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

STATE OF WEST VIRGINIA, *et al*., *Plaintiffs*, CASS COUNTY FARM BUREAU, *et al*., *Plaintiff-Intervenors* v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al*., *Defendants*, CHICKALOON VILLAGE TRADITIONAL COUNCIL, *et al*., *Defendant-Intervenors*.	)	No. 3:23-cv-32-DLH-ARS Hon. Daniel L. Hovland

FEDERAL DEFENDANTS' COMBINED MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' AND BUSINESS INTERVENORS' MOTIONS FOR SUMMARY JUDGMENT

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GLOSSARY

1986 Regulations	33 C.F.R. § 328.3(a) (2014) (Corps); 40 C.F.R. § 232.2(q) (2014) (EPA)
2023 Rule	*Revised Definition of "Waters of the United States*,*"* 88 Fed. Reg. 3004 (Jan. 18. 2023)
Agencies	U.S. Army Corps of Engineers and U.S. Environmental Protection Agency
Amended Regulations	The regulations put in place by the 2023 Rule, as amended by the Conforming Rule: 33 C.F.R. § 328.3 (Corps); 40 C.F.R. § 120.2 (EPA)
APA	Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*
Bus. Mem.	ECF No. 199
Business Intervenors or Intervenors	Associated General Contractors of North Dakota, Cass County Farm Bureau, Florida Transportation Builders Association, Home Builders Association of Central Arizona, Kansas Livestock Association, North Dakota Association of Builders, North Dakota Farm Bureau, North Dakota Petroleum Council, REALTORS Land Institute, South Carolina REALTORS, Southern Arizona Home Builders Association, Tennessee Road Builders Association, Utah Mining Association
Conforming Rule	*Revised Definition of "Waters of the United States"; Conforming*, 88 Fed. Reg. 61964 (Sept. 8, 2023)
CWA or Act	Clean Water Act, 33 U.S.C. § 1251 *et seq.*
EA	Economic Analysis of the 2023 Rule
EOs	Executive Orders
PI Order	Order Granting Plaintiffs' Motion for Preliminary Injunction, ECF No. 131
Pls. Mem.	ECF No. 201-1
pre-2015 regime	The Agencies' pre-2015 and pre-*Sackett* application of the 1986 Regulations
RFA	Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*
status quo regime	The Agencies' post-*Sackett* application of the 1986 Regulations (where the 2023 Rule is enjoined, including in Plaintiff states)

consistent with relevant case law including *Sackett* and the *Rapanos* plurality, as informed by applicable guidance, training, and experience

INTRODUCTION

Congress enacted the Clean Water Act ("CWA" or "Act") to replace prior state-led efforts to regulate water pollution that proved "inadequate in every vital aspect." S. Rep. No. 92-414, 1st Sess. at 7 (1971). With the "2023 Rule," the Army Corps of Engineers and Environmental Protection Agency (collectively, "Agencies") updated the regulations that specify which waters are covered by the CWA. 88 Fed. Reg. 3004, 3006-07 (Jan. 18, 2023). Months later, in *Sackett v. EPA*, the Supreme Court hailed the Act as a "great success" but narrowed the scope of covered waters and in the process clarified that certain aspects of the 2023 Rule were unlawful. 598 U.S. 651, 658 (2023).

The Agencies issued a new "Conforming Rule" to amend the regulations put in place by the 2023 Rule consistent with *Sackett*. 88 Fed. Reg. 61964 (Sept. 8, 2023). The resulting "Amended Regulations" eliminated the significant-nexus standard that this Court identified as a serious concern at the preliminary injunction stage, substantially reducing the scope of covered waters, and made other changes consistent with *Sackett* that shrink the scope of covered waters.

Plaintiffs and Business Intervenors have not established standing to press a facial challenge to the Amended Regulations. Their alleged injuries-in-fact rest on speculative, hypothetical scenarios and, regardless, are not fairly traceable to the Amended Regulations (as opposed to the CWA or the Supreme Court's interpretation thereof). Plaintiffs' and Business Intervenors' claims also are unripe and are better left for future administrative proceedings or adjudication in as-applied contexts that would allow for development of a factual record.

In any event, the Amended Regulations are reasonable, reasonably explained, and procedurally proper. Each of Plaintiffs' and Intervenors' challenges to discrete pieces of the regulatory definition of "waters of the United States" lacks merit and should be rejected.

BACKGROUND

The CWA's objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The statute prohibits unauthorized discharges "of any pollutant by any person," *id.* § 1311(a), to "navigable waters," broadly defined as "the waters of the United States, including the territorial seas," *id.* § 1362(7). Waters that meet that definition are often called "covered," or "jurisdictional," waters. The scope of key CWA provisions is tied to that definition, including permitting programs that regulate discharges of pollutants, *see id.* §§ 1311(a), 1362(12), 1342, 1344; provisions concerning water quality standards and impaired waters, *id.* § 1313(a)-(d); the oil spill prevention and response program, *id.* § 1321; and the state certification process for federally-authorized activities, *id.* § 1341.

Since the CWA's enactment, the Agencies defined covered waters in regulations. *See* 88 Fed. Reg. at 3011. In 1986 and 1988, the Agencies recodified regulations that (with some minor revisions) remained in effect until 2015. *See* 33 C.F.R. § 328.3 (2014) (Corps); 40 C.F.R. § 232.2 (2014) (EPA) ("1986 Regulations"); *see* 88 Fed. Reg. at 3012. The 1986 Regulations defined "waters of the United States" to include seven categories: (1) traditional navigable waters, i.e., waters that are, were, or may be used "in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;" (2) interstate waters, including interstate wetlands; (3) "other waters," i.e., intrastate waters that could affect interstate or foreign commerce; (4) impoundments; (5) tributaries; (6) the territorial seas; and (7) adjacent wetlands. 33 C.F.R. § 328.3(a) (2014). The 1986 Regulations also defined terms such as "wetlands" and "adjacent" and codified two exclusions. *Id.* § 328.3(a)(8), (b), (c) (2014).

The Agencies refined their application of the 1986 Regulations over time and as informed by Supreme Court decisions. In *United States v. Riverside Bayview Homes, Inc.*, the Court upheld the Corps' assertion of CWA jurisdiction over adjacent wetlands. 474 U.S. 121, 135

(1985). In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("*SWANCC*"), the Court held that the use of "nonnavigable, isolated, intrastate waters" by migratory birds was not a sufficient basis for the exercise of federal authority under the "other waters" category of the 1986 Regulations. 531 U.S. 159, 164-66, 168, 171-72 (2001). In response, the Agencies established coordination procedures for that category to comport with *SWANCC*. *See* 68 Fed. Reg. 1991, 1996 (Jan. 15, 2003).

In *Rapanos v. United States*, the Court assessed the Agencies' assertion of jurisdiction over certain adjacent wetlands and, in a decision fractured in its rationale, remanded for further consideration. 547 U.S. 715, 757 (2006) (Scalia, J., plurality); *id.* at 786-87 (Kennedy, J., concurring). The *Rapanos* plurality's standard considered CWA coverage to extend to "relatively permanent, standing or continuously flowing bodies of water," *id.* at 739, that are connected to traditional navigable waters, as well as wetlands with a "continuous surface connection" to such waters. *Id.* at 742. Notwithstanding this narrower standard, the *Rapanos* plurality found that "waters of the United States" does "not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months." *Id.* at 732 n.5. Justice Kennedy interpreted the Act as covering wetlands with a "significant nexus" to traditional navigable waters. *Id.* at 759 (Kennedy, J., concurring). The Agencies issued guidance on how to apply certain provisions of the 1986 Regulations consistent with the *Rapanos* plurality's and Justice Kennedy's opinions. Under the guidance, tributaries that are not traditional navigable waters and adjacent wetlands were generally covered if they met either the *Rapanos* plurality standard or the significant-nexus standard. The Agencies' application of the 1986 Regulations—implemented consistent with relevant case law and longstanding practice, as

informed by applicable guidance, training, and experience—is referred to as the "pre-2015 regime."

The 2023 Rule largely codified the pre-2015 regime. 88 Fed. Reg. at 3007. Like the 1986 Regulations, the 2023 Rule categorically included traditional navigable waters, the territorial seas, and interstate waters, as well as wetlands adjacent to these waters. *Id.* at 3142. But unlike the 1986 Regulations' categorical inclusion of tributaries and wetlands adjacent to other covered waters, and coverage of non-traditional navigable intrastate waters based on interstate commerce, the 2023 Rule required those waters to meet the *Rapanos* plurality or significant-nexus standard. *Id.* at 3142-43; *see also* 33 C.F.R. § 328.3 (2014); 88 Fed. Reg. at 3006 (describing both standards). The 2023 Rule's preamble provided "substantial guidance" in implementing both standards. 88 Fed. Reg. at 3068. The 2023 Rule also codified in the regulations exclusions from the definition that the Agencies had generally applied under the pre-2015 regime. *Id.* at 3142-43.

States and business groups challenged the 2023 Rule in three courts. This Court and the Southern District of Texas preliminarily enjoined the Rule as to state plaintiffs. ECF No. 131 ("PI Order"); *Texas v. EPA*, 662 F. Supp. 3d 739 (S.D. Tex. 2023). The Eastern District of Kentucky dismissed on standing and ripeness grounds. *Kentucky v. EPA*, No. 3:23-cv-7 (E.D. Ky. Mar. 31, 2023), ECF No. 51 at 1, 21-22. The Sixth Circuit enjoined the 2023 Rule as to Kentucky plaintiffs pending appeal of their dismissal. *Kentucky v. EPA*, No. 23-5345 (6th Cir. May 10, 2023), ECF No. 28 at 7. Accordingly, the pre-2015 regime remained in effect in 27 states, including Plaintiff States.

While these cases were pending, the Supreme Court decided *Sackett*. The Court's opinion revisited the definition of "waters of the United States" in considering the CWA's coverage of adjacent wetlands. *Sackett* concluded that "the *Rapanos* plurality was correct," and adopted its

standard. 598 U.S. at 671, 678. The Agencies then issued the Conforming Rule, effective immediately, to conform the regulations put in place by the 2023 Rule to the *Sackett* decision, which substantially narrowed the scope of covered waters. 88 Fed. Reg. 61964 (Sept. 8, 2023). The Conforming Rule removed the significant-nexus standard as a basis for jurisdiction; removed wetlands from the interstate waters category; limited the "other waters" category to lakes and ponds; and narrowed the definition of "adjacent" to mean "having a continuous surface connection." *See id.* at 61968-69; *see also* Amendments to 40 C.F.R. 120.2 and 33 C.F.R. 328.3, https://perma.cc/737Y-6NBJ (redline showing Conforming Rule changes to 2023 Rule). The 2023 regulations, as amended by the Conforming Rule, are referred to as the "Amended Regulations." Where an injunction of the 2023 Rule applies, including in Plaintiff States, the Agencies are applying the pre-2015 regime consistent with *Sackett* ("status quo regime").

After the Agencies issued the Conforming Rule, Plaintiffs and Business Intervenors filed amended complaints challenging the Amended Regulations and certain aspects of the Conforming Rule and 2023 Rule. ECF Nos. 175, 176, 188. Plaintiffs and Intervenors then moved for summary judgment. ECF Nos. 198, 199 ("Bus. Mem."), 201, 201-1 ("Pls. Mem.").[1]

STANDARD OF DECISION

In moving for summary judgment, Plaintiffs and Business Intervenors bear the burden to establish standing and ripeness. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). To establish standing, they must demonstrate (1) injury-in-fact that is (2) fairly traceable to the Amended Regulations and that (3) would be redressed by a favorable decision. *Id.* at 560-61. To establish

[1] Plaintiffs' purported "Statement of Uncontested Material Facts" is procedurally improper in this record review case, and the Court relieved the parties of the Local Rules' requirements on such statements. *See* ECF Nos. 197 at 2 (order), 196 at 2. In addition, Plaintiffs' "Statement" includes argument. As addressed throughout this Memorandum, the Agencies do, in fact, contest Plaintiffs' characterization of the 2023 Rule, Conforming Rule, CWA, and judicial decisions.

ripeness, Plaintiffs and Intervenors must also demonstrate both that their claims are "fit" for judicial review and that they will not suffer hardship if review is delayed. *Nat'l Park Hosp. Ass'n v. Dep't of Interior* ("*NPHA*"), 538 U.S. 803, 808 (2003). If the Court reaches the merits, under the Administrative Procedure Act ("APA"), summary judgment serves as the mechanism for deciding, as a matter of law, whether the challenged agency action "is supportable on any rational basis" and is not "arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with law." *Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d 759, 763 (8th Cir. 2004) (quoting 5 U.S.C. § 706(2)(A)). "This is a highly deferential standard" providing a "narrow" standard of review. *Org. for Competitive Mkts. v. USDA*, 912 F.3d 455, 459 (8th Cir. 2018). If "a statute is ambiguous, and if the implementing agency's construction is reasonable," the Court is required to "accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Cuomo v. Clearing House Ass'n, LLC*, 557 U.S. 519, 538 (2009) (citing *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)). Where *Chevron* does not apply, *Skidmore* deference applies to agency interpretations of statutes. *TeamBank, N.A. v. McClure*, 279 F.3d 614, 619 n.4 (8th Cir. 2002) (referring to *Skidmore v. Swift & Co*., 323 U.S. 134 (1944)). In this facial challenge, Plaintiffs and Intervenors "must establish that no set of circumstances exists under which the regulation would be valid." *Reno v. Flores*, 507 U.S. 292, 301 (1993) (cleaned up).

SUMMARY OF THE ARGUMENT

Plaintiffs' and Business Intervenors' speculative and conclusory assertions of Article III injury fall well short of demonstrating standing. They have failed to show a concrete injury-in-fact caused by the Amended Regulations. Their claims are also unripe—further factual development would aid the Court, and Plaintiffs and Intervenors would not suffer hardship in delaying review until an actual controversy exists. If the Court disagrees and concludes that there

is jurisdiction, the Amended Regulations should be upheld. The Amended Regulations faithfully conform to Supreme Court precedent and the text and purpose of the CWA, reasonably limit the scope of covered waters, and are procedurally proper.

ARGUMENT

I. Plaintiffs and Business Intervenors lack standing.

Plaintiffs and Business Intervenors have failed to carry their burden to establish standing to challenge the Amended Regulations. Plaintiffs and Intervenors may not rely on each other for standing because they now (a) assert unique claims, *see, e.g.*, Pls. Mem. at 40-43; 31-37 (pressing Tenth Amendment and APA challenges that Intervenors are not raising); *Davis v. FEC*, 554 U.S. 724, 734 (2008) (holding that plaintiff must have standing for "each claim he seeks to press"); (b) allege distinct injuries, *see infra* Part VI (explaining that the scope of any relief should be tailored to established injuries); and (c) seek different relief, *compare* Bus. Am. Compl. at 32-33 (not seeking permanent injunction) *with* Pls. Am. Compl. at 74 (seeking permanent injunction); *Town of Chester v. Laroe Ests., Inc.*, 581 U.S. 433, 439 (2017) ("At least one plaintiff must have standing to seek each form of relief[.]").

Further, Plaintiffs forfeited their standing argument. *See Owner-Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp.*, 878 F.3d 1099, 1102 n.4 (8th Cir. 2018) ("[S]tanding should be established at the first appropriate point in the review proceeding." (cleaned up)). As movants, Plaintiffs must *prove* standing; they have no excuse to raise standing only in reply. *See id.* (rejecting standing argument raised for the first time in a reply brief).

Nor can Plaintiffs and Business Intervenors rely on the Court's prior standing analysis regarding their challenge to the 2023 Rule: Plaintiffs and Intervenors must now establish standing to challenge the *Amended Regulations*. *See Sisney v. Kaemingk*, 15 F.4th 1181, 1194 (8th Cir. 2021). They also must demonstrate a higher degree of proof for standing at summary

judgment than for preliminary injunction or for intervention. *Lujan*, 504 U.S. at 561 (requiring plaintiffs to demonstrate standing "with the manner and degree of evidence required at the successive stages of the litigation"); *Mausolf v. Babbitt*, 85 F.3d 1295, 1301 (8th Cir. 1996) (requiring only factual allegations to satisfy standing for intervention); *Arc of Iowa v. Reynolds*, 94 F.4th 707, 710 (8th Cir. 2024) (concluding plaintiffs failed to prove standing at summary judgment despite previously establishing standing for a preliminary injunction).

A. Plaintiffs' purported Article III injuries are speculative and unsubstantiated.

Not only did Plaintiffs fail to make an opening argument in favor of standing, only five of the 24 Plaintiffs—Alaska, Florida, Ohio, North Dakota, and West Virginia—tendered any declarations in support of their motion for summary judgment. *See* ECF No. 201-2 to 9. And these scant declarations are too abstract and conclusory to establish standing.

First, Plaintiffs' claim that the act of "reading and analyzing" the Amended Regulations to determine their implications constitutes a cognizable Article III injury is meritless. *E.g.*, McCabe Decl.[2] ¶¶ 6, 8-9; DeKrey Decl. ¶ 16; Goehring Decl. ¶ 11.j. "A desire to obtain legal advice is not a reason for universal standing." *Brunett v. Convergent Outsourcing, Inc.*, 982 F.3d 1067, 1069 (7th Cir. 2020). If an alleged "state of confusion" were enough to confer Article III standing, "then everyone would have standing to litigate about everything." *Id.* at 1068. And in any event, Plaintiffs have only proffered conclusory averments that they will spend an unspecified amount of time and resources to review the Amended Regulations. *E.g.*, Goehring Decl. ¶ 11.j. This hardly satisfies the standard at summary judgment, which requires the moving party to substantiate its alleged Article III injuries. *Smith v. Golden China of Red Wing, Inc.*, 987

[2] The declarations referenced in this brief are those attached to Plaintiffs' and Business Intervenors' summary judgment motions.

F.3d 1205, 1209 (8th Cir. 2021) (It is "black letter summary judgment law that a conclusory, self-serving affidavit will not defeat an otherwise meritorious summary judgment motion.").

Second, Plaintiffs' assertion that they will develop compliance trainings to "provide assistance" to their citizens to help them comply with the Amended Regulations is unsupported by any evidence and is not traceable to the Amended Regulations, as the Amended Regulations do not require states to engage in public outreach. *E.g.*, McCabe Decl. ¶¶ 6-7; Goehring Decl. ¶ 11.j; *see Washington v. U.S. Dep't of Health & Hum. Servs.*, 482 F. Supp. 3d 1104, 1118 (W.D. Wash. 2020) (holding costs to inform citizens about regulatory changes were not traceable to the challenged regulation when public outreach was not required under the regulation).

Third, Plaintiffs' claim that regulatory uncertainty may cause delays in project implementation, resulting in added costs, is also unsubstantiated and too speculative to establish standing. *E.g.*, McCabe Decl. ¶ 19; DeKrey Decl. ¶¶ 7-15; Travnicek Decl. ¶¶ 10-11; Foster Decl. ¶ 7. For example, DeKrey attests that North Dakota could incur costs arising out of any delay or cancellation of a state project but acknowledges that any delay or cancellation of this project is still to be determined. *See* DeKrey Decl. ¶ 7 (stating that the Amended Regulations "may require the State . . . Project to obtain a CWA Section 404 Permit"); *id.* ¶ 14 (noting only that the project could be "potentially" delayed); *see also* Foster Decl. ¶ 7 (noting only the "potential" for project delay). These speculative injuries born out of purported uncertainty "are highly nebulous in both character and degree and are a far cry from the type of 'concrete and particularized' injury required for Article III standing." *ViroPharma, Inc. v. Hamburg*, 777 F. Supp. 2d 140, 147 (D.D.C. 2011), *aff'd*, 471 F. App'x 1 (D.C. Cir. 2012).

While Plaintiffs also assert pocketbook costs to implement changes in CWA programs or to comply with CWA requirements (such as permitting) because of the Amended Regulations,

these injuries are unsupported and too speculative to establish injury-in-fact. Plaintiffs must proffer more than just conclusory assertions about purported added administrative costs. *Red Wing*, 987 F.3d at 1209. Instead, Plaintiffs simply speculate that the Amended Regulations could somehow *increase* the waters covered and that in turn *could* lead to an increase in administrative costs. *E.g.*, Foster Decl. ¶¶ 5-6, 9, 11 (attesting in conclusory fashion that the Amended Regulations "*appear* to significantly expand the scope of federal jurisdiction" such that administrative costs will rise (emphasis added)); Johnson Decl. ¶¶ 13-14 (assuming with no explication that the Amended Regulations expand CWA jurisdiction, which would result in higher costs). Not only is this speculative, it assumes that the Amended Regulations expand the scope of CWA jurisdiction, which Plaintiffs have not demonstrated.

And Plaintiffs' citation to a Corps' letter to an Alaska citizen about construction near wetlands does not support their claim that the *Amended Regulations* expand CWA jurisdiction. Pls. Mem. at 42 (citing ECF No. 201-2 at 11). The letter was issued in the context of an alleged CWA violation but does not threaten enforcement or assert jurisdiction over any waters under the status quo regime or the Amended Regulations. The letter informs the citizen that the Corps "will not" pursue enforcement action because, "while the wetlands in question may be" jurisdictional, the reported activity appears to have been outside those wetlands. ECF No. 201-2.[3]

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[3] The statement in the Corps' letter that "all waters are assumed to be [jurisdictional] until an Approved Jurisdictional Determination is completed" reflects the distinction between preliminary jurisdictional determinations, which "merely advise a property owner 'that there *may* be waters of the United States on a parcel,'" and approved jurisdictional determinations, which "definitively 'stat[e] the presence or absence' of such waters." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 595 (2016). Similarly, the Corps' factual observation in the letter that authorization is required prior to discharging dredged or fill material into waters of the United States merely recites statutory provisions of CWA, 33 U.S.C. §§ 1311, 1344.

Similarly, Plaintiffs' assertions of harms to their quasi-sovereign interests in the economic well-being of their citizens are unsubstantiated. Several declarants attest that the Amended Regulations will cause a cascade of economic harms to various Alaska and North Dakota industries and citizens. *E.g.*, McCabe Decl. ¶¶ 16, 19-20; Goehring Decl. ¶¶ 8, 11.e-i, 19-20. For example, Goehring opines, without any supporting evidence, that the Amended Regulations will "significantly adversely impact our nation's food security" by reducing the amount of land available for North Dakota's farmers. Goehring Decl. ¶¶ 20, 11.g. These claims lack support, relying on a speculative chain of hypotheticals that do not account for the Conforming Rule's substantial changes in conformance with the decision in *Sackett*. For the same reasons, Plaintiffs have also failed to demonstrate how these allegedly threatened injuries are traceable to the Amended Regulations or redressable by setting them aside.

And in this Circuit, states are prohibited from bringing *parens patriae* suits on behalf of their citizens against the United States. *See Iowa ex rel. Miller v. Block*, 771 F.2d 347, 355 (8th Cir. 1985). In *Stenehjem v. Whitman*, No. A3-00-109, 2001 WL 1708825, at *2 (D.N.D. June 20, 2001), this Court reiterated the Eighth Circuit's broad "prohibition on all *parens patriae* suits brought by a state against the federal government" in dismissing North Dakota's suit challenging a pesticide regulation promulgated by EPA. *Id.* (citing *Block*, 771 F.2d at 354-55).

Finally, Plaintiffs' abstract claims that the Amended Regulations encroach on the states' "sovereign interests" cannot support a finding of injury-in-fact. *E.g.*, Goehring Decl. ¶¶ 7, 13 ("[I]n violation of cooperative federalism, EPA's Amended [Regulations] attempt[] to manifestly arrogate State reserved authority."); Travnicek Decl. ¶ 14; Glatt Decl. ¶ 6; Johnson Decl. ¶ 9. Even under a cooperative federalism framework, Plaintiffs must still show a concrete, certainly impending injury traceable to the Amended Regulations. *Missouri v. Biden*, 52 F.4th 362, 369

(8th Cir. 2022) (rejecting state's abstract assertion that an executive order that encroached on the states' regulatory role constituted a concrete injury). Moreover, Plaintiffs cannot rely on "special solicitude" to rescue their failure to show an injury-in-fact. "Special solicitude" does not eliminate Plaintiffs' requirement to otherwise establish a concrete injury. *See Missouri v. Yellen*, 39 F.4th 1063, 1070 n.7 (8th Cir. 2022); *Biden*, 52 F.4th at 369.

B. Business Intervenors' purported Article III injuries are also unsubstantiated.

Business Intervenors fail to show that they have organizational standing (from harm to trade associations) or associational standing (from harm to identified members). *Summers v. Earth Island Inst.*, 555 U.S. 488, 494, 498 (2009); *contra* Bus. Mem. at 15.

The Court should reconsider its prior finding that Business Intervenors and their members are direct objects of the Amended Regulations. Intervention Order at 5, ECF No. 171; Bus. Mem. at 15. Like the 2023 Rule, the Amended Regulations "do[] not directly apply to specific entities and therefore [they] do[] not 'subject' any entities of any size to any specific regulatory burden." 88 Fed. Reg. at 3139. They simply define the scope of "waters of the United States," *id.*, and "do not on their face directly impose regulatory restrictions, costs, or other burdens on any of these types of entities." *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 175 (D.C. Cir. 2012). So Intervenors and their members would not be subject to the Amended Regulations *unless* they plan to take an action, that action would occur on or around a "waters of the United States," that action constitutes the discharge of a pollutant from a point source, *and* that action is not excluded or exempted by statute or regulation. Intervenors have not proffered any declaration showing any plans to take an action on or around jurisdictional waters.[4] *See generally* Bus. Decls.

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[4] For the same reasons, Plaintiffs are also not "direct objects" of the Amended Regulations.

Even if Intervenors were the object of the Amended Regulations, none of their cited cases supports their suggestion that they have standing per se. *See* Bus. Mem. at 15; *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 986 (8th Cir. 2011) (finding plaintiffs established all three elements of standing); *Pietsch v. Ward Cnty.*, 446 F. Supp. 3d 513, 527-28 (D.N.D. 2020) (same); ECF No. 171, at 5 (simply stating that often "it is not difficult to establish standing" for regulated entities). They must establish each element of standing, which they failed to do here.

1. Business Intervenors fail to show organizational harm.

Business Intervenors fail to establish organizational standing, as only one of the 13 organizations' declarations even asserts an organizational harm—stating that it has "expended resources in assisting its members in complying with the [CWA]." Teagarden Decl. ¶ 9. But resource expenditure, without more, is insufficient to confer standing. *Pietsch*, 446 F. Supp. 3d at 528. The cost incurred must "'have *perceptibly* impaired' the organization's activities," "impaired their ability to advocate on behalf of the populations they serve," or "frustrated" their organizations' missions. *Id.* at 528-29 (emphasis added). Teagarden and all other declarants fail to show how their organizations have been harmed in these ways.

2. Business Intervenors fail to show member harm.

Likewise, Intervenors fail to demonstrate associational standing. Only one Intervenor submitted a declaration identifying a member that will allegedly be harmed by the Amended Regulations. *See generally* Bus. Decls. Declarations that fail to name individual members cannot demonstrate injury-in-fact. *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583, 601 (8th Cir. 2022); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 235 (1990). The sole member-declarant Intervenors do offer, Adams, purports to suffer injury from only a narrow portion of the Amended Regulations, which cannot support standing for *all* of Intervenors' claims, *see Davis*, 554 U.S. at 733. Nor does Adams present a cognizable injury.

Adams's purported harms arise out of business "uncertain[ty]"—whether he may need to obtain a permit to avoid liability or change his business practices, and costs and delays in possibly obtaining a permit, identifying features that may be jurisdictional, and in attempting to understand the Amended Regulations.[5] Adams Decl. ¶¶ 7-11. As explained *supra* Part I.A, these business uncertainty harms are not cognizable injuries-in-fact, nor are time and money spent to understand a new regulation. Even if time and resources spent could be cognizable, past harms alone cannot prove injury-in-fact for Business Intervenors who seek prospective relief. *Park v. Forest Serv. of United States*, 205 F.3d 1034, 1037 (8th Cir. 2000). And any purported injury "based on [Adams's] fears of hypothetical future harm that is not certainly impending" is not cognizable. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013); *see, e.g.*, Adams Decl. ¶ 7 (stating that "[s]hould [he] encounter the need to build," he may need a permit).

C. On a claim-by-claim basis, Plaintiffs and Business Intervenors do not have standing to bring any of their individual challenges.

Even if their injuries were generally cognizable, Plaintiffs and Business Intervenors fail to substantiate their injuries for any specific claim.[6] They proffer only speculative, conclusory assertions of harms that are not concrete or particularized for each claim. *Davis*, 554 U.S. at 734 (stating that standing must be established for "each claim"). Relatedly, they fail to meet their burden of establishing that any purported injury is traceable to the Amended Regulations and redressable with a favorable decision. *Red Wing*, 987 F.3d at 1209; Bus. Mem. at 18 (offering only one conclusory statement for these two standing requirements).

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[5] Business Intervenors also assert that Adams "may" need to "forego certain uses of [his] land altogether," Bus. Mem. at 17, but Adams's declaration is void of such statement. Conclusory assertions are insufficient to show injury-in-fact. *See Red Wing*, 987 F.3d at 1209. Even so, this purported injury is a non-cognizable, business-uncertainty harm. *See supra* Part I.A.

[6] As addressed *infra* Parts III & V, Plaintiffs' claims lack merit.

1. Plaintiffs and Business Intervenors fail to demonstrate standing to challenge any jurisdictional category in the Amended Regulations.

Plaintiffs and Business Intervenors fail to show the necessary injury-in-fact, which must be "concrete and particularized"—in other words, "real," "personal and individual"—and must be "actual or imminent," to establish standing. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016).

Regarding the Amended Regulations' coverage of interstate waters, *no* Plaintiff proffers any evidence whatsoever suggesting any Plaintiff is harmed by the Amended Regulations' interstate waters category. *See generally* Pls. Decls. And Business-member Adams proffers only an abstract injury from unidentified, speculative actions that *may* implicate features that are jurisdictional under this category. *See* Adams Decl. ¶ 7 (asserting that he *may* need to obtain a permit, *if* he "encounter[s] the need to build" around the Cimarron River, a tributary to an interstate water, and its tributaries); *see also* Bus. Mem. at 19 (pointing out that the Agencies consider portions of the Amargosa River to be covered solely by the interstate waters category but alleging no injury from the Amended Regulations' continued coverage of that river).

Adams fails to show that he is harmed by the Amended Regulations' categorical inclusion of interstate waters because (in addition to failing to show concrete, imminent injury), Adams attests that the Cimarron River is a relatively permanent tributary to the Arkansas River (a traditional navigable water), so that river would not be solely covered under the interstate waters category. Adams Decl. ¶ 4; 88 Fed. Reg. at 61968; *see* https://www.swt.usace.army.mil/Missions/Regulatory/Section-10-Waters/ (listing the Arkansas River as a navigable water under Section 10 of the Rivers and Harbors Act). Further, based on Adams' description of the Cimarron River's tributaries, which "only carry[] water directly following rainfall, and hold water only sporadically," those tributaries would not be jurisdictional under the Amended Regulations. Adams Decl. ¶ 5; *see* 88 Fed. Reg. at 3080 ("Relatively permanent waters do not

include tributaries with flowing or standing water for only a short duration in direct response to precipitation."). So, even if Adams imminently plans to take any action around such waters (which he does not assert), he fails to show injury-in-fact from the interstate waters category.

More generally, the Conforming Rule's removal of the significant-nexus standard further restricted the waters that could be jurisdictional based solely on their connection to interstate waters, making it even more unlikely that the categorical inclusion of interstate waters might have any real-world impact on Adams (or Plaintiffs or other Business Intervenors' members). And the 2023 Rule preamble provides more clarity on the extent of an interstate water compared to the status quo regime. 88 Fed. Reg. at 3073 (specifying the extent of interstate waters that are lakes and ponds or streams and rivers).

Even if Plaintiffs or Business Intervenors showed it was reasonably likely that the interstate waters category could affect unidentified water features or unnamed projects, asserting only an "objectively reasonable likelihood" of injury is "inconsistent with [the] requirement that threatened injury must be certainly impending to constitute injury in fact." *Clapper*, 568 U.S. at 410 (quotation omitted). No Plaintiff or Intervenor has identified any specific way it is harmed by the Amended Regulations' interstate waters category as would be required to establish standing to press this claim.

For impoundments, Plaintiffs raise only the theoretical possibility that unidentified waters could be jurisdictional under the Amended Regulations' impoundments category and could harm them. *E.g.*, Travnicek Decl. ¶ 13 (noting that certain unidentified dammed waters maintained by North Dakota *may* be considered covered under the Amended Regulations). And Business-member Adams does not allege any injury from the impoundments category. So neither party has any basis to show injury-in-fact from the Amended Regulations' coverage of impoundments.

As for the remaining challenged jurisdictional categories, Plaintiffs fail to establish an actual or imminent injury from the Amended Regulations' coverage of tributaries and other "relatively permanent" waters, "adjacent" wetlands with a "continuous surface connection" to covered waters, and intrastate lakes and ponds that satisfy the *Rapanos* plurality standard. Plaintiffs' declarants assert they were injured by the Amended Regulations' (a) alleged inclusion of isolated wetlands, McCabe Decl. ¶ 10; (b) alleged inclusion of unidentified prairie potholes or lakes and ponds that may, sometime in the future, require analysis to determine if they are covered, DeKrey Decl. ¶¶ 7, 12, 15, Glatt Decl. ¶ 8, Goehring Decl. ¶ 11.a, Travnicek Decl. ¶ 12; (c) alleged reach of terms such as "continuous surface connection" and "relatively permanent," DeKrey Decl. ¶¶ 9-12, 15, Glatt Decl. ¶ 8, Goehring Decl. ¶ 11.b; and (d) alleged inclusion of what the declarants refer to as "ephemeral" and "intermittent" streams as covered tributaries, Foster Decl. ¶¶ 6-13. But these declarants simply assert that in the abstract, these features "may" exist and could impose additional costs, require them to delay or abandon projects, or subject them to additional permitting requirements. *See, e.g.*, DeKrey Decl. ¶ 15 (noting possibility that certain unidentified lakes and ponds could be considered relatively permanent which could impact a state project). They do not attest with any likelihood that the Amended Regulations' jurisdictional categories will in fact impose concrete injuries on them, as required to establish injury-in-fact at the summary-judgment stage. *See Lujan*, 504 U.S. at 561 (requiring actual evidence of harm); *see also Clapper*, 568 U.S. at 411-15 (conclusory and speculative harms do not establish injury-in-fact).

In fact, much of Plaintiffs' concern stems from implementation guidance and other discussion that appears in the *preamble* to the 2023 Rule, not the codified text of the Amended Regulations. *See* Pls. Mem. at 9-11 (criticizing the Agencies' discussion of "relatively

permanent" and "continuous surface connection," in the preamble of the 2023 Rule); *see also*, *e.g.*, DeKrey Decl. ¶¶ 12, 15 (asserting that the "relatively permanent" standard "could" result in ponds and lakes being considered jurisdictional). Plaintiffs speculate that the Agencies could interpret "relatively permanent" or "continuous surface connection" to include unidentified prairie potholes, isolated ponds and lakes, wetlands, and ephemeral or intermittent tributaries. *See* Pls. Mem. at 8-11. But they have not demonstrated that these statements in the preamble "ha[ve] immediate legal or practical consequences." *NRDC v. EPA*, 559 F.3d 561, 565 (D.C. Cir. 2009). Indeed, the Agencies may later provide further implementation guidance. *See* 88 Fed. Reg. at 61966. Given the absence of actual or imminent implementation in the context of any specific regulated activity, Plaintiffs have not demonstrated harm from the preamble language. *See Racing Enthusiasts & Suppliers Coal. v. EPA*, 45 F.4th 353, 359 n.3 (D.C. Cir. 2022).

What is more, no Plaintiff declarant identifies any specific feature that falls or likely would fall under the Amended Regulations' jurisdictional categories. For example, DeKrey simply speculates that the "relatively permanent" requirement "could" result in unidentified "prairie potholes" or "ponds and lakes" being covered under the Amended Regulations and speculates that if covered, a state project could be impacted. DeKrey Decl. ¶¶ 7-15; *contra Spokeo*, 578 U.S. at 339. McCabe similarly attests that Alaska has a large presence of wetlands and thus, Alaska may be responsible for more jurisdictional wetlands under the Amended Regulations. McCabe Decl. ¶¶ 11, 16-17. Neither DeKrey nor McCabe identifies any specific waters that are now jurisdictional or explains how they could now be subject to new CWA requirements.

Travnicek also baselessly asserts that two North Dakota projects may now be subject to new CWA requirements under the Amended Regulations because of a theoretical increased

presence of jurisdictional waters but does not credibly demonstrate that this purported harm is even likely or certainly impending. Travnicek Decl. ¶¶ 11-12. In fact, the Amended Regulations codify a narrower scope of jurisdictional categories than the 1986 Regulations. *Compare* 33 C.F.R. § 328.3(a), *with* 33 C.F.R. § 328.3(a) (2014). Plaintiffs cannot show harm from additional costs and delays when the Amended Regulations narrowed jurisdictional categories.

Foster attests that West Virginia's Coalfields Expressway project could be impacted by what he alleges are "ephemeral" streams. Foster Decl. ¶ 6. But Foster has offered nothing to suggest that such unnamed and unidentified streams would be jurisdictional tributaries under the Amended Regulations now that the significant-nexus standard is eliminated. *See* 88 Fed. Reg. at 3080 (streams that flow for a short duration only in response to rainfall are not covered). And as explained above, Foster's claim that West Virginia's Department of Transportation is harmed by uncertainty and confusion is not a cognizable Article III injury. *See supra* Part I.A.

Likewise, member-declarant Adams asserts only speculative injury and only from the Amended Regulations' allegedly broad reach of "tributaries." Adams Decl. ¶ 9. Adams simply asserts that it is "uncertain[]" whether unidentified tributaries that he characterizes as ephemeral *might* be considered covered under the Amended Regulations, which *might* impose additional costs and delays, require him to change his business practices, or subject him to liability. *See id.* ¶¶ 8, 9-11. Business-uncertainty harms are not cognizable. *See supra* Part I.A. Even if they were, Adams's speculative harms are not "imminent" as needed to establish injury-in-fact. *Spokeo*, 578 U.S. at 339; *Clapper*, 568 U.S. at 411-15. Adams fails to show that those tributaries likely would be jurisdictional under the Amended Regulations. Nor does he identify any specific project that likely would impact such a feature, such that he likely would incur those purported harms.

Ultimately, the proffered declarants' asserted injuries not only are unsupported by evidence, but also are not traceable to the Amended Regulations, as distinct from the CWA's prohibition on unpermitted or unexempt discharges of pollutants. *See* 33 U.S.C. § 1311. That prohibition may cause persons to assess whether certain waters on their property are covered or seek permits. Plaintiffs and Intervenors have not shown that the Amended Regulations have changed that aspect of the CWA in any way. In fact, their allegations at bottom concern the alleged vagueness of terms that the Supreme Court coined—"relatively permanent" and "continuous surface connection." *See supra* Part I.A.

2. Plaintiffs and Business Intervenors fail to demonstrate standing to challenge the Amended Regulations' ditch exclusion.

Plaintiffs and Business Intervenors also fail to show any particularized, concrete, or imminent injury from the Amended Regulations' ditch exclusion. They simply assert non-cognizable, business-uncertainty harms from the ditch exclusion's allegedly nebulous standards. Pls. Mem. at 20; Bus. Mem. at 17; *see also* Kramer Decl. ¶ 14; Goehring Decl. ¶ 11.a; Foster Decl. ¶ 5. Even if such harms were cognizable, Plaintiffs and Intervenors have no basis to allege that the Amended Regulations require "thousands of miles of roadside ditches" to be evaluated. Significantly, the Amended Regulations *codify* a ditch exclusion, which does not exist in the 1986 Regulations. Foster Decl. ¶ 5; *see also* Bus. Mem. at 17; 33 C.F.R. § 328.3(b)(3). In addition, Plaintiffs and Business Intervenors identify no project allegedly affected by the ditch exclusion, *see* Pls. Mem. at 20; Foster Decl. ¶ 5; *cf. Spokeo*, 578 U.S. at 339, and Intervenors additionally fail to identify any affected member, *see Religious Sisters*, 55 F.4th at 601.

Plaintiff declarant Kramer asserts only that it is "unclear" whether an unspecified ditch would qualify as a "relatively permanent" waterbody. Kramer Decl. ¶ 14. Foster similarly asserts, without any evidence, that under the Amended Regulations, it is possible that roadside

ditches may be covered. Foster Decl. ¶ 5. Goehring attests that North Dakota landowners will need to determine if ditches are now jurisdictional under the Amended Regulations.[7] Goehring Decl. ¶ 11.a. This allegation is legally meaningless, however, because even in the absence of the Amended Regulations, ditches can be subject to CWA jurisdiction when they function as relatively permanent tributaries; indeed, in *Rapanos*, the plurality ordered lower courts on remand to determine whether "ditches or drains near each wetland are 'waters' in the ordinary sense of containing a relatively permanent flow." 547 U.S. at 757. In addition, the declarant's alleged state of confusion is not a cognizable injury. *Brunett*, 982 F.3d at 1069. Thus, these purported injuries lack specificity and imminence for injury-in-fact.

3. Plaintiffs and Business Intervenors fail to demonstrate standing for their remaining constitutional and APA challenges.

Plaintiffs' remaining constitutional and procedural challenges lack specificity, concreteness, and imminence. *See* Pls. Mem. at 31-43; *see supra* Part I.C.1 (summarizing purported injuries from allegedly vague terms). They have failed to show any imminent or even credible threat of prosecution from the enforcement of these purportedly vague terms to establish standing for their vagueness challenge. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 165 (2014); *see also infra* Part II.B. And because Plaintiffs fail to substantiate a concrete or imminent injury from the Amended Regulations, they lack standing to raise their constitutional and procedural APA claims. *See Earth Island Inst*., 555 U.S. at 496; *North Dakota v. Heydinger*, 825 F.3d 912, 917 (8th Cir. 2016); *West Virginia v. U.S. Dep't of Health & Hum. Servs*., 145 F. Supp. 3d 94, 110 (D.D.C. 2015), *aff'd sub nom. W. Va. ex rel. Morrisey v. U.S. Dep't of Health & Hum. Servs*., 827 F.3d 81 (D.C. Cir. 2016).

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[7] Goehring is describing an injury purportedly incurred by North Dakota residents, not by the state itself. This is a *parens patriae* claim that cannot be brought by the state. *See supra* Part I.A.

Intervenors raise similar constitutional and statutory challenges. *See* Bus. Mem. at 31-35. They lack standing to raise any of these challenges because their sole member declaration fails to allege any harm tied to those claims. *See generally* Bus. Decls.; *Religious Sisters*, 55 F.4th at 601 (requiring organization to "identify particular members and their injuries" for associational standing).

