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

MOTION FOR SUMMARY JUDGMENT

The Commonwealth of Kentucky moves this Court to grant summary judgment in its favor. The regulatory scheme established by the U.S. Environmental Protection Agency (the "EPA") and the U.S. Army Corps of Engineers (the "Corps") (collectively, "the Agencies") to define "waters of the United States" for the purposes of the Clean Water Act ignores the limitations and constraints of that Act and fails to comply with the U.S. Supreme Court's decision in *Sackett v. EPA*, 598 U.S. 651 (2023). The regulations comprising that scheme—the Final Rule promulgated on January 18, 2023, *Revised Definition of "Waters of the United State*s," 88 Fed. Reg. 3,004 ("Final Rule"), and the amendment to that Rule promulgated on September 8, 2023, *Revised Definition of "Waters of the United States," Conforming*, 88 Fed. Reg. 61,964 ("Amended Rule")—must, therefore, be vacated.

BACKGROUND

In 1972, Congress passed the Clean Water Act ("CWA") "to restore and maintain the . . . integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA's cooperative federalism scheme made clear that the grant of regulatory authority to the EPA and the Corps does not extend to every body of water in the United States or eliminate the primary control of the States over water use. Rather, Congress emphasized the primary role of the States by saying explicitly:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . .

33 U.S.C. § 1251(b). Congress also limited federal authority to regulating only discharges into and dredging of "navigable waters," which the statute defines as "waters of the United States." *See* 33 U.S.C. §§ 1342, 1344, 1362(7).

Originally, there was no confusion about what "navigable waters" meant. The Commerce Clause allows Congress 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*, 37 U.S. (12 Pet.) 72, 78 (1838)); *Gibbons v. Ogden*, 22 U.S. (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."). Thus, when Congress used

the term "navigable waters," in a predecessor statute to the CWA, the Supreme Court interpreted it 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. (10 Wall.) 557, 563 (1870). And the Supreme Court distinguished navigable waters of the United States from "navigable waters of the States"; waters that are navigable only between different places within a State are not waters of the United States. *Id.*; *cf. The Montello*, 78 U.S. (11 Wall.) 411, 415 (1871).

This was still the understanding when Congress enacted the CWA. 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); *see also Hardy Salt Co. v. S. Pac. 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)). Indeed, the Corps issued a rule a few years after the CWA's enactment that defined "navigable waters" as waters that have been, are, or may be, used for interstate or foreign commerce. *Sackett*, 598 U.S. at 700 (Thomas, J., concurring) (citing 33 C.F.R. § 209.120(d)(1) (1974).

However, a year after the enactment of the CWA, the General Counsel of the EPA issued an opinion asserting "the deletion of the word 'navigable' eliminates the requirement of navigability." *Id.* at 701 (Thomas, J., concurring) (quoting 1 EPA Gen. Counsel Op. 295 (1973)). A district court similarly opined 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).

The Supreme Court disagreed and held that the 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 N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) ("*SWANCC*") ("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 found 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 impermissibly "alter[ed] the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* at 172–74. Specifically, the Court held the Act does not confer federal jurisdiction over physically isolated, wholly intrastate waters or to ponds that are not adjacent to open water. *Id.* at 168, 171.

In *Rapanos v. United States*, the Supreme Court again rejected the Agencies' assertion of broader jurisdiction that, according to the plurality, stretched the

statutory text "beyond parody." 547 U.S. 715, 734 (2006). In *Rapanos,* 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" and held that only "relatively permanent, standing or continuously flowing bodies of water," and other waters with a "continuous surface connection" to such relatively permanent waters, qualify as "waters of the United States." *See id.* at 734, 739, 742. "Wetlands with only an intermittent, physically remote hydrologic connection," the plurