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.*,

Intervenor-Plaintiffs,

v.

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

Defendants,

CHICKALOON VILLAGE TRADITIONAL COUNCIL, *et al.*,

Intervenor-Defendants.

Case No. 3:23-cv-00032-DLH-ARS

Hon. Daniel L. Hovland

INTERVENOR-DEFENDANTS' COMBINED MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION

Defendant-Intervenors Chickaloon Village Traditional Council, Rappahannock Tribe, Tohono O'odham Nation, and White Earth Band of Minnesota Chippewa Tribe (the "Tribes") are federally recognized Indian Tribes and sovereign nations. Each Tribe has cultural, religious, economic, and/or physical connections to water that are integral to the identity of that Tribe. This case concerns challenges to a federal rule that guides agency determinations regarding applicability of Clean Water Act protections to our Nation's waters.

The objective of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Complying with these directives is a necessarily scientific endeavor; to protect the chemical, physical, and biological integrity of the Nation's waters requires an understanding of how pollutants move and affect bodies of water and how dredging and filling wetlands may affect filtration of pollutants or flooding downstream. It is neither uncommon, nor illegal, for Congress to set the fenceposts and to entrust agencies to string the wire, especially as to scientific details and especially where the science of how best to protect waters may change as knowledge develops or new pollutants emerge. To that end, the Clean Water Act entrusts the Army Corps of Engineers ("Corps") and Environmental Protection Agency ("EPA") (collectively, "the Agencies") with broad authority to interpret the term 'waters of the United States' and define the scope of the Act's protections. The Agencies built on decades of experience, a large body of consensus science, and guidance from the Supreme Court in promulgating the earlier January 2023 rule defining the term "waters of the United States." 88 Fed. Reg. 3004 (Jan. 18, 2023) (the "2023 Rule").

In May 2023, the Supreme Court decided *Sackett v. EPA*, which narrowed the scope of federal jurisdiction over "waters of the United States," by reducing protections for adjacent

wetlands and rejecting one method of determining jurisdiction called the "significant nexus standard." *Sackett v. EPA*, 598 U.S. 651, 671, 678-79 (2023). The Agencies quickly amended the January 2023 regulations to conform to *Sackett*. *See* 88 Fed. Reg. 61964 (Sept. 8, 2023) ("Amended Final Rule"). Specifically, the Amended Final Rule removed the significant nexus standard from the definition of "waters of the United States" and amended the definition of "adjacent." 88 Fed. Reg. at 61966. The Agencies confirmed that they would interpret the remainder of the definition of "waters of the United States" in the 2023 Rule consistent with *Sackett*'s holdings. *Id.*

State Plaintiffs and Industry Intervenor-Plaintiffs (collectively "Plaintiffs") now object to the Agencies' failure to solicit comments on the Amended Final Rule. To the extent this Court finds any procedural error, the appropriate remedy would be remand for notice and comment procedures. On the merits, Plaintiffs ask this Court to go beyond the bounds of *Sackett*, which already removed federal protections for vast numbers of waters, and place additional limits on Clean Water Act jurisdiction. The Court should reject that invitation because Plaintiffs fail to demonstrate that the Amended Final Rule cannot be lawfully applied as written. In addition, the Amended Final Rule is well within the EPA's statutory authority under the Clean Water Act and presents no constitutional problems. Plaintiffs' myriad critiques of the Agencies' definition of "waters of the United States" are meritless and should be rejected.

STANDARD OF REVIEW

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In rule challenges like this one, the court must examine the rule against the governing statute, and, "[i]f the intent of Congress is clear, that is

the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). If the statute is silent or ambiguous regarding the issue, then the court inquires whether the rule is based on a permissible construction of the statute. *Id.* at 843. Even without *Chevron* deference, agency interpretations of statutes are entitled to *Skidmore* deference, under which courts should defer to an agency's interpretation if it is persuasive. *Godinez-Arroyo v. Mukasey*, 540 F.3d 848, 851 (8th Cir. 2008); *United States v. Mead Corp.*, 533 U.S. 218, 221, 234 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (noting an agency's "body of experience and informed judgment to which courts and litigants may properly resort for guidance").

To prevail in a facial challenge to a rule like the one here, a plaintiff "must establish that no set of circumstances exists under which the [regulation] would be valid." *Reno v. Flores*, 507 U.S. 292, 301 (1993) (quoting *United States v. Salerno,* 481 U.S. 739, 745, (1987); bracketed text in *Reno*).

The Court's review is governed by section 10 of the Administrative Procedure Act, 5 U.S.C. § 706(2). The Court will invalidate an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," *id.* § 706(2)(A); "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," *id*. § 706(2)(C); or "without observance of procedure required by law," *id*. § 706(2)(D). The Court engages in a "probing," "substantial inquiry," with the agency action entitled to a presumption of regularity. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).

LEGAL BACKGROUND

In 1972, Congress passed the Clean Water Act because, despite years of effort and funding, states had failed to address ongoing pollution and destruction of waters throughout the Nation. *See EPA v. California*, 426 U.S. 200, 202-09 (1976); *Am. Paper Inst., Inc. v. EPA*, 890 F.2d 869, 870-71 (7th Cir. 1989); *Montgomery Env't Coal. v. Costle*, 646 F.2d 568, 574 (D.C. Cir. 1980); H.R. 11896, 92nd Cong. (1971) and S. 2770, 92nd Cong. (1971). The "major purpose" of the Act was "to establish a *comprehensive* long-range policy for the elimination of water pollution." S. Rep. No. 92–414, at 95 (1971), 2 Legislative History of the Water Pollution Control Act Amendments of 1972 (Committee Print compiled for the Senate Committee on Public Works by the Library of Congress), Ser. No. 93–1, p. 1511 (1971) (emphasis added). To that end, the Clean Water Act prohibits "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12), except in compliance with the Act's permitting requirements and other pollution prevention programs. *Id.* §§ 1311(a), 1344.

Congress broadly defined the term "navigable waters" as "the waters of the United States, including the territorial seas." *Id*. § 1362(7). Predecessor statutes to the Clean Water Act had protected narrower subsets of the Nation's waters, like the Rivers and Harbors Act of 1899 which protected "traditional navigable waters," meaning interstate waters that were navigable in fact or susceptible to being used in commerce. *See Sackett*, 598 U.S. at 659-660. The Supreme Court has previously recognized that, based on the Act's text and legislative history, this change in terminology was intended to broaden, not narrow, the scope of the Act, and that "in adopting this definition of 'navigable waters,' Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed

"navigable" under the classical understanding of that term." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985).[1] The Supreme Court in *Sackett* reaffirmed this understanding, noting that the Court has "acknowledged that the CWA extends to more than traditional navigable waters." *Sackett*, 598 U.S. at 672.

STATEMENT OF MATERIAL AND CONTESTED FACTS

I. THE 2023 RULE

The Agencies developed the 2023 Rule to "establish[] limits that appropriately draw the boundary of waters subject to Federal protection[,]" and provide additional clarifications to the definition of "waters of the United States" to improve the efficiency and consistency of jurisdictional determinations. 88 Fed. Reg. at 3005-07. The 2023 Rule was founded on the "familiar 1986 regulations, with amendments to reflect the agencies' construction of limitations on the scope of 'waters of the United States' based on the law, the science, and agency expertise." *Id.* at 3024-29.

The 2023 Rule, based upon the foundation of the pre-2015 regime that the Agencies and states have applied for decades, established limits on the scope of waters protected by the Clean Water Act, adopting two limiting principles for assessing whether tributaries, wetlands, or other waters qualify as waters of the United States, derived from two opinions in *Rapanos v. United*

[1] During debate on the bill that would become the Clean Water Act, Representative Dingell expounded further on Congress' intended definition of the term "navigable waters," stating it "means all 'the waters of the United States' in a geographical sense. It does not mean 'navigable waters of the United States' in the technical sense as we sometimes see in some laws." CWA Legislative History, House Consideration of the Rpt. of the Conference Committee, Oct. 4, 1972, at 250 (remarks of Rep. Dingell). He explained that the new, broad definition of the term was explicitly intended to go beyond the scope of the definition of "navigable waters" in the *Daniel Ball* case, *id*., which was very similar to the definition that was (and still is) used in the Rivers and Harbors Act. 33 C.F.R. § 329.4.