II. The case is not ripe for review.

For the same reasons that Plaintiffs and Intervenors lack standing, their claims are not constitutionally ripe for review. *Driehaus*, 573 U.S. at 157 n.5. Their facial challenges are also not ripe for prudential reasons. To prevail on their facial challenges, Plaintiffs and Intervenors must establish "no set of circumstances" under which the Amended Regulations would be valid. *Reno*, 507 U.S. at 301 (quotation omitted). Facial challenges are "disfavored" because they "raise the risk of premature interpretation of statutes on the basis of factually barebones records." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). This is not to say that Plaintiffs and Business Intervenors can never bring a facial pre-enforcement challenge to the Amended Regulations. But at a minimum, they must show their claims are prudentially ripe: that (1) the issues are fit for review, and (2) they would suffer hardship absent judicial review. *Iowa League of Cities v. EPA*, 711 F.3d 844, 867 (8th Cir. 2013). Here, Plaintiffs and Business Intervenors fail to meet each prong. There is zero factual development relevant to their claims, and their purported injuries are speculative, and thus, their purported harms are "contingent [on] future events that may not occur as anticipated, or indeed may not occur at all." *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 582 (8th Cir. 2007) (quotation omitted). The Court should decline to decide the lawfulness of the Amended Regulations based on speculation that they *might* be applied unlawfully in hypothetical situations.

A. Plaintiffs' and Business Intervenors' claims are not fit for review.

The facial challenges are not fit for review because factual development would significantly advance the Court's ability to address their claims. *Iowa League*, 711 F.3d at 867.

1. The challenges to each jurisdictional category are not fit for review.

Broadly, Plaintiffs' and Business Intervenors' purported injuries "may not occur at all," *Minn. Pub. Utils.*, 483 F.3d at 582, because their declarants acknowledge that the potential application of the Amended Regulations to specific projects is not yet fully elucidated, *see, e.g.*, Kramer Decl. ¶ 16; King Decl. ¶ 8. More facts would significantly advance the Court's ability to adjudicate each of Plaintiffs' and Intervenors' claims by providing the Court with information on the nature of specific waters or projects in or near waters. *See Iowa League*, 711 F.3d at 867 (recognizing that "where further factual development regarding the agency's application of the document would aid [the court's] decision," challenge to that document would be unripe).

For example, Plaintiffs' and Intervenors' challenges to the interstate waters category would benefit from more concrete facts because as explained *supra* Part I.C.1, Plaintiffs and Intervenors do not point to any instance of the Agencies asserting that the Amended Regulations cover a water solely as an interstate water. They have not shown an actual dispute regarding "waters" (i.e., "rivers, lakes, and other waters") that "flow across, or form a part of, State boundaries." 88 Fed. Reg. at 3072; *see* 88 Fed. Reg. at 61966 (discussing interstate waters in the context of *Sackett*; excluding interstate wetlands). Nor have they shown that such waters are not covered under other categories. 88 Fed. Reg. at 3072 ("Interstate waters also include waters that meet the definition of a traditional navigable water or are tributaries of traditional navigable waters or the territorial seas[.]"). So even if Plaintiffs and Intervenors were correct that the Agencies' *future application* of the interstate waters category *might* be inconsistent with *Sackett*, such a case may never arise. The Court should wait for such a case and decide it on a developed

record. *See NPHA*, 538 U.S. at 812 (holding case unfit for review where regulation might be lawful in certain circumstances).

Likewise, the challenge to the impoundments category would benefit from more facts because, among other deficiencies, Plaintiffs and Business Intervenors fail to show that, under the Amended Regulations, the Agencies would assert jurisdiction over any particular impoundment, simply because it has some connection to covered waters and was jurisdictional at the time of impoundment. *See S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 112 (2004) (finding further factual development necessary to resolve dispute over whether two waterbodies are meaningfully distinct). And an impoundment may be covered under another category. *See* 88 Fed. Reg. 3067.

The challenge to the Amended Regulations' coverage of ditches that qualify as relatively permanent (a)(3) tributaries is also hypothetical and devoid of context. *See* Pls. Mem. at 19-20; Bus. Mem. at 28-29. Plaintiffs and Business Intervenors fail to present any concrete facts that would aid this Court's review, such as the putatively covered ditch's bed, bank, flow duration, and downstream connection to (a)(1) waters. *See Rapanos*, 547 U.S. at 736 n.7 (explaining that "ditches, channels, conduits and the like can all hold water permanently as well as intermittently" and "when they do, we usually refer to them as rivers, creeks, or streams") (cleaned up). Similarly, the remaining challenges to the Amended Regulations' incorporation of the *Rapanos* plurality standard and treatment of adjacent wetlands and (a)(5) lakes and ponds are also based on speculation that they could someday be applied in an unlawful manner and thus are unripe for review.

This Court should decline to decide the lawfulness of the Amended Regulations' jurisdictional categories based on speculation that they *might* be applied unlawfully in certain

hypothetical circumstances; such an invitation is flatly inconsistent with the standard set forth in *Reno*. Nor would immediate adjudication foster effective administration of the CWA; it would "hinder agency efforts to refine its policies." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 735 (1998). For example, much of Plaintiffs' and Intervenors' arguments stem from how the Agencies *may* apply implementation guidance in the 2023 Rule's preamble in an unlawful manner. *E.g.*, Bus. Mem. at 21-25 (challenging the preamble's discussion of "relatively permanent" waters); Pls. Mem. at 19-20 (same). Such challenges are not cognizable injuries. *See supra* Part I.C.3. And challenges to "hypothetical and non-specific" preamble statements would benefit from the Agencies' interpretation and application, *NRDC*, 559 F.3d at 565, which the Agencies plan to do, 88 Fed. Reg. at 61966.

2. The vagueness challenges are not fit for review.

Plaintiffs' and Business Intervenors' facial vagueness claims are particularly unfit for judicial review. It is "well established that vagueness challenges" that "do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand and judged on an as-applied basis." *Sanimax USA, LLC v. City of S. St. Paul*, 95 F.4th 551, 569 (8th Cir. 2024) (quotation omitted). This Court must reject these *facial* challenges until it can discern whether the Amended Regulations violate the due process clause *as applied* to specific facts. *E.g.*, *id.* (dismissing facial vagueness challenge of a penal ordinance that did not implicate First Amendment freedoms); *Gallagher v. City of Clayton*, 699 F.3d 1013, 1022 (8th Cir. 2012) (dismissing vagueness claim that only raised a facial challenge). Even if this Court entertains the facial vagueness challenge, Plaintiffs and Intervenors must show that in all applications, the Amended Regulations (1) lack adequate notice of the proscribed conduct and (2) lend themselves to arbitrary enforcement. *Sanimax*, 95 F.4th at 569; *Reno*, 507 U.S. at 301. Additional facts are required to review each element of the facial vagueness claims.

First, it is premature to assess whether the challenged terms are vague *in all applications* on the current record before the Court. *See Reno*, 507 U.S. at 301. Review now risks "premature interpretation" based on "factually barebones records." *Wash. State Grange*, 552 U.S. at 450.

Second, whether a regulation lacks fair notice is almost always fact-dependent. *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498 (1982). Courts typically consider a regulation "within the context of the particular conduct to which it is being applied," *Great Am. Houseboat Co. v. United States*, 780 F.2d 741, 747 (9th Cir. 1986), such as an enforcement action where a penalty has been imposed, *see, e.g.*, *B&B Insulation, Inc. v. Occupational Safety & Health Rev. Comm'n*, 583 F.2d 1364, 1368-72 (5th Cir. 1978). While Plaintiffs and Intervenors focus on the CWA's potential penalties and their own subjective confusion, Pls. Mem. at 39-40; Bus. Mem. at 32, they allege no actual or threatened enforcement and no imposition of a criminal penalty. Because the question of fair notice would benefit from more facts, the facial vagueness challenge is not fit for review. *Iowa League*, 711 F.3d at 867.

B. Plaintiffs and Business Intervenors will not suffer hardship if judicial review is delayed.

Plaintiffs and Intervenors also fail the hardship prong because they have not shown that they have "sustained or [are] immediately in danger of sustaining some direct injury as the result of the challenged" regulation. *Water Supply Dist. No. 10 of Cass Cnty. v. City of Peculiar*, 345 F.3d 570, 573 (8th Cir. 2003); *see also Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 164 (1967). Plaintiffs and Business Intervenors are in the same position as the petitioners in *Toilet Goods* and *NPHA*, where the Supreme Court held that the petitioners could not establish hardship should judicial review be delayed because the challenged regulations did not impose any immediate obligations on the parties. In *Toilet Goods*, manufacturers challenged an agency regulation requiring them to provide the agency with access to certain information upon request.

Holding that petitioners' challenge was not ripe, the Supreme Court noted the regulation did not govern the petitioners' conduct but only the circumstances in which the agency could require inspections. To that end, the Court recognized that it had "no idea whether or when" petitioners would be subject to the inspections they were challenging. 387 U.S. at 163. Similarly, in *NPHA*, a group of concessioners challenged a regulation that announced the position an agency would take in any contract dispute arising out of concession contracts. 538 U.S. at 810. Nothing in the regulation imposed requirements on the concessioners' day-to-day operations. *Id.*

Likewise, this Court and the parties have "no idea whether or when" the Amended Regulations will ever have a direct or immediate impact on Plaintiffs' or Business Intervenors' interests. *Toilet Goods*, 387 U.S. at 163; Travnicek Decl. ¶ 13 ("The majority of these dams were not previously covered by the CWA but *may* now be WOTUS . . . under the [Amended Regulations]") (emphasis added); Adams Decl. ¶ 3 ("Some of these features [on my company's land] may constitute "waters of the United States" under EPA's recently promulgated Conforming Rule"). The only immediate hardship that Plaintiffs and Intervenors point to is "uncertainty" and the desire to plan for the unlikely possibility that the Amended Regulations will impose *additional* CWA obligations. *E.g.*, Adams Decl. ¶¶ 7-11; Travnicek Decl. ¶ 13; Foster Decl. ¶ 4. Ironically, they also claim harm arising out of regulatory uncertainty due to the judicial review of the Amended Regulations. *E.g.*, DeKrey Decl. ¶ 16 (assuming that, if the Amended Regulations do not survive judicial review, expenses and planning to comply with the Amended Regulations "will have been wasted and unnecessary"). But the Supreme Court rejected these exact claims of "hardship" in *NPHA*, 538 U.S. at 811.

And with better factual development, Plaintiffs and Business Intervenors will have opportunities to raise these claims later in a more appropriate judicial forum. For example, they

could challenge a Corps' approved jurisdictional determination that a feature of land was a "water of the United States." *Hawkes*, 578 U.S. at 602. They can also challenge CWA permit requirements or raise these claims as a defense to an enforcement action. Plaintiffs' and Intervenors' speculations fall far short of the "hardship" they must demonstrate to show that this pre-enforcement challenge is ripe for review.

III. The Amended Regulations' jurisdictional categories are lawful.

If this Court reaches the merits, it should uphold the Amended Regulations' jurisdictional categories. To prevail on their claims regarding the treatment of each jurisdictional category, Plaintiffs and Business Intervenors must "establish that no set of circumstances exists under which [each challenged category] would be valid." *Reno*, 507 U.S. at 301 (quotation omitted). They have not met that burden. Because the categories are reasonable, they should be upheld.

A. Coverage of interstate waters is appropriate.

The Court should reconsider its prior findings concerning the interstate waters category. PI Order at 17-18, 20, 27-29. The categorical inclusion of interstate waters is lawful.

1. The Commerce Clause provides authority to cover interstate waters.

Article I, Section 8 of the Constitution authorizes Congress to regulate interstate commerce. That authority is "broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981). Interstate waters are, by definition, waters of "the several States." U.S. Const. art. I, § 8. They are channels and instrumentalities of interstate commerce and have a substantial relation to interstate commerce. *See United States v. Lopez*, 514 U.S. 549, 558-59 (1995). Activities that pollute waters are economic in nature. *See, e.g.*, *Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176, 202

(2d Cir. 2002). And pollution that flows from one state to another degrades water quality, *see Arkansas v. Oklahoma*, 503 U.S. 91, 98-100 (1992), resulting in substantial economic impacts.

Coverage of interstate waters does not raise the constitutional questions at issue in *SWANCC* that concerned this Court in its preliminary injunction order. In *SWANCC*, the Court was concerned with whether intrastate waters that were not traditional navigable waters were sufficiently connected to traditional navigable waters. *See SWANCC*, 531 U.S. at 161, 169, 171. The Court considered that, as to intrastate waters, Congress had exercised its power over traditional navigable waters. *Id.* at 172. Later, and again in the context of intrastate waters, *Sackett* held that the CWA covers relatively permanent waters connected to traditional navigable waters. *Sackett*, 598 U.S. at 678 (quoting *Rapanos*, 547 U.S. at 742).[8] Application of the relatively permanent standard to non-traditional navigable intrastate waters therefore avoids the constitutional concerns that troubled the Court in *SWANCC*, and the Agencies recognize that Congress did not exercise all aspects of its Commerce Clause authority for intrastate waters. See 88 Fed. Reg. at 3037.

But Congress's authority to regulate *interstate* waters is unquestionably broader, and Congress exercised that authority in the CWA. While *Sackett*, *Rapanos*, *SWANCC*, and *Riverside Bayview* do not speak to that authority, other Supreme Court cases do. The Court recognized that the CWA supplanted federal common law mechanisms that were available to states to address the problem of pollution moving across state borders. *City of Milwaukee v. Illinois*, 451 U.S.

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[8] *Sackett* and the *Rapanos* plurality at times use the phrase "traditional interstate navigable waters," *Sackett*, 598 U.S. at 678 (quoting *Rapanos*, 547 U.S. at 742), which appears to be shorthand for waters that "Congress was focused on": "waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 672 (quoting *SWANCC*, 531 U.S. at 172); *see also Rapanos*, 547 U.S. at 724 (describing the 1986 Regulations' reference to traditional navigable waters—then, as now, codified at 33 C.F.R. § 328.3(a)(1)—as "traditional interstate navigable waters").

304, 317-19 (1981). And the Court has long recognized that this problem is properly addressed by federal law. *Illinois v. City of Milwaukee*, 406 U.S. 91, 102, 104 (1972) ("[F]ederal, not state, law . . . controls the pollution of interstate or navigable waters."); *id.* at 105 ("Rights in interstate streams, like questions of boundaries, 'have been recognized as presenting federal questions.'" (citation omitted)).

Because the Tenth Amendment reserves to the states only those powers not delegated to the United States and because Congress exercised its Article I authority over interstate waters, coverage of interstate waters is not in conflict with the Tenth Amendment, nor does it raise federalism concerns.

