the Amended Final Rule creates could lead to decreased property values for any property that even arguably might contain a covered water. Given the "primary" role of the States in this area, balancing these burdens should be a choice primarily left to those States. But the Amended Final Rule assumes that anything less than a maximalist

approach to water regulation represents an abdication of this traditional state role. *See* 88 Fed. Reg. at 3065.

56. *Second*, the Amended Final Rule significantly increases the burden the States must bear related to the various programs run through the CWA. The Agencies professed that they "d[id] not have the information available to assess what change in environmental benefits or compliance costs that individual States would bear under the final rule." U.S. ENVTL. PROT. AGENCY & DEP'T OF THE ARMY, ECONOMIC ANALYSIS FOR THE FINAL "REVISED DEFINITION OF 'WATERS OF THE UNITED STATES'" RULE 49 (2022), *available at* https://bit.ly/40jczd8. Even so, they declared that States would face only "de minimis" costs relative to the pre-2015 regime. *Id.* at xii. Not so.

57. The CWA, for example, requires the States to enact Water Quality Standards (WQS) for waters within the definition of WOTUS and to revise the WQS as necessary. 33 U.S.C. §§ 1311(b)(1)(C), 1313(e)(3)(A); 40 C.F.R. §§ 130.3, 131.3(i), 131.4(a). For waters that fail to meet the WQS, States must set pollution limits, called Total Maximum Daily Loads (TMDL), and apply the TMDL to the State's water quality management plan and National Pollution Discharge Elimination System (NPDES) permitting program. 40 C.F.R. § 130.7. EPA admits that "[s]ome States have developed standards for certain categories of water … that could be jurisdictional under the final rule but not jurisdictional under the secondary baseline of the 2020 NWPR, and others have not." Economic Analysis, *supra*, at xix. Because the Amended Final Rule increases the number of waters subject to the CWA, the States must expend significant resources to immediately determine which waters were added to the Agencies' jurisdiction and decide if current WQS apply to these additional waters. 33 U.S.C. § 1313(c)(4)(B).

58. If current WQS do not apply for particular waters, then the State must issue new WQS. 33 U.S.C. § 1313(c)(4). If the State's WQS does not comply with the CWA, EPA's duty to establish a WQS for the State is triggered. 33 U.S.C. § 1313(c)(4)(B). The State must also issue a TMDL in the case of non-compliant waters. 40 C.F.R. § 130.7. The process of implementing these changes is expensive and places a significant strain on limited state resources.

59. In addition, under the CWA, States must prepare and submit to the EPA a biennial water quality report describing "the water quality of all navigable waters in such State" and analyzing the extent to which individual waters support wildlife populations and recreational activities. 33 U.S.C. § 1315(b)(1)(A). The Amended Final Rule places more water bodies within the definition of "navigable waters," and therefore, requires the States to conduct more water quality assessments at significant expense to provide a complete report.

60. The Amended Final Rule also directly affects the States' administration of the NPDES permitting program. *See* 33 U.S.C. § 1342; State Program Information, EPA https://bit.ly/3HlEPDg (last visited Feb. 13, 2023). The States will receive additional federally mandated NPDES permit applications for discharging pollutants into waters now federally regulated as a result of the Amended Final Rule. 33 U.S.C. §§ 1311, 1342. The States will then be required to process these additional federally mandated CWA permit applications. The same problem will occur as to the CWA's requirement that all federal permit applicants obtain a state certification from the State in which the proposed discharge will occur. *See* 33 U.S.C. § 1341. By expanding the number of activities requiring a permit, and thus the number of permit applicants seeking certifications from the States, it's no surprise that the Agencies admit that States could face increased costs on these fronts, as well. Economic Analysis, *supra*, at 66-67, 95.

61. *Third*, the Amended Final Rule imposes additional costs on the States as permit applicants themselves. States will have to apply for their own federal permits to complete any range of infrastructure activities, including building roads, schools, hospitals and water pipelines. By expanding the number of these activities that require a permit, the Amended Final Rule imposes new direct costs on the States. Expenses related to studies for current and future builds, topographic mapping, extensive surveys—all these actions require money.

62. The Agencies did not take into account the unique ecological, geological, and hydrological differences among the States and have ignored the scientific expertise of the state regulators charged with protecting state resources under both federal and state law. In fact, several of the States have unique hydrological features that no other areas of the country enjoy, including, for example, the extensive prairie pothole regions in North Dakota, South Dakota, and Montana that the Amended Final Rule identifies as jurisdictional, 88 Fed. Reg. at 3031; the ephemeral streams that exist in several States, *id.* at 3029; or the permafrost wetlands and other wetlands comprising much of the North Slope in Alaska. By failing to adequately consider these factors, the Agencies have woefully underestimated the impact of the Amended Final Rule on state programs and budgets.

63. *Fourth*, States must also bear substantial costs when named as a violator in a CWA "citizen suit." 33 U.S.C. § 1365(a), (g). With the Amended Final Rule creating confusion on multiple fronts over what is (and is not) WOTUS, the States are subject to a much greater risk of defending themselves in these actions. These litigation costs can stack up quickly. And with the Amended Final Rule expanding the Agencies' jurisdiction as broadly as it has, this harm is not a question of "if," but "when."

BACKGROUND

I. The Clean Water Act

64. Congress enacted the provisions at issue as part of the Federal Water Pollution Control Act Amendments of 1972. 33 U.S.C. §§ 1251-1387.

65. The CWA is "the principal federal law regulating water pollution in the United States." *Sackett*, 598 U.S. at 657-58. In it, Congress gave the Agencies limited authority to regulate the discharge of certain materials into "navigable waters" through permitting programs. 33 U.S.C. §§ 1341-1346. The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas." *Id.* § 1362(7).

66. The definition of WOTUS significantly alters at least three CWA programs that affect the States.

67. As noted above, one program involves establishing and revising WQS or goals for each water body within the definition of WOTUS. *See* 33 U.S.C. §§ 1311(b)(1)(C), 1313(e)(3)(A). If a State's WQS does not comply with the CWA, EPA will create a WQS for the State. *See* 33 U.S.C. § 1313(c)(3). If waters fail to meet the WQS, the State must set TMDL limiting the amount of a pollutant that can be discharged into the water while achieving the WQS. *See* 40 C.F.R. § 130.7. The State must then apply the TMDL to its water quality management plan and permitting programs. *Id.* Each State must also biennially submit a water quality report to EPA describing "the water quality of all navigable waters in such State" and analyzing the extent to which these waters provide for "the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities in and on the water." 33 U.S.C. § 1315(b)(1)(A)-(B).

68. Another program is the NPDES permitting program. Under the CWA, anyone seeking to discharge material into WOTUS must obtain a permit from either the States or EPA for pollutants, or the Corps for dredge or fill material. *See* 33 U.S.C. §§ 1311(a), 1342, 1344,

1362(12). "The discharge of a pollutant" includes "'any addition of any pollutant to navigable waters from any point source,' and 'pollutant' is defined broadly to include not only traditional contaminants but also solids such as 'dredged spoil, … rock, sand, [and] cellar dirt.'" *Rapanos*, 547 U.S. at 723 (plurality op.) (citing 33 U.S.C. §§ 1362(12), 1362(6)); *see also Sackett*, 589 U.S. at 660 (citing 33 U.S.C. § 1362(6)). The States serve as the primary administrative authority for the NPDES permitting program, and help the Corps administer the dredge and fill permitting program. 33 U.S.C. §§ 1342, 1344.

69. Obtaining a discharge permit from the Agencies is an expensive and uncertain process—it can take years and cost tens and hundreds of thousands of dollars. *See* 33 U.S.C. §§ 1342, 1344 (describing the discharge permitting process). "For a specialized 'individual' permit … one study found that the average applicant 'spends 788 days and $271,596 in completing the process,' without 'counting costs of mitigation or design changes.'" *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 594-95 (2016) (quoting *Rapanos*, 547 U.S. at 721). "Even more readily available 'general' permits took applicants, on average, 313 days and $28,915 to complete." *Id.* at 595. And even with all of that, "[s]uccess is [] far from guaranteed, as the Corps has asserted discretion to grant or deny permits based on a long, nonexclusive list of factors that ends with a catchall mandate to consider 'in general, the needs and welfare of the people.'" *Sackett*, 598 U.S. at 661 (quoting 33 C.F.R. § 320.4(a)(1) (2022)).

70. When it comes to violations, "[t]he CWA is a potent weapon." *Sackett*, 589 U.S. at 660. Discharging into WOTUS without a permit can subject an individual to "crushing" "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)). Fines can climb to as high as $64,618 per violation, per day on the civil side, and fines and penalties of up to 15 years imprisonment on the criminal side for certain violations. 33 U.S.C. §§ 1311, 1319, 1342, 1344, 1362, 1365; 40 C.F.R. § 19.4; *see Sackett*, 598 U.S. at 660 (discussing the "severe criminal penalties" and "civil penalties [that] can be nearly as crushing" "due to the Act's 5-year statute of limitations").

71. There are several ways a party—including the Plaintiff States—can be put at risk of facing penalties. One way, of course, is through enforcement by the Agencies. *See, e.g.*, 33 U.S.C. § 1319. Another is through CWA "citizen suits." A citizen suit may be filed by any "person or persons having an interest which is or may be adversely affected" against "any person," including "any … governmental instrumentality or agency to the extent permitted by the eleventh amendment to the [U.S.] Constitution[] who is alleged to be in violation of … an effluent standard or limitation under this chapter or … an order issued by the Administrator or a State with respect to such a standard or limitation." 33 U.S.C. § 1365(a), (g).

72. The final program is one where all CWA permit applicants, whether for pollutants or dredge and fill material, are required to obtain a statement from the State in which the discharge will occur, certifying that the discharge will comply with the State's WQS. 33 U.S.C. § 1341(a)(1).