States, 547 U.S. 715 (2006): Justice Kennedy's "Significant Nexus Standard" and Justice Scalia's "Relatively Permanent Standard." *Id.* at 3019.

II. THE AMENDED FINAL RULE

After promulgation of the 2023 Rule, the Supreme Court decided *Sackett*, a case in which property owners challenged the Agencies' assertion of Clean Water Act jurisdiction over wetlands located on their property. As State Plaintiffs recognized when seeking to enjoin the 2023 Rule, the *Sackett* decision "put[] the definition of WOTUS squarely before the [Supreme] Court." Dkt. 44-1 at 6. On May 25, 2023, the Supreme Court issued its opinion in *Sackett*, which held "that the CWA extends to only those 'wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right,' so that they are 'indistinguishable' from those waters." *Sackett*, 598 U.S. at 678, 684. In so holding, the Court rejected the Agencies' long-standing, much broader definition of "adjacency," meaning "bordering, contiguous, or neighboring." *See, e.g.*, 88 Fed. Reg. at 3116-17. The Court also rejected Justice Kennedy's significant nexus standard from the *Rapanos* case, which had been adopted by most circuits, and instead adopted Justice Scalia's relatively permanent standard, which commanded a plurality of votes in *Rapanos*. 598 U.S. at 671. As the White House has recently recognized, *Sackett* "severely curtailed" the scope of the Clean Water Act.[2]

Following *Sackett*, the Agencies promulgated the Amended Final Rule currently at issue, which removed the significant nexus standard from the 2023 Rule and amended the 2023 Rule's definition of "adjacent" to conform to *Sackett*. 88 Fed. Reg. at 61966. The Agencies concluded that "under the decision in *Sackett*, waters are not jurisdictional under the Clean Water Act based

[2] Executive Office of the President of the United States, *Wetland and Water Protection Resource Guide*, at 3 (March 2024), https://www.whitehouse.gov/wp-content/uploads/2024/03/Wetland-and-Water-Protection-Resource-Guide.pdf.

on the significant nexus standard" and that "wetlands are not defined as 'adjacent' or jurisdictional . . . solely because they are 'bordering, contiguous, or neighboring . . . [or] separated from other 'waters of the United States' by man-made dikes or barriers, natural river berms, beach dunes and the like." *Id.* (alterations in the original). The Agencies affirmed that they "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.*

Importantly, the Amended Final Rule establishes express limits on the scope of waters protected by the Clean Water Act, as informed by the Supreme Court's decision in *Sackett*. 88 Fed. Reg. at 61966. In particular, the Amended Final Rule reaffirms the "Relatively Permanent Standard," a limiting principle from the 2023 Rule for assessing whether tributaries, adjacent wetlands, or other waters qualify as waters of the United States. *Id.*; 88 Fed. Reg. at 3038-42. When upstream waters have a relatively permanent connection to the traditional navigable waters, the territorial seas, and interstate waters—the Amended Final Rule ensures that those upstream waters fall within the scope of the Clean Water Act. 88 Fed. Reg. at 61966; 88 Fed. Reg. at 3006. By contrast, where waters do not have a relatively permanent connection to downstream jurisdictional waters, the Amended Final Rule leaves regulation to the Tribes and States. 88 Fed. Reg. at 61966; 88 Fed. Reg. at 3006. The Agencies' use of this limitation is "supported by consideration of the text of the relevant provisions of the Clean Water Act and the statute as a whole, the scientific record, relevant Supreme Court decisions, and the agencies' experience and technical expertise after more than 45 years of implementing the longstanding pre-2015 regulations defining 'waters of the United States.'" 88 Fed. Reg. at 61966; 88 Fed. Reg. at 3033. The relatively permanent standard generally requires less information gathering and assessment, 88 Fed. Reg. at 3038, and the 2023 Rule provides ample details regarding the

meaning of this standard which remain applicable,[3] *id.* at 3013, 3084-87. Further, the Corps provides the public with jurisdictional determinations free-of-charge. *Id.* at 3011.

The Amended Final Rule also affirms the 2023 Rule's codification of eight exclusions to "waters of the U.S." Among these are longstanding exclusions for prior converted cropland and waste treatment systems, with minor modifications. 88 Fed. Reg. at 3103. The Amended Final Rule further provides exclusions for certain ditches, artificially irrigated areas, artificial lakes or ponds, artificial reflecting pools or swimming pools, waterfilled depressions, and swales and erosional features. *Id*. In addition, the Clean Water Act exempts activities such as the normal farming activities, construction and maintenance of irrigation ditches, and the maintenance of drainage ditches. *See* 33 U.S.C. § 1344(f).

ARGUMENT

Having received their desired outcome and guidance on the definition of "waters of the United States" from the nation's highest court, significantly curtailing the reach of Clean Water Act protections, Plaintiffs remain unsatisfied. The Supreme Court's answers to questions about the scope of federal jurisdiction do not go far enough in Plaintiffs' view, and they have accordingly come back before this Court seeking to further limit protections under the Clean Water Act. In so doing, Plaintiffs ask this Court to do what the Supreme Court could have done in *Sackett*, but did not—summarily discard multiple longstanding definitions that are

[3] U.S. Army Corps of Engineers and U.S. Environmental Protection Agency, *Joint Coordination Memorandum to the Field Between the U.S. Department of the Army, U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA)* at 1 (Sept. 27, 2023) ("Because the Supreme Court in Sackett adopted the Rapanos plurality standard and the 2023 rule preamble discussed the Rapanos plurality standard, the implementation guidance and tools in the 2023 rule preamble that address the regulatory text that was not amended by the Amended Final Rule, including the preamble relevant to the Rapanos plurality standard incorporated in paragraphs (a)(3), (4), and (5) of the 2023 rule, as amended, generally remain relevant to implementing the 2023 rule, as amended.").

scientifically supported and judicially ratified, and which the Agencies have successfully implemented for almost fifty years.

Plaintiffs ask too much. Although *Sackett* was not a case about the validity of the 2023 Rule, the Supreme Court considered the Sacketts' claims in the context of the 2023 Rule and demonstrated familiarity with its contents. *See Sackett*, 598 U.S. at 668-69; *see also* 88 Fed. Reg. at 61965 ("While the 2023 Rule was not directly before the Court, the Court considered the jurisdictional standards set forth in that rule."). The Court's opinion explicitly references the 2023 Rule's promulgation and acknowledges its coverage of "traditional navigable waters, interstate waters, and the territorial seas, as well as their tributaries and adjacent wetlands," and also "any '[i]ntrastate lakes and ponds, streams or wetlands' that either have a continuous surface connection to categorically included waters or have a significant nexus to interstate or traditional navigable waters." *Sackett*, 598 U.S. at 668-69. In deciding *Sackett*, the Supreme Court specified which aspects of the Agencies' definition of waters of the United States it found unlawful—the significant nexus test and the definition of adjacent wetlands—leaving in place other elements. The Court also endorsed the *Rapanos* plurality opinion's "relatively permanent test," *Sackett*, 598 U.S. at 671, which is included in both the 2023 Rule and the Amended Final Rule. The Amended Final Rule adopts *Sackett*'s holding regarding adjacent wetlands and broader finding regarding the relatively permanent test. Plaintiffs' motions should accordingly be denied.

I. IF THE COURT FINDS ANY PROCEDURAL ERROR WITH THE AMENDED FINAL RULE, THE APPROPRIATE REMEDY WOULD BE REMAND FOR NOTICE AND COMMENT.