2. The Clean Water Act covers interstate waters.

Interstate waters are waters of multiple states. Thus, a plain reading of "waters of the United States" encompasses all interstate waters. The Supreme Court has repeatedly recognized that Congress intended the CWA to cover interstate waters. *See supra* Part III.A.1. Inclusion of all interstate waters is not in tension with the term "navigable waters." The Court has consistently acknowledged that the term "navigable waters" is not limited to traditional navigable waters. *E.g.*, *Rapanos*, 547 U.S. at 731 (plurality) ("We have twice stated that the meaning of 'navigable waters' in the Act is broader than the traditional understanding of that term"; *Sackett*, 598 U.S. at 672 (noting *SWANCC*'s acknowledgment that the CWA extends to more than traditional navigable waters).[9]

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[9] Plaintiffs and Business Intervenors, like the court in *Georgia v. Wheeler*, 418 F. Supp. 3d 1336 (S.D. Ga. 2019), overlook that interstate waters are encompassed in "waters of the United States" and that the Supreme Court has required a connection to traditional navigable waters only in determining the extent that the CWA covers intrastate features that are not traditional navigable waters.

Although the Supreme Court has stressed that the word "navigable" has import in determining which non-traditional navigable waters are covered, the Court has not done so in the context of the interstate waters category. *See Riverside Bayview*, 474 U.S. at 131 (describing wetlands at issue as adjacent to a navigable waterway); *SWANCC*, 531 U.S. at 171 (describing isolated ponds "wholly located" in Illinois); *Rapanos*, 547 U.S. at 729 (plurality) (describing "Michigan wetlands" that eventually connect to traditional navigable waters); *Sackett*, 598 U.S. at 662-63 (describing EPA's contention that wetlands had a connection to "an intrastate body of water"). Importantly, "any reliance upon judicial precedent must be predicated upon careful appraisal of the *purpose* for which the concept of 'navigability' was invoked in a particular case." *Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979) (citation omitted). "[W]aters of the United States" is admittedly ambiguous as to inclusion of intrastate waters that are not traditional navigable waters. In *SWANCC*, *Rapanos*, and *Sackett*, the Court focused on "navigable waters" in finding that non-traditional navigable intrastate waters must be connected to traditional navigable waters to be covered. In doing so, the Court was concerned with correcting an overbroad reading of the CWA as applied to those waters. The Court had no occasion to discuss interstate waters.

Moreover, the CWA's text, structure, purpose, and legislative history support inclusion of all interstate waters. *See* 88 Fed. Reg. at 3072-75; 2023 Rule Response to Comments Document, *available at* https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-2493, Sec. 2.3.2.1 at 27-47. Including interstate waters is consistent with the Act's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C.

§ 1251(a), because the integrity of interstate waters cannot be fully protected by a single state. *See* 88 Fed. Reg. at 3073.[10]

Section 303(a)(1) of the CWA, 33 U.S.C. § 1313(a)(1), provides further evidence that Congress intended to retain coverage of all interstate waters. This Court should reconsider its contrary conclusion in its preliminary injunction order. Section 303(a)(1) expressly retained pre-CWA water quality standards applicable to interstate waters. It speaks only to the potential for EPA to determine that a state's preexisting water quality standard is inconsistent with the Act, upon which EPA would notify the state to specify the changes needed and promulgate those changes if the state does not timely do so. *Id.* So section 303(a)(1) does not suggest that regulation of some interstate waters is left entirely to states; it *requires* federal regulation if state standards are inadequate. These state standards, approved or issued by EPA, apply only to waters of the United States. Absent continued federal jurisdiction, Congress would have no reason to specifically retain water quality standards for interstate waters, much less to require EPA to issue water quality standards for interstate waters. *See id.* § 1313(c)(2)(A), (c)(4).

Predecessor statutes and congressional history also show congressional intent that the CWA continue longstanding coverage of interstate waters, i.e., "all rivers, lakes, and other

[10] In the CWA, Congress recognized federal authority over interstate waters and provided states with mechanisms to restore and maintain the integrity of interstate waters—with federal oversight. Congress expressly consented to states entering into multi-state agreements or compacts. 33 U.S.C. § 1253. A state's permitting program (administered under state law or an interstate compact) must ensure that any other state with waters that may be affected by the state's decision on a permit application receive notice and opportunity for a hearing; an affected state can submit recommendations to the permitting state; and the permitting state must notify the affected state and EPA of its failure to accept such recommendations and its reason. *Id.* § 1342(b)(2), (b)(5); *Arkansas*, 503 U.S. at 99 (citing *Milwaukee*, 451 U.S. at 325-26). EPA may veto a state's permit and may issue a permit if a state fails to issue a compliant permit. 33 U.S.C. § 1342(d)(4). These statutory provisions strongly indicate congressional intent to include interstate waters regardless of their connection to traditional navigable waters.

waters that flow across, or form a part of, State boundaries," 88 Fed. Reg. at 3072 (quoting 33 U.S.C. § 466i(e) (1952)), especially because Congress intended to broaden federal jurisdiction. The 1948 statute declared that the "pollution of interstate waters" and their tributaries is "a public nuisance and subject to abatement[.]" Pub. L. No. 80-845 § 2(d)(1), 62 Stat. 1156 (1948). Interstate waters were defined without reference to navigability. *See* Pub. L. No. 80-845 § 10(e), 62 Stat. 1161 (1948). In 1961, Congress broadened the 1948 statute and made the pollution of "interstate or navigable waters" subject to abatement, retaining the definition of "interstate waters." Pub. L. No. 87-88 § 8(a), 75 Stat. 204, 208 (1961). In 1965, Congress required states to develop water quality standards for "interstate waters or portions thereof within such State." Pub. L. No. 89-234 § 5(c), 79 Stat. 903, 907-08 (1965); *see also* 33 U.S.C. § 1173(e) (1970) (retaining definition of interstate waters). In 1972, Congress replaced the abatement approach with permitting programs for discharges of pollutants to "navigable waters," defined as "waters of the United States." *See* 33 U.S.C. §§ 1311(a); 1362(7). In doing so, Congress sought to expand, not narrow, federal protections. *See* S. Rep. No. 92-414, 1st Sess. at 7 (1971) (recognizing that prior efforts to control water pollution had been "inadequate in every vital aspect").[11] Accordingly, the phrase "navigable waters" defined broadly as "waters of the United States" does not evince congressional intent to exclude interstate waters that had long been covered. Interpreting the CWA to exclude interstate waters that are not traditional navigable waters would over-emphasize the term "navigable waters" while rendering "waters of the United States" devoid of

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[11] *See also Milwaukee*, 451 U.S. at 317-18 (stating that the CWA was a "complete rewriting" of existing law, to "establish an all-encompassing program of water pollution regulation" (citation omitted)); S. Rep. No. 92-1236, 2d Sess. at 144 (1972) (Conf. Rep.) (omitting "navigable" from "waters of the United States" and urging that the term "be given the broadest possible" interpretation); S. Rep. No. 92-414, 1st Sess. at 77 (1971) (stating that "interstate waters" had been interpreted to "severely limit[]" implementation of the 1965 Act); 88 Fed. Reg. at 3049-51.

significance. *See Rapanos*, 547 U.S. at 731 n.3 (plurality) (rejecting argument that would "preserve the traditional import of the qualifier 'navigable' in the *defined* term 'navigable waters,' at the cost of depriving the qualifier 'of the United States' *in the definition* of all meaning").

Indeed, categorical coverage of interstate waters makes practical sense. The interstate waters category encompasses many waters that are otherwise covered (such as traditional navigable waters and tributaries). Assessing whether a water is an interstate water may be easier than assessing it under other jurisdictional categories. Thus, "identification of a specific waterbody as an interstate water may be the clearest way to determine its jurisdictional status." 2023 Rule Response to Comments Document, Sec. 6.3.1 at 8. And because the CWA provides a mechanism for resolving states' disputes concerning interstate water pollution, *Milwaukee*, 451 U.S. at 317-19, restricting coverage of interstate waters would impair a state's ability to protect its water resources. It would also undermine the CWA's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Accordingly, the Amended Regulations' inclusion of the interstate waters category is lawful.

Contrary to Plaintiffs' claimed confusion, Pls. Mem. at 12-13, the Conforming Rule is clear that, consistent with *Sackett*, wetlands are now excluded from the interstate waters category. 88 Fed. Reg. at 61966. Also, contrary to Plaintiffs' suggestion, Pls. Mem. at 16-17, the pre-2015 regime has long covered interstate waters, as does the current status quo regime.

B. The Amended Regulations' coverage of impoundments is lawful.

The Court should uphold the (a)(2) impoundments category. First, the Agencies straightforwardly reason that an impoundment that is currently covered by another category is

also covered by the impoundments category. 88 Fed. Reg. at 3075.[12] Second, the Agencies reasonably assert that impounding a water does not, on its own, render a covered water non-jurisdictional. *Id.* at 3075-76. Contrary to Plaintiffs' argument, this approach is generally consistent with the status quo regime. *See id.* at 3076-77. The Supreme Court has confirmed that impounding covered waters does not make them non-jurisdictional. *See S.D. Warren Co. v. Me. Bd. of Env't Prot.*, 547 U.S. 370, 379 n.5 (2006); *see also Econ. Light & Power Co. v. United States*, 256 U.S. 113, 123-24 (1921) (concluding that "artificial obstructions" that render a river non-navigable do not make a traditional navigable river beyond Congress's power to preserve the river for purposes of future transportation).

Continuing coverage of impounded waters is consistent with *Sackett*. Plaintiffs and Business Intervenors misleadingly omit the remainder of the footnote they cite, Pls. Mem. at 18; Bus. Mem. at 27, which in context does not support their argument:

> Although a barrier separating a wetland from a water of the United States would ordinarily remove that wetland from federal jurisdiction, a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA. Whenever the EPA can exercise its statutory authority to order a barrier's removal because it violates the Act, see 33 U.S.C. §§ 1319(a)-(b), that unlawful barrier poses no bar to its jurisdiction.

598 U.S. at 678 n.16. A "barrier separating" a wetland from covered waters is not equivalent to the type of structure used to create an impoundment, and the Court expressed no opinion on structures placed in (a)(1) or (a)(3) waters. Also, impounded waters usually retain some

[12] Plaintiffs and Business Intervenors take no issue with that rationale. But Business Intervenors argue that (a)(2) coverage is unlawful when it is based on another category that is unlawful. Even if such an argument is successful, it would impact which waters could be covered under other categories—not the (a)(2) category's inclusion of impoundments that are otherwise covered.

hydrologic connection to downstream waters. *See* 88 Fed. Reg. at 3076.[13] Moreover, consistent with *Sackett*'s recognition that an *illegal barrier* cannot remove wetlands coverage, the Agencies acknowledge that a lawfully constructed impoundment could render an impounded water non-jurisdictional. *Id.* at 3076 n.94 (discussing impoundment pursuant to a CWA permit), 3077 n.96 (noting exception for waste treatment systems constructed prior to CWA).

Contrary to Business Intervenors' arguments, more than "seepage" from an impoundment would be needed for impounded waters to be covered under (a)(1), (a)(3), or (a)(4). 33 C.F.R. § 328.3. The 2023 Rule preamble's section on impoundments only mentions seepage in discussing that impoundments typically do not prevent all water flow; and in the context of the significant-nexus standard. 88 Fed. Reg. at 3076, 3079. Seepage would have no bearing on whether a water was covered at the time of impoundment.

Moreover, Plaintiffs' and Business Intervenors' concern about determining whether a water qualifies as an (a)(2) impoundment because it has been impounded from a jurisdictional water are unfounded. First, such an assessment would be needed only when the impounded water does not qualify under the (a)(1), (a)(3) or (a)(4) category. *Id.* at 3078. Second, property owners and users are best positioned to know the historical characteristics of waters on their property, including prior to the construction of an impoundment, and several assessment tools are readily available to them. *See id.* And if they have any doubt, they can request a determination from the Corps for free. *See id.* at 3011, 3132. Third, and importantly, the Agencies would have the burden of proof to show that the impounded waters were covered. Notably, for an impoundment of an (a)(3) tributary located off-channel (meaning the impoundment has no outlet to the

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[13] While Plaintiffs argue that such a connection is not always maintained, they have presented no instance where such a connection is absent and a water could credibly be considered jurisdictional under the impoundments category.

tributary network), the Agencies would need to demonstrate that the impounded water qualified as an (a)(3) tributary at the time of impoundment and that "there was evidence of a flowpath . . . directly or indirectly through another water or waters, downstream from the structure that created the impoundment to a paragraph (a)(1) water." *Id.* at 3078. Thus, impoundments of otherwise jurisdictional waters need not be "isolated" as Plaintiffs and Business Intervenors contend.

C. The Amended Regulations reasonably include relatively permanent tributaries and exclude non-relatively permanent ditches.

The Amended Regulations lawfully cover tributaries that meet the relatively permanent requirement from the *Rapanos* plurality standard that the Supreme Court adopted in *Sackett* and exclude ditches that do not meet that standard. 88 Fed. Reg. at 61968; 88 Fed. Reg. at 3142. For over 100 years, the regulation of tributaries has been "part and parcel of a Federal effort to protect traditional navigable waters." 88 Fed. Reg. at 3025. Tributaries—whether natural, human-made, or human-altered—can "carry water (and pollutants) to traditional navigable waters, the territorial seas, or interstate waters." *Id.* at 3026. But, under the Amended Regulations, ditches that lack important hydrogeomorphic features and/or relatively permanent flow are non-jurisdictional. *Id.* at 3112, 3142.

1. The Amended Regulations' relatively permanent requirement is the same as *Sackett*'s.

The Amended Regulations codify the same relatively permanent requirement that the *Rapanos* plurality articulates and *Sackett* adopts. 88 Fed. Reg. at 61968. So there is no merit to the contention that the Amended Regulations' requirement is "inconsistent with the CWA (as construed by the *Sackett* majority and the *Rapanos* plurality opinion)." Pls. Mem. at 10.

Sackett holds that "the CWA extends to more than traditional navigable waters" and encompasses "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.'" 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739). The Amended Regulations codify that requirement in 33 C.F.R. § 328.3(a)(3). Before *Sackett*, the 2023 Rule incorporated both *Rapanos* standards. 88 Fed. Reg. at 61965. After *Sackett*, the Agencies removed the significant-nexus standard and "will continue to interpret the remainder of the definition of 'waters of the United States' in the 2023 Rule consistent with the *Sackett* decision." *Id.* at 61966. Plaintiffs and Intervenors do not even try to show that no set of circumstances exists under which the inclusion of relatively permanent tributaries is invalid. The Court need go no further on this point.