II. CWA Regulations and Law: 1974 to 2023

73. "Due to the CWA's capacious definition of 'pollutant,' its low *mens rea*, and its severe penalties, regulated parties have" no choice but to "focus[] particular attention on the Act's geographic scope"—"the outer boundaries of" which "have been uncertain from the start." *Sackett*, 598 U.S. at 658, 661.

74. For a century before the CWA, the Supreme Court interpreted the phrase "navigable waters of the United States" in the CWA's predecessor statute to refer to "navigable in fact" interstate waters. *The Daniel Ball*, 77 U.S. 557, 563 (1870).

75. In keeping with this traditional understanding, the Corps' first rule under the CWA in 1974 defined "navigable waters" as those waters that have been, are, or may be used for interstate or foreign commerce. 39 Fed. Reg. 12119 (Apr. 3, 1974). EPA, on the other hand, read Congress to have silently deleted any requirement of navigability from the definition of "waters." *See Sackett*, 598 U.S. at 701 (Thomas, J., concurring).

76. After a federal district court enjoined the Corps' initial rule, *see Nat. Res. Def. Council v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975), the Agencies sought on remand to expand their regulatory jurisdiction (in line with EPA's more expansive understanding) to include areas never before subject to federal permitting requirements, 40 Fed. Reg. 31320 (July 25, 1975). Those 1975 regulations defined WOTUS to include navigable waters and their tributaries, as well as non-navigable intrastate waters that could affect interstate commerce. *Id.* at 31324-25. "Eventually [] EPA and Corps settled on materially identical definitions" of WOTUS as encompassing "'[a]ll ... waters' that 'could affect interstate or foreign commerce.'" *Sackett*, 598 U.S. at 664 (citing 45 Fed. Reg. 33424 (1980) and 47 Fed. Reg. 31810–31811 (1982), and quoting 40 C.F.R. § 230.3(s)(3) (2008)).

77. The Supreme Court reviewed this definition of WOTUS in 1985 after the Corps "assert[ed] [] authority under the CWA over wetlands that 'actually abut[ted] on a navigable waterway.'" *Sackett*, 598 U.S. at 665 (quoting *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985)). "Although … concern[ed] that wetlands seemed to fall outside traditional notions of 'waters,' [the Court] nonetheless deferred to the Corps, reasoning that 'the transition from water to solid ground is not necessarily or even typically an abrupt one.'" *Id.* (quoting *Riverside Bayview*, 474 U.S. at 132-133) (cleaned up).

78. In 1986, "[t]he agencies responded to *Riverside Bayview* by expanding their interpretations even further." *Sackett*, 598 U.S. at 665. Under the 1986 Regulations, "waters of the United States" included traditional navigable waters, interstate waters, intrastate waters whose use or degradation could affect interstate commerce, and tributaries of all those waters, as well as wetlands adjacent to these waters and tributaries, and waters used as habitat by migratory birds that either are protected by treaty or cross state lines. 51 Fed. Reg. 41206-60 (Nov. 13, 1986).

79. The Supreme Court would have occasion to review two aspects of the Agencies' definition of WOTUS under the 1986 regime—first in 2001 and again in 2006. In both instances, the Court rejected the Agencies' assertion of authority over non-navigable, intrastate waters.

80. In *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, the Supreme Court rejected the Corps' assertion of jurisdiction over any waters "[w]hich are or would be used as habitat" by migratory birds. 531 U.S. 159, 164 (2001) (*SWANCC*) (quoting 51 Fed. at 41217). The Court in *SWANCC* explained that Congress did not authorize the Agencies to regulate "nonnavigable, isolated, intrastate waters," like seasonal ponds. *Id.* at 171.

81. The Court added that regulation of isolated waters like these would invoke "the outer limits of Congress' power," have the effect of "alter[ing] the federal-state framework by permitting federal encroachment upon a traditional state power," and raise "significant constitutional questions" regarding the CWA's constitutionality. *Id.* at 172-74. Congress, the Court concluded, did not intend to create such difficult constitutional questions, nor press the outer boundaries of its constitutional authority. *Id.* In short, *SWANCC* "directly contradict[ed] the EPA's 1973 interpretation, upon which every subsequent expansion of its authority has been based." *Sackett*, 598 U.S. at 703 (Thomas, J., concurring).

82. *SWANCC* included the first instance of the "significant nexus" term that ultimately became a centerpiece of the Final Rule. But it did so in passing, while characterizing *Riverside Bayview*. And it gave the term a narrow read: *SWANCC* perceived *Riverside Bayview* to hold that the non-navigable wetlands in that case could constitute WOTUS only because they were "inseparably bound up" with "conventionally defined" waters. *SWANCC*, 531 U.S. at 167 (citing *Riverside Bayview*, 474 U.S. at 134).

83. Almost immediately following the Court's opinion in *SWANCC*, the Agencies "issued guidance that sought to minimize *SWANCC*'s impact" by construing the holding as "strictly limited to waters that are 'nonnavigable, isolated, and intrastate'" and instructing field staff to "continue to exercise CWA jurisdiction to the full extent of their authority"—whatever that meant—for "any waters that fall outside of that category." *Sackett*, 598 U.S. at 666 (quoting EPA & Corps, Memorandum, Supreme Court Ruling Concerning CWA Jurisdiction Over Isolated Waters 3 (2001) (alteration omitted)). The result was disastrous: a "system of vague rules" based on "locally developed practices" that spawned "an array of expansive interpretations of the CWA's reach." *Id.*

84. "It was against this backdrop that [the Supreme Court] granted review in *Rapanos v. United States* [547 U.S. 715 (2006)]." *Sackett*, 598 U.S. at 666. In that case, the Supreme Court rejected the Agencies' assertion of authority over non-navigable, intrastate waters that are not significantly connected to navigable, interstate waters. *Rapanos* dealt with whether non-navigable tributaries of traditional navigable waters are within the Agencies' jurisdiction and, if so, in what circumstances. The Court's majority consisted of two opinions. Both rejected the Agencies' position.

85. A four-justice plurality held that only "relatively permanent, standing or continuously flowing bodies of water," as well as secondary waters with a "continuous surface connection" to those relatively permanent waters, qualify as "waters of the United States." *Id.* at 739-42. "Wetlands with only an intermittent, physically remote hydrologic connection," the plurality explained, do not fall within the Agencies' jurisdiction. *Id.* at 742.

86. Justice Kennedy, writing for himself, explained that the Agencies' jurisdiction extends only to primary "waters that are navigable in fact or that could reasonably be so made" and secondary waters with a "significant nexus" to primary waters. *Id.* at 759. To satisfy that nexus, the secondary waters must "significantly affect the chemical, physical, *and* biological integrity of primary waters." *Id.* at 780 (emphasis added).

87. Under Justice Kennedy's interpretation, the Agencies could not assert jurisdiction over all "wetlands (however remote) possessing a surface-water connection with a continuously flowing stream (however small)." *Id.* at 776-77. Justice Kennedy added that the Agencies' position would impermissibly "permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters." *Id.* at 778.

88. Thus, in both *SWANCC* and *Rapanos*, the Court remained firm that an expansive definition of jurisdictional waters would exceed Congress's powers under the Commerce Clause. *See Rapanos*, 547 U.S. at 738 (plurality op.) (rejecting significant nexus test on this ground); *SWANCC*, 531 U.S. at 173 (rejecting broad agency construction based on similar concerns).

89. After *Rapanos*, the Agencies issued a guidance document explaining the approach the Agencies would use to determine whether waters were subject to the CWA. U.S. ENVTL. PROT. AGENCY & U.S. ARMY CORPS OF ENG'RS, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S.

SUPREME COURT'S DECISION IN *RAPANOS V. UNITED STATES* & *CARABELL V. UNITED STATES* (Dec. 2, 2008) ("*Rapanos* Guidance"), *available at* https://bit.ly/3RXUs8E. The guidance document asserted that the Agencies would exercise per se jurisdiction over:

(1) "traditional navigable waters";

(2) "wetlands adjacent to traditional navigable waters";

(3) "non-navigable tributaries of traditional navigable waters that are relatively permanent where tributaries typically flow year-round or have continuous flow at least seasonally"; and

(4) "wetlands that abut such tributaries."

Id. at 1.

90. The Agencies also asserted case-by-case authority, as they deemed appropriate, over:

(1) "non-navigable tributaries that are not relatively permanent";

(2) "wetlands adjacent to non-navigable tributaries that are not relatively permanent"; and

(3) "wetlands adjacent to but not directly abutting a relatively permanent non-navigable tributary."

Id.

91. Critically, the Agencies announced that they planned to identify jurisdictional waters using reasoning drawn from the *Rapanos dissenters'* view of the operative test; that is, CWA jurisdiction "exists over a water body if either the plurality's [relatively permanent] or Justice Kennedy's [significant nexus] standard is satisfied." *Id.* at 3 & n.16 (citing *Rapanos*, 547 U.S. at 810 (Stevens, J., dissenting) ("judgments should be reinstated if either of those tests is met")).

92. The guidance document also stated that, by its own terms, it did "not impose legally binding requirements on EPA, the Corps, or the regulated community, and may not apply to a particular situation depending on the circumstances." *Rapanos* Guidance, *supra*, at 4 n.17.

93. Legally binding requirements incorporating *Rapanos* would not come until June 2015, when the Agencies published a final rule entitled "Definition of 'Waters of the United States' Under the Clean Water Act." 80 Fed. Reg. 37054-127 (June 29, 2015). This rule embraced a novel and sweeping view of the Agencies' jurisdiction—"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 (quoting EPA & Dept. of the Army, Economic Analysis of the EPA-Army Clean Water Rule 11 (2015)).