Sackett represents the Supreme Court's latest pronouncement on the scope of "waters of the United States" and is now the law of the land. All future jurisdictional determinations must follow *Sackett* regardless of whether the Agencies decided to memorialize the details through rulemaking. Although not required to do so, the Agencies have chosen to proceed with

incorporating the *Sackett* decision into the Amended Final Rule, as is their prerogative. When an agency chooses to engage in rulemaking, it must ensure it has followed applicable law under the Administrative Procedure Act. Citing the limited scope of the Amended Final Rule and the need for expediency, the Agencies promulgated the Rule without soliciting public comment. 88 Fed. Reg. at 61964-65. While the Tribes believe that the Amended Final Rule correctly implements *Sackett*'s directives without the exercise of agency discretion, it does not necessarily follow that the Agencies can forego notice and comment. If the Court finds errors with the Agencies' procedural approach (*see* Dkt. 131 at 25-26; Dkt. 201-1 at 36-37), the Tribes respectfully suggest that the appropriate remedy would be to remand to the Agencies for promulgation with notice and comment. *See, e.g.*, *U.S. Steel Corp. v. EPA*, 649 F.2d 572, 577 (8th Cir. 1981).

II. PLAINTIFFS' MOTIONS SHOULD BE DENIED BECAUSE PLAINTIFFS FAIL TO SHOW THAT THE AMENDED FINAL RULE CANNOT BE LAWFULLY APPLIED.

Plaintiffs' motions should be denied because these challenges to the Amended Final Rule were improperly brought as facial challenges. Rather than await application of the Amended Final Rule, Plaintiffs bring facial challenges, asking the Court to speculate as to how the Rule will be applied and implemented. To prevail, Plaintiffs must establish "no set of circumstances" under which the Rule would be valid. *Reno*, 507 U.S. at 301 (quotation omitted). Yet Plaintiffs fall short of demonstrating that the Amended Final Rule as written will inherently sweep up waters that are non-jurisdictional under the Supreme Court's guidance. The Amended Final Rule does nothing more than implement *Sackett*'s directives, including its endorsement of the reasoning in Justice Scalia's *Rapanos* plurality opinion. At bottom, Plaintiffs' complaints about the Amended Final Rule boil down to (i) disapproval of the extent to which the Amended Final Rule imports language verbatim from the *Sackett* decision; (ii) vague worries regarding general uncertainty as to how the Amended Final Rule may be applied; (iii) speculative assumptions that

the Agencies will apply the Amended Final Rule in ways that are contrary to *Sackett*, despite the Agencies' obligations to follow the law; and (iv) general discontent with the inherently case-specific nature of jurisdictional determinations. These arguments are unpersuasive.

What Plaintiffs claim are contradictions between the Amended Final Rule and *Sackett* are very often simply differences in words used with no legal import. For example, the Amended Final Rule defines the term "adjacent" as "having a continuous surface connection," consistent with and using direct terminology from *Sackett*. *Compare* 88 Fed. Reg. at 61969, *with* 598 U.S. at 678 (wetlands must have a "continuous surface connection" to a covered water), 684 (same). Plaintiffs make much of the Amended Final Rule's omission of additional language from *Sackett* regarding a wetland being "as a practical matter indistinguishable" from a covered water. Dkt. 201-1 at 22-23; Dkt. 199 at 3, 14. Rulemaking is, however, not a recitation exercise, nor need it be. Agencies are required to regulate consistent with Supreme Court precedent, but they need not repeat every word from a Supreme Court opinion in the regulatory text in order to carry out the Court's requirements. Here, the Agencies summarized the Supreme Court's conclusions in *Sackett*, identified those portions of the 2023 Rule that were no longer valid under the Court's interpretation of "waters of the United States," and removed or altered those parts of the 2023 Rule that are incompatible with that interpretation. *See* 88 Fed. Reg. at 61965-66.

Because Plaintiffs cannot show any tension between the Amended Final Rule and Supreme Court precedent, they instead rely on vague claims of general uncertainty and speculation regarding how the Rule might be applied—evidence that these challenges would be better and more-properly brought as-applied when the Court has before it a specific instance of regulation of a specific waterbody. None of Plaintiffs' declarants compares waters covered under the pre-2015 regime with the Amended Final Rule. None identifies a specific harm to a project

or water caused by the Amended Final Rule, or identifies a regulatory task they must now engage in that they need not have engaged in previously. Many declarants fail to discuss any specific water bodies at all, and instead vaguely decry the "uncertainty" in the Final Amended Rule. *See, e.g.*, Decls. of David Godlewski and Russ Hanson, Dkt. 199-4, Ex. D at 3-13. Even the more detailed declarations fail to point to any actual application of the Amended Final Rule. For example, State Plaintiffs' declarant Ms. Jessica Kramer avers that "[i]t is unclear under the Amended Final Rule, for instance, whether a manmade ditch or culvert qualifies as a 'relatively permanent' continuous flowing waterbody." Dkt. 201-3 at ¶ 14. Ms. Kramer does not identify any specific manmade ditches or culverts she is concerned about, much less how the Amended Final Rule would be applied to them. Nor does she acknowledge identified exclusions under the Amended Final Rule, including the specific exclusion for ditches excavated in dry land without a relatively permanent flow of water. Uncertainty and generic fear about regulation is a far cry from establishing that there is "no set of circumstances" under which the application of the Amended Final Rule would be valid, as Plaintiffs must establish to prevail in a facial challenge. *Reno*, 507 U.S. at 301.

Other arguments from Plaintiffs simply assume with no evidence that the Agencies will apply the Amended Final Rule in contravention to *Sackett*'s guidance. For example, Industry Intervenor-Plaintiffs claim that the Amended Final Rule "requires them to obtain CWA permits to work around features that are simply not WOTUS" and will require them to obtain "costly permits when none should be needed." Dkt. 199 at 16-17. These would only be "impossible—and unpredictable" burdens, *id.*, if one assumes that the Agencies will apply the Amended Final Rule in ways that exceed the limits articulated in *Sackett* and the plain language of the Rule. *See* 88 Fed. Reg. at 61966 ("The agencies will continue to interpret the remainder of the definition of

'waters of United States' in the 2023 Rule consistent with the *Sackett* decision"). Agencies are entitled to a presumption of regularity in the discharge of their duties, and Plaintiffs offer nothing to rebut that presumption. *See United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926). Rather than engage in speculation about how the Agencies might implement the Amended Final Rule, this Court is better served by deferring review until it can be conducted in the context of a jurisdictional determination on a specific waterbody. *See Sabre, Inc. v. Dep't of Transp*., 429 F.3d 1113, 1119 (D.C. Cir. 2005) (explaining that "a later as-applied challenge will present the court with a richer and more informative factual record").

Finally, Plaintiffs repeatedly label the Agencies' definition of "waters of the United States" as "vague," "uncertain," or "open-ended" simply because definitional terms and phrases must be applied in context to determine jurisdiction. But the use of "case-specific determinations" is inherent in assessing jurisdiction, and the Supreme Court has never held otherwise. 88 Fed. Reg. at 3042. On the contrary, the Supreme Court recently endorsed the use of fact-specific analysis under a different section of the Clean Water Act. In *County of Maui v. Hawaii Wildlife Fund*, the Supreme Court held that the Act requires a permit for the discharge of a pollutant from a point source that travels through groundwater into jurisdictional waters if that discharge is the "*functional equivalent of a direct discharge*." 590 U.S. 165, 183 (2020). The majority opinion rejected alternative bright-line tests that would have excused all indirect discharges—no matter how short the conveyance from point source to navigable waters—from federal permitting requirements. *See id.* at 178-83. Acknowledging that its chosen phrase, "functional equivalent," "does not, on its own, clearly explain how to deal with middle instances," the Court nonetheless observed that "context imposes natural limits" on the definitional terms in the statute. *Id.* at 184. Using "more specific language" would not account

for the multitude of "factors that may prove relevant depending upon the circumstances of a particular case." *Id.* (parentheticals omitted). The Court expressed confidence that courts can, over time, "provide guidance through decisions in individual cases," guided by the Clean Water Act's "underlying statutory objectives." *Id.* at 185. In addition, the Court explained, the U.S. Environmental Protection Agency "can provide administrative guidance" in the form of, for example, "grants of individual permits, promulgation of general permits, or the development of general rules." *Id.* In sum, the Supreme Court has said, in no uncertain terms, that case-specific, multi-factor tests are both perfectly acceptable and often necessary to the advancement of the statutory purposes Congress seeks to achieve. The need to apply *Sackett* and the Amended Final Rule on a case-by-case basis is accordingly not grounds to throw out the Rule, and is instead evidence that an as-applied challenge would be the appropriate vehicle for any challenge to this Rule.

III. EVEN IF THE COURT WERE TO REACH PLAINTIFFS' CLAIMS REGARDING THE AMENDED FINAL RULE, EACH FAILS ON THE MERITS.

A. The Amended Final Rule is Squarely within EPA's Authority Under the Clean Water Act.

1. The Amended Final Rule appropriately retains the Rapanos relatively permanent standard, which the Supreme Court endorsed in Sackett.

In *Sackett*, the Supreme Court rejected Justice Kennedy's significant nexus standard and endorsed the relatively permanent standard as set forth in Justice Scalia's *Rapanos* plurality opinion. *Sackett*, 598 U.S. at 671. Accordingly, the Agencies revised the 2023 Rule to eliminate the significant nexus standard, 88 Fed. Reg. at 61966, resolving the vast majority of issues that Plaintiffs raised at the outset of this case. *Id.* Plaintiffs now shift to take issue with the relatively permanent standard itself. Plaintiffs' arguments lack support in the record and the law.

First, the Agencies' detailed definition of "relatively permanent" in the 2023 Rule was lawfully continued in the Amended Final Rule. The *Sackett* Court had the 2023 Rule in its record, including its definition of the relatively permanent standard, and the Court "adopted the *Rapanos* plurality standard" without further definition or amendment. *Sackett*, 598 U.S. at 671. The 2023 Rule's definition of relatively permanent accordingly remains intact. Indeed, the Agencies have clarified that the sections of the 2023 Rule preamble that discuss the *Rapanos* plurality standard "remain relevant to implementing" the Amended Final Rule.[4] These definitional sections are hardly cursory. The 2023 Rule preamble defines the term "relatively permanent standard" multiple times. *See, e.g.*, 88 Fed. Reg. at 3006, 3066. The 2023 Rule preamble also includes extensive sections that provide guidance on how to determine whether certain categories of waters meet the relatively permanent standard. 88 Fed. Reg. at 3084-85 (tributaries), 3095-96 (adjacent wetlands), 3102-03 ("other waters"). In addition, the Agencies explain that their interpretation is consistent with the *Rapanos* plurality's interpretation of "waters of the United States" and quote extensively from Justice Scalia's opinion. 88 Fed. Reg. at 3084. These definitions and guidance provide fair notice as to the meaning and implementation of the relatively permanent standard, which courts in the Eighth Circuit have successfully applied for years. *See, e.g.*, *United States v. Mlaskoch*, 2014 WL 1281523, at *16-17 (D. Minn. Mar. 31, 2014) (unreported); *Eoff v. EPA*, 2015 WL 2405658, at *3-4 (E.D. Ark. May 19, 2015) (unreported).

Second, contrary to Plaintiffs' arguments, Dkt. 199 at 24; Dkt. 201-1 at 9, neither *Sackett* nor the *Rapanos* plurality opinion require—or even suggest—a need for any minimum flow

[4] *See* Joint Coordination Memorandum to the Field Between the U.S. Department of the Army, U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) (Sept. 27, 2023).

duration. In fact, both opinions specifically recognize that temporary interruptions in flow do not sever jurisdiction under the relatively permanent standard. *See* 598 U.S. at 678; 547 U.S. at 732 n.5 (plurality opinion). The Agencies also reasonably explain why they decided not to establish a minimum flow requirement. The 2023 Rule preamble notes that "flow duration varies extensively by region" and that "a more flexible approach . . . accounts for specific conditions in each region." 88 Fed. Reg. at 3085. As the Agencies point out, a "bright line cutoff would not reflect hydrological diversity among different regions and alterations in flow characteristics." 88 Fed. Reg. at 3085-86. Moreover, neither the 2020 Navigable Waters Protection Rule, which Plaintiffs seem to prefer over the Amended Final Rule, nor the pre-2015 regulatory regime, to which Plaintiffs are seeking to revert, establish a minimum flow duration. 88 Fed. Reg. at 3086. In sum, both science and past agency practice support the Agencies' decision not to include a minimum flow requirement as part of the relatively permanent standard, and Supreme Court precedent does not require or suggest otherwise.

Finally, the relatively permanent standard is not too uncertain and does not give too much discretion to the Agencies. *Contra* Dkt. 199 at 22-23; Dkt. 201-1 at 9-11. As explained above, the 2023 Rule preamble provides extensive guidance on how the relatively permanent standard is applied. While Plaintiffs are correct that the standard involves case-specific factors, that is not legal defect. *See Cnty. of Maui*, 590 U.S. at 183-85 & discussion *supra* at II. Furthermore, State Plaintiffs' unremitting discontent has them first claim that the standard is too imprecise and then, in the face of the detail provided in the relatively permanent definitions, that that detail and guidance is not of the right or desired type of detail and guidance. *See, e.g.*, Dkt. 201-1 at 9-10 (complaining that the Agencies encouraged use of "complicated mapping, modelling, and

'geomorphic indicator[]' assessment to determine relative permanence" instead of mentioning geographical features). The relatively permanent standard is not too uncertain.

In sum, the relatively permanent standard is not unlawful simply because Plaintiffs would prefer a different, more restrictive interpretation.

2. The Amended Final Rule limits the scope of jurisdiction over tributaries, consistent with the law.

The Amended Final Rule sets appropriate limits on the scope of jurisdiction over tributaries, consistent with the law. For more than 45 years, the Agencies have recognized the need to protect "the many tributary streams that feed into the tidal and commercially navigable waters . . . since the destruction and/or degradation of the physical, chemical, and biological integrity of each of these waters is threatened by the unregulated discharge of dredged or fill material." 42 Fed. Reg. 37121, 37123 (July 19, 1977). In contrast to the 2023 Rule, which protected relatively permanent tributaries and tributaries that alone or with similarly situated waters significantly affected the chemical, physical, or biological integrity of (a)(1) jurisdictional waters, the Amended Final Rule protects only relatively permanent waters. *See* 88 Fed. Reg. at 3143; 88 Fed. Reg. at 61969. Despite this Rule's significant reduction in jurisdiction over tributaries per *Sackett*, Plaintiffs seek further reductions that the *Sackett* Court was not willing to make.

First, the Amended Final Rule appropriately limits jurisdiction to relatively permanent tributaries, consistent with the language of *Sackett*. State Plaintiffs improperly target the potential for ephemeral and intermittent streams to be jurisdictional under the relatively permanent test that that *Sackett* Court endorsed. Dkt. 201-1 at 20. In complaining about this potential result, Plaintiffs ignore what the 2023 Rule and Amended Final Rule actually provide—to be jurisdictional, a tributary must both 1) flow directly or indirectly to another jurisdictional water,

and 2) meet the relatively permanent standard. *See* 88 Fed. Reg. at 3080; 88 Fed. Reg. at 61969. Only streams that meet these two tests are properly considered jurisdictional.

In addition, the Amended Final Rule is not uncertain or subjective in its treatment of tributaries. State Plaintiffs vaguely express dissatisfaction with potential application of the Agencies' tributary definition due to alleged uncertainties around the definition of the relatively permanent standard. Dkt. 201-1 at 19-21. But again, such arguments are speculative and inappropriate in a facial challenge like this one. Moreover, as explained *supra*, the 2023 Rule provides extensive definitions and guidance—which govern the Amended Final Rule—about how to apply the relatively permanent standard, including its application to tributaries. *See supra* III.A.1. Just because Plaintiffs dislike these definitions does not mean they are not reasonably comprehensible and provide appropriate guidance under the law. Moreover, Plaintiffs incorrectly state that ditches that are wholly excavated in dry land or that are not relatively permanent would be jurisdictional under the 2023 Rule and Amended Final Rule, Dkt. 201-1 at 19-20, when such ditches are clearly excluded under both Rules. *See* 88 Fed. Reg. at 3144; 88 Fed. Reg. at 61969 (leaving these exclusions intact). Industry Intervenor-Plaintiffs also assert that the Agencies erred by employing "subjective determinations," such as whether a potential tributary has indications of an "ordinary high water mark." Dkt. 199 at 28. While a concept like "beauty" might be a subjective determination as applied to water, indications of an "ordinary high water mark" are decidedly not, particularly where a detailed description of the concept appears in regulatory text itself. 88 Fed. Reg. at 3144.[5] Finally, as with the relatively permanent standard, there is nothing

[5] An "[o]rdinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas." *Id.*

unlawful about the multi-factor and case-specific nature of the Amended Final Rule's definition of tributaries. *See Cnty. of Maui*, 590 U.S. at 183-85 & discussion *supra* at II.

In sum, the Amended Final Rule's definition of a tributary is consistent with the law.

3. The Amended Final Rule imposes limitations on jurisdictional wetlands, consistent with Sackett.

By redefining the word "adjacent" in conformity with *Sackett*, the Amended Final Rule provides that wetlands are jurisdictional only if they have a continuous surface connection to a traditionally navigable water, territorial sea, or interstate water, or a continuous surface connection to a covered impoundment or tributary. *See* 88 Fed. Reg. at 61966, 61969. Following *Sackett*'s guidance, the Amended Final Rule modifies the 2023 Rule such that a wetland will not be deemed jurisdictional if it merely borders, is contiguous to, or neighbors another jurisdictional water.

The Amended Final Rule's usage of the term "continuous surface connection," is lawful and consistent with *Sackett*. *Contra* Dkt. 201-1 at 21-23; Dkt. 199 at 25. State Plaintiffs wrongly insist the Amended Final Rule should include the additional language from *Sackett* that states that wetlands should be considered jurisdictional when they are "'as a practical matter indistinguishable from waters of the United States' ..., which is to say, 'it is "difficult to determine where the 'water' ends and the 'wetland' begins.'" Dkt. 201-1 at 22 (quoting *Sackett*, 598 U.S. at 678, 684). But, as explained *supra*, the Agencies need not include every word in Supreme Court opinions, verbatim, to adopt and correctly implement the Court's direction. The plain meaning of the term "continuous surface connection" indicates the wetland must include water that touches and mixes with the adjacent water of the United States. State Plaintiffs' preference that the Agencies quote *Sackett* at greater length for the same point is not evidence that the Amended Final Rule somehow fails to conform with *Sackett*; it is merely wordsmithing.

Industry Plaintiff-Intervenors go further, seeking to expand *Sackett* in contravention of *Sackett*'s explicit language. They argue that the Amended Final Rule's definition of adjacency contradicts *Sackett* because the 2023 Rule preamble acknowledges that "continuous surface connection does not require a constant hydrologic connection," while *Sackett* allegedly demands that a wetland always be "indistinguishable" from an adjacent water. 88 Fed. Reg. at 3102; Dkt. 199 at 25. Intervenor-Plaintiffs ignore that, in discussing the "continuous surface connection" test from *Rapanos* and the need for there to be no clear demarcation between the wetland and the other jurisdictional water, the *Sackett* Court stated: "We also acknowledge that temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells." *Sackett*, 598 U.S. at 678. The *Sackett* Court specifically addressed this issue and agreed with the Agencies that temporary interruptions in connectivity do not destroy jurisdiction under the continuous surface connection test.

Intervenor-Plaintiffs' citation to an out-of-circuit case also fails to show any contradiction between the Amended Final Rule and *Sackett*. Dkt. 199 at 25-26. That Fifth Circuit case, which was not even a challenge to a jurisdictional determination under the 2023 Rule or Amended Final Rule, simply repeats the definition of adjacent wetlands from *Sackett* and from the *Rapanos* plurality—the same language that the Amended Final Rule cites as the basis of its amendments to the 2023 Rule. *Compare Lewis v. United States*, 88 F.4th 1073, 1078 (5th Cir. 2023) *with* 88 Fed. Reg. at 61966. Applying that definition, the *Lewis* Court found that the wetlands in question did not have a continuous surface connection to any relevant covered waters and so were not jurisdictional. 88 F.4th at 1078. *Lewis* demonstrates that the determination of whether wetlands are jurisdictional remains a fact-specific inquiry, even under the *Rapanos* plurality's adjacency test, which *Sackett* adopted and affirmed. In *Lewis*, the court struck down a jurisdictional

determination where the factual context showed that the agency exceeded the bounds of the Clean Water Act. Here, by contrast, Plaintiffs have not shown that the Amended Final Rule's definition of adjacent wetlands is incompatible with *Sackett* on its face, nor have they identified any particular wetland that the Rule would erroneously cover.

4. The Amended Final Rule retains protections for jurisdictional impoundments, consistent with the law.

The Amended Final Rule, like the 2023 Rule, retains the definition of jurisdictional impoundments from the 1986 regulations covering impoundments of "waters of the United States." 88 Fed. Reg. at 3076.[6] In the preamble to the 2023 Rule, the Agencies provided two principal reasons for this well-established approach. First, damming or impounding "waters of the United States" does not make those waters non-jurisdictional. *Id.* "[I]mpoundments do not de-federalize a water, and therefore impoundments of 'waters of the United States' remain 'waters of the United States.'" *Id.*[7] A contrary interpretation would create a perverse incentive to impound jurisdictional waters in order to escape the Act. The Supreme Court put that kind of nonsensical result to rest in *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370, 379 n.5 (2006) ("[N]or can we agree that one can denationalize national waters by exerting private control over them."). Second, impoundments are jurisdictional where they satisfy the criteria for other covered waters (*i.e.*, traditionally navigable waters, tributaries, etc.)

[6] Impoundments are created by discrete structures (often human-built) like dams or levees that typically have the effect of raising the water surface elevation, creating or expanding the area of open water, or both. *Id.*

[7] Impoundments like "dams do not prevent all water flow," a point thoroughly documented in the 2023 Rule and scientific record. Technical Support Document for the Final Rule: Definition of "Waters of the United States," EPA Rulemaking Docket ID No. EPA-HQ-OW-2021-0602-2500 (Jan. 17, 2023) ("TSD") at 196-202.

based on similar reasoning—that impoundments alone should not be allowed to defederalize a water that is otherwise jurisdictional. 88 Fed. Reg. at 3075-78.

Plaintiffs fail to identify any legal or scientific flaw in the Amended Final Rule's approach to impoundments. Instead, they suggest that "isolated" waters will be regulated in contravention of *Sackett*. Dkt. 201-1 at 18; Dkt. 199 at 26-27. But the 2023 Rule preamble specifically requires a "traceable" flowpath at the time of impoundment, 88 Fed. Reg. at 3078,[8] and *Sackett* does not address impoundments at all, isolated or otherwise.

Industry Intervenor-Plaintiffs go even further and assert that *Sackett* "precludes" jurisdiction over impoundments because impoundments are separated by other waters by a barrier, and *Sackett* stated that barriers separating wetlands from other waters ordinarily destroy jurisdiction. Dkt. 199 at 27. Yet, Industry Intervenor-Plaintiffs acknowledge that this statement in *Sackett* regarding barriers is explicitly limited to barriers between wetlands and other waters. *Id*. Plaintiffs cannot extend such a specific statement by the Court to apply to other types of water to suit Intervenor-Plaintiffs' desire that the Court had gone further to limit Clean Water Act jurisdiction. In addition, *Sackett* itself observed that "a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA." *Sackett*, 598 U.S. at 678 n.16. That reasoning is consistent with the longstanding principles supporting federal jurisdiction over impoundments: a water that otherwise qualifies for federal protection (*e.g.*, a tributary that flows directly or indirectly to a paragraph (a)(1) or (a)(2)

[8] Impoundments generally do not prevent all water flow, a point that Plaintiffs do not dispute because it is so thoroughly documented in the 2023 Rule preamble and scientific record. Dkt. 201-1 at 17 (acknowledging that impoundments typically do have a hydrologic connection to a navigable water); TSD at 196-202.

water and meets the relatively permanent test) does not fall out of the scope of the Clean Water Act by virtue of being impounded.

In short, nothing in *Sackett* changed the core legal and scientific underpinnings of jurisdictional impoundments, and Plaintiffs have not demonstrated otherwise.

5. The Amended Final Rule imposes additional limitations on other waters, consistent with the law.

For more than 45 years, the Agencies' regulations have included a provision to address waters that did not fall within the specific jurisdictional categories the regulations established, because such waters could have effects on water quality and on interstate commerce. 42 Fed. Reg. 37128 (July 19, 1977). Under the 1986 regulations, "other waters" could be determined to be jurisdictional if the use, degradation, or destruction of the water could affect interstate or foreign commerce. 88 Fed. Reg. at 3099. The 2023 Rule was "substantially narrower," covering only those waters that satisfy the relatively permanent or significant nexus standard. *Id.* at 3097. Taking direction from *Sackett*, the Amended Final Rule narrows the definition of "other waters" still further, eliminating the reference to the significant nexus standard but retaining the requirement that these waters must satisfy the relatively permanent standard to be jurisdictional. *See* 88 Fed. Reg. at 61966.

State Plaintiffs once again ignore this history and limitation, falsely claiming that the Amended Final Rule creates a "broad (and novel) catch-all." Dkt. 201-1 at 23. But both Rules do the opposite, as evidenced by the 2023 Rule preamble's detailed description of the numerous ways it *narrows* the pre-2015 regulatory regime that Plaintiffs seek to reinstate and the Amended Final Rule's further narrowing of this category. *See* 88 Fed. Reg. at 3097 (explaining that "[t]he 1986 regulations, for example, authorized the assertion of jurisdiction over waters from which fish or shellfish are or could be taken and sold in interstate or foreign commerce"); 88 Fed. Reg.

at 61966 (removing the significant nexus standard from this category). Other than invalidating significant nexus as a test, the Supreme Court's opinion has no bearing on this category. Plaintiffs have no basis to seek that remedy here.

6. The Amended Final Rule's exclusions to "waters of the United States" are consistent with the law.

The Amended Final Rule continues the 2023 Rule's codification of eight exclusions to "waters of the U.S." Among these are the longstanding exclusions for prior converted cropland and waste treatment systems, with minor modifications. 88 Fed. Reg. at 3103; 88 Fed. Reg. at 61969.

Industry Intervenor-Plaintiffs claim, with no evidence of examples, that the Amended Final Rule's ditch exclusion is "vague" because it requires analysis of the specific circumstances surrounding a given ditch. Dkt. 199 at 28-29. Once again, the fact that certain ditches may require a fact-intensive inquiry to determine whether they are excluded is not a legal problem. *See Cnty. of Maui*, 590 U.S. at 183-85 & discussion *supra* at II. And, despite many briefing and declaration pages on the topic of ditches, Industry Intervenor-Plaintiffs fail to point to any ditch that would be improperly covered by the Amended Final Rule, again demonstrating the inappropriateness of this facial challenge as it relates to ditches.

7. The Amended Final Rule eliminates protections for interstate wetlands, consistent with the law.

The Amended Final Rule eliminates categorical protections for interstate wetlands, specifically removing the phrase "including interstate wetlands" from the interstate waters jurisdiction category. 88 Fed. Reg. at 61966 (noting that the Agencies are "removing 'interstate wetlands' from the 2023 Rule to conform with the decision in *Sackett*"). To explain this regulatory change, the Agencies point to the discussion in *Sackett* regarding the term "waters" in the Clean Water Act excluding wetlands, *see id.*, meaning that wetlands must now meet the

Sackett test for adjacent wetlands to be jurisdictional under the Act. In light of *Sackett*, the new elimination of protections for interstate wetlands is an appropriate limiting principle this Court has previously sought for the category of interstate waters. Dkt. 131 at 20, 28.

Plaintiffs' arguments that this Court should now go further and entirely eliminate protections for all interstate waters that are not traditional navigable waters is unsupported by *Sackett*. The question presented and holding in *Sackett* unambiguously apply only to wetlands. *See Sackett*, 598 U.S. at 663, 678. The Agencies' elimination of categorical protections for interstate wetlands is a logical outgrowth of the *Sackett* Court's new test for wetland jurisdiction. But this holding simply has no bearing on the protection of other interstate waters. To the extent the majority opinion references interstate waters at all, and in *dicta*, it does so only to 1) note the scope of predecessor statutes to the Clean Water Act, and 2) support the contention that wetlands are not "waters" under the Clean Water Act. *Id*. at 659-61, 673. Nowhere in the opinion does the Supreme Court state or imply that it believes interstate waters other than wetlands should lose federal protections.

The *Sackett* Court provided a detailed history of predecessor statutes to the Clean Water Act like the Rivers and Harbors Act of 1899, which protected "traditional navigable waters," meaning interstate waters that were navigable in fact or susceptible to being used in commerce. *Id*. at 659-60. The *Sackett* Court acknowledged that when the Clean Water Act was passed in 1972, earlier statutory references to traditional navigable waters were replaced with the term "waters of the United States, including the territorial seas." *Id*. at 660-61. The Supreme Court has previously recognized that, based on the Act's text and legislative history, this change in terminology was intended to broaden, not narrow, the scope of the Act, and that "in adopting this definition of 'navigable waters,' Congress evidently intended to repudiate limits that had been

placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term." *Riverside Bayview*, 474 U.S. at 133. The Supreme Court in *Sackett* reaffirmed this understanding, noting that they "have acknowledged that the CWA extends to more than traditional navigable waters." *Sackett*, 598 U.S. at 672. In other words, the *Sackett* Court again recognized, and did not repudiate, the Supreme Court's long-time understanding that the Act extends to more than traditional navigable waters—interstate waters that are navigable-in-fact or capable of use in commerce.

Moreover, while the 2023 Rule was not formally before the Supreme Court, the *Sackett* Court nonetheless had the text of that rule in its record and specifically recognized that the 2023 Rule protected interstate waters as waters of the United States. *Id*. at 668. The Court never suggested it was concerned about this category of protections.

In an attempt to twist the *Sackett* holding to eliminate federal protection of interstate waters, State Plaintiffs inaccurately paraphrase and quote language from *Sackett*, with bracketed word substitutions that significantly and incorrectly change the Supreme Court's meaning. State Plaintiffs claim *Sackett* held that, to assert jurisdiction, the Agencies "must establish both (1) that a body of water is 'a relatively permanent body of water connected to traditional interstate navigable waters,' and (2) that the former body of water 'has a continuous surface connection with [the latter] water, making it difficult to determine where the [latter] 'water' ends and the [former water] begins.'" Dkt. 201-1 at 14. The actual second sentence of the *Sackett* holding instead states in full: "This requires the party asserting jurisdiction over adjacent wetlands to establish 'first, that the adjacent [body of water constitutes] . . . 'water[s] of the United States,' (*i.e.* a relatively permanent body of water connected to traditional interstate navigable waters);

and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins.'" *Sackett*, 598 U.S. at 678-79 (quoting *Rapanos*, 547 U.S. at 742). The text of *Sackett*'s holding clearly announces a test for *only* adjacent wetlands, not for all waters, as Plaintiffs inaccurately suggest. *Sackett* accordingly neither mandates nor implies a further narrowing of the category of interstate waters beyond the removal of protections for interstate wetlands.

Finally, rather than raising federalism questions, as State Plaintiffs aver, Dkt. 201-1 at 15-16, the protection of interstate waters under the Act actually *protects* state sovereignty, especially that of 'downstream' states. *See, e.g.*, *Rapanos*, 547 U.S. at 777 ("As for States' 'responsibilities and rights,' § 1251(b), it is noteworthy that 33 States plus the District of Columbia have filed an *amici* brief in this litigation asserting that the Clean Water Act is important to their own water policies . . . [noting] that the Act protects downstream States from out-of-state pollution that they cannot themselves regulate"). Indeed, without protection for interstate waters, downstream states would be forced to resort to uncertain, and potentially unavailable,[9] common law claims to challenge unfettered pollution streaming across state lines into their waters.

8. The Amended Final Rule respects the rights and responsibilities of states, consistent with Section 101(b).

Congress made its purpose crystal clear by stating its objective in the first section of the Clean Water Act: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). It also set forth a policy of cooperative federalism to preserve the "primary responsibilities" of States "to prevent, reduce, and eliminate pollution"

[9] *See City of Milwaukee v. Illinois*, 451 U.S. 304, 317-19 (1981) (noting that the Clean Water Act supplanted common law claims regarding water pollution crossing state lines); *Illinois v. City of Milwaukee*, 406 U.S. 91, 102, 104-05 (1972) (noting that "federal, not state, law . . . controls the pollution of interstate or navigable waters" and that "[r]ights in interstate streams, like questions of boundaries, 'have been recognized as presenting federal questions.'" (citation omitted)).

within state boundaries. *Id.* § 1251(b). The 2023 Rule preamble explains how the Agencies "carefully considered" both Section 101(a) and Section 101(b) to strike a balance consistent with the Clean Water Act. 88 Fed. Reg. at 3043-46. The preamble also details how it "respects the role of Tribes and States in section 101(b)" by limiting federal jurisdiction to "those waters that significantly affect the indisputable federal interest in . . . traditional navigable waters, the territorial seas, and interstate waters." *Id.* at 3043. By contrast, "where protection (or degradation) of waters does not implicate this Federal interest, such waters fall exclusively within Tribal or State regulatory authority should they choose to exercise it." *Id.* at 3043-44. That balanced approach tracks *SWANCC* and *Rapanos*, avoiding federalism concerns and respecting Section 101(b). *Id.* at 3045; *Solid Waste Agency of N. Cook Cnty. v. U. S. Army Corps of Eng'rs* (*SWANCC*), 531 U.S. 159, 172 (2000).

Industry Intervenor-Plaintiffs nonetheless contend that the Agencies got it wrong, apparently by failing to elevate Section 101(b) to the exclusion of federal jurisdiction. Dkt. 199 at 29-30. But there is no basis for giving Section 101(b) such "prominence." 88 Fed. Reg. at 3044. By its terms, Section 101(b) does not reflect a general policy of deference to state regulation to the exclusion of Federal regulation—an outcome that would "be inconsistent with Congress's enactment of the Clean Water Act because of the failures of a statutory scheme that relied primarily on State enforcement of State water quality standards." *Id.* (citing S. Rep. No. 92–414, 92d Cong., 1st Sess. 7 (1971)). Accordingly, the Agencies did not improperly "subordinate" Section 101(b) as Industry Intervenor-Plaintiffs claim, Dkt. 199 at 30; Congress never granted Section 101(b) such "prominence" to begin with. 88 Fed. Reg. at 3044. Instead, the Agencies carefully and appropriately considered both Section 101(a) and Section 101(b), striking a balance well within their discretion. The Agencies have established express limits on

the scope of waters protected by the Clean Water Act, as informed by the Supreme Court's *Sackett* decision and the *Rapanos* plurality opinion. *Id.* at 3034-42; 88 Fed. Reg. at 61965-66.

B. The Amended Final Rule is a Valid Exercise of Authority Under the Commerce Clause.

Congress's constitutional authority to regulate interstate commerce, U.S. Const., art. I, § 8, extends to navigable waters, interstate waters, and waters that significantly affect those waters. Waters that are themselves navigable are, by definition, channels of commerce. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012) (Congress may regulate "the channels of interstate commerce"); *PPL Mont., LLC v. Montana*, 565 U.S. 576, 592 (2012) (waters are "navigable in fact" when they are or may be used "as highways for commerce"). Federal authority over interstate waters, without regard to navigability, is equally well-established. *See, e.g.*, *Illinois*, 406 U.S. at 105 ("Rights in interstate streams, like questions of boundaries, 'have been recognized as presenting federal questions.'"). Congress may regulate waters that significantly affect navigable and interstate waters, lest those channels of commerce become "a mere conduit for upstream waste" that "is an obvious hazard to navigation which Congress has every right to seek to abate under its interstate commerce powers." *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1326 (6th Cir. 1974).

State Plaintiffs argue the Amended Final Rule exceeds the Agencies' Commerce Clause authority under the Clean Water Act because it regulates waters that do not have a "direct connection to navigable waters" or "a substantial relationship with interstate commerce." Dkt. 201-1 at 38. However, *Sackett* explicitly "acknowledged that the CWA extends to more than traditional navigable waters." 598 U.S. at 672. Plaintiffs' preferred reading of the Clean Water Act—limiting federal jurisdiction to only those waters that are traditionally navigable or could be so made—commanded the votes of only two justices, far from a majority position. *Sackett*, 598

U.S. at 684-710 (Thomas, J., concurring, with Gorsuch, J., joining). Thus, State Plaintiffs' assertion that the Agencies have stretched the limits of their Commerce Clause authority lacks grounding in *Sackett* or any other judicial precedent.

C. The Amended Final Rule Does Not Violate the Tenth Amendment.

As explained above, the Amended Final Rule is within the scope and purpose of the Clean Water Act and the Constitution, as interpreted and directed by the Supreme Court, and is fully supported by the record. The Amended Final Rule does not infringe on the purview of the states. To the extent State Plaintiffs argue that the Amended Final Rule violates the Tenth Amendment because it regulates an area traditionally subject to state regulation, the Supreme Court has resoundingly rejected that theory as "unsound in principle and unworkable in practice." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985).

Moreover, the Tenth Amendment reserves only those rights not granted to the federal government, so it has no bearing on valid Commerce Clause legislation. Here, a water protected by the Act can also be regulated by the states and subject to even more stringent protections. That is, the Act's protections are a floor, a minimum standard of protection for a shared resource. *See* 33 U.S.C. § 1370; *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 499 (1987) (the Act "specifically allows" states "to impose stricter standards" on pollution sources). It preserves state authority; it does not displace state authority.

D. The Amended Final Rule Does Not Violate the Due Process Clause.

Due process requires that "a statute may not be 'so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.'" *United States v. Abbate*, 970 F.3d 601, 603-4 (5th Cir. 2020). The Constitution, however, does not demand "perfect clarity" or "precise guidance." *United States v. Williams*, 553 U.S. 285, 304 (2008). "What renders a statute vague, however, is not the possibility that it will

sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *Id*. at 306; *see also Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (the test is whether a person of common intelligence has a reasonable opportunity to know what is prohibited and need not guess); *United States v. Washam*, 312 F.3d 926, 929-30 (8th Cir. 2002) (a statute is unconstitutionally vague where a person of reasonable intelligence cannot determine what is prohibited and if it is so lacking in legally fixed standards it will be subject to arbitrary enforcement without boundaries).[10]

Contrary to Plaintiffs' protestations otherwise, Dkt. 201-1 at 38-40; Dkt. 199 at 31-32, the 2023 Rule and Amended Final Rule are not vague. The 2023 Rule outlines exactly what markers the Agencies will examine to determine whether a waterbody is subject to the protections of the Act. It describes how those factors are grounded in science, and provides the public a technical support document and science report for additional detail.

For example, the 2023 Rule preamble fully defines the "relatively permanent standard" at 88 Fed. Reg. at 3006, 3066. The 2023 Rule preamble also includes extensive sections that provide guidance on how to determine whether certain categories of waters meet the relatively permanent standard. *Id.* at 3084-85 (tributaries), 3095-96 (adjacent wetlands), 3102-03 ("other waters"). The phrase "certain times of the year" is defined at 88 Fed. Reg. at 3085. Unsurprisingly, given that it is a key component of the jurisdictional impoundment category, the 2023 Rule preamble defines the term "impoundments" at 88 Fed. Reg. at 3066. The preamble also explains that "[i]mpoundments are distinguishable from natural lakes and ponds because they are created by discrete structures (often human-built) like dams or levees that typically have

[10] Vagueness challenges should also only be entertained if the rule is *vague in all of its applications. Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982).

the effect of raising the water surface elevation, creating or expanding the area of open water, or both." *Id.* at 3075. The definition of impoundments encompasses both the "natural (like beaver ponds)" and the "artificial (like reservoirs)." *Id.* Further guidance as to how to identify an impoundment, including additional examples of impoundments, appears at 88 Fed. Reg. at 3077-78. The 2023 Rule addresses the scope of the phrase "continuous surface connection" multiple times, explaining how the term applies to adjacent wetlands in line with the *Rapanos* plurality opinion, *see id.* at 3096, and how it applies to "other waters," *id.* at 3102. Finally, the term "wetlands" is defined in the regulatory text itself. *See id.* at 3143, 3144.[11] This term should be familiar as it remains unchanged from the 1986 regulations. *See id.* at 3067.

