UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT FRANKFORT
Electronically filed

COMMONWEALTH OF KENTUCKY,

Plaintiff,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Defendants.

Civil Action No. 3:23-cv-00007

FIRST AMENDED COMPLAINT

INTRODUCTION

1. The United States Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers (the "Corps") (collectively, the "Agencies") have attempted yet again to grant themselves regulatory authority over broad swaths of the country's land and water by redefining the term "waters of the United States."

2. On January 18, 2023, the Agencies published a Revised Definition of "Waters of the United States," 88 Fed. Reg. 3,004 (Jan. 18, 2023) ("Final Rule"), Exhibit 1. Kentucky and twenty-six other states challenged the Rule in three federal district courts. *See Texas v. EPA*, No. 3:23-cv-00017 (S.D. Tex.); *West Virginia v. EPA*, No. 3:23-cv-00032 (D. N.D.); *Kentucky v. EPA*, No. 3:23-cv-00007 (E.D. Ky.)). The two courts that discussed the likelihood of success on the merits found the Final Rule likely exceeded the Agencies' authority. *Texas v. EPA*, No. 3:23-cv-00017 (S.D. Tex.

Mar. 19, 2023), Exhibit 2; *West Virginia v. EPA*, No. 3:23-cv-00032 (D.N.D. Apr. 12, 2023), Exhibit 3.

3. When the Final Rule was issued, the Supreme Court was already considering the Agencies' authority under the Federal Water Pollution Control Act ("Clean Water Act," "CWA," or "Act"), 33 U.S.C. §§ 1251–1387, having heard oral argument in *Sackett v. EPA* on the first day of the Court's 2023 term. Predictably, with a decision in May 2023, the Supreme Court rejected the Agencies' overly-broad interpretation of the Act and their arrogation of authority. *See generally Sackett v. EPA*, 598 U.S. 651 (2023).

4. In response—without providing notice or opportunity to comment—the Agencies published the *Revised Definition of "Waters of the United States"; Conforming,* 88 Fed. Reg. 61,964 (Sept. 8, 2023) ("Amended Rule"), Exhibit 4.

5. At just 6 pages in the Federal Register, the Amended Rule does not eliminate the issues that prompted Kentucky to initiate this action in response to the Final Rule. Rather, despite some begrudging revisions, the language of the Amended Rule still allows the Agencies to assert jurisdiction over waters and lands that are not within the Agencies' authority under the Clean Water Act.

6. With their impermissibly broad interpretation of their jurisdiction under the Amended Rule, the Agencies usurp Kentucky's sovereign interest in managing, protecting, and caring for its waters and lands. As well, the Amended Rule creates significant regulatory burdens for the Commonwealth and its citizens—particularly Kentucky farmers. And now the Agencies do all this without providing

the mandatory notice and comment period. The Amended Rule should be vacated and set aside because it violates the Clean Water Act, the Administrative Procedure Act ("APA"), and the U.S. Constitution.

THE PARTIES

7. Plaintiff Commonwealth of Kentucky is a sovereign state of the United States of America. As primary protector of the natural resources within its borders, Kentucky has exercised its authority to regulate its own waters, including imposing its own water-purity and pollution standards. *See* Ky. Rev. Stat. §§ 224.70-100 to -150 and 224.16-040 to -090; *see also* 401 KAR 10:031. Russell Coleman is the duly elected Attorney General of the Commonwealth of Kentucky with the constitutional, statutory, and common-law authority to bring suit on behalf of the Commonwealth and its citizens. *See* Ky. Rev. Stat. §§ 15.020; *see also Commonwealth ex rel. Beshear v. Commonwealth ex rel. Bevin*, 498 S.W.3d 355, 362 (Ky. 2016). The Attorney General is authorized to enforce Kentucky's environmental protections. *See* Ky. Rev. Stat. §§ 15.020, 15.255(a), 15.260, 224.99-010(9), 224.99-020(1).

8. Defendant United States Environmental Protection Agency is a federal agency within the meaning of the APA, 5 U.S.C. § 551(1). The EPA is tasked with implementing sections of the Clean Water Act. Defendant Michael S. Regan is the Administrator of the EPA.

9. Defendant United States Army Corps of Engineers is a federal agency within the meaning of the APA, 5 U.S.C. § 551(1). The Corps is tasked with implementing sections of the Clean Water Act. Defendant Lieutenant General Scott

A. Spellmon is the Chief of Engineers and Commanding General for the Corps. Defendant Michael L. Connor is the Assistant Secretary of the Army for Civil Works.

JURISDICTION AND VENUE

10. This case arises under the APA, 5 U.S.C. §§ 701–706, and under the Constitution and laws of the United States.

11. This Court has federal question jurisdiction under 28 U.S.C. § 1331.

12. The Court may award declaratory and injunctive relief under the APA, 5 U.S.C. §§ 705–706, as well as 28 U.S.C. §§ 2201–2202 and Federal Rules of Civil Procedure 57 and 65.

13. Venue is proper under 28 U.S.C. § 1391(e)(1)(C). The Commonwealth of Kentucky is located in this judicial district, Defendants are officers or agencies of the United States, and "waters of the United States" jurisdictional determinations will be made under the Amended Rule in this district.

14. Under Local Rules 3.2(a)(3) and 8.1, the Central Division of the Eastern District of Kentucky at Frankfort is the proper division for this action because substantial property that is the subject of the action is situated in Franklin County, Kentucky, where Kentucky's seat of government is located, and where Attorney General Coleman maintains an office.

STANDING

15. The Commonwealth of Kentucky has standing to challenge the Amended Rule and to seek injunctive and declaratory relief.

16. Standing requires an injury that is concrete and particularized, actual or imminent, fairly traceable to the actions of the Defendants and likely to be

redressed by a favorable decision from this Court. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Under the Amended Rule, Kentucky incurs injuries as a sovereign and as a landowner.

17. The Amended Rule encroaches on Kentucky's "power to control navigation, fishing, and other public uses of water," which "is an essential attribute of [state] sovereignty." *Tarrant Reg'l Water Dist. v. Hermann*, 569 U.S. 614, 631 (2013) (citation omitted); *see also Kansas v. Nebraska*, 574 U.S. 445, 480 (2015) (Thomas, J., concurring in part) ("Authority over water is a core attribute of state sovereignty."). Kentucky's right to control rivers and other intrastate waters is "obvious, indisputable," and "omnipresent." *See Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 349, 356 (1908). Indeed, "[r]egulation of land and water use lies at the core of traditional state authority." *Sackett*, 598 U.S. at 679.

18. Naturally, Kentucky has taken steps to control and preserve water in the Commonwealth. Recognizing the "vital importance" of "[t]he conservation, development, and proper use of the water resources of the Commonwealth," the Kentucky General Assembly has passed laws to regulate waters in the Commonwealth. *See* Ky. Rev. Stat. § 151.110(1)(a) (declaring several chapters to be enacted with the purpose of, *inter alia*, conserving water, preventing obstructions of waterways by the dumping of substances therein, and ensuring adequate water supplies for various uses); *Id.* at (2) (making it a policy of the Commonwealth "to manage groundwater for the health, welfare, and economic prosperity of all citizens").

19. Congress has honored the primary role of the States by showing "purposeful and continued deference to state water law." *California v. United States*, 438 U.S. 645, 653 (1978). In the Clean Water Act, Congress explicitly recognized the primacy of the States' control. Under Section 1251(b) of the Act, the Agencies must "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources. 33 U.S.C. § 1251(b).