94. Among other things, the 2015 Rule declared that all "tributaries" of waters used in interstate commerce (and certain other "primary" waters) were *per se* jurisdictional waters. 33 C.F.R. § 328.3(c)(3) (2015). All waters "adjacent" to primary waters, impoundments, and tributaries—including those that were merely "neighboring" waters—were swept into WOTUS, too. 33 C.F.R. § 328.3(c)(1) (2015); 40 C.F.R. § 230.3(o)(3)(i) (2015). And the 2015 definition covered *all* interstate waters (including non-navigable ones) and any intrastate waters adjacent to them. *See* 33 C.F.R. § 328.3(a)(2), (7) (2015); 40 C.F.R. § 230.3(o)(3)(i), (1)(vii) (2015). Lastly, as relevant here, the 2015 Rule swept in any "similarly situated waters in the region" of a primary water that would "significantly affect[] the chemical, physical, or biological integrity" of a primary water. *See* 33 C.F.R. § 328.3(c)(5) (2015); 40 C.F.R. § 230.3(o)(3)(v) (2015).

95. Many of the Plaintiff States challenged the rule in district court. Several courts, including this one, stayed its implementation. *See, e.g.*, *North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015); *Georgia v. Pruitt*, 326 F. Supp. 3d 1356 (S.D. Ga. 2018). The rule was

eventually remanded to the Agencies for "read[ing] the term navigability out of the" statute. *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1358 (S.D. Ga. 2019).

96. In 2019, the Agencies published a final rule repealing the 2015 Rule and temporarily recodifying the 1986 Regulations. *See* 84 Fed. Reg. 56626 (Oct. 22, 2019). Three months later, the Agencies issued another final rule—the Navigable Waters Protection Rule (NWPR)—that defined "waters of the United States" in accordance with the *Rapanos* plurality opinion. *See* 85 Fed. Reg. 22250 (Apr. 21, 2020). The NWPR provided predictability and clarity by identifying four easily understandable categories of jurisdictional waters: (1) the territorial seas and traditional navigable waters; (2) tributaries of those waters; (3) certain lakes, ponds, and impoundments of jurisdictional waters; and (4) wetlands adjacent to other jurisdictional waters (other than jurisdictional wetlands). "Significant nexus" and other ambiguous standards were absent. Interstate waters were also not included in WOTUS. And several types of waters, such as ditches and ephemeral streams, were categorically excluded.

97. The step toward certainty that the NWPR offered was short-lived. Without making any merits determination, a district court granted the Agencies' motion for voluntary remand in a challenge to the NWPR and vacated the rule. *See generally Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949 (D. Ariz. 2021).

98. The Agencies then published a proposed new rule for comment in December 2021. *See* 86 Fed. Reg. 69372 (Dec. 7, 2021). In short, the Proposed Rule outlined returning to a purportedly modified version of the pre-2015 WOTUS framework. The Agencies received roughly 114,000 comments in response, 88 Fed. Reg. at 3019, including comments from most of the Plaintiff States in strong opposition, *see, e.g.*, State of West Virginia, *et al.*, Comment Letter on Proposed Rule Entitled "Revised Definition of 'Waters of the United States'" (Feb. 7, 2022)

available at http://bit.ly/40YBNhs (24-State letter); State of North Dakota, Comment Letter on Proposed Rule Entitled "Revised Definition of 'Waters of the United States'" (Feb. 7, 2022), *available at* http://bit.ly/3E4HKiI.

99. Despite substantial pushback to their proposal, the Agencies morphed the Proposed Rule into a *more* expansive understanding of "waters of the United States" when it issued the Final Rule. *See Sackett*, 598 U.S. at 668-69 (explaining how the Final Rule was a "broader rule" than the 2019 iteration).

100. For instance, the Final Rule defined "significant nexus" to mean "material influence," a recharacterization of the key test that the Agencies did not signal in the Proposed Rule.

101. Ultimately, the Final Rule asserted WOTUS jurisdiction (with limited exceptions) over five categories of land and water:

(1) Traditional navigable waters, territorial seas, and interstate waters;

(2) Impoundments of "waters of the United States";

(3) Tributaries to traditional navigable waters, territorial seas, interstate waters, or impoundments, where those tributaries meet either the relatively permanent or significant nexus standard;

(4) Wetlands that are adjacent to:

a. Traditional navigable waters, territorial seas, and interstate waters;

b. Relatively permanent impoundments or tributaries, where the wetlands bear a continuous surface connection with those impoundments or tributaries; or

c. Non-relatively permanent impoundments and tributaries where the wetlands meet the significant nexus standard.

(5) Other intrastate lakes, ponds, streams, or wetlands that meet either the relatively permanent or significant nexus standard.

88 Fed. Reg. at 3142.

102. In the Final Rule, the Agencies repeatedly relied on scraps of legislative history to argue that they were justified in pursuing "the broadest possible constitutional interpretation" of their own jurisdictional provision. 88 Fed. Reg. at 3008 (quoting S. REP. NO. 92-1236, at 144 (1972) (Conf. Rep.)). Yet that same legislative history—such as it is—stresses that waters must comprise part of the "continuing [water] highway over which commerce is or may be carried on with other States" before they can constitute "waters of the United States." 118 CONG. REC. 33,699 (1972) (statement of Senator Muskie); *see also id.* at 33,756-57 (statement of Rep. Dingell) ("[I]t is enough that the waterway serves as a link in the chain of commerce among the States as it flows in the various channels of transportation[.] … The 'gist of the Federal test' is the waterway's use 'as a highway.'"). At best, the legislative history is "ambiguous," and the Supreme Court has warned away from relying on it. *Sackett*, 598 U.S. at 703 & n.8 (Thomas, J., concurring).

103. In short, "for decades, the EPA (of its own license) and the Corps (under the compulsion of an unreasoned and since discredited District Court order) have issued substantively identical regulatory definitions of 'the waters of the United States' 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., concurring).

III. The Plaintiff States and Others Challenge the Final Rule

104. On February 16, 2023, the Plaintiff States filed a Complaint with this Court to hold, vacate, and set aside the Final Rule as unlawful. *See* ECF No. 1.

105. The Final Rule faced other challenges around the country as well, from other states and industry groups seeking to stave off the massive confusion the Final Rule was about to unleash. *See Texas v. EPA*, No. 3:23-cv-17 (S.D. Tex. filed Jan. 18, 2023) (challenge from industry groups and the States of Texas and Idaho); *Kentucky v. EPA*, No. 3:23-cv-00007 (E.D. Ky. filed Feb. 22, 2023) (challenge from business groups and the Commonwealth of Kentucky).

106. The Agencies repeatedly insisted that the Final Rule was "founded on the familiar framework of the longstanding 1986 regulations," 88 Fed. Reg. at 3007, and the "familiar pre-2015 definition," *id.* at 3005. But it wasn't. Rather than being "generally consistent with the pre-2015 regulatory regime," *id.* at 3007, it marked another significant expansion of the Agencies' regulatory authority.

107. The Final Rule returned to the flawed approach of the *Rapanos* dissent, purporting to create federal jurisdiction where a water met *either* the relatively permanent standard *or* the significant nexus standard. And many examples showed that the way the Final Rule understood this approach leads to broader results than under the pre-2015 regime. Among other things, the Agencies offered a new construction of "relatively permanent" for tributaries, under which a tributary would be considered "relatively permanent" if it contained "flowing or standing water year-round or continuously during certain times of the year." *Id.* at 3084. The Agencies also altered the definition of the "significant nexus" standard (borrowed again from the since-rejected 2015 Rule), which further extended their grasp over tributaries. Further, the Agencies redefined tributaries to cover any watercourse so long as it made its way to a traditional navigable water, territorial sea, or interstate water by any wet *or dry* waterway, such as wetlands, ditches, or waste treatment centers. 88 Fed. Reg. at 3080. The Agencies expanded their reach over wetlands, too, using a broad "significant nexus" standard to reach all manner of "reasonably close" wetlands. 88 Fed. Reg. at 3089-90. And the Final Rule created a broad catch-all category for any other *intra*state lakes, ponds, streams, and wetlands that met either the relatively-permanent or significant-nexus standards. *Id.* at 3097-98.

108. In short, the Final Rule was not merely a codification of longstanding policy. If anything, by relying on vague standards and broad conceptions of agency power, the Final Rule

echoed many aspects of the now-defunct 2015 Rule. The Agencies even relied—over and over again—on the same "Science Report" that led them to issue the vacated 2015 Rule. *See* 88 Fed. Reg. at 3035; *see also, e.g.*, *id.* at 3006, 3026, 3029, 3030, 3033.

109. Aside from incongruence with the Agencies' own pre-2015 regime, other definitional problems in the Final Rule also lurked. The Final Rule covered *all* interstate waters, regardless whether they are navigable or bear any relationship to other navigable water. 88 Fed. Reg. at 3072. Tributaries to these interstate waters, wetlands adjacent to them, and other bodies of water that meet the relatively permanent or significant nexus standard were likewise treated as jurisdictional waters. *Id.* at 3006. No exclusions applied. *Id.* at 3103-04. The Final Rule further treated impoundments as jurisdictional waters, too, if they were either WOTUS at the time of impoundment or WOTUS at the time of assessment. 88 Fed. Reg. at 3078. The Agencies also asserted broad authority over "perennial, intermittent, and ephemeral streams." *Id.* at 3030. And the Final Rule further employed a definition of "adjacency"—for purposes of determining when a wetland is "adjacent" to jurisdictional water and accordingly may also qualify as jurisdictional—that provided no practical limit on the agency's discretion, applying to any wetland that was "bordering, contiguous, or neighboring." *Id.* at 3006.

110. Thus, the Final Rule was no return to a stable and easily administrable regulatory framework. All throughout the Rule, the Agencies adopted provisions that were beyond the CWA's text, mirrored or exceeded the 2015 Rule's aggression, and were practically useless in providing meaningful guidance when it came to what is—and what (if anything) is *not*—"waters of the United States."