Trying to change the subject, Plaintiffs instead contend that the Amended Regulations exhibit an "openly hostile understanding of 'relatively permanent.'" Pls. Mem. at 10. Intervenors similarly assert that "the Agencies punted on defining 'relatively permanent' waters because they assumed that, for the most part, such waters would be jurisdictional under the Rule's significant nexus text." Bus. Mem. at 21. These arguments are irrelevant on a facial challenge. Moreover, the record shows that the Agencies provided extensive implementation guidance concerning the familiar *Rapanos* plurality standard, including its relatively permanent requirement. *E.g.*, 88 Fed. Reg. at 3038, 3046, 3084-88, 3102. The Agencies did so to provide "efficiencies and additional clarity for regulators and the public." *Id.* at 3038. That the Agencies crafted such guidance prior to *Sackett*, when they viewed the *Rapanos* plurality standard as one of two available CWA jurisdictional tests, has no bearing on the guidance's utility.

At bottom, Plaintiffs and Intervenors are demanding more specific instructions than *Sackett* or the *Rapanos* plurality provide. They allege, for example, that there is no definition of the term "relatively permanent" that "provides meaningful guidance," Bus. Mem. at 22; *see also* Pls. Mem. at 10; there are no national or regional "minimum flow duration" periods under that standard, Pls. Mem. at 9; *see also* Bus. Mem. at 23-24; and the Agencies do not offer "anything

about what relative permanence really means," Pls. Mem. at 9. These challenges are not to the Amended Regulations, which the Agencies issued to conform to precedent, but to Supreme Court opinions that do not provide the additional clarity Plaintiffs and Intervenors seek. Their allegations simply do not establish unreasonableness on the Agencies' part as they work to interpret and implement precedent. *See, e.g.*, *Sackett*, 598 U.S. at 659 (describing the Court's "attempt to identify with greater clarity what the Act means by 'the waters of the United States'").[14] Likewise, the Amended Regulations' codification of *Sackett*'s relatively permanent requirement addresses this Court's initial concern about its understandability. *See* PI Order at 22.

Moreover, Plaintiffs and Intervenors do not cite any specific Agency statement—much less specific regulatory text—about the relatively permanent requirement that conflicts with any specific statement from *Sackett* or the *Rapanos* plurality. For example, with respect to the Agencies' explanation, consistent with *Sackett* and the *Rapanos* plurality, that "[r]elatively permanent waters do not include surface waters with flowing or standing water for only a short duration in direct response to precipitation," 88 Fed. Reg. at 3084, Plaintiffs argue that the Agencies do not "articulate the contours of this standard." Pls. Mem. at 9. Intervenors similarly assert that the Amended Regulations do not establish "how much flow and duration of flow in response to a precipitation event is sufficient to trigger relatively permanent status," Bus. Mem. at 23. These arguments are deficient. The Agencies reasonably elected to address broader *Sackett* issues through regulatory text and implementation guidance while leaving to future adjudicatory context details that would inevitably turn on case-specific facts. *See, e.g.*, 88 Fed. Reg. at 61966; *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1477 (2020) ("EPA . . . can provide

[14] *See also id.* at 727 (Kavanaugh, J., concurring in judgment) (asserting that the majority opinion "will generate regulatory uncertainty"); *id.* at 707 (Thomas, J., concurring) (noting that CWA jurisdictional determinations are not "*always* easy").

administrative guidance (within statutory boundaries) in numerous ways[.]"); *Shalala v. Guernsey Mem. Hosp.*, 514 U.S. 87, 96 (1995) ("The APA does not require that all the specific applications of a rule evolve by further, more precise rules rather than by adjudication.") (citing, *inter alia*, *SEC v. Chenery Corp.*, 332 U.S. 194 (1947)).

Similarly, the Amended Regulations reasonably reflect that the relatively permanent requirement invariably entails case-specific determinations. Indeed, the *Rapanos* plurality ordered a case-specific determination on remand. *See* 547 U.S. at 757 (ordering lower courts to first determine whether "ditches or drains near each wetland are 'waters' in the ordinary sense of containing a relatively permanent flow"). Case-specific tests are the norm and well within the discretion that the Act assigns to the Agencies. *See* 88 Fed. Reg. at 3042. Instructively, when interpreting another CWA provision to require a case-specific approach, the Supreme Court in *Maui* recognized "that a more absolute position . . . may be easier to administer" but would be "inconsistent with major congressional objectives, as revealed by the statute's language, structure, and purposes." 140 S. Ct. at 1477.

2. The Amended Regulations' coverage of (a)(3) tributaries is lawful.

There is no merit to Plaintiffs' contention that the Amended Regulations "regulate tributaries as if nothing has changed," Pls. Mem. at 19, and Intervenors' similar argument that the Amended Regulations' coverage of tributaries is "more than *Sackett* permits," Bus. Mem. at 22. The Amended Regulations faithfully incorporate the relatively permanent requirement of *Sackett* and the *Rapanos* plurality, as explained above. In addition, they provide parameters for case-specific tributary determinations. For instance, while the Amended Regulations do not define "tributaries," they retain the "well-established definition of an ordinary high water mark" to assist in identifying tributaries. 88 Fed. Reg. at 3080. The Agencies have further clarified through implementation guidance that tributaries are geographical features such as "rivers,

streams, lakes, ponds, and impoundments" that "flow directly or indirectly through another water or waters to" an (a)(1) water or (a)(2) impoundment. *Id.*; *see also id.* at 3083-88 (providing guidance for determining whether a water is a tributary and meets the relatively permanent test); 88 Fed. Reg. at 61966 n.2 (noting that lakes and ponds can qualify under (a)(3) if they meet the relatively permanent requirement and connect to (a)(1) or (a)(2) waters).

Plaintiffs and Intervenors also challenge, without support, the structure of the Amended Regulations and the Agencies' implementation guidance concerning the downstream connection part of the relatively permanent requirement. *See* Pls. Mem. at 20; Bus. Mem. at 22. *Sackett* and the *Rapanos* plurality provide that covered waters include any relatively permanent body of water "connected to" traditional navigable waters. *Sackett*, 598 U.S. at 678 (quoting *Rapanos*, 547 U.S. at 742). But they do not describe or elaborate on this downstream connection. Nor do they discuss how to evaluate whether a water is a tributary *of* or *to* a downstream water. Thus, it is reasonable for the Agencies to "maintain[] their interpretation of tributary" and describe the kinds of "[s]ite specific conditions" relevant to ascertaining whether a tributary actually connects to downstream waters pursuant to the relatively permanent requirement. 88 Fed. Reg. at 3080, 3083 (cleaned up); *see, e.g.*, *id.* at 3082 (example of a deficient connection).

3. The Amended Regulations' treatment of ditches is reasonable.

Plaintiffs and Intervenors briefly challenge the Amended Regulations' treatment of relatively permanent ditches as (a)(3) tributaries. *See* Pls. Mem. at 19 (asserting that operation of the Amended Regulations "muddies the waters as to 'when' and 'how' exclusions for, say, certain ditches and swales will operate with any sort of meaning"); Bus. Mem. at 28-29 (asserting that the ditch exclusion provides "insufficient guidance"). But the CWA generally and conditionally exempts the discharge of dredged or fill material "for the purpose of construction or maintenance of . . . irrigation ditches" or "maintenance of drainage ditches." 33 U.S.C.

§ 1344(f)(1). Plainly, "there would be no need for such a permitting exemption" if the Act regarded all ditches as non-jurisdictional. 88 Fed. Reg. at 3112.

Moreover, the Amended Regulations' treatment of ditches is consistent with the *Rapanos* plurality's explanation that "ditches, channels, conduits and the like can all hold water permanently as well as intermittently" and "when they do, we usually refer to them as rivers, creeks, or streams." *Rapanos*, 547 U.S. at 736 n.7 (cleaned up); *accord* 88 Fed. Reg. at 3084 ("Relatively permanent waters do not include surface waters with flowing or standing water for only a short duration in direct response to precipitation.").

In sum, given that the Agencies have codified the controlling CWA jurisdictional standard from *Sackett*, Plaintiffs' facial claims respecting the relatively permanent standard, (a)(3) tributaries, and the ditch exclusion lack merit.

D. The regulatory coverage of adjacent wetlands accords with *Sackett*.

The Amended Regulations correctly implement *Sackett* and the *Rapanos* plurality opinion by: (1) providing that wetlands "adjacent" to covered waters are "waters of the United States," and (2) narrowing the definition of "adjacent" to mean "having a continuous surface connection." 88 Fed. Reg. at 61969; 88 Fed. Reg. at 3142. Plaintiffs' and Intervenors' arguments to the contrary are without merit. *See* Pls. Mem. at 8-11, 21-23; Bus. Mem. at 25-26.

First*,* contrary to Plaintiffs' and Intervenors' misreading of *Sackett*, the word "indistinguishable" is not a separate element of adjacency, nor is it alone determinative of whether adjacent wetlands are "waters of the United States"; rather, the term (among others the Supreme Court uses) informs the application of the "continuous surface connection" requirement. Specifically, *Sackett*: (1) adopts the familiar "continuous surface connection" requirement from the *Rapanos* plurality; (2) holds that adjacent wetlands must have a "continuous surface connection" with covered waters to qualify as "waters of the United States"; and (3) explains and

quotes from *Rapanos* that wetlands are "as a practical matter indistinguishable from waters of the United States"—and therefore are themselves covered—"when" there is a "continuous surface connection" between wetlands and covered waters. 598 U.S. at 678 (quoting *Rapanos*, 547 U.S. at 678). *Sackett* does not require the party asserting CWA jurisdiction to prove that wetlands and covered waters are visually identical. Indeed, as *Sackett* notes (and as explained below), courts have long regarded wetlands that abut covered waters as meeting the continuous surface connection requirement. Further, as judicial decisions applying the familiar test since 2006 illustrate, *see, e.g.*, *United States v. Cundiff*, 555 F.3d 200, 212-13 (6th Cir. 2009), the demonstration that wetlands have a continuous surface connection and so are indistinguishable is a fact-specific one—as lawfully remains the case under *Sackett* and the Amended Regulations.

Second, Plaintiffs and Intervenors mistakenly read *Sackett* to require a continuous surface *water* connection between wetlands and covered waters. *Sackett* does not use such phrasing. The *Rapanos* plurality (which *Sackett* follows) repeatedly uses phrases like continuous *physical* connection to describe the continuous surface connection requirement. *See Rapanos*, 547 U.S. at 751 n.13 (referring to "our physical-connection requirement"); *id. at* 747 (referring to "a wetland's *physical* connection to covered waters"); *id.* at 755 (describing wetlands with a "physical connection" to covered waters to be "as a practical matter *indistinguishable*" from covered waters); *accord Sackett*, 598 U.S. at 667 (quoting the *Rapanos* plurality's reference to "wetlands with such a close physical connection" to covered waters, 547 U.S. at 742); *id.* at 678 (referencing wetlands with an "unimpaired connection" to covered waters) (citation omitted).

Thus, as the Agencies reasonably explain, "[a] continuous surface connection is not the same as a continuous surface *water* connection, by its terms and in effect." 88 Fed. Reg. at 3096. The most common example of wetlands meeting the continuous surface connection requirement

are wetlands that abut or touch covered waters. *See id.* at 3089 ("[I]n a substantial number of cases, adjacent wetlands abut (touch) a jurisdictional water."). This is so even though surface water need not be present for wetlands to exist. Under longstanding wetlands criteria that the Supreme Court applied in *Riverside Bayview*, wetlands are "inundated or saturated by surface or ground water at a frequency and duration sufficient to support . . . a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(b) (2014); *see Riverside Bayview*, 474 U.S. at 135 ("[W]etlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water."). Further, as *Sackett* describes the *Riverside Bayview* holding: "the Corps could reasonably determine that wetlands 'adjoining bodies of water' were part of those waters." *Sackett*, 598 U.S. at 677 (quoting *Riverside Bayview*, 474 U.S. at 135 & n.9); *see also id.* at 676 (CWA jurisdiction includes wetlands "contiguous" with covered waters). Likewise, the *Rapanos* plurality describes *Riverside Bayview*, 474 U.S. at 135, as upholding the assertion of CWA jurisdiction over wetlands "actually abutting" traditional navigable waters; explaining that the Corps "could reasonably conclude that a wetland that adjoined waters of the United States is itself a part of those waters"; and resolving an ambiguity "in favor of treating all abutting wetlands as waters." *Rapanos*, 547 U.S. at 740-42 (cleaned up).

And courts applying the continuous surface connection requirement agree that proof of physical abutment suffices. *See, e.g.*, *United States v. Mlaskoch*, No. 10-cv-2669, 2014 WL 1281523, at *17 (D. Minn. Mar. 31, 2014) ("Because the affected wetlands abutted these tributaries, jurisdiction under the CWA is proper."); *United States v. Donovan*, No. 96-484, 2010 WL 3000058, at *4 (D. Del. July 23, 2010) ("A continuous surface connection exists when a wetland physically abuts another regulated body of water.") (citation to *Rapanos* plurality omitted),

report and recommendation adopted, 2010 WL 3614647 (D. Del. Sept. 10, 2010), *aff'd*, 661 F.3d 174 (3d Cir. 2011); *cf. United States v. Andrews*, No. 3:20-cv-01300, 2023 WL 4361227, at *2-3 (D. Conn. June 12, 2023) (upholding CWA jurisdiction over wetlands "directly abut[ting]" a relatively permanent tributary connected to traditional navigable waters; "continuous surface flow paths" also linked the wetlands with the tributary).

At the same time, precedent and the Agencies' experience applying the continuous surface connection requirement demonstrate that physical abutment is not the *only* way for wetlands to meet the requirement. While the CWA does not require a continuous surface *water* connection between wetlands and covered waters (as explained above), such evidence can suffice to meet the continuous surface connection requirement. *See, e.g.*, *United States v. Lucas*, 516 F.3d 316, 326-27 (5th Cir. 2008) (considering evidence of kayaking in relatively permanent tributaries and their connected wetlands). Further, depending on the factual context, the requirement can be met when a channel, ditch, swale, pipe, or culvert (regardless of whether such feature would itself be jurisdictional) "serve[s] as a physical connection that maintains a continuous surface connection between an adjacent wetland and a relatively permanent water." 88 Fed. Reg. at 3095; *see, e.g.*, *Cundiff*, 555 F.3d at 212-13 (considering evidence of a channel with surface water flow and surface connections between wetlands and relatively permanent water bodies "during storm events, bank full periods, and/or ordinary high flows" and also concluding that "it does not make a difference whether the channel by which water flows from a wetland to a navigable-in-fact waterway or its tributary was manmade or formed naturally").