20. Yet, as with the Final Rule before it, the Amended Rule ignores Congress' intent and explicit instructions with respect to the division of authority between the States and the federal government. By its terms, the current regulatory scheme would supplant Kentucky's laws and primary authority over land and water use. The Amended Rule continues the Final Rule's practice of enabling expanded Agency jurisdiction over land and waters traditionally under the States' sole control by using subjective and ill-defined criteria that place no meaningful boundaries on the Agencies' discretion to assert jurisdiction.

21. The Amended Rule thereby harms Kentucky. Once an area is determined to fall within the Agencies' authority as a "water of the United States," this determination eliminates the States' primacy to regulate and protect that water under the State's standards. Areas that should be solely under the regulatory control of the Commonwealth are now also under federal control. This infringement on state sovereignty is a harm. *See Tennessee v. Dep't of Educ.*, 104 F.4th 577, 591–92 (6th Cir. 2024) (explaining that sovereign interests can establish Article III standing).

22. The current regulatory scheme also harms Kentucky as a landowner. The Commonwealth owns thousands of acres. *See* Storm Declaration, Exhibit 5; *see* Shell Declaration, Exhibit 6. Given the water-abundant character of the Commonwealth, much of this property has some form of water feature. *See ibid*. A broader definition of "waters of the United States" therefore, limits the freedom of the Commonwealth to engage in projects on many of its properties. *See* Storm Declaration, Exhibit 5; *see also Sackett*, at 669 ("[T]he CWA can sweep broadly enough to criminalize mundane activities like moving dirt[.]"). This is particularly true because the current regulatory scheme is unclear as to what constitutes "waters of the United States."

23. For instance, the Kentucky Department of Fish & Wildlife Resources ("KDFWR") owns approximately 169,373 acres throughout the Commonwealth. Storm Declaration, Exhibit 5. It manages these acres as part of conserving, protecting, and enhancing Kentucky's fish and wildlife resources and providing "opportunities for hunting, fishing, trapping, boating, shooting sports, wildlife viewing and related activities on those properties." *Id*. For projects on these properties that impact a "water of the United States," KDFWR must seek a federal permit and sometimes pay mitigation fees. *See id*. A broader definition of "waters of the United States" will increase the number of projects for which KDFWR must seek permits and pay mitigation. "This means the department must expend more of its general funds to do projects and could potentially cause the department to forego some projects because it could not justify the mitigation fees." *Id*.

24. The current regulatory scheme brings within the scope of federal jurisdiction many more waters than under a proper reading of the Clean Water Act. The KDFWR identified three examples of properties it owns that have water features that should be solely under the Commonwealth's jurisdiction, but due to the subjective and ill-defined criteria of the Final (and Amended) Rule would be considered "waters of the United States."

25. First, the KDFWR headquarters located in Franklin County has two impoundments. Prather Declaration, Exhibit 7. Seasonally, an uphill marsh will overflow into the upper impoundment, which may also overflow into the lower impoundment. *Id*. The lower impoundment also overflows sometimes. *Id*. The flowpath proceeds through various water features until the water eventually makes its way to the Kentucky River, which is a navigable water. *See id*; *see also* Map 1, Exhibit 8; Map 2, Exhibit 9. The Agencies explained in the Final Rule that covered tributaries are "rivers, streams, lakes, ponds, and impoundments, regardless of their flow regime, that flow directly or indirectly through another water or waters to a traditional navigable water." Final Rule at 3,080. According to the Agencies, any such water is jurisdictional if it "eventually flows to a traditional navigable water." *Id*. Under this definition, the impoundments at the KDFWR headquarters are now waters of the United States.

26. Second, KDFWR owns the West Kentucky Wildlife Management Area ("WMA"). Prather Declaration, Exhibit 7. The West Kentucky WMA has a creek running through the property. Map 3, Exhibit 10. There are wetlands on the property

that are disconnected from the creek. *See id*. Post-*Sackett*, all wetlands need a "continuous surface connection" with the navigable water to be jurisdictional, 598 U.S. at 678, but the Agencies left untouched the explanation in the Final Rule that "continuous surface connection" "does not require the continuous presence of surface water between the adjacent wetland and relatively permanent paragraph (a)(2) impoundment or jurisdictional tributary," Final Rule at 3,096. Thus, although under controlling Supreme Court precedent, the unconnected wetlands on the West Kentucky WMA are not "waters of the United States," under the current regulatory scheme the Agencies assert jurisdiction over them.

27. Third, KDFWR also owns property in Carlisle County which is managed as the Winford WMA. Prather Declaration, Exhibit 7. This WMA has a creek running around the northern edges of the WMA and flowing into a lake on the property. *Id*; Map 4, Exhibit 11. Separate from the lake are several disconnected oxbow lakes, which are near the creek, but do not have a flowing outlet to the tributary system. *See* Prather Declaration, Exhibit 7. Under the Final (and Amended) Rule, an oxbow lake or pond can be deemed jurisdictional so long as it is "near" a "traditional navigable water" and connected to a dry swale land form that "provides a continuous surface connection." Final Rule at 3,102.

28. Additionally, Kentucky will incur compliance costs under the Amended Rule, and these compliance costs constitute a redressable injury-in fact. *See Ky. v. FHWA*, No. 5:23-cv-162, 2024 WL 1402443, at *3 (W.D. Ky. Apr. 1, 2024); *Commonwealth v. Biden*, 57 F.4th 545, 556 (6th Cir. 2023).

29. Kentucky must expend time and resources to determine which areas constitute "waters of the United States" under the ambiguous Amended Rule so it can comply with the requirements under the CWA. *See* 33 U.S.C. § 1313 (requiring States to enact Water Quality Standards for waters within the definition of WOTUS); 33 U.S.C. § 1315 (requiring States to submit a biennial water quality report describing "the water quality of all navigable waters in such State"); 33 U.S.C. § 1341 (requiring all federal permit applicants to obtain a certification from the State in which the proposed discharge of a pollutant into waters of the United States would occur).

30. The Kentucky Energy and Environment Cabinet ("EEC") spent 97.25 hours training and preparing to familiarize staff on the Rule. Exhibit 12.[1]

31. As a landowner, Kentucky must expend time and resources determining which areas it owns now constitute "waters of the United States" and then spend the time and effort to obtain the necessary permits. *See* Storm Declaration, Exhibit 5.

32. The Agencies are well aware of these costs. In the Economic Analysis, "[t]he agencies acknowledge that there would likely be some administrative costs associated with regulated entities as well as States, Tribes and localities reviewing the final rule language and ensuring their activities going forward are in keeping with it." *Economic Analysis for the Final "Revised Definition of 'Waters of the United States'" Rule*, U.S. EPA and Dep't of the Army (Dec. 2022) ("Economic Analysis"), Exhibit 13 at xii. "The agencies also acknowledge that there would likely be some

[1] This excel sheet was produced by the EEC in response to an open records request made by the Office of the Attorney General.

minimal increased costs associated with regulated entities obtaining permits and complying with mitigation requirements under section 404[.]" *See id.* at xii.

33. While the Agencies claim any increased costs would be *de minimis*, "[t]he agencies note that the economic analysis of the secondary baseline is subject to various layers of uncertainty regarding the potential implications of the change in CWA jurisdiction as well as data limitations. Notably, the main challenge is quantifying the amount, type, and location of water resources that are affected by the changing definition of 'waters of the United States.'" *Id.* at xiii.