IV. This Court and Others—Including the Supreme Court—Reject the Final Rule

111. On February 21, 2023, the Plaintiff States moved for a preliminary injunction of the Final Rule, arguing that they were likely to succeed on the merits of their claims, they would

face irreparable harm absent an injunction, and the balance of harms tipped in their favor. *See* ECF No. 44-1.

112. On April 12, 2023, this Court granted the Plaintiff States' motion and preliminarily enjoined the Agencies' from enforcing the Final Rule in those states. ECF No. 131. Just a few days earlier, the federal court in the Southern District of Texas had granted a similar motion filed by the States of Texas and Idaho, and this Court found much of that order persuasive here.

113. The Court identified two major categories of problems associated with the Final Rule that showed that the Plaintiff States are likely to succeed on the merits of their claims: (1) those related to the Final Rule's purported use of the significant-nexus test from Justice Kennedy's *Rapanos* concurrence; and (2) those related to critical statutory, notice, and constitutional concerns.

114. *First*, the Court identified key "material differences between the version of the 'significant-nexus' test under the [Final] Rule and the standard articulated by Justice Kennedy in *Rapanos*," ECF No. 131 at 18-19 (citing *Texas*, 2023 WL 2574591, at *7-8)—differences which rendered the Final Rule "neither understandable nor 'intelligible,'" and exposed it as having "boundaries [that] are unlimited." ECF No. 131 at 19.

115. The Final Rule defines the standard as "waters that, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, or interstate waters," 88 Fed. Reg. 3006, but, as the Court noted, the Final Rule failed to provide clear meaning for terms like "similarly situated," "in the region," "significant affect," and "chemical, physical, or biological integrity," ECF No. 131 at 22-23.

116. Furthermore, the Court noted that some definitions provided by the Final Rule are so "murky" and "unintelligible" that they "provide little guidance to parties impacted by the regulations." ECF No. 131 at 23. As a result, the significant-nexus standard in the Final Rule "poses important due process concerns," and "seems to muddy the waters even more" than they already are "with its numerous factors and malleable application." ECF No. 131 at 27-28 (citing *Texas*, 2023 WL 2574591, at *8 n.11.

117. *Second*, the Court homed in on the many other problems with the Final Rule.

118. The Court noted that the Final Rule's "categorical inclusion and extension to all interstate waters," "even those that are not 'connected to navigable waters' in any manner," for example, was a nonstarter: it reads "navigability out of the Act," "lacks any limiting principle," is "of significant constitutional import," "raises serious federalism" and "due-process concerns," and cuts against the plain text and purpose of the CWA to "preserve the 'primary state responsibility for ordinary land-use decisions.'" ECF No. 131 at 17-18, 20 (citing *Texas v. EPA*, No. 3:23-CV-17, 2023 WL 2574591, at *9 (S.D. Tex. Mar. 19, 2023) and quoting 33 U.S.C. § 1313(a)(1)).

119. The category was so brazen that the Court wondered out loud how anything close to a "permissible construction of the [CWA]" could "support making every wetland, stream, tributary or other water traversing a border subject to federal jurisdiction." ECF No. 131 at 20; *see also* ECF No. 131 at 27 ("This Court agrees there are serious constitutional concerns triggered by the implementation of the" Final Rule, including "[t]he categorical extension of federal jurisdiction over all interstate waters, regardless of navigability[.]"). "Simply stated," the Court asked, "does the [Final Rule] interpreting [WOTUS] support unrestrained federal jurisdiction over all interstate waters?" *Id.* at 28. Surely there must be "some limits" on "the exercise of Commerce Clause authority under the [CWA]," just as there must be limits on regulations that necessarily

affect "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.* at 28-29 (quoting *West Virginia v. EPA*, 142 S. Ct. 2587, 2608-09 (2022)).

120. The Court also noted conflicts between the Final Rule's "treatment of impoundments … and the text of the [CWA]." ECF No. 131 at 20-21. Specifically, the Court doubted "that Congress intended the [CWA] to empower the EPA to regulate impounded waters merely because they were once [WOTUS]." *Id.* at 21. While they "typically do have a hydrologic connection to a navigable water, [] that is not always the case." *Id.*

121. The Court found the Final Rule's broad-brush "treatment of tributaries … suspect," too. *See* ECF No. 131 at 21. As the Court noted, it is simply not enough that "water [may] eventually get[] to a traditional navigable water, territorial sea, or interstate water" to qualify as jurisdictional WOTUS. *Id.* (citing *North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015) as standing for the same proposition).

122. The category of wetlands was likewise "plagued with uncertainty" under the Final Rule. ECF No. 131 at 21-22. The Court noted that 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. And that cannot do.

123. Likewise, the Court pointed out just how troublesome it was for the Final Rule to "allow[] for case-specific assertions of jurisdiction by the EPA 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 *SWANCC*, 531 U.S. at 167, 171).

124. The Court also took issue with the Final Rule's use of the "relatively permanent standard" from the *Rapanos* plurality opinion. ECF No. 131 at 22. The Agencies took that standard to mean "'waters that are relatively permanent, standing or continuously flowing waters' connected to paragraph (a)(1) traditional navigable waters, interstate waters, and the territorial seas, 'and waters with a continuous surface connection to such relatively permanent waters or to paragraph (a)(1) waters.'" *Id.* at 22 (quoting 88 Fed. Reg. 3038). But "[t]his definition" troubled the Court, and for good reason: the Final Rule never bothered to actually define "relatively permanent." *Id.*

125. The Court also called out the flawed *way* the Agencies went about promulgating the Final Rule. The Agencies provided "little assistance" by way of guidance to landowners on how it will be implemented. ECF No. 131 at 24. The cost-benefit analysis is based on the flawed premise that the Final Rule is "consistent with the pre-2015 enforcement regime." *Id.* at 24-25. The Agencies' decision to skip the key procedural requirement imposed by the Regulatory Flexibility Act ignores the direct effect the Final Rule will have on "States/landowners who now find themselves potentially subject to federal jurisdiction and permitting requirements," and now face down the "need to undertake expensive assessments or forego their activities." *Id.* at 25. And there are "serious concerns about whether" the Agencies' followed "proper [notice-and-comment] procedures" given that there are several key "terms and definitions are found in the 2023 Rule but were not included in the proposed rule." *Id.* at 25-26.

126. On May 10, 2023, the Sixth Circuit enjoined enforcement of the Final Rule in Kentucky pending appeal of the lower court's denial of Kentucky's preliminary-injunction motion. *See* Order, *Kentucky v. EPA*, Case Nos. 23-5343 & 23-5345 (6th Cir. May 10, 2023), ECF No. 24 (23-5343), 29 (23-5345).

127. On June 12, 2023, the Agencies filed an interlocutory appeal of the Court's order. *See* ECF No. 141.

128. But just days before the appeal went in, the Supreme Court issued its ruling in *Sackett*. The opinion was instructive in several key ways.

129. For starters, the Court unanimously rejected the significant nexus test from Justice Kennedy's lone opinion in *Rapanos*. *See Sackett*, 598 U.S. at 679, 684 (rejecting the significant nexus test); *see also id.* at 715-76 (Kavanaugh, J., with whom Sotomayor, J., Kagan, J., and Jackson, J. join, concurring in the judgment) ("I agree with the Court's decision not to adopt the 'significant nexus' test.").

130. As for exactly how WOTUS should be defined, a majority of the Court first looked to the text of the CWA. "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." *Sackett*, 598 U.S. at 672. The CWA's reference to "waters" "encompasses 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 the way Congress has used "waters" in other parts of the U.S. Code. *Id.* at 672-673. And it is in line with the way the Court has viewed "waters" in the CWA over the years—including in *Riverside Bayview* and *SWANCC*. *Id.* at 673. The more expansive view offered by the Agencies does not square with any of this, and it leaves no room for the States' "primary" "role in regulating water resources." *Id.* at 674.

131. As applied to wetlands, in particular, the Supreme Court found it clear that "at least some wetlands must qualify as" WOTUS under the statute. *Id.* at 675. But these adjacent wetlands "must be indistinguishably part of a body of water that itself constitutes 'waters' under the CWA."

Id. at 676. This means that "[w]etlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby." *Id.* This is exactly what the *Rapanos* plurality opinion determined years ago: Only wetlands that are "as a practical matter indistinguishable from waters of the United States," are WOTUS, which is to say, they "have 'a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands." *Id.* at 678 (quoting *Rapanos*, 547 U.S. at 742 (plurality op.)).

132. Critically, the Supreme Court considered the Agencies' position on covered wetlands in the Final Rule as part of its analysis—and it squarely rejected that position as "inconsistent with the text and structure of the CWA." *Id.* at 679. The Agencies' understanding also "clashe[d] with 'background principles of construction' that apply to the interpretation of the relevant statutory provisions." *Id.* at 679 (citing 88 Fed. Reg. 3144 and quoting *Bond v. United States*, 572 U.S. 844, 857 (2014)).

133. And it is precisely "those presumptions" under which "EPA must provide clear evidence that it is authorized to regulate in the manner it proposes." *Id.*

134. One is the federalism clear statement canon. With no clear statement of Congress to point to for its expansive jurisdictional power grab, the Agencies cannot cast aside the "traditional state authority" to "[r]egulat[e] [] land and water use," especially given the "truly staggering" implications of "[a]n overly broad interpretation of the CWA's reach" allowing regulation of wetlands that are "greater than the combined surface area of California and Texas," and "supplemented by … additional area, some of which is generally dry." *Id.* at 679-680.

135. Another principle captures the "serious vagueness concerns" and due process problems EPA's position implicates "in light of the CWA's criminal penalties." *Id.* at 680. The

"freewheeling inquiry" the Agencies offer "provides little notice to landowners of their obligations under the CWA." *Id.* at 680-681. And given the "severe criminal sanctions" landowners can face "for even negligent violations," courts must be "wary about going beyond what Congress certainly intended the statute to cover." *Id.* at 681 (cleaned up).

136. Under both of these principles, the Court held, "EPA's interpretation falls far short." *Id.* at 681.

137. The Supreme Court was likewise unpersuaded by EPA's two argument fallbacks beyond the "weak textual argument" that the Court rejected. *Id.*

138. EPA first argued that Congress "implicitly ratified [the Final Rule's] interpretation of 'adjacent' wetlands"—that is, "wetlands that are 'bordering, contiguous, or neighboring' to covered waters"—"when it adopted [33 U.S.C.] § 1344(g)(1)," *id.* at 682 (quoting 88 Fed. Reg. 3143). But the majority of the Court disagreed for three reasons: (1) the CWA's text "shows that 'adjacent' cannot include wetlands that are not part of covered 'waters,'" *id.* at 682; (2) the theory "cannot be reconciled" with the Court's decisions in *SWANCC* and *Riverside Bayview*, *id.*; and (3) there is no "overwhelming evidence of acquiescence" necessary to give that theory any legs, *id.* at 682-683.

139. EPA also put forth a policy-based argument that "the ecological consequences of a narrower definition of adjacent" should factor into the Court's interpretation. *Id.* at 682-683. But this argument fared no better: "the CWA," held the Court, "does not define the EPA's jurisdiction based on ecological importance, and [the Court] cannot redraw the [CWA's] allocation of authority," *id.* at 683. Instead, held the Court, the States "can and will continue to exercise their primary authority to combat water pollution by regulating land and water use." *Id.*

140. The bottom line from the opinion was clear: "[T]he CWA extends to only those 'wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right,' so that they are 'indistinguishable' from those waters. *Id.* at 684 (quoting *Rapanos*, 547 U.S. at 742 (plurality op.)).

V. The Agencies Fail to Salvage the Final Rule with a "Conforming" Amendment

141. In keeping with their modus operandi following past Supreme Court WOTUS rulings, *see Sackett*, 598 U.S. at 665-66 (discussing aggressive agency responses immediately following *Riverside Bayview* and *SWANCC*), the Agencies seemed largely undeterred by the Supreme Court's direct rebuke in *Sackett*.

142. On September 8, 2023, without going through notice and comment, the Agencies published a six-page final rule entitled "Revised Definition of "Waters of the United States"; Conforming." 88 Fed. Reg. 61964 (Sept. 8, 2023). The Agencies describe it as an "amend[ment] [to] the provisions of the agencies' definition of [WOTUS] that are invalid under the Supreme Court's interpretation of the Clean Water Act in the [*Sackett*] decision." *Id.*

143. Specifically, the Agencies made only a handful of revisions—mostly ~~subtractions~~ and <one addition>—that affect only certain Code of Federal Regulations (CFR) provisions listed in the Final Rule and the Conforming Rule:

- 40 CFR 120.2(a)(1)(iii) and 33 CFR 328.3(a)(1)(iii): Interstate waters~~, including interstate wetlands~~;
- 40 CFR 120.2(a)(3) and 33 CFR 328.3(a)(3): Tributaries of waters identified in paragraph (a)(1) or (2) of this section:

  ~~(i)~~ That are relatively permanent, standing or continuously flowing bodies of water;

  ~~or~~

~~(ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section~~

- 40 CFR 120.2(a)(4) and 33 CFR 328.3(a)(4):

(4) Wetlands adjacent to the following waters:

(i) Waters identified in paragraph (a)(1) of this section; or

(ii) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3)~~(i)~~ of this section and with a continuous surface connection to those waters;~~ or~~

~~(iii) Waters identified in paragraph (a)(2) or (3) of this section when the wetlands either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section;~~

- 40 CFR 120.2(a)(5) and 33 CFR 328.3(a)(5):

(5) Intrastate lakes and ponds~~, streams, or wetlands~~ not identified in paragraphs (a)(1) through (4) of this section:

~~(i)~~ That are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3)~~(i)~~ of this section~~; or~~

~~(ii) That either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section.~~

- 40 CFR 120.2(c)(2) and 33 CFR 328.3(c)(2):

(2) Adjacent means ~~bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are "adjacent wetlands."~~ <having a continuous surface connection.>

- 40 CFR 120.2(c)(6) and 33 CFR 328.3(c)(6): [term and definition removed entirely]

~~(6) Significantly affect means a material influence on the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section. To determine whether waters, either alone or in combination with similarly situated waters in the region, have a material influence on the chemical, physical, or biological integrity of waters identified in paragraph (a)(1) of this section, the functions identified in paragraph (c)(6)(i) of this section~~

~~will be assessed and the factors identified in paragraph (c)(6)(ii) of this section will be considered:~~

~~(i) Functions to be assessed:~~

~~(A) Contribution of flow;~~
~~(B) Trapping, transformation, filtering, and transport of materials (including nutrients, sediment, and other pollutants);~~
~~(C) Retention and attenuation of floodwaters and runoff;~~
~~(D) Modulation of temperature in waters identified in paragraph (a)(1) of this section; or~~
~~(E) Provision of habitat and food resources for aquatic species located in waters identified in paragraph (a)(1) of this section;~~

~~(ii) Factors to be considered:~~

~~(A) The distance from a water identified in paragraph (a)(1) of this section;~~
~~(B) Hydrologic factors, such as the frequency, duration, magnitude, timing, and rate of hydrologic connections, including shallow subsurface flow;~~
~~(C) The size, density, or number of waters that have been determined to be similarly situated;~~
~~(D) Landscape position and geomorphology; and~~
~~(E) Climatological variables such as temperature, rainfall, and snowpack.~~

Compare 88 Fed. Reg. at 3142-3144 (Final Rule) *with* 88 Fed. Reg. at 61,968-61,969 (Conforming Rule).

144. These are the *only* changes the Agencies made to the Final Rule following orders from this Court and others enjoining its enforcement, and the Supreme Court's decision in *Sackett*. According to the Agencies, "the implementation guidance and tools in the 2023 rule preamble that address the regulatory text that was not amended by the conforming rule, … generally remain relevant to implementing the 2023 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'tl Prot. Agency (Sept. 27, 2023), https://bit.ly/3SDQ4yi.

145. But the Conforming Rule falls well short of what is required to render the Final Rule lawful under the APA, the text of the CWA, and the Constitution.

146. *First*, while the Conforming Rule "remove[s] the significant nexus standard and [] amend[s] its definition of 'adjacent'" in the Final Rule, 88 Fed. Reg. at 61,966, it misses the mark on definition for adjacency that the Supreme Court required in *Sackett*. It is not enough to deem wetlands "adjacent" because they are 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." 88 Fed. Reg. at 61,966. The wetlands "must be indistinguishably part of a body of water that itself constitutes 'waters' under the CWA." *Sackett*, 598 U.S. at 676. This means that "[w]etlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby." *Id.*

147. Thus, *only* wetlands that are "as a practical matter indistinguishable from waters of the United States," are WOTUS, which is to say, they "have 'a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands." *Id.* at 678 (quoting *Rapanos*, 547 U.S. at 742 (plurality op.)). And it is "*only* those wetlands" that may be deemed jurisdictional." *Id.* at 684 (quoting *Rapanos*, 547 U.S. at 742 (plurality op.)) (emphasis added). The Agencies continue to fail to grasp this key limitation on their permissible authority, especially by (apparently) 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 3,095 (refusing to require a hydrologic connection or connection through jurisdictional waters and instead permitting connection through any discrete feature, like a pipe); *id.* at 3,096 ("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").

148. *Second*, the Conforming Rule makes no attempt to reconcile the Final Rule's position on the relatively permanent standard (and the related continuous surface connection definition) from the *Rapanos* plurality opinion with the Supreme Court's ruling in *Sackett*.

149. As a reminder: in the Final Rule, the Agencies harshly criticized the 2020 NWPR—and the "plurality's limitation of jurisdiction to 'relatively permanent' waters and those with a 'continuous surface connection' to those waters that "pervade[d]" it—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 Agencies went on to provide a host of reasons why they reject that interpretation of WOTUS "as inconsistent with the objective of the [CWA], the science, and the case law." *Id.* And, following the *Sackett* decision, the Agencies have justified promulgating the Conforming Rule in the way they did by stating that the Confirming Rule "does not involve the exercise of the agencies' discretion" whatsoever. 88 Fed. Reg. at 61,965, 61,967, 61,968.

150. Do the Agencies still hold to that view today? Do they still view "the relatively permanent standard" as, at best, merely "administratively useful"? The answer isn't apparent. The only mention of the relatively-permanent standard in the Conforming Rule is in the summary of the *Rapanos* decision, a top-level summary of what standards the Agencies considered in the Final Rule pre-*Sackett*, and the summary of *Sackett* itself. *See* 88 Fed. Reg. at 61,965-61,966. If one assumes that the understanding of "relatively permanent" from the Final Rule remains in place, that understanding offered a circular, faux definition of "relatively permanent" that covered "waters that are relatively permanent, standing, or continuously flowing." *Id.* at 3,038; *see also id.* at 3,066 (same). The Final Rule refused to provide useful benchmarks like minimum flow durations or references to sources. *See id.* at 3,085-87. It suggested that "relatively permanent

flow" can result merely from a few intense storms. *Id.* at 3,086; *id.* at 3,113 (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 also made no reference to the "geographical features" reference in both *Rapanos* and *Sackett*, which is 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. *Id.* at 3,087-88.

151. That omission is critical here. Without offering anything about what relative permanence really means, the Amended Final Rule remains as problematic as the Final Rule was when this Court enjoined it earlier this year. *See, e.g.*, *supra* 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).

152. The Supreme Court in *Sackett* made sure to emphasize the centrality of the relatively-permanent standard in defining WOTUS in the future: "[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.)).

153. 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 678-679 (quoting *Rapanos*, 547 U.S. at 742). By failing to articulate contours of this standard in the Conforming Rule, 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.

154. *Third*, it appears that the Agencies remain intent on pressing their "categorical inclusion and extension to all interstate waters" in such a way as to read "navigability out of the Act." ECF No 131, at 17-18, 20. Although the Conforming Rule modified the CFR to remove the "including" language as to wetlands, the Agencies stop short of establishing a limiting principle to clarify that the "rivers, lakes, and other waters that flow across or form a part of State boundaries" are not necessarily jurisdictional. 88 Fed. Reg. at 61,966. Accordingly, all of the concerns this Court had with the Agencies' categorical inclusion are still alive: the due-process concerns, federalism concerns, Commerce Clause crossover, the major questions doctrine, *and* the textual problems vis-à-vis the CWA, to boot. *See* ECF No. 131 at 17-18, 20, 28-29.

155. *Fourth*, in addition to the problems with wetlands and tributaries, the Conforming Rule did nothing to calm this Court's fears about problems related to impoundments. The Conforming Rule should have tracked the Supreme Court's paring down of this jurisdictional category following *Sackett*, but it 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).

156. *Fifth*, the Conforming Rule continues to embrace an odd catchall 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 catchall imports the problematically overbroad understandings of those two operative phrases from previous categories of waters. *Id.* at 3,098. And it expressly covers "standing water" that "do[es] not have a flowing outlet to the tributary system." *Id.* at 3,102. 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 3,102.

157. *Sixth*, the Conforming Rule did nothing to explain—much less remedy—the procedural problems that plagued the Final Rule. *See, e.g.*, ECF No. 131 at 24-26 (detailing the problems with the Agencies' process of promulgating the Final Rule). Those problems remain just as live as they were when this Court enjoined the Final Rule. And those procedural problems alone would justify this Court's decision to vacate that rule now that the Agencies have made clear they have no plans to address or explain them.

158. In those States in which the Final Rule has been enjoined or stayed, the Agencies have said that they "are interpreting 'waters of the United States' consistent with the pre-2015 regulatory regime and the Supreme Court's decision in *Sackett* until further notice." *See* Definition of "Waters of the United States": Rule Status and Litigation Update, U.S. Army Corps of Eng'rs & the U.S. Env'tl Prot. Agency (last updated Sept. 8, 2023), https://bit.ly/46ainaw. But it is not even clear what this description means in practice, as other guidance from the Agencies says that they "will implement the pre-2015 regulations *generally* consistent with the pre-2015 regulatory regime's approach to the plurality standard [in *Rapanos*], including [unspecified] relevant case law and [unspecified] longstanding practice, as informed by [unspecified] applicable guidance, training, and experience." *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'tl Prot. Agency (Sept. 27, 2023), https://bit.ly/47v4SmO (emphasis added).

CLAIMS FOR RELIEF

COUNT ONE

Violation of the Administrative Procedure Act and the Clean Water Act In Excess of Statutory Jurisdiction, Authority, or Limitations (5 U.S.C. § 706(2)(C); 33 U.S.C. § 1251, *et seq.*)

159. The Plaintiff States incorporate the preceding paragraphs by reference.

160. A final agency action, like the Amended Final Rule at issue here, shall be held "unlawful and set aside" if it is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). In other words, all rules must be consistent with their authorizing statutes.

161. The CWA, 33 U.S.C. § 1251-1387, is the authorizing statute for the Amended Final Rule. The Amended Final Rule is not consistent with it.

162. The CWA authorizes the Agencies to assert jurisdiction over only "navigable waters," defined as "waters of the United States." 33 U.S.C. §§ 1311(a), 1342(a), 1344(a), 1362(7), (12).

163. The Amended Final Rule's definition of "waters of the United States" runs contrary to the plain language of the CWA. In several respects, the Agencies construed WOTUS to embrace land and waters that cannot be termed "navigable waters" under any plausible interpretation of that phrase.

164. *First*, the Amended Final Rule does not clearly or lawfully define the "relatively permanent" standard that drives the jurisdictional analysis. The Conforming Rule contains no analysis at all of the standard. Assuming that 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 in 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.

165. *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. The CWA's text, as interpreted by the Supreme Court 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.

166. *Third*, all interstate waters qualify as WOTUS under the Amended Final Rule even if they are not navigable and bear no relationship whatsoever to navigable waters. Furthermore, other waters that relate to those non-navigable interstate waters (as described in the Amended Final Rule) can also be deemed jurisdictional, even though they have no relationship to navigable waters, either. Each of these aspects is clearly inconsistent with the CWA.

167. *Fourth*, impoundments may be dubbed WOTUS even though, by the Agencies' own acknowledgement, the impounded waters are not presently "waters of the United States." Instead, the Amended Final Rule declares that impoundments may be WOTUS today based solely

on the impounded waters' past status as WOTUS—a jurisdictional power grab that the CWA's present-tense focus does not allow, and which common sense does not support.

168. *Fifth*, the Amended Final Rule reaches "tributaries" that—for years at a time—may be nothing more than land that water formerly crossed. By focusing on undefined typography, vegetation, and sediment, the Amended Final Rule otherwise describes tributaries in such a subjective fashion that the Agencies may be free to extend jurisdiction over any number of places that bear no relationship to navigable waters.

169. *Sixth*, the Amended Final Rule still exercises inappropriately expansive jurisdiction as to wetlands. As *Sackett* made crystal clear, wetlands may *only* be deemed jurisdictional if they are "as a practical matter indistinguishable from waters of the United States," which is to say, they "have 'a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands." *Sackett*, 598 U.S. at 678 (quoting *Rapanos*, 547 U.S. at 742 (plurality op.)). But the Amended Final Rule still does not specify that the Agencies will assess its jurisdiction over wetlands in this way, thus leaving the door open for the Agencies to once again make standardless determinations that wetlands are WOTUS even in the absence of a continuous surface water connection.

170. *Seventh*, other intrastate waters qualify under the Agencies' ambiguous and overbroad constructions of the relatively permanent test. These waters that are entirely within a State's borders can be deemed jurisdictional despite their ephemeral nature (such as rain-fed mountain streams), and despite no physical connection to a navigable-in-fact water (such as isolated ponds and lakes). Adopting lenient and ill-defined tests like these—tests that permit almost anything to be jurisdictional if a loose connection of dots can lead to some navigable water—ensures that the Agencies can still assert jurisdiction over almost *all* waters. *See Cnty. of*

Maui, 140 S. Ct. at 1470 ("Virtually all water, polluted or not, eventually makes its way to navigable water.").

171. The Agencies' interpretation of the CWA in the Amended Final Rule also remains seriously flawed in several other ways.

172. For one, the Amended Final Rule improperly upsets the balance of State and federal powers in an area typically dominated by the States. As explained above, water and land management is a domain of substantial and traditional state interest. Despite that long-recognized state authority, the Amended Final Rule places the federal government's interests ahead of the States' as to a variety of intrastate waterways, lands with no surface waters at all, and other geographic features traditionally understood to fall under state control. State power is further subjugated to the Agencies because the States are compelled to divert and devote resources to administering federal permitting and other water regulation schemes. Ordinarily, States would be free to choose how to devote resources to water and land management and conservation.

173. "Absent a clear statement of intention from Congress, there is a presumption against a statutory construction that would significantly affect the federal-state balance." *Boelens v. Redman Homes, Inc.*, 748 F.2d 1058, 1067 (5th Cir. 1984); *see also United States v. Bass*, 404 U.S. 336, 349 (1971). The CWA does not contain any clear statement of this sort. Quite the opposite: the CWA specifically recognizes, preserves, and protects the primary responsibilities of the States to plan the development and use of their land and water resources. 33 U.S.C. § 1251(b). The federalism canon therefore counsels that the Amended Final Rule goes too far.

174. For another, the Amended Final Rule further runs afoul of the major questions doctrine. Courts will not assume that an agency has "'unheralded' regulatory power over a 'significant portion of the American economy'" without clear congressional intent. *West Virginia*

v. EPA, 142 S. Ct. 2587, 2608 (2022). Instead, courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014). The Supreme Court has also required Congress to use "exceedingly clear language" to "alter the balance between federal and state power and the power of the Government over private property." *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021).

175. The Amended Final Rule purports to tackle a question that is major in every sense. It will require thousands—or potentially millions—of landowners in every corner of the country to take expensive compliance efforts whenever their property might implicate navigable water in the most distant way. The Amended Final Rule can be expected to directly and substantially impact major industries of all stripes, including farming and ranching, energy and mining projects, infrastructure, construction, and homebuilding. So the vagueness the Amended Final Rule embodies can be expected to cast a pall over our entire Nation's economy, including all those of the States.

176. The Amended Final Rule points to nothing in the CWA that provides a clear statement of Congress's intent for the Agencies to take on a jurisdictional reach of this scale. The lone jurisdictional provision speaks of waters (not land), and navigability (not isolated moisture). These words imply a congressional intent to confine the Agencies to their appropriate role of regulating "relatively permanent bod[ies] of water connected to traditional interstate navigable waters." *Sackett*, 598 U.S. at 678. If Congress had intended the Agencies to instead regulate the vast majority of the country's land and water (a constitutionally dubious proposition to begin with), then it would have spoken with directness and clarity in the CWA when laying out such an all-encompassing range of jurisdiction. *Cf. Sackett*, 598 U.S. at 677 (rejecting the suggestion that

Congress would have hidden a broad expansion of CWA jurisdiction in narrow and obscure language).

177. Further, the Supreme Court has explained that courts will not "lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Thus, an agency interpretation of a statute that would cause the statute to swell to the outer limits of Congress's authority is impermissible, unless Congress clearly expressed such an intent. *Id.*; *see also Almendarez-Torres v. United States*, 523 U.S. 224, 237-38 (1998) (explaining that, if "fairly possible," courts will construe a statute "to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score").

178. Were it correct, the Amended Final Rule's overbroad construction of WOTUS would also raise serious doubts about the CWA's constitutionality under the non-delegation doctrine. Under Article I, Section 1 of the U.S. Constitution, Congress is vested 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 (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) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928)). If Congress fails to provide an intelligible principle, then the grant of authority is a constitutionally "forbidden delegation of legislative power." *Mistretta*, 488 U.S. at 372 (quoting *J.W. Hampton*, 276 U.S. at 409).

179. In the Amended Final Rule, the Agencies claim sweeping power to regulate lands and waters far and wide. Determining that this broad jurisdiction exists—and applying it in a concomitantly broad way—is a legislative determination in the purest sense. "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). But 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). 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.

180. Further still, the rule of lenity further counsels for a narrower understanding of "waters of the United States" than that reflected 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 Amended Final Rule, however, offends the rule of lenity by construing any ambiguities in the statute in some of the broadest possible ways.

181. For these and other reasons, the Court should deem the Amended Final Rule unlawful and set it aside for "exce[eding] [the Agencies'] statutory jurisdiction [and] authority," 5 U.S.C. § 706(2)(C), granted to it under the Clean Water Act, 33 U.S.C. § 1251-1387.

COUNT TWO

Violation of the Administrative Procedure Act
Arbitrary, Capricious, an Abuse of Discretion,
or Otherwise Not In Accordance With Law
(5 U.S.C. § 706(2)(A))

182. The Plaintiff States incorporate the preceding paragraphs by reference.

183. A final agency action, like the Amended Final Rule at issue here, shall be held "unlawful and set aside" if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

184. In other words, a rule must not be deficient in its basis, its reach, its considerations, its explanations, its plausibility, or its treatment of similar cases. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962); *Gen. Chem. Corp. v. United States*, 817 F.2d 844, 846 (D.C. Cir. 1987); *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996); *Northport Health Servs. of Ark., LLC v. U.S. Dep't of Health & Hum. Servs.*, 14 F.4th 856, 873 (8th Cir. 2021).

185. The Amended Final Rule is deficient in many of these respects.

186. The Amended Final Rule arbitrarily and capriciously reaches waters with no relevant connection to navigable waters of the United States. The Amended Final Rule—especially now with the Agencies' nine-page Confirming Rule further confusing the issue—extends to waters that Congress never intended the CWA to cover, including intermittent, ephemeral, and perennial streams. It can extend to intrastate, isolated waterbodies with no actual hydrological connection to navigable-in-fact waters. *Contra Sackett*, 598 U.S. at 673 (explaining

that "the term ['waters'] conventionally refers to hydrographic features" (cleaned up)). It can extend to lands that contain moisture and exist within some undefined proximity to other water features. *Id.* at 674 (reiterating that the "ordinary presence of water" is not enough to say that waters are covered). It can extend to dry channels and the like that only formerly contained water. And it can extend to impoundments that contain waters that formerly constituted WOTUS but no longer bear any connection to navigable waters.

187. The Agencies did not—and still do not—provide any valid justification for extending their understanding of WOTUS so broadly and indiscriminately. For example, although the Final Rule frequently cites to the Agencies' 2015 Science Report and similar publications, it also disclaims strict reliance on the Science Report or any other part of "the science" in construing the scope of the CWA. And now, in the aftermath of the Supreme Court's *Sackett* decision, the Agencies made zero effort in the Confirming Rule to explain how that reliance—or any scientific calculus at all, really—is affected by *Sackett*. Thus, the Amended Final Rule is plagued by that key problem.

188. The Agencies also offered a contradictory and implausible discussion of their engagement with relevant Supreme Court precedent. Although the Agencies repeatedly insisted that the Amended Final Rule was "informed" by "Supreme Court case law," *see, e.g.*, 88 Fed. Reg. at 3020, and now claim to "conform the[ir] definition of [WOTUS]" to the *Sackett* decision, 88 Fed. Reg. at 61,964, they simultaneously insist that the Amended Final Rule was not "an application of the Supreme Court's principles to derive a governing rule of law," *id.* at 3021. Thus, the Agencies appear to have read the relevant Supreme Court precedents, yet employed only those they found helpful—and even those they only employed in an undefined way. Cherry-picking preferred parts of precedent does not reflect reasoned decision-making. Moreover, the Agencies

cited their own generalized experience in applying prior iterations of the statute without explaining how that experience helps decide the question of what the *statute* intended when it greenlit regulating "navigable" "waters of the United States."

189. The Agencies also acted arbitrarily and capriciously in refusing to offer concrete standards or guidelines for determining when a water is a jurisdictional water, other than vague qualitative norms to be applied on a case-by-case basis—even *after* a Supreme Court case issued directly on point and critical of such an approach. This nebulous approach ensures that similar parcels and waters will be treated inconsistently as different evaluators undertake jurisdictional assessments. The ambiguity further invites protracted administrative proceedings and potential litigation, imposing needless burdens on States and regulated parties.

190. Next, the Agencies engaged in a flawed cost-benefit analysis that concluded that the Amended Final Rule would result in only "*de minimis* costs" generally, 88 Fed. Reg. at 3007, and somehow would produce *no* "new costs or other requirements [as to] states," *id.* at 3141.

191. At bottom, the Agencies reached this conclusion by assuming that the Amended Final Rule was consistent with the pre-2015 enforcement regime (as amended by *Sackett*) that was reinstated immediately before the Final Rule's promulgation. Working from this mistaken belief, the Agencies contradictorily concluded that any "increase in waters being found to be jurisdictional under the final rule in comparison to the pre-2015 regulatory regime" would be "unquantifiable" but "slight." U.S. ENV'T PROT. AGENCY & U.S. ARMY CORPS OF ENG'RS, REVISED DEFINITION OF "WATERS OF THE UNITED STATES": RESPONSE TO COMMENTS DOCUMENT, SECTION 5 – RULEMAKING PROCESS AND OTHER STATUTES' REQUIREMENTS 38 (2022) ("Comments Response"), *available at* https://bit.ly/3RYgkko; *but see id.*, SECTION 17 – ECONOMIC ANALYSIS,

at 14, *available at* https://bit.ly/3xmBWNT ("The agencies acknowledge that changes to the definition of 'waters of the United States' inevitably have a cost to states.").

192. Yet in the many ways as explained above, the Amended Final Rule extends further than the pre-2015 regulatory framework, so additional costs are certain to be more than "de minimis." The Agencies confirmed that will remain the case even after their post-*Sackett* changes: according to them, the Confirming Rule "does not by itself impose cost savings or forgone benefits." 88 Fed. Reg. at 61,967, 61,968. For the States, increased permitting and enforcement costs are inevitable. The Agencies should have, at the very least, *attempted* to measure these costs. But they did not.

193. In doing so, the Agencies further ignored or unreasonably minimized the many specific costs and consequences identified in the many comments that recommended scrapping the Amended Final Rule, including compliance, mitigation, and in-lieu-fee costs. Indeed, the Agencies outright refused to address costs to small businesses (many of which were expressly identified in public comments) despite their statutory obligation to do so. 88 Fed. Reg. at 3139. At the same time, the Agencies overestimated purported benefits of the Amended Final Rule.

194. Moreover, the Agencies treated the purpose to which potentially covered waters will be put in an inconsistent and contradictory way. 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 such 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.

195. 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." Comments Response, *supra*, SECTION 2 – LEGAL ARGUMENTS," at 23 (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.

196. The Amended Final Rule's treatment of "environmental justice" is arbitrary and capricious, 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. *Id.* 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).

197. For these and other reasons, the Court should deem the Amended Final Rule 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).

COUNT THREE

Violation of the Administrative Procedure Act
Without Observance of Procedure Required by Law
(5 U.S.C. § 706(2)(D))

198. The Plaintiff States incorporate the preceding paragraphs by reference.

199. A final agency action, like the Amended Final Rule at issue here, shall be held "unlawful and set aside" if found to be "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). In other words, it is not enough for a rule to be substantively sound—the process by which it was promulgated must also be proper.

200. The APA provides that before an agency conducts a "rulemaking," it must provide a "[g]eneral notice of proposed rule-making" and give "interested persons an opportunity to participate in the rule-making through submission of written data, views, or arguments." 5 U.S.C. § 553(b)-(c). A reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be … without observance of procedure required by law." *Id.* § 706(2)(D).

201. If a final rule is not the "logical outgrowth" of the proposed rule, the rule is invalid. *Long Island Care At Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007). The object of the test is to provide adequate notice and opportunity to comment. *See Citizens Telecomm. Co. of Minnesota,*

LLC v. Fed. Commc'ns Comm'n, 901 F.3d 991, 1005 n.11 (8th Cir. 2018) (finding no meaningful difference between fair notice inquiry and "logical outgrowth" approach).

202. The Amended Final Rule does not satisfy the logical outgrowth test because it created a new standard for Approved Jurisdictional Determinations issued under the NWPR. The Proposed Rule did not say anything about how the Agencies might treat prior determinations. Because the Supreme Court has said that an adjudication finding no jurisdiction is "a five-year safe harbor from liability under the" CWA, *Hawkes*, 578 U.S. at 600, parties could have reasonably concluded from the face of the Proposed Rule that the Agencies' silence meant that existing determinations would continue to be respected. The Amended Final Rule, however, upsets that expectation. Instead, the Agencies formalized prior informal agency communications (outside the Proposed Rule) showing that the Agencies will largely refuse to rely on NWPR-approved jurisdictional determinations going forward. Thus, without warning in the Proposed Rule, the Agencies forced regulated parties to reassume expensive jurisdictional assessments for a second time. *See Sackett*, 598 U.S. at 670 (noting that "the Corps maintains that it has no obligation to provide jurisdictional determinations, … and it has already begun announcing exceptions to the legal effect of some previous determinations" and explaining that "[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" (citing 88 Fed. Reg. 3136)).

203. Apart from the logical outgrowth concerns, the Agencies also failed to meet their obligations under the Regulatory Flexibility Act of 1980 (RFA), *as amended*, 5 U.S.C. §§ 601-612. They did not solicit or consider flexible regulatory proposals, and they did not undertake required cost-benefit analyses. Instead, the Agencies mistakenly declared that they were excused

from these obligations because the Amended Final Rule "will not have a significant economic impact on a substantial number of small entities." 88 Fed. Reg. at 3139-40.

204. The Agencies wrongly determined that no RFA analysis was needed because the Amended Final Rule introduces only "de minimis differences" from the rule in place since the 2020 NWPR vacatur, while generally "narrow[ing] the scope of jurisdiction from the text of the 1986 regulations." 88 Fed. Reg. at 3139-40. In fact, the Amended Final Rule serves as a top-to-bottom expansion of the Agencies' authority closer to the now-defunct 2015 Rule than the 1986 Regulations. The Agencies should have meaningfully analyzed those changes—but they did not.

205. The Agencies also declared that the Amended Final Rule "does not directly apply to specific entities." 88 Fed. Reg. at 3139. But, of course, the Amended Final Rule directly affects, among many others, the many landowners who now find themselves subject to federal jurisdiction, permitting requirements, operations restrictions, and more. Even the potential specter of federal jurisdiction provides enough reason to say that the Amended Final Rule "applies" to parties; those parties who *may* be within the Amended Final Rule's grasp will still need to undertake expensive assessments, forego their activities on the potentially covered property, or risk serious civil and criminal penalties. The Supreme Court's decision in *Sackett*, for instance, confirms that these jurisdictional decisions have meaningful consequences for the parties they apply to, and a reasonable agency would account for those consequences. 598 U.S. at 660 (describing the CWA as "a potent weapon," detailing the "significant" costs of obtaining a permit, and discussing the "severe criminal penalties" and "civil penalties [that] can be nearly as crushing" "due to the Act's 5-year statute of limitations"). The Agencies unreasonably blinded themselves to the consequences of their actions to justify foregoing a proper RFA analysis.

206. For these and other reasons, the Court should deem the Amended Final Rule unlawful and set it aside for being promulgated "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

COUNT FOUR

Violation of the Administrative Procedure Act and the Commerce Clause (5 U.S.C. § 706(2)(B); U.S. CONST. art. I, § 8)

207. The Plaintiff States incorporate the preceding paragraphs by reference.

208. A final agency action, like the Amended Final Rule at issue here, shall be held "unlawful and set aside" if it is "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B). In other words, a rule cannot extend beyond what is constitutionally permissible. The Amended Final Rule does just that.

209. The Constitution grants to Congress the power "to regulate commerce with foreign nations, and among the several states." U.S. CONST. art. I, § 8. Congress has power over the "channels of interstate commerce," power to "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce," and power over "activities having a substantial relation to interstate commerce," which means those that "substantially affect interstate commerce." *United States v. Morrison*, 529 U.S. 598, 608-09 (2000) (cleaned up).

210. In the context of the Clean Water Act, Congress's authority over "waters of the United States" is tethered to navigable channels of interstate commerce. *SWANCC*, 531 U.S. at 172. Congress's use of the word "navigable" indicates "what Congress had in mind as its authority for enacting the CWA: Its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.*; *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.").

211. Here, the Amended Final Rule reaches land and waters without requiring that they bear a direct connection to navigable waters or otherwise bear some substantial relationship with (or otherwise substantially affect) interstate commerce. For example, the Amended Final Rule removes portions of the 1986 Regulations that spoke directly to interstate commerce, replacing that category with the catch-all "other waters" category that does not carry with it any meaningful connection with commerce. It did so even though "Clean Water Act 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).

212. The Amended Final Rule also embraces subsurface waters in many different circumstances. Yet "as to groundwater pollution and nonpoint source pollution, Congress intended to leave substantial responsibility and autonomy to the States." *Cnty. of Maui*, 140 S. Ct. at 1471; *see 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.").

213. For these and other reasons, the Court should 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.

COUNT FIVE

Violation of the Administrative Procedure Act and the Due Process Clause (5 U.S.C. § 706(2)(B); U.S. CONST. amend. V)

214. The Plaintiff States incorporate the preceding paragraphs by reference.

215. A final agency action, like the Amended Final Rule at issue here, shall be held "unlawful and set aside" if it is "contrary to constitutional right, power, privilege, or immunity."

5 U.S.C. § 706(2)(B). In other words, a rule cannot extend beyond what is constitutionally permissible.

216. A statute or regulation that imposes penalties for non-compliance violates the Due Process Clause of the Fifth Amendment where it "either 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).

217. The Clean Water Act, and by extension the Amended Final Rule, directly implicates these due-process concerns. "It is often difficult to determine whether a particular piece of property contains waters of the United States, but there are important consequences if it does." *Hawkes*, 578 U.S. at 594. Most relevant here, the CWA imposes tens of thousands of dollars of civil penalties, and further potential criminal penalties, for individuals who discharge or dredge in "waters of the United States." 33 U.S.C. § 1319; *Hawkes*, 578 U.S. at 600; *Sackett*, 598 U.S. at 660 (discussing the "severe criminal penalties" and "civil penalties [that] can be nearly as crushing" "due to the Act's 5-year statute of limitations").

218. At the same time, the Amended Final Rule is irretrievably vague. It nests ambiguous and undefined terms into tests and standards that themselves offer no clear guidance how to balance the relevant factors. The vague terms abound, including "adjacent," "certain times of year," "interstate waters," "impoundments," "mosaic," "relatively permanent," "seasonally," and "tributaries."

219. Qualitative standards and bright-line rules are almost totally absent. Even where the Agencies purport to create actual standards, they often invoke their ill-defined "experience" with previous iterations of WOTUS regulations or guidance and say that this experience will inform their decision-making—in unspecified ways. *See, e.g.*, 88 Fed. Reg. at 3127.

220. Further, the Amended Final Rule expressly declines to provide definite standards for several important aspects of the jurisdictional test, encouraging arbitrary and discriminatory treatment by way of an ill-defined "case-by-case" approach to enforcement. *See, e.g.*, 88 Fed. Reg. at 3103. The ambiguities of the rule guarantee that application will vary wildly from one jurisdictional determination to another.

221. All together, the Amended Final Rule does not give fair notice of what waters are subject to the reach of the Clean Water Act, and thus when unpermitted activities involving waters might carry substantial civil or criminal penalties. In other words, the Amended Final Rule's vagueness prevents ordinary people from understanding when the CWA even applies, and "most laws do not require the hiring of expert consultants to determine if they even apply to you or your property." *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 1003 (8th Cir. 2015) (Kelly, J., concurring); *Sackett*, 598 U.S. at 669 ("Even if a property appears dry, application of the guidance in a complicated manual ultimately decides whether it contains wetlands.").

222. For these and other reasons, the Court should 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 Due Process Clause, U.S. CONST. amend. V.

COUNT SIX

Violation of the Administrative Procedure Act and the Tenth Amendment (5 U.S.C. § 706(2)(B); U.S. CONST. amend. X)

223. The Plaintiff States incorporate the preceding paragraphs by reference.

224. A final agency action, like the Amended Final Rule at issue here, shall be held "unlawful and set aside" if it is "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B). In other words, a rule cannot extend beyond what is constitutionally permissible.

225. The Tenth Amendment to the United States Constitution requires 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. In short, the federal government can only exercise powers expressly granted to it by the Constitution. *See New York v. United States*, 505 U.S. 144, 155 (1992); *Printz v. United States*, 521 U.S. 898, 919 (1997). Although certain legislative powers were granted to Congress, "they are not unlimited." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018).

226. Among the rights and powers reserved to the States under the Tenth Amendment is the authority to regulate intrastate land use and water resources. *SWANCC*, 531 U.S. at 174 (quoting *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments.")); *see 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.").

227. In the CWA, Congress expressly honored this constitutionally mandated primacy of the States over intrastate waters and lands.

228. By adopting the Amended Final Rule, the Agencies violated the States' Tenth Amendment rights, as recognized by the CWA, by asserting jurisdiction over extremely wide swaths of intrastate waters and lands. Federal standards will now become the necessary floor for environmental regulation in a host of new contexts, with state authority relegated to a secondary, supplemental status.

229. For these and other reasons, the Court should 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 Tenth Amendment, U.S. CONST. amend. X.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff States respectfully request that the Court:

A. Declare the Amended Final Rule to be in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(C), and the Clean Water Act, 33 U.S.C. § 1251-1387, for exceeding the Agencies' statutory authority;

B. Declare the Amended Final Rule to be in violation of the Administrative Procedure Act 5 U.S.C. § 706(2)(A), for lacking essential findings and imposing arbitrary standards;

C. Declare the Final Rule to be in violation of the Administrative Procedure Act 5 U.S.C. § 706(2)(D), for failing to conduct required analyses and failing to provide adequate notice in the Proposed Rule;

D. Declare the Amended Final Rule to be in violation of the Administrative Procedure Act 5 U.S.C. § 706(2)(B), by offending the Commerce Clause, U.S. CONST. art. I, § 8, Due Process Clause, U.S. CONST. amend. V, and the Tenth Amendment, U.S. CONST. amend. X;

E. Hold, vacate, and set aside the Amended Final Rule as unlawful;

F. Enjoin Defendants and any other agency or employee acting on behalf of the United States from using, applying, implementing, enforcing, or otherwise proceeding on the basis of the Amended Final Rule;

G. Remand the matter to the Agencies with instructions to issue a rule that complies with the Constitution, the statutory limits and cooperative-federalism mandate of the Clean Water

Act, the procedural mandates of the Regulatory Flexibility Act, and the Administrative Procedure Act, and the rulings of the Supreme Court of the United States;

H. Award Plaintiff States their reasonable attorney fees and costs; and

I. Grant the Plaintiff States such other relief as may be necessary and appropriate or as the Court deems just and proper.

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