Lewis v. United States, 88 F.4th 1073 (5th Cir. 2024), did not address the particulars of the continuous surface connection requirement. *Contra* Bus. Mem. at 25. In *Lewis*, the Corps had previously asserted jurisdiction over adjacent wetlands under the significant-nexus standard, and

"the district court found, and [the Corps] conceded, that the *Rapanos* adjacency [continuous surface connection] test could not be met on the undisputed facts that the court thoroughly described." 88 F.4th at 1080. But *Sackett* "cleared the air" by eliminating the significant-nexus standard and requiring a continuous surface connection. *Id.* at 1078. The Fifth Circuit described the context—"the nearest relatively permanent body of water [to the wetlands in question] is removed miles away from the Lewis property by roadside ditches, a culvert, and a non-relatively permanent tributary"—and held there was not a continuous surface connection on these facts. *Id.*

Regardless, in *this* case, Plaintiffs and Intervenors are not entitled to review of adjacent wetlands scenarios in the abstract. What counts—and defeats facial claims under the *Reno* standard of review—is the *legal* alignment between *Sackett*'s and the Amended Regulations' continuous surface connection requirement. *See* 88 Fed. Reg. at 61969; 88 Fed. Reg. at 3095.

E. The intrastate lakes and ponds category is reasonable.

The (a)(5) lakes and ponds category likewise adheres to governing precedent. The (a)(5) category includes only lakes and ponds that do not meet another category when the lake or pond is relatively permanent and has a continuous surface connection to (a)(1) or (a)(3) waters. 33 C.F.R. § 328.3(a)(5); *see* 88 Fed. Reg. at 61966. By requiring that covered lakes and ponds have a continuous surface connection to (a)(1) waters or their tributaries, the (a)(5) category is consistent with *SWANCC* and *Sackett*. *See Sackett*, 598 U.S. at 674 (describing *SWANCC*'s holding that "the Act does not cover isolated ponds"); *id.* at 678 (requiring that a party asserting jurisdiction over adjacent wetlands must establish that the adjacent body of water is covered, and that the wetland has a continuous surface connection to such water) (citing *Rapanos*).

Plaintiffs baselessly suspect that the phrases "relatively permanent" and "continuous surface connection" will be applied too broadly. Pls. Mem. at 23; *see also* Bus. Mem. at 29 (similar concern). But as explained *supra* Part III.C.1 & D, Plaintiffs' suspicion is unsupported.

It cannot render the (a)(5) entire category unlawful. *See Reno*, 507 U.S. at 301. Moreover, Plaintiffs and Business Intervenors are wrong to suggest that "isolated" ponds would be deemed jurisdictional. Pls. Mem. at 23; Bus. Mem. at 29. A pond would not be "isolated" if it has a continuous surface connection to covered waters. Thus, the (a)(5) category excludes isolated waters, consistent with *SWANCC* and *Sackett*.

IV. The Amended Regulations should also be upheld for broader reasons.

A. The Regulations conform with *Sackett*.

Sackett found that EPA and the Ninth Circuit had applied the incorrect standard for CWA jurisdiction (significant-nexus) and an overly broad definition of adjacency. 88 Fed. Reg. 3047-48. *Sackett* then adopted the *Rapanos* plurality standard but did not expand upon its operative terms "relatively permanent," "connected to," or "continuous surface connection." 598 U.S. at 678. The Agencies revised their regulations in the wake of *Sackett*. As revised, they eliminate the significant-nexus standard, adopt the *Rapanos* plurality standard, are fully consistent with *Sackett*, and represent the best interpretation of the term "waters of the United States." In coming to this interpretation, the Agencies employed traditional tools of statutory interpretation. *Am. Hosp. Ass'n v. Becerra*, 142 S. Ct. 1896, 1904-06 (2022); 88 Fed. Reg. at 3021. At the very least, the Amended Regulations are a permissible interpretation of an ambiguous phrase, "navigable waters," and its definition, "waters of the United States." 33 U.S.C. § 1362(7). *See, e.g.*, *Rapanos*, 547 U.S. at 758 (recognizing the "somewhat ambiguous" terms Congress used to determine CWA jurisdiction) (Roberts, J., concurring).

Deference extends to an agency's construction of a statute it administers. *Voigt v. EPA*, 46 F.4th 895, 900 (8th Cir. 2022) (recognizing *Chevron* framework). Where *Chevron* does not apply, *Skidmore* deference applies. *See TeamBank*, 279 F.3d at 619 n.4. At the preliminary injunction stage, this Court concluded that *Chevron* did not apply due to rule of lenity. PI Order

at 17. This reasoning does not bind the Court now, especially as the Amended Regulations should be considered in the first instance. *Henderson v. Bodine Aluminum, Inc*., 70 F.3d 958, 962 (8th Cir. 1995). Contrary to Plaintiffs' claim, Pls. Mem. at 30, the rule of lenity does not apply to a facial challenge of a regulation that applies to the entire CWA, simply because the CWA contains some criminal penalties. While lenity may apply in civil enforcement proceedings of statutes with criminal penalties, lenity applies in criminal enforcement proceedings "at the end of the process," *Albernaz v. United States*, 450 U.S. 333, 342 (1981) (quotation omitted), "'after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended.'" *United States v. Smith*, 756 F.3d 1070, 1075 (8th Cir. 2014) (quoting *United States v. Castleman*, 572 U.S. 157, 172-73 (2014)). An as-applied challenge in the enforcement context must exist to invoke the rule of lenity. *Id*. Further, the ambiguity must be grievous and more than "[t]he simple existence of some statutory ambiguity" because "most statutes are ambiguous to some degree." *Muscarello v. United States*, 524 U.S. 125, 138 (1998). The Amended Regulations narrow the scope of jurisdiction, and Plaintiffs and Intervenors cite no credible threat of any enforcement. The rule of lenity thus does not apply and the Court should uphold the Agencies' permissible interpretation of "waters of the United States," which conforms to *Sackett*.

B. Congress lawfully delegated the Agencies rulemaking authority.

The CWA provides an intelligible principle, and Congress's delegation of authority to define "waters of the United States" was lawful. *See* 88 Fed. Reg. at 3020. A delegation is constitutional so long as Congress has set out an "intelligible principle" to guide the exercise of authority. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474-75 (2001). The Supreme Court has "over and over upheld even very broad delegations" and has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to

those executing or applying the law," *Gundy v. United States*, 139 S. Ct. 2116, 2129-30 (2019) (Kagan, J., plurality) (citation omitted). Here, the underlying objective and policies expressed in the Act provide the "intelligible principle" required to uphold a delegation of legislative power. *See, e.g.*, 33 U.S.C. § 1251(a)-(b); 88 Fed. Reg. at 3020-22. The CWA expressly authorizes prescribing regulations "as are necessary to carry out [EPA's] functions." 33 U.S.C. § 1361(a). And Congress knew that a regulation defining "waters of the United States" would be necessary because the term applies to many of the Act's key provisions. *See supra* Background.

Despite extensive litigation over the scope of "waters of United States," the Supreme Court has never suggested that the Agencies were not delegated authority to define the term. Rather, the Court has affirmed that Congress delegated a "breadth of federal regulatory authority" to the Agencies to address the "inherent difficulties of defining precise bounds to regulable waters." *Riverside Bayview*, 474 U.S. at 134. *Sackett* did not question EPA's authority to issue regulations defining "waters of the United States." 598 U.S. at 665. Nor is *Sackett* inconsistent with the Chief Justice's earlier observation that the Agencies "enjoy[] plenty of room to operate in developing some notion of an outer bound to the reach of their authority." *Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring).

Moreover, even if, as Plaintiffs and Business Intervenors contend, "Congress has not adequately delegated legislative power to define" covered waters, Bus. Mem. at 35; *see also* Pls. Mem. at 29, that would not provide them "a narrowing interpretation of the Rule," Bus. Mem. at 35, that they seek. The Agencies would still need to implement the statute—e.g., make permit decisions and enforce the CWA against unauthorized polluters—but would do so untethered to a binding regulatory definition that provides clarity on covered waters.

C. The major questions doctrine is inapplicable.

The major questions doctrine does not apply, and Plaintiffs and Intervenors fail to show how the Amended Regulations assert "extravagant statutory power over the national economy." *West Virginia v. EPA*, 597 U.S. 697, 724 (2022) (quotation omitted). The Amended Regulations merely *define* the scope of the Agencies' regulatory authority and are a far cry from *West Virginia*, where EPA asserted a novel interpretation of a provision that "had rarely been used" to "transformative[ly] expan[d]" its regulatory authority. *Id.* Here, the Agencies have exercised their authority to interpret the term "waters of the United States" under 33 U.S.C. § 1361 for decades, which the Supreme Court has long recognized without invoking the major questions doctrine. *See generally Riverside Bayview*, 474 U.S. 121; *SWANCC*, 531 U.S. 159; *Rapanos*, 547 U.S. 715; *Sackett*, 598 U.S. 651. And the Amended Regulations do not expand the Agencies' regulatory authority over "waters of the United States"; they are narrower in scope as compared to the pre-2015 regime. 88 Fed. Reg. at 61966 (removing significant nexus standard). Even the 2023 Rule was projected to have de minimis costs when compared to the pre-2015 regime. *See* PI Resp. at 26, ECF No. 40.

Even if this doctrine applied, it would speak only to whether Congress authorized the Agencies to issue regulations defining "waters of the United States." The CWA provides "clear congressional authorization" for the Agencies to do so. *See West Virginia*, 597 U.S. at 732 (citation omitted). The doctrine thus provides Plaintiffs and Intervenors no aid.

D. The Amended Regulations are permissible under the Commerce Clause and do not raise Tenth Amendment concerns.

The Amended Regulations respect the scope of the CWA's exercise of Commerce Clause authority and the states' traditional role over land and water use. The Agencies recognize that their authority is narrower for intrastate waters than for interstate waters. *See supra* Part III.A.1.

However, regulation of channels of interstate commerce need not be confined to protecting navigability or tied to the effect of pollution in a particular water. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964) (concluding that Congress's authority "to keep the channels of interstate commerce free from immoral and injurious uses" is no longer an open question (citation omitted)); *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942) (finding that a potentially trivial impact can be regulated when "taken together with that of many others similarly situated, is far from trivial"). The CWA is concerned with protecting more than just navigability. *See, e.g.*, 33 U.S.C. § 1251(a) (stating the objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters"). And nothing in the CWA indicates that Congress intended the Agencies to evaluate each water's or pollutant's relation to interstate commerce before finding a violation of the Act. Indeed, the CWA prohibits the discharge "of any pollutant by any person." *Id.* § 1311(a). Courts, including the Supreme Court, have repeatedly evaluated whether waters qualify as "waters of the United States" without requiring any showing of a particular water's effect on interstate commerce or navigation.

As the Agencies recognize, the CWA does not extend to cover all waters and wetlands. For the reasons stated *supra* Part III.A.1, the interstate waters category is permissible and does not implicate the concerns that the Supreme Court expressed in *SWANCC*. Likewise, because the *Rapanos* plurality standard is incorporated in the Amended Regulations, the Amended Regulations' coverage of intrastate waters that are not traditional navigable waters and adjacent wetlands is permissible under the CWA's Commerce Clause authority and does not shift the balance of federal and state power. States retain their ability to choose whether to regulate many waters and wetlands that are not "waters of the United States," and states are free to regulate

waters covered by the CWA more stringently than federal standards.[15] Thus, states retain their traditional authority and primary role in regulation—the CWA merely provides a federal backstop for covered waters.

The Amended Regulations do not violate the Tenth Amendment because they do not shift the balance of state and federal power. *See supra* Part III.A.1. The Regulations merely define the scope of the CWA's coverage, which is substantially similar to the status quo regime. Moreover, even assuming that states are regulated, such regulation would come from the CWA—not the Amended Regulations. *See* Pls. Mem. at 41 (citing various provisions demonstrating the CWA's cooperative federalism approach). Plaintiffs have not shown the elements necessary to mount a successful Tenth Amendment challenge against the Amended Regulations (or the CWA). *Cf. id.* at 40-42. Indeed, state obligations under the CWA would be the same absent the Regulations. No conflict between state and federal authority exists here. As the Supreme Court has recognized, while states have "important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999). Because Congress exercised its Commerce Clause authority in the CWA and the Amended Regulations are consistent with that exercise of authority, the Amended Regulations do not violate the Tenth Amendment.

E. The Regulations are not unconstitutionally vague.

If the Court permits a facial vagueness challenge, it should reject it. Plaintiffs' and Intervenors' challenges rest on a laundry list of terms that are allegedly vague simply because

[15] Contrary to Plaintiffs' argument, Pls. Mem. at 38, the Amended Regulations do not apply to groundwater, *see* 88 Fed. Reg. at 3105; nor do they speak to nonpoint source pollution.

they are not specifically defined and do not provide the precise clarity Plaintiffs and Intervenors seek. As explained *supra* Part II.A.2, Plaintiffs and Intervenors must show that these terms are unconstitutionally vague in all circumstances. They failed to meet their burden. Nor have they shown that the Amended Regulations fail to provide fair notice or allow for arbitrary enforcement. *Sanimax*, 95 F.4th at 569.

A regulation is not unlawfully vague merely because "difficulty is found in determining whether certain marginal offenses fall within" it. *United States v. Nat'l Dairy Prods. Corp*., 372 U.S. 29, 32 (1963); *Calzone v. Summers*, 942 F.3d 415, 426 (8th Cir. 2019) (en banc) (holding that a law is not unconstitutionally vague simply because it "does not define or otherwise explain what [a term] means"). So allegedly vague terms do not render the Amended Regulations unconstitutionally vague. *See United States v. Lucero*, 989 F.3d 1088, 1101 (9th Cir. 2021) (upholding the 1986 Regulations). Significantly, in affirming criminal penalties for conduct within waters that satisfy (*inter alia*) the *Rapanos* plurality standard, the Fifth Circuit has rejected the position that the Act was unconstitutionally vague. *Lucas*, 516 F.3d at 327-28.