34. Under both the Amended Rule and the Final Rule, "the number of Clean Water Act section 404 permits would be expected to increase since certain features would no longer be categorically excluded from the definition of "waters of the United States." *See id.* at xix. According to the Agencies, "[a]n increase in Clean Water Act section 404 permits could result in costs to states . . . by increasing the number of section 401 reviews and required staff time." *Id.*

35. Indeed, this has been the case in Kentucky. Since the effective date of the Final Rule, EEC conducted 2,219 certification reviews. Exhibit 12. This is an increase. Prior to the Final Rule, the Energy and Environment Cabinet ("EEC" or "Cabinet") conducted around 81 reviews per month.[2] After the Final Rule, the Cabinet has conducted around 123 reviews per month.[3]

[2] The EEC reported to the Office of the Attorney General that between January 1, 2015 and March 19, 2023 (about 98 months), it conducted 7,958 reviews. *See* Exhibit 12.

[3] EEC reported conducting 2,219 reviews between March 20, 2023 and September 30, 2024 (about 18 months). *Id.*

36. The Agencies project total national annualized compliance costs, relative to the secondary baseline of the 2020 NWPR (with a 7% discount rate) as follows:

a. Mitigation Costs: $182.6 million to $405.5 million.

b. Permit Costs: $43.3 million to $141.5 million.

c. State Costs from increases in Section 401 reviews: $0.7 million to $21.8 million.

Economic Analysis, Exhibit 13 at xv. Thus, even considering only the State costs from increases in Section 401 reviews, the Agencies acknowledge that Kentucky will incur some additional costs.

37. The compliance costs—even if they were only *de minimis* as the Agencies assert, Final Rule at 3,049, 3,139—are an injury. *See Commonwealth v. Biden*, 57 F.4th at 556 ("[T]he peculiarity and size of a harm affects its weight in the equitable balance, not whether it should enter the calculus at all.").

38. Outside of the compliance costs to administer the rule, as a landowner, the Commonwealth will incur costs as it complies with the permitting requirements. Obtaining a discharge permit is an expensive and time-consuming process. It can cost hundreds of thousands of dollars and take years. *See Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 594–95 (2016). "For a specialized 'individual' permit . . . one study found that the average applicant 'spends 788 days and $271,596 in completing the process,' without 'counting costs of mitigation or design changes.'" *Id.* (quoting *Rapanos v. United States*, 547 U.S. 715, 721 (2006)). "Even more readily available

'general' permits took applicants, on average, 313 days and $28,915 to complete." *Id.* at 595. And, as the Supreme Court noted in *Sackett*, "[s]uccess is . . . far from guaranteed, as the Corps has asserted discretion to grant or deny permits based on a long, nonexclusive list of factors that ends with a catchall mandate to consider 'in general, the needs and welfare of the people.'" *Sackett*, 598 U.S. at 661 (quoting 33 C.F.R. § 320.4(a)(1) (2022))

39. Discharging materials into the "waters of the United States" without a permit is also costly. Doing so can result in civil penalties of thousands of dollars per violation, per day, as well as criminal penalties. *See generally Hanousek v. United States*, 528 U.S. 1102 (2000) (Thomas, J., dissenting from the denial of certiorari); *Cnty. of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165, 206 (2020) (Alito, J., dissenting) (noting the "crushing" "criminal penalties and steep civil fines"); *see also* 33 U.S.C. §§ 1319, 1365; 40 C.F.R. § 19.4.

40. The Amended Rule also imposes an indirect economic impact on Kentucky. The expanded federal regulatory authority imposes burdens on farmers, ranchers, homeowners, miners, and business owners within the Commonwealth who will incur costly consultant fees to determine if any portion of their land falls within the Amended Rule's current definition of "waters of the United States." The ambiguity of the Amended Rule could also lead to decreased property values, which would result in less taxes for the Commonwealth. Moreover, if businesses and individuals cannot easily ascertain whether they will need federal permitting, they may choose to leave or not come in the first place. The ambiguity of the Amended

Rule therefore poses a particular harm for States like Kentucky where water features are abundant.[4]

41. Moreover, the Act allows for "citizen suits." Any "person or persons having an interest which is or may be adversely affected" may bring suit against "any person," including "any . . . governmental instrumentality or agency to the extent permitted by the eleventh amendment to the [U.S.] Constitution[] who is alleged to be in violation of . . . an effluent standard or limitation under this chapter or . . . an order issued by the Administrator or a State with respect to such a standard or limitation[.]" 33 U.S.C. § 1365(a), (g). These suits impose costs on the Commonwealth, and the ambiguity of the Amended Rule means more suits will be brought because it is not clear what constitutes a violation under the Act.

42. Finally, Kentucky has standing as an object of the challenged action. *See Rice v. Vill. Of Johnstown, Ohio*, 30 F.4th 584, 592 (6th Cir. 2022) ("When the plaintiff is an object of the challenged action there is ordinarily little question that the action or inaction has caused him injury." (citation omitted)). As a landowner, Kentucky is the object of the Amended Rule because the Agencies' interpretation will determine whether Kentucky must seek federal permitting for any projects. As a sovereign, Kentucky is the object of the Rule because the Agencies' interpretation is redefining the scope of the States' authority to regulate intrastate waters. Additionally, Kentucky's state agency tasked with completing section 401 reviews must apply the

[4] Kentucky has more miles of running water than any other state except Alaska. *See* UK Kentucky Geological Survey, Water Fact Sheet, *available at* https://www.uky.edu/KGS/education/factsheet/factsheet_water.pdf.

Agencies' interpretation. As a result, "there can be 'little question' that the rule does injure" Kentucky. *West Virginia v. EPA*, 597 U.S. 697, 719 (2022) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992)). "So [Kentucky has] standing to complain that the [Agencies] overstepped [their] authority." *Kentucky v. Fed. Highway Admin.*, No. 5:23-CV-162-BJB, 2024 WL 1402443, at *3 (W.D. Ky. Apr. 1, 2024).

BACKGROUND

I. The Clean Water Act

43. Congress passed the Clean Water Act in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through a cooperative federalism scheme. 33 U.S.C. § 1251(a).

44. Under the CWA, Congress granted the EPA and the Corps regulatory authority over "navigable waters," which the statute defines as "waters of the United States." *See* 33 U.S.C. §§ 1342, 1344, 1362(7). Both the statutory language and Supreme Court precedent make clear that this term does not extend to every body of water in the United States. States retain their sovereign responsibility and authority to regulate lands and waters within their borders. Under the CWA, the Agencies must "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). Accordingly, Congress granted the Agencies only limited authority to regulate the discharge of certain materials into "navigable waters" through permitting programs. *See generally* 33 U.S.C. §§ 1341–1346.

45. Under the CWA, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). "The discharge of a pollutant" is defined broadly to include "any addition of any pollutant to navigable waters from any point source," *id.* § 1362(12), and "pollutant" is defined broadly to include more benign solids such as "dredged spoil, . . . rock, sand, [and] cellar dirt," *id.* § 1362(6).

46. There are some exceptions to the CWA's prohibition against discharging pollutants. Section 1342(a)(1) of the Act authorizes the EPA or the State to "issue a permit for the discharge of any pollutant, . . . notwithstanding section 1311(a) of this title[.]" *See also id.* § 1344(a), (b). And Section 1344 authorizes the Corps or the State to "issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites." *Id.* § 1344(a), (g).

47. The Clean Water Act clearly establishes a cooperative system with the States. All landowners in Kentucky who are applying for a permit under the CWA—whether for pollutants or dredge and fill material—must obtain a statement from the Commonwealth, certifying that the discharge will comply with Kentucky's Water Quality Standards ("WQS"). *See id.* § 1341(a)(1). The Act requires States to establish these WQS or goals for each area falling within the definition of "waters of the United States." *See id.* §§ 1311, 1313; 40 C.F.R. §§ 130.3, 131.3(i), 131.4(a). If a water body fails to meet the WQS, Kentucky must set Total Maximum Daily Loads limiting the amount of a pollutant that can be discharged into the water while achieving the WQS. *See* 40 C.F.R. § 130.7. Kentucky must then apply the limit to its water quality management plan and permitting programs. *Id.* Kentucky also helps implement the

National Pollution Discharge Elimination System permitting program. *See* 33 U.S.C. § 1342; Ky. Rev. Stat. § 224.16-050.

48. The CWA also requires Kentucky to submit a water quality report to the EPA biennially that describes "the water quality of all navigable waters" in the Commonwealth and analyzes the extent to which these waters provide for "the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities in and on the water." 33 U.S.C. § 1315(b)(1)(A)–(B).

II. Defining "waters of the United States"

49. While the Agencies—and even some courts—have struggled to agree on the breadth of the meaning of "waters of the United States," the basis for Congress' authority to enact the CWA necessarily sets the outer boundaries for what constitutes waters of the United States—that is, for what waters the federal government can regulate.

50. The Commerce Clause grants Congress power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. "From the beginning, it was understood that 'the power to regulate commerce, includes the power to regulate navigation,' but only 'as connected with the commerce with foreign nations, and among the states.'" *Sackett*, 598 U.S. at 686–87 (Thomas, J., concurring) (quoting *United States v. Coombs*, 12 Pet. 72, 78 (1838)); *Gibbons v. Ogden*, 9 Wheat. 1, 190 (1824) ("All America understands . . . the word 'commerce,' to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed.").

51. In a predecessor statute to the CWA, Congress used the term "navigable waters." *See Sackett*, 598 U.S. at 661 (citing 33 U.S.C. § 1160(a) (1970 ed.)). The Supreme Court interpreted this phrase to mean "navigable in fact," that is, waters that "are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *The Daniel Ball*, 77 U.S. 557, 563 (1870). In the same case, the Supreme Court made a distinction between navigable waters of the United States and "navigable waters of the States." *Id*. Waters that are navigable only within a State are not waters of the United States. *See United States v. The Montello*, 11 Wall. 411, 415 (1871); c*f. The Daniel Ball*, 77 U.S. at 564.

52. This was still the understanding when the CWA was enacted. Leading up to and around the time of enactment, courts "continued to apply traditional navigability concepts" in cases involving the regulation of waters. *Sackett*, 598 U.S. at 698 (Thomas, J., concurring) (citing *United States v. Standard Oil Co.*, 384 U.S. 224, 226 (1966) and *United States v. Republic Steel Corp.*, 362 U.S. 482, 487–91 (1960); *see Hardy Salt Co. v. Southern Pacific Transp. Co.*, 501 F.2d 1156, 1167 (10th Cir. 1974) ("Although the definition of 'navigability' laid down in *The Daniel Ball* has subsequently been modified and clarified, its definition of 'navigable water of the United States,' insofar as it requires a navigable interstate linkage by water, appears to remain unchanged." (internal citations omitted)).

53. Accordingly, when Congress enacted the CWA, the terms "'navigable waters,' 'navigable waters of the United States,' and 'waters of the United States'

were still understood as invoking only Congress' authority over waters that are, were, or could be used as highways of interstate or foreign commerce." *Sackett*, 598 U.S. at 685, 698 (Thomas, J., concurring). And these terms were used interchangeably. *See id*. at 699. "The terms 'navigable waters' and 'waters of the United States' shared a core requirement that the water be a 'highway over which commerce is or may be carried,' with the term 'of the United States' doing the independent work of requiring that such commerce 'be carried on with other States or foreign countries.'" *Id*. (quoting *The Daniel Ball*, 10 Wall. at 563). As Justice Thomas noted in his concurrence in *Sackett*, "[i]t would be strange indeed if Congress sought to effect a fundamental transformation of federal jurisdiction over water through phrases that had been in use to describe the traditional scope of that jurisdiction for well over a century and that carried a well-understood meaning." *Id*.

54. Indeed, the Corps issued a rule a few years after the CWA was enacted that reflected the well-understood meaning. The rule defined "waters of the United States" as those waters that have been, are, or may be, used for interstate or foreign commerce. *Permits for Activities in Navigable Waters or Ocean Waters*, 39 Fed. Reg. 12,115, 12,119 (Apr. 3, 1974) ("The term 'navigable waters of the United States' and 'navigable waters,' as used herein mean those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce.").

55. However, not everyone agreed. A year after the enactment of the Clean Water Act, the General Counsel of the EPA issued an opinion asserting "the deletion of the word 'navigable' eliminates the requirement of navigability." *Sackett*, 598 U.S. at 701 (Thomas, J., concurring) (quoting 1 EPA Gen. Counsel Op. 295 (1973)). The D.C. Circuit court similarly believed that "waters of the United States" as used in the Act was "not limited to the traditional tests of navigability." *See Natural Res. Def. Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975).

56. Yet, the Supreme Court explicitly rejected these views in *SWANCC* when it held that use of the phrase 'waters of the United States' in the CWA is not "a basis for reading the term 'navigable waters' out of the statute." *Solid Waste Agency of Northern Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) ("The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA; its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."). The Court also expressly held that the Corps did not "mist[ake] Congress' intent" when it promulgated the 1974 regulations where navigability was a determinative factor. *Id*. at 168. Rather, the Agencies' broader assertion of jurisdiction tested "the outer limits of Congress's power" and thereby impermissibly "alter[ed] the federal-state framework by permitting federal encroachment upon a traditional state power." *See id*. at 172–74.

57. In *Rapanos*, the Supreme Court again rejected the Agencies' assertion of broader jurisdiction. Specifically, the Court considered which, if any, non-navigable

tributaries of traditional navigable waters are jurisdictional under the Act and what is required for a wetland to be considered "adjacent" to navigable waters. *Rapanos*, 547 U.S. at 731–42. The majority of the Court rejected the Agencies' expansive jurisdictional claim across two opinions.

58. Justice Scalia's plurality opinion emphasized that the traditional concept of "navigable waters" must inform and limit the construction of the phrase "the waters of the United States." *See id.* at 734. With that in mind, the plurality held that only "relatively permanent, standing or continuously flowing bodies of water," as well as other waters with a "continuous surface connection" to such relatively permanent waters, qualify as "waters of the United States." *Id.* at 739, 742. "Wetlands with only an intermittent, physically remote hydrologic connection," the plurality explained, do not fall within the Agencies' jurisdiction. *Id.* at 742.

59. Writing separately, Justice Kennedy explained that the Agencies' jurisdiction extends only to primary "waters that are or were navigable in fact or that could reasonably be so made" and to other waters with a "significant nexus" to traditionally navigable waters. *Id.* at 759, 779 (Kennedy, J., concurring in the judgment). To satisfy that nexus, the other waters must "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780.

60. After *Rapanos*, the Agencies issued a guidance document, in which they explained they would assert jurisdiction "over a water body if either the plurality's [relatively permanent] *or* Justice Kennedy's [significant nexus] standard [was]

satisfied."[5] A 2015 rule promulgated by the Agencies similarly asserted broad jurisdiction. *Clean Water Rule: Definition of "Waters of the United States*," 80 Fed. Reg. 37,054 (June 29, 2015).

61. But two federal courts found the 2015 rule unlawful, in part because it "read[] the term navigability out of the CWA." *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1358 (S.D. Ga. 2019)[6]; *Texas v. EPA*, 389 F. Supp. 3d 497 (S.D. Tex. 2019). So the Agencies rescinded the 2015 Rule and in April of 2020 adopted the *Navigable Waters Protection Rule: Definition of "Waters of the United States*," 85 Fed. Reg. 22,250 (Apr. 21, 2020) ("2020 Rule"). The 2020 Rule narrowed the Agencies' jurisdiction by limiting it to traditional navigable waters and their tributaries, lakes, and adjacent wetlands. *See id*. at 22, 251. It defined adjacent to mean wetlands that abut covered waters, are flooded by those waters, or are separated from those waters either by natural features or by artificial features if they allow "for a direct hydrologic surface connection." *Id*.

62. After President Biden took office, he issued Executive Order 13990, which directed federal agencies to "immediately review, and . . . take action to address the promulgation of Federal regulations and other actions during the last 4 years that conflict with . . . work to confront the climate crisis." 86 Fed. Reg. 7037 (Jan. 20, 2021). In response, the Agencies decided to initiate new rulemaking to again revise the definition of "waters of the United States."

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[5] EPA & Army Corps of Eng'rs, "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States*," at 3 (Dec. 2, 2008), https://perma.cc/KJD4-L33Y (emphasis added).

[6] Kentucky was a plaintiff in this litigation.

63. On December 7, 2021, the Agencies published a proposed rule titled, *Revised Definition of "Waters of the United States*." 86 Fed. Reg. 69,372 (Dec. 7, 2021) ("Proposed Rule"). The Proposed Rule claimed to "restore the longstanding, familiar 1986 regulations, with amendments to reflect the agencies' determination of the statutory limits on the scope of the 'waters of the United States' informed by Supreme Court case law." *Id.* at 69,416. In reality, it was a significant expansion of the Agencies' jurisdiction under the CWA.

64. During the notice and comment period, Kentucky—along with 23 other States—argued the proposed rule was unlawful.[7] Among other things, the States explained the Proposed Rule exceeded the Agencies' statutory authority, and the proposed "significant nexus" standard was inconsistent with even Justice Kennedy's *Rapanos* concurrence.[8] According to Justice Kennedy, non-navigable jurisdictional water must "significantly affect the chemical, physical, *and* biological" integrity of navigable waters. *Rapanos*, 547 U.S. at 780 (emphasis added). But the Proposed Rule sought to regulate non-navigable waters so long as they "significantly affect[] the chemical, physical, *or* biological" integrity of the navigable waters. 86 Fed. Reg. at 69,373 (emphasis added). The States asserted "[t]his swap might triple the Agencies' jurisdiction over water and land."[9] The States also noted that the viability of Justice

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[7] Comments of the States of West Virginia, Alabama, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wyoming, the Commonwealth of Kentucky, and the Commonwealth of Virginia, on the Proposed Rule Entitled Revised Definition of "Waters of the United States," 86 Fed. Reg. 69,372 (Dec. 7, 2021), Dkt. No. EPA-HQ-OW-2021-0602 (Feb. 7, 2022). A true and correct copy of the States' Comment Letter is attached as Exhibit 13.

[8] *Id.* at 6.

[9] *Id.* at 7.

Kennedy's significant nexus standard was then pending before the Court in *Sackett v. EPA*, and thereby counseled against its incorporation in the final rule.[10]

III. The Final Rule

65. Rather than wait for the Supreme Court's opinion in *Sackett*, the Agencies published the Final Rule in the Federal Register on January 18, 2023. Final Rule at 3,004. Like the 2015 Rule, the Final Rule took a broad interpretation of the Agencies' jurisdiction under the CWA.

66. The Final Rule allowed for jurisdiction where a water met either the relatively permanent standard or the significant nexus standard. And it continued to modify the language of Kennedy's significant nexus standard. *See id.* at 3,142–44. The Final Rule created a catch-all category for any other intrastate lakes, ponds, streams, and wetlands that met either the relatively permanent or significant-nexus standards. *Id.* at 3,097–98. Moreover, it purported to cover all interstate waters regardless of navigability, *id.* at 3,072, and asserted jurisdiction over "perennial, intermittent, and ephemeral streams," *id.* at 3,030.

67. The Final Rule also construed terms in novel and overly broad ways. For instance, the Agencies offered a new construction of "relatively permanent" for tributaries, under which a tributary would be considered "relatively permanent" if it contained "flowing or standing water year-round or continuously during certain times of the year." *Id.* at 3,084. The Agencies also redefined tributaries to cover any watercourse so long as it made its way to a traditional navigable water, territorial

[10] *See id.* at 4–5.

sea, or interstate water by any wet or dry waterway, such as wetlands, ditches, or waste treatment centers. *Id*. at 3080. Further, the Agencies asserted the significant nexus standard could reach all "reasonably close" wetlands." *Id*. at 3,089–90.

IV. *Sackett v. EPA*

68. The Supreme Court took the opportunity in *Sackett* to clarify what the CWA means by "waters of the United States." All nine justices agreed that the Agencies' interpretation of "waters of the United States" was impermissibly broad. Justice Alito delivered the opinion of the court and explained that the Court concluded the "*Rapanos* plurality was correct: the CWA's use of 'waters' encompasses only those relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes." *Sackett*, 598 U.S. at 671 (cleaned up, internal quotation marks omitted). Specifically, the Court reaffirmed its refusal to read "navigable" out of the CWA because the term "at least shows that Congress was focused on 'its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.'" *Id*. at 672 (citation omitted).

69. And since the Agencies had already promulgated the Final Rule, the Supreme Court addressed it directly. The Court refused to defer to the EPA's understanding of the CWA's jurisdictional reach as set out in the Final Rule. It found the Agencies' interpretation was "inconsistent with the text and structure of the CWA" and that the Agencies failed to provide clear evidence that Congress authorized them to regulate in the manner the Final Rule proposed. *Id*. at 679. Further, the

Court found the Agencies' interpretation of their jurisdiction in the Final Rule "gives rise to serious vagueness concerns in light of the CWA's criminal penalties." *Id.* at 680.

70. The Court also repeatedly noted that States, not the Agencies have the primary responsibility for regulating water. *See, e.g., id.* at 674, 680, 683.

V. The Amended Rule

71. In response to *Sackett*, on September 8, 2023—without giving notice or providing an opportunity for comments—the Agencies published the Amended Rule.

72. The Amended Rule is less than six pages long and makes only a handful of revisions. *See* Exhibit 15. Therefore, it must be read in conjunction with the Final Rule to understand how the Agencies now purport to define "waters of the United States." When read accordingly, it is clear the Amended Rule did not moot Kentucky's claims asserted against the Final Rule. The current regulatory scheme still exceeds the scope of the Agencies' authority under the CWA and the Amended Rule did little to address the issues that prompted Kentucky and twenty-six other States to challenge the Final Rule.

73. Like the Final Rule, the Amended Rule defines the waters of the United States to include five categories. *See* Amended Rule at 61,969; *see also* Exhibit 15. Under the current regulatory scheme, the Agencies assert jurisdiction over:

a. Waters that are, were, or could be used in interstate or foreign commerce, the territorial seas, and interstate waters;

b. Impoundments;

c. Tributaries of certain waters identified in the first category;

d. Wetlands adjacent to certain waters; and

e. Intrastate waters not already identified as jurisdictional that meet the relatively permanent standard.

See ibid.

74. The Agencies made just four substantive changes to the Final Rule in the Amended Rule.[11] First, the Amended Rule eliminates the various references to the significant nexus test, Exhibit 15, which the Supreme Court held in *Sackett* was inconsistent with the Agencies' authority under the CWA, 598 U.S. at 680. Second, the Agencies delete the language that explicitly said interstate wetlands were waters of the United States. *See* Exhibit 15. Third, they deleted the explicit reference to "streams" and "wetlands" in the fifth category of waters. *See id.* Fourth, the Agencies amended the definition of "adjacent" in light of the Supreme Court's decision in *Sackett*. *See id.*

75. However, there are notable aspects of the Final Rule that the Agencies did not change—and the failure[12] to do so means the Amended Rule exceeds the Agencies' authority and violates the APA and the U.S. Constitution.

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[11] Some of the changes are repeated because they appear in multiple sections.

[12] Leaving as much of the Final Rule in place as possible was intentional. The Biden-Harris administration condemned the *Sackett* decision. *See* White House, *Statement from President Joe Biden on Supreme Court Decision in* Sackett v. EPA (May 25, 2023), https://bit.ly/3Xx95V7 ("The Supreme Court's disappointing decision in *Sackett v. EPA* will take our country backwards."). And the minimal changes made by the Amended Rule are indicative of the Biden-Harris administration's view and desire to keep as much of the Final Rule as possible. *See* Amended Rule at 61,966 (explaining that "[t]he agencies will continue to interpret the remainder of the definition of 'waters of the United States'" as they did in the "2023 Rule," as they believed that was "consistent with the *Sackett*

CLAIMS FOR RELIEF

Count One:
The Amended Rule exceeds the authority of the Clean Water Act.

76. The Plaintiff incorporates by reference the preceding allegations of this Complaint as if fully set forth herein.

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

78. Yet, the Amended Rule's definition of "waters of the United States" conflicts with the plain language of its authorizing statute, the CWA.

79. The CWA necessarily reflects that Congress' authority for the CWA comes from the Commerce Clause. Therefore, it authorizes the Agencies to assert jurisdiction over only "navigable waters," defined as "waters of the United States." 33 U.S.C. §§ 1311, 1342, 1344, 1362(7), (12).

80. Under the Commerce Clause, Congress is empowered only to "regulate Commerce . . . among the several states." U.S. CONST. art. I, § 8, cl. 3. As a result, Congress may regulate the "use of the channels of interstate commerce" and "activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

81. Like the Final Rule, the Amended Rule ignores these limitations.

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decision"); *see also id.* at 61,967 (describing "the agencies' intent . . . to preserve [any] remaining portions [of the 2023 Rule] to the fullest extent," even if other parts are struck down or stayed).

82. First, the Amended Rule does nothing to correct the Agencies' failure to consider navigability. In the Final Rule—and unchanged by the Amended Rule—Federal Agencies identify "interstate waters" as "all rivers, lakes, and other waters that flow across, or form a part of, State boundaries." Final Rule at 3,072. And the Agencies explain that the categorical protections for interstate waters apply "regardless of their navigability." *Id*.

83. Classifying all "interstate waters," including water features like ditches, ephemeral streams, and ponds[13]—all of which were included under the Final Rule and were not excluded in the Amended Rule—as waters of the United States impermissibly ignores the foundation of the CWA's jurisdiction: navigable waters.

84. And it is contrary to the Supreme Court's opinion in *Sackett*, where the Court noted the CWA prohibits the discharge of pollutants into only navigable waters. 598 U.S. at 661. In fact, the Supreme Court clarified that "[a]lthough we have acknowledged that the CWA extends to more than traditional navigable waters, we have refused to read 'navigable' out of the statute, holding that it at least shows that Congress was focused on its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id*. at 672.

85. The Agencies cannot simply ignore this determination by the Supreme Court or the foundation for the CWA and their authority in the first place. The

[13] Although the Amended Rule eliminated "wetlands" from this category, it said nothing about the other features, including ditches, which the Agencies had explicitly included if they crossed state lines "even if the water would otherwise meet the criteria for an exclusion" as a ditch. Final Rule at 3,067.

Agencies exceed their authority under the CWA when they continue to assert jurisdiction over waters without regard to navigability.

86. Second, like the Final Rule, the Amended Rule fails to define "impoundments" with adequate specificity. No changes were made to the Final Rule's language regarding impoundments in the Amended Rule, and the Final Rule qualified impoundments as jurisdictional whether or not the impoundment is hydrologically connected to the impounded Traditional Water, Jurisdictional Tributary, or Jurisdictional Wetland. The Final Rule included off-channel impoundments ("an impoundment with no outlet or hydrologic connection to the tributary network"), Final Rule at 3,077–78, and waters wholly separated by dams because dams "generally do not prevent all water flow, but rather allow seepage under the foundation of the dam and through the dam itself," *id.* at 3,076. Thus, under the Final Rule—and now the Amended Rule—whether an impoundment is jurisdictional is divorced from whether it bears a relatively permanent connection to a jurisdictional water.

87. In *Sackett*, the Court said the Agencies did not have jurisdiction over wetlands lacking a continuous surface connection to "proper"—that is, navigable—waters of the United States because the wetland needs to be "indistinguishable" from the navigable water for jurisdiction over the navigable water to extend to the wetland. *Sackett*, 598 U.S. at 678. The Supreme Court gave no indication a more attenuated connection would be acceptable for impoundments, and the Agencies offer no reason why the Clean Water Act permits it.

88. Moreover, under the Final and Amended Rule, impoundments can also be jurisdictional "regardless of the water's jurisdictional status at the time the impoundment was created." Final Rule at 3,078. If the water body impounded was not a "water of the United States" at the time it was impounded, but has since become one, the impoundment is now jurisdictional. *See id*. Yet, if the water was once jurisdictional, but is no longer, the impoundment remains jurisdictional. *Id*.

89. The Agencies' treatment of impoundments ignores navigability in direct contradiction to *Sackett*, which recognized that "a barrier separating a wetland from a water of the United States would ordinarily remove that wetland from federal jurisdiction." 598 U.S. at 678, n.16. After *Sackett*, it is also clear there may be instances where changes mean waters that once were jurisdictional are no longer jurisdictional because they no longer satisfy the Court's test. *See id*. at 678–79. The Agencies cannot continue to assert permanent jurisdiction under the CWA just because a water once was jurisdictional. The Agencies should have made changes in the Amended Rule to address this with respect to impoundments but they failed to do so.

90. The Amended Rule also makes no changes to the treatment of tributaries. Under the Final Rule, jurisdictional tributaries include "rivers, streams, lakes, ponds, and impoundments, regardless of their flow regime, that flow directly or indirectly through another water or waters to" "Traditional Waters." Final Rule at 3,080. According to the Agencies, "indirect" flow could be through "a number of downstream waters"—including non-jurisdictional features like a ditch—so long as it

is "part of a tributary system that *eventually* flows to" a Traditional Water. *Id.* (emphasis added).

91. The Agencies also assert manmade features may be tributaries "so long as they contribute flow to" a traditional water, *id.*, and flow can include still water and waters that flow only at "certain times of the year," *id.* at 3084–85. Indeed, the Agencies would consider a tributary jurisdictional even if it does not "have a surface flowpath all the way down to the [traditional waters]." *Id.* at 3084.

92. This would capture innumerable water features that should be under the exclusive control of the Commonwealth. *See, e.g.*, Prather Declaration, Exhibit 7; Map 1, Exhibit 8; Map 2, Exhibit 9. Again, the Agencies are impermissibly ignoring navigability, the foundational predicate to Congress'—and thereby, their own—authority under the CWA. This they cannot do.

93. Even with respect to wetlands, the Amended Rule still exceeds the Agencies' authority. In response to *Sackett*, the Agencies took out references to wetlands that made them automatically jurisdictional waters and redefined "adjacent" as "having a continuous surface connection." Amended Rule at 61,969. However, the Agencies left untouched the Final Rule's explanation that "continuous surface connection" "does not require surface water to be continuously present between the adjacent wetland and relatively permanent paragraph (a)(2) impoundment or jurisdictional tributary." Final Rule at 3,096.

94. This cannot be reconciled with the Supreme Court's conclusion in *Sackett* that for the Agencies to have authority over wetlands under the CWA, the

wetlands must be "indistinguishable" from "waters of the United States." 598 U.S. at 678. While the Supreme Court acknowledged there may be "temporary interruptions in surface connection" because of low tides or dry spells, *id*., the Agencies' conclusion does not appear to be similarly limited to only allowing jurisdiction where—absent something unusual—there would be a continuous surface connection. Rather, the Agencies pay lip service to the Court's opinion in *Sackett* by changing the definition in the Rule but leaving in place explanatory language that would allow the Agencies to continue broadly construing their authority.

95. Finally, the Amended Rule retains the problematically vague and broad catchall category of other jurisdictional intrastate waters. The final category purports to assert jurisdiction over intrastate waters that are not traditional waters, territorial seas, interstate waters, impoundments, or wetlands without grappling with the Supreme Court's recent clarity that the Agencies' authority under the CWA is unavoidably linked to the Commerce Clause and therefore navigability. And it ignores the principles the Supreme Court emphasized in *Sackett* about the type of connection waters need. For instance, the Amended Rule leaves untouched the Final Rule's assertion that Agencies have jurisdiction over "standing water" that "do[es] not have a flowing outlet to the tributary system." Final Rule at 3,102. Indeed, by the Agencies' own explanation, an oxbow pond can be deemed jurisdictional so long as it is "near" a "traditional navigable water" and connected to a dry swale land form. *Id*.

96. The Agencies completely fail to respect the foundation and the scope of their authority under the CWA in the Amended Rule. Therefore, for exceeding its statutory authority, the Amended Rule should be set aside.

Count Two:
The Amended Rule is impermissibly vague.

97. The Plaintiff incorporates by reference the preceding allegations of this Complaint as if fully set forth herein.

98. The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend V. "[T]he Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357–358 (1983); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (explaining the Due Process Clause requires adequate notice of what conduct is forbidden before criminal or civil penalties may attach, and may not be so incomplete, vague, indefinite, or uncertain that persons of common intelligence must necessarily guess at its meaning and as to its application).

99. The language in the Amended Rule fails to give the Commonwealth as a landowner fair notice of when its conduct may be criminalized.

100. First, the Amended Rule fails to give adequate notice of what is, and what is not, "waters of the United States." Instead, it employs vague and undefined terms. For instance, the Amended Rule leaves unchanged the Final Rule's

explanation that "under this rule the relatively permanent standard encompasses surface waters that have flowing or standing water year-round or continuously during certain times of the year." Final Rule at 3,084. The only explanation the Agencies give as to what constitutes "certain times of the year" is to say that the phrase "is intended to include extended periods of standing or continuously flowing water occurring in the same geographic feature year after year, except in times of drought." *id*. at 3,085, and that it means waters that are flowing "more than for a short duration in direct response to precipitation," *id*. at 3,087. That is not sufficiently clear that a landowner could know whether the regulation—and its penalties—apply.

101. The Amended Rule also does not clearly define the "continuous surface connection" standard that, working with relative permanence, drives the jurisdictional analysis. In the Final Rule, the Agencies explained they would find the required continuous connection even without water. *See, e.g.*, Final Rule at 3,051; *id*. at 3,095 (refusing to require a hydrologic connection or connection through jurisdictional waters and instead permitting connection through any discrete feature, like a pipe); *id*. at 3,096 ("A continuous surface connection is not the same as a continuous surface *water* connection."). But in *Sackett*, the Supreme Court clearly contemplated a continuous surface connection based on water. *See* 598 U.S. at 678 (explaining that a continuous surface connection would be present where it was "difficult to determine where the 'water' ends and the [water feature] begins").

102. Because the Agencies left the earlier explanations of "continuous surface connection" unchanged, landowners are left to guess whether water is required for a

continuous surface connection or if some other connection is sufficient to trigger the permitting requirements of the CWA.

103. Further, the Agencies make no attempt in the Amended Rule to reconcile how they described the relatively permanent standard in the Final Rule with *Sackett*. In the Final Rule, the Agencies criticized the 2020 Rule, and, in contrast to it, they described the relatively permanent standard as—at most—"administratively useful." Final Rule 3,007 ("The Agencies have concluded that while the relatively permanent standard is administratively useful . . . it is insufficient as the sole test for Clean Water Act jurisdiction."). Accordingly, the Agencies neglected to fully explain the relatively permanent standard in the Final Rule. Instead, they offered the unclear definition of "relatively permanent" as "waters that are relatively permanent, standing, or continuously flowing." *Id*. at 3,038, 3066. The Rule refused to provide useful benchmarks like minimum flow durations or references to sources, *id*. at 3,085–87, and instead suggested "relatively permanent flow" can result from intense storms. *Id*. at 3,086.

104. The Supreme Court made clear in *Sackett* that the relatively permanent standard was central to how waters of the United States should be determined. *See Sackett*, 598 U.S. at 671.

105. By failing to offer any new guidance on what "relatively permanent" means, the Amended Rule is as problematic as the Final Rule.

106. Just as the Supreme Court found in *Sackett*, "[t]his freewheeling inquiry provides little notice to landowners of their obligations under the CWA. Facing severe

criminal sanctions for even negligent violations, property owners are 'left to feel their way on a case-by-case basis.'" *Sackett*, 598 U.S. at 681 (citations omitted). Due process demands more than that. *See id*. at 680–81; *see also FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

107. The Amended Rule is impermissibly vague and should be set aside.

Count Three:
The Amended Rule violates the APA because it infringes the Commonwealth's sovereignty in violation of the Tenth Amendment.

108. The Plaintiff incorporates by reference the preceding allegations of this Complaint as if fully set forth herein.

109. Under the APA, an agency action is unlawful and may be set aside if it is "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B).

110. The Amended Rule is such an abuse because it infringes on Kentucky's sovereignty in violation of the Tenth Amendment.

111. Under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Nothing in the Constitution delegates to the federal government general powers over land- and water-use planning, regulation, and zoning. Indeed, these are traditionally areas of state authority. *See Sackett,* 598 U.S. 679; *SWANCC*, 531 U.S. at 174; *see also Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994).

112. Typically, Congress must give a "clear and manifest" statement before a federal agency may intrude into areas of traditional state authority. *Rapanos*, 547 U.S. at 738 (citation omitted); *Sackett*, 598 U.S. 677. And the phrase "the waters of the United States" is not such a "clear and manifest" statement. *See Rapanos*, 547 U.S. at 738.

113. Indeed, far from Congress clearly saying that Agencies may intrude on traditional state control of land and waters, Congress explicitly preserved the primacy of the States' role in regulating land and water use. 33 U.S.C. § 1251(b).

114. The Agencies can neither ignore what Congress has said nor say what Congress has not.

115. The Amended Rule should be set aside as a violation of the Tenth Amendment.

Count Four:
The Amended Rule violates the major questions doctrine.

116. Plaintiff incorporates by reference the preceding allegations of this Complaint as if fully set forth herein.

117. Under the major questions doctrine, an agency's claim of authority must be clearly supported by statute before an agency can assert "'unheralded' regulatory power over a 'significant portion of the American economy.'" *West Virginia v. EPA*, 597 U.S. at 722 (citation omitted). The Supreme Court has accordingly rejected agencies' claims of regulatory authority when the underlying claim of authority concerns an issue of "vast 'economic and political significance,'" unless Congress has

clearly empowered the agency. *See, e.g., Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) (citation omitted).

118. Whether a body of water qualifies as one of the "waters of the United States" is an issue of "vast 'economic and political significance.'" As the Supreme Court recognized in *Sackett*, "[t]he area covered by wetlands alone is vast—greater than the combined surface area of California and Texas. And the scope of the EPA's conception of 'the waters of the United States' is truly staggering when this vast territory is supplemented by all the additional area, some of which is generally dry, over which the Agency asserts jurisdiction." *Sackett*, 598 U.S. at 680.

119. The broader the Agencies' jurisdiction under the CWA, the more individuals will be forced to undertake costly and time-consuming permitting procedures before they can use their land for agricultural development, constructing infrastructure, energy development, and other ordinary uses. Non-compliance results in civil and/or criminal penalties.

120. The CWA does not clearly authorize the expansive jurisdiction the Agencies claim in the Amended Rule. Indeed, particularly given that the CWA specifically recognizes, preserves, and protects the primary responsibilities of States to plan the development and use of their land and water resources, "waters of the United States" cannot be read as expansively as the Agencies have done here.

121. The Amended Rule should be set aside.

Count Five:
The Amended Rule is arbitrary and capricious.

122. Plaintiff incorporates by reference the preceding allegations of this Complaint as if fully set forth herein.

123. Under the APA, an agency action is unlawful and may be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency rule is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered 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 of United States, Inc. v. State Farm. Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

124. The current regulatory scheme is so implausible it cannot be ascribed to a difference of view. In their half-hearted attempt to respond to the Supreme Court's decision in *Sackett* while placating the Biden-Harris administration which thought the *Sackett* opinion was taking the country "backwards,"[14] the Agencies failed to produce a logical and comprehensible rule that is consistent with *Sackett*.

125. For instance, under the Amended Rule, the Agencies defined adjacent as "having a continuous surface connection." Amended Rule at 61,969. But the Agencies said in the Final Rule—and left untouched in the Amended Rule—that a

[14] *Supra* note 12.

continuous surface connection does not mean "a continuous surface *water* connection." Final Rule at 3,095–96 (emphasis in original). Nor does it mean a continuous *surface* water connection because ground water can apparently suffice. *See id*.

126. These explanations cannot be reconciled with the holding in *Sackett* that "the CWA extends to only those wetlands that are 'as a practical matter indistinguishable from waters of the United States.'" 598 U.S. at 678 (citation omitted). Or with the Supreme Court's explanation of "continuous surface connection" as being when it is "difficult to determine where the 'water' ends and the 'wetland' begins." *Id*. at 678–89.

127. More fundamentally, the current regulatory scheme is arbitrary and capricious because the Agencies considered factors Congress did not intend for them to consider. Much of the linguistic gymnastics that produced the implausible result the Amended Rule represents was necessary because the Agencies are attempting to regulate waters they do not have any control over. Congress has authority under the Commerce Clause to regulate waters that "are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *See The Daniel Ball*, 77 U.S. at 563. Congress cannot delegate regulatory authority beyond its own authority. Therefore, pursuant to the CWA, the Agencies can only regulate waters that are "highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *See id*. The

Agencies' attempt to regulate waters that are not navigable and therefore, not susceptible of being used for interstate commerce, is an attempt to consider factors Congress has not intended for them to consider.

128. Further, the current regulatory scheme is an impermissible attempt to redraw how Congress allocated authority. As the Supreme Court explained in *Sackett*, "the CWA does not define the EPA's jurisdiction based on ecological importance, and we cannot redraw the Act's allocation of authority. 'The Clean Water Act anticipates a partnership between the States and the Federal Government.' States can and will continue to exercise their primary authority to combat water pollution by regulating land and water use." *Sackett*, 598 U.S. at 683 (internal citations omitted). Congress preserved the primary role for the States in regulating water and did not authorize the Agencies to consider ecological concerns in the place of the States. Because the Agencies do just that with the Amended Rule, it is arbitrary and capricious.

Count Six:
The Amended Rule violates the APA's procedural requirements.

129. The Plaintiff incorporates by reference the preceding allegations of this Complaint as if fully set forth herein.

130. Before issuing a rulemaking, federal agencies must provide a "[g]eneral notice of proposed rule making" and give "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(b)-(c). The proposed rule must contain "either the terms or substance of the proposed rule or a description of the subjects and issues involved."

Id. at § 553(b)(3). The objective is to provide fair notice to parties impacted by the proposed rulemaking. *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007).

131. The only exception to the notice and comment requirement is when the agency demonstrates "good cause" that the process is impracticable, unnecessary, or contrary to public interest. 5 U.S.C. § 553(b)(B). This exception is "narrowly construed" and should not be used to provide agencies with an "escape clause" from the requirements established by Congress. *See New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980); *U.S. v. Cain*, 583 F.3d 408, 420 (6th Cir. 2009) ("[T]he Government's burden to show that good cause exists is a heavy one—the good cause exception is narrowly construed and only reluctantly countenanced." (citations omitted)). It is not to be employed simply because the agencies want to move quickly or because they feel the changes are minor. Indeed, when an agency amends a prior rule, it must generally use the same procedures it used to issue the rule in the first place. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015).

132. In the explanation to the Amended Rule, the Agencies assert that the exception should apply here because notice and comment was "unnecessary." Amended Rule at 61,964.

133. But for a finding of good cause based on the unnecessary prong, the rule must be "insignificant in nature," inconsequential to the industry and public," or "a minor rule in which the public is not particularly interested." *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754–55 (D.C. Cir. 2001); *see also* Federal Practice

and Procedure § 8204 (Wright & Miller 2d ed.) (explaining "[u]nnecessary refers to the issuance of a minor rule or amendment in which the public is not particularly interested" (citation omitted)).

134. A rule that defines what constitutes the waters of the United States is anything but insignificant in nature or "inconsequential to the industry and public." *See Sackett*, 598 U.S. at 680. Rather, it is "without doubt, something about which . . . the public [is] greatly interested." *Util. Solid Waste Activities Grp.*, 236 F.3d at 755. Indeed, the Agencies received approximately 114,000 comments on the proposed rule. Final Rule at 3,019. Both States and industry groups challenged the Final Rule.

135. The Agencies simply have not met the required showing that the "unnecessary" exception to providing notice and an opportunity to comment should apply here.

136. Under the APA, a final agency action may be held unlawful and set aside if it is "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). That should occur here.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff Commonwealth of Kentucky respectfully asks this Court to:

A. Declare the Amended Rule is unlawful because it: (1) exceeds the Agencies' statutory authority, (2) is contrary to constitutional rights and powers; (3) is arbitrary and capricious, and (4) failed to observe the procedures required by law;

B. Vacate and set aside the Amended Rule in its entirety;

C. Award the Commonwealth reasonable costs and fees, including attorney's fees, pursuant to any applicable statute or authority;

D. Grant the Commonwealth such additional relief that the Court deems appropriate.

Dated: November 8, 2024

Respectfully Submitted,

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