While the 2023 Rule preamble does not provide specific definitions for "extended period" and "short duration," these terms have straightforward meanings and are used throughout the 2023 Rule preamble with considerable contextual support. In addition, these words and phrases do not exist in a vacuum. They are objective, science-based terms that are grounded in familiar concepts that long predate the Amended Final Rule and the 2023 Rule. Plaintiffs' real complaint thus seems to be that the meaning of these terms on the ground, as it were, may be further detailed in case-specific application. Once again, this is not problematic under Supreme Court precedent, and illustrates the need for Plaintiffs to raise such arguments in the context of an as-applied challenge. *See Cnty. of Maui*, 590 U.S. at 183-85 & discussion *supra* at II. The Amended Final Rule thus satisfies due process because it and the 2023 Rule it incorporates puts the regulated public on reasonable notice that certain types of water bodies—based on

[11] "(1) *Wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas."

scientifically supported, objective, and knowable measures present on the landscape—may be covered by the Act.

E. The Amended Final Rule Does Not Implicate the Major Questions Doctrine, nor Does It Constitute an Improper Delegation of Legislative Powers.

The Amended Final Rule does not implicate the "major questions doctrine." Industry Intervenor-Plaintiffs invoke *West Virginia v. EPA*, 597 U.S. 697 (2022) to support their contention that the Amended Final Rule violates this doctrine. Dkt. 199 at 33-35. They seem to claim that Congress did not authorize the Agencies to issue a rule that interprets the statutory term "waters of the United States." But the Supreme Court recognizes, and has endorsed, the Agencies' responsibility to clarify that term through regulation. *See Riverside Bayview*, 474 U.S. at 134 (noting "the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters"); *see also Rapanos*, 547 U.S. at 758 (Roberts, J., concurring) (noting that the need for the Court's review could have been avoided if the Agencies had issued regulations and that they "enjoyed plenty of room to operate in developing some notion of an outer bound to the reach of their authority").

As the Tribes have explained in detail in their briefing on Plaintiffs' motions for preliminary injunction, *see* Dkt. 93 at 24-26, the 2023 Rule lacks any of the indicators suggesting a "transformative" or paradigm-shifting expansion of the Agencies' authority. *West Virginia*, 597 U.S. at 724; *see id.* at 727-29 (calling EPA's enactment of the Clean Power Plan a fundamental shift from source-based pollution regulation to generation-shifting). Under the Amended Final Rule, the Agencies will continue to exercise jurisdiction over waters that were covered under the existing baseline pre-2015 regulations, authorized by the same portions of the same statute (33 U.S.C. § 1362(7)), using the same tools. Nothing in *Sackett*, which represents the Supreme Court's most recent pronouncement on the Agencies' authority to define the scope of federal

Clean Water Act jurisdiction, suggests that "major questions" analysis is warranted. In sum, for "extraordinary" cases to warrant major questions scrutiny, there must be other, "ordinary" cases subject to the normal course of judicial evaluation. The Amended Final Rule represents the ordinary case, and Plaintiffs fail to demonstrate otherwise.

For parallel reasons, Industry Intervenor-Plaintiffs' brief nondelegation argument, Dkt. 199 at 34-35, fails too. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473-76 (2001) (noting that the Court has invalidated only two statutes on nondelegation grounds, while blessing many that contain minimal guidance). The Clean Water Act's text and purpose provide intelligible principles to guide the Agencies (and courts) when interpreting the term "waters of the United States." The Supreme Court has never suggested that the Agencies have limitless authority when doing so; instead, it has consistently said that the phrase contains discernable limits. *See, e.g.*, *Riverside Bayview*, 474 U.S. at 139 (evaluating regulation against "the language, policies, and history of the Clean Water Act"); *see also Rapanos*, 547 U.S. at 753 (plurality op.) (describing its analysis as resting on only "the phrase 'waters of the United States'").

F. The Amended Final Rule is Not Arbitrary and Capricious.

Lastly, the Amended Final Rule is not arbitrary and capricious. State Plaintiffs make three arguments supporting their contention that the Amended Final Rule is arbitrary and capricious under the Administrative Procedure Act. Dkt. 201-1 at 31-34. None are persuasive.

First, State Plaintiffs argue the Amended Final Rule fails to update the "multi-step 'guidance for landowners'" in the preamble to the 2023 Rule to provide unspecified needed updates from *Sackett*, and that this preamble language remains vague. Dkt. 201-1 at 31-32; 88 Fed. Reg. at 3130-35. But it is clear the multi-step guidance for landowners in the 2023 Rule has been modified as needed by *Sackett*, both because the Amended Final Rule removes the significant nexus test from the 2023 Rule and changes the definition of "adjacency," rendering

any parts of the preamble discussing those definitions inapplicable, and because the preamble to the Amended Final Rule explains that the remainder of the 2023 Rule will be interpreted consistent with *Sackett*. 88 Fed. Reg. at 61966. Moreover, the multi-step guidance as modified by *Sackett* is incredibly detailed and comprehensive, offering many pages of explanation regarding when a water is jurisdictional as well as a variety of publicly available tools such as maps and, most helpfully, specific information about how to receive a jurisdictional determination from the Corps free of charge. 88 Fed. Reg. at 3130-35. These acknowledged "resources" are far from mere "vagaries," Dkt. 201-1 at 31, as they contain voluminous specific details and instructions for the public. Certainly, this multi-step guidance does not "fail[] to consider an important aspect of the problem, offer[] an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Second, State Plaintiffs argue the Agencies have arbitrarily and capriciously mishandled the cost-benefit analysis in the Amended Final Rule. Dkt. 201-1 at 32-34. In the Amended Final Rule, the Agencies reasonably concluded that, because the Rule merely edits the 2023 Rule as needed to conform with *Sackett*, the Rule does not itself impose cost savings and forgone benefits. 88 Fed. Reg. at 61967. In other words, any changes to the cost savings and forgone benefits compared with the 2023 Rule are a result of *Sackett*, not this Rule. Moreover, State Plaintiffs' confusing argument that the Agencies' use of some purpose-based exclusions somehow overestimates the benefits of the 2023 Rule fails to articulate any arbitrary action by the Agencies. State Plaintiffs' final argument that the Agencies improperly assumed that federal jurisdiction is beneficial to water quality is illogical and contrary to the facts. Dkt. 201-1 at 33-

34. As State Plaintiffs themselves imply, it is an undisputed fact that many states lack regulatory programs that would protect waters left unprotected by the Clean Water Act. *Id*. at 33; 88 Fed. Reg. 3065. And while State Plaintiffs fault the Agencies for assuming that these entirely unregulated waters will be vulnerable to degradation, this reality is also a fact that not even State Plaintiffs attempt to refute.

Finally, State Plaintiffs confusingly argue that the Agencies unlawfully considered environmental justice in the Amended Final Rule. Dkt. 201-1 at 34. To the contrary, the Agencies explicitly declined to consider environmental justice in the Amended Final Rule. 88 Fed. Reg. at 61968 ("EPA and the Army believe that it is not necessary to assess whether this action would result in disproportionate and adverse effect on communities with environmental justice concerns . . . ."). While the Tribes disagree with this decision, there was simply no environmental justice analysis in the Amended Final Rule at all—lawful or otherwise.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motions for summary judgment, grant the Tribes' motion, and enter final judgment in the Tribes' favor.

Respectfully submitted this 26th day of April, 2024.

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