Plaintiffs and Intervenors broadly attack the use of "relatively permanent" and "continuous surface connection" and thereby attack Supreme Court precedent, as the *Rapanos* plurality coined these terms and *Sackett* adopted them. *See, e.g.*, *Sackett*, 598 U.S. at 671, 678, 684 (adopting these terms). Their challenge is therefore not to the Amended Regulations, which were issued to conform to Supreme Court precedent. And because the Amended Regulations reflect the Court's interpretation of the Act, they cannot be unlawfully vague. *See United States v. Lanier*, 520 U.S. 259, 266 (1997) ("[C]larity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute."); *Sanimax*, 95 F.4th at 570 (recognizing that terms are not unconstitutionally vague if they have "narrowing context, or settled legal meanings"); *United*

States v. Morison, 844 F.2d 1057, 1071 (4th Cir. 1988) ("[A]ll vagueness may be corrected by judicial construction which narrows the sweep of the statute . . . ."). For the same reason, arguments against "adjacent," which is an express term in the statute and has been used by the Supreme Court for years, also lack merit. *See, e.g.*, *Riverside Bayview*, 474 U.S. at 134-35; *Sackett*, 598 U.S. at 676-79.

As for the other allegedly vague terms, like "certain times of [the] year," Pls. Mem. at 40, those appear in the 2023 Rule's preamble, not the regulatory text. The term clarifies the scope of relatively permanent waters and aids in identifying such waters. 88 Fed. Reg. at 3084-88, 3102. Moreover, the preamble guides agency discretion and cannot render the *Amended Regulations* unconstitutionally vague. *See, e.g.*, *Beckles v. United States*, 580 U.S. 256, 257, 265 (2017) (finding guidelines "not amenable to a vagueness challenge").[16] Other terms, like "impoundments" and "tributaries," identify discrete waters, provide more clarity than the broad term "waters of the United States," and have been reasonably explained, *supra* Parts III.B., III.C.

The Amended Regulations likewise provide Plaintiffs and Business Intervenors with fair notice of proscribed behavior. *See FCC v. Fox Television Stations, Inc*., 567 U.S. 239, 253 (2012). "[P]erfect clarity and precise guidance have never been required" to defeat a facial vagueness challenge as "[c]lose cases can be imagined under virtually any [regulation]." *United States v. Williams*, 553 U.S. 285, 304, 306 (2008) (quotations omitted). So long as the "regulations set forth a standard, albeit somewhat imprecise, which provides 'minimal guidelines to govern law enforcement,'" they are not unconstitutionally vague. *St. Croix Waterway Ass'n v.*

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[16] Plaintiffs criticize the Agencies for using the term "seasonally," Pls. Mem. at 40, but ignore that the 2023 Rule declined to adopt "seasonal" because the meaning could vary or be misunderstood, 88 Fed. Reg. at 3085. Instead, the Agencies interpreted "relatively permanent" to encompass "surface waters that have flowing or standing water year-round or continuously during certain times of the year." *Id*. at 3084.

Meyer, 178 F.3d 515, 521 (8th Cir. 1999) (holding that a regulation imposing criminal penalties was not unconstitutionally vague). Moreover, courts must consider any clarifying interpretation or "limiting construction" the Agencies have offered. *Vill. of Hoffman*, 455 U.S. at 494 n.5. Here, the Agencies have provided guidance of the Amended Regulations' terms in the preamble, *see supra* Part III.C.1, and Plaintiffs and Business Intervenors have (cost-free) opportunities to obtain a jurisdictional determination, ensuring as a matter of law that the Amended Regulations are not unduly vague, *Vill. of Hoffman*, 455 U.S. at 494 n.5.

F. The Amended Regulations are reasonable under the APA.

Ignoring the Conforming Rule, Plaintiffs claim that the Amended Regulations are still arbitrary and capricious under the APA for the same reasons raised in the Court's PI Order. Pls. Mem. at 31-34. But that order was not a ruling on the merits. *Henderson*, 70 F.3d at 962. More importantly, the Amended Regulations conform to *Sackett*, and either address the concerns raised by the PI Order or render such concerns irrelevant.

First, the Court may not review the Agencies' cost-benefit analysis for compliance with Executive Orders ("EOs") 12866 and 13563. On their face, the EOs do not "create any right or benefit, substantive or procedural," enforceable by any party against agencies. Exs. 1 & 2; *Nat'l Mining Ass'n v. United Steel Workers*, 985 F.3d 1309, 1327 (11th Cir. 2021) (holding the court could not review whether agency action was inconsistent with either EO); *see also Helicopter Ass'n Int'l, Inc. v. FAA*, 722 F.3d 430, 439 (D.C. Cir. 2013) (same).

Second, the Agencies' compliance with the EOs has no bearing on the Amended Regulations' consistency with the CWA. Plaintiffs object to the Agencies' cost-benefit analysis in the Economic Analysis ("EA") of the 2023 Rule because they claim the Agencies understated the costs and overstated the benefits. Pls. Mem. at 32-34. But the Agencies completed the analysis for informational purposes and internal management and not as a basis for the 2023

Rule (which, in any event, is now amended) or the Conforming Rule. EA at xi, ECF No. 92-5 at 12 ("[T]he costs and benefits analysis presented in this EA is not used by the agencies to help determine the extent of their authority under the [CWA]."); *see also* 88 Fed. Reg. at 3139.

Third, Plaintiffs' unspecified concerns about guidance in the preamble do not show that the *Amended Regulations* are arbitrary and capricious. Pls. Mem. at 31. Courts generally reference the preamble if the regulatory text is ambiguous, *see Advanta USA, Inc. v. Chao*, 350 F.3d 726, 729 (8th Cir. 2003), but the Amended Regulations unambiguously adopt the *Rapanos* plurality standard consistent with *Sackett*. While the Court may generally consult implementation guidance in the preamble, that guidance is not binding nor are the Agencies required to provide it. *See Webster v. Reprod. Health Servs.*, 492 U.S. 490, 506 (1989) (declining to review constitutionality of preamble language); *Wilgar Land Co. v. Dir., Off. of Workers' Comp. Programs, U.S. Dep't of Lab.*, 85 F.4th 828, 838 (6th Cir. 2023) (holding preamble not binding). If the preamble is applied in future actions, those actions may be challenged. Indeed, the Corps has issued hundreds of approved jurisdictional determinations under the Amended Regulations, which may be challenged. *See* Coordination Process Update at 2, https://www.epa.gov/system/files/documents/2024-04/ajdcoordinationupdatereport_april2024.pdf.

Fourth, the Court may not review the Agencies' environmental justice analysis, which was completed pursuant to EO 12898 and was not used to define the scope of "waters of the United States." As with the other EOs, EO 12898, on its face, does not create an independent right of action. Ex. 3; *see California v. EPA*, 72 F.4th 308, 318 (D.C. Cir. 2023). Plaintiffs also again ignore the Conforming Rule and do not explain how the 2023 Rule's environmental justice analysis provides a basis to invalidate the Amended Regulations. 88 Fed. Reg. at 3141.

Lastly, Plaintiffs do not account for the APA's rule of prejudicial error, *see* 5 U.S.C. § 706. The Court cannot invalidate the Amended Regulations based on analyses that did not even determine the scope of coverage under the CWA. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2385 (2020). Nor do Plaintiffs identify any prejudice from the Agencies' failure to update the analyses in the Conforming Rule. Plaintiffs do not dispute, nor can they, that the *Amended Regulations*, which conform to *Sackett*, sharply contract the scope of covered waters and impose less regulatory burden than the broader pre-2015 regime that the EO analyses address. Plaintiffs also fail to identify *any* harm or prejudicial error from the Amended Regulations' purpose-based exclusions, which merely codified longstanding exclusions. *See* 88 Fed. Reg. at 3103; *Spokeo*, 578 U.S. at 339 (requiring concrete and particularized injury). *Contra* Pls. Mem. at 33.

V. The Agencies complied with the APA's procedural requirements.

A. Plaintiffs cannot seek judicial review under the Regulatory Flexibility Act ("RFA"); even if they could, the Agencies' analysis was reasonable.

Plaintiffs' challenge to the Agencies' RFA analysis, Pls. Mem. at 35-36, fails for three reasons. First, under the RFA, only a "small entity" can request judicial review. 5 U.S.C. § 611(a). Here, Plaintiffs do not qualify as a "small entity." *See id*. § 601(6) (defining "small entity" under the RFA). Furthermore, the RFA strictly circumscribes judicial review. *Id.* § 611(c). Thus, Plaintiffs cannot invoke APA section 706(2)(D) to seek judicial review of the Agencies' purported non-compliance with any RFA requirements. 5 U.S.C. § 701(a) (review under the APA is unavailable to the extent the RFA "preclude[s] judicial review"); *Tex. Gen. Land Off. v. Biden*, 619 F. Supp. 3d 673, 704 (S.D. Tex. 2022) (holding states are not "small entities" and cannot challenge an agency's compliance with the RFA), *rev'd and remanded on other grounds sub nom.*, *Gen. Land Off. v. Biden*, 71 F.4th 264 (5th Cir. 2023).

Second, even if Plaintiffs' claim were reviewable, the Agencies complied with their obligations under the RFA. "[A] court reviewing a[n] RFA-based challenge does not evaluate whether the agency got the required analysis right." *N.C. Fisheries Ass'n, Inc. v. Gutierrez*, 518 F. Supp. 2d 62, 95 (D.D.C. 2007). All that is required from the Agencies is "a reasonable, good-faith effort to carry out [RFA's] mandate." *Northport Health Servs. of Ark., LLC v. U.S. Dep't of Health & Hum. Servs.*, 14 F.4th 856, 876 (8th Cir. 2021) (internal quotation marks omitted). The Agencies did exactly that. They explained that the 2023 Rule would not have a significant economic impact on a substantial number of small entities and that the 2023 Rule largely codified the existing regulatory regime. 88 Fed. Reg. at 3139. Further, the 2023 Rule only clarified the meaning of "waters of the United States;" it did not impose any direct regulatory requirements on any entities (regardless of size). *Id.* at 3139-40. And a regulatory flexibility analysis is not required to analyze impacts on indirectly regulated small entities. *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 869 (D.C. Cir. 2001).

Third, Plaintiffs do not challenge the Conforming Rule's compliance with the RFA but instead point to the 2023 Rule's RFA analysis. But given that the Conforming Rule *reduces* the CWA's jurisdictional footprint when compared to the 2023 Rule, the Agencies' finding that the 2023 Rule will not have a significant economic impact on small entities is even more reasonable now. *See Northport*, 14 F.4th at 878 (holding that, because the revised rule ultimately lessened the financial burden placed on small entities compared to the original rule, any RFA deficiency associated with the original rule was harmless error). So even assuming the Agencies did not fulfill their requirements under the RFA, Plaintiffs cannot point to any "prejudicial" harm arising out of the Agencies' RFA analysis stemming from the 2023 Rule. *See* 5 U.S.C. § 706 (providing that, to bring a claim under the APA, the moving party must demonstrate "prejudicial" harm).

B. Plaintiffs' claim that certain terms found in the 2023 Rule are not logical outgrowths of the proposed rule is either moot or without merit.

Plaintiffs continue to assert that several unidentified terms (presumably "catchment," "material influence," and "wetland mosaics," *see* ECF No. 44-1 at 18-19) that appear in the 2023 Rule were not "logical outgrowths" of the proposed rule. Pls. Mem. at 36-37; ECF No. 44-1 at 18-19. However, many of the challenged terms that appear in the preamble to the 2023 Rule are no longer relevant as a result of *Sackett* and the Conforming Rule. For example, the terms "catchment" and "material influence" were both used to implement the significant-nexus standard, 88 Fed. Reg. at 3088, 3143, which the Amended Regulations eliminate. Thus, Plaintiffs' claims with respect to these terms are moot, and they cannot demonstrate prejudice with respect to the inclusion of these terms in the 2023 Rule. *See* 5 U.S.C. § 706.

The term "wetland mosaics" does not appear in the Code of Federal Regulations. Rather, the 2023 Rule's preamble uses the term to describe the Agencies' longstanding approach to identifying and delineating a jurisdictional "wetland." 88 Fed. Reg. at 3093; *see also* 85 Fed. Reg. 22250, 22313 (Apr. 21, 2020). Given the existing practice of defining "wetlands," Plaintiffs' contention that the term is not a "logical outgrowth" of the 2023 Rule's proposed rule is meritless. *See Morehouse Enter., LLC v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 3:22-CV-116, 2022 WL 3597299, at *4 (D.N.D. Aug. 23, 2022) ("A final rule is a logical outgrowth if interested parties should have anticipated that the change was possible . . . ." (internal quotation marks omitted)), *aff'd*, 78 F.4th 1011 (8th Cir. 2023).

VI. Any remedy should be narrowly tailored.

While Business Intervenors simply seek remand "for further rulemaking consistent with this Court's opinion," Bus. Mem. at 35, Plaintiffs' sweeping request for vacatur lacks foundation and should be rejected, *see* Pls. Mem. at 43-45. Any relief the Court might grant "must be

tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 585 U.S. 48, 73 (2018). Further, some members of the Supreme Court have recently raised serious questions about whether vacatur (as opposed to, for example, party-specific declaratory or injunctive relief) is a legally available remedy under the APA at all, a question that the Eighth Circuit has not yet directly addressed. *See United States v. Texas*, 143 S. Ct. 1964, 1980-86 (2023) (Gorsuch, J., concurring).

Even assuming vacatur is a legally available remedy, remand without vacatur can also be appropriate in certain circumstances. *See, e.g.*, *Elbert v. U.S. Dep't of Agric*., No. 18-1574, 2022 WL 2670069, at *5 (D. Minn. July 11, 2022) (collecting cases). It is difficult to ascertain whether those circumstances are applicable, *contra* Pls. Mem. at 45, because any remedy must be narrowly tailored to the Court's forthcoming holdings on the merits and "must not be more burdensome to the defendant than necessary to redress the plaintiff's injuries." *Labrador v. Poe*, 144 S. Ct. 921, 927 (2024) (Gorsuch, J., concurring) (concurring in granting stay of district court's order of universal injunction and reminding lower courts "of th[is] foundational rule" of tailoring equitable relief); *see also, e.g.*, *United Food & Com. Workers Union, Local No. 663 v. USDA*, 532 F. Supp. 3d 741, 777 (D. Minn. 2021) ("[T]he APA permits a court to sever a rule by setting aside only the offending parts of the rule." (citation omitted)).[17] The Agencies thus request the opportunity to submit supplemental briefing on remedy issues, should this Court rule in Plaintiffs' or Intervenors' favor on any merits issue.

CONCLUSION

The Court should deny Plaintiffs' and Business Intervenors' motions, grant the Agencies' motion, and enter final judgment in the Agencies' favor.

[17] *See* 88 Fed. Reg. at 3135; 88 Fed. Reg. at 61966-67 (discussing severability).

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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2024, I filed the foregoing using the Court's CM/ECF system, which will electronically serve all counsel of record registered to use the CM/ECF system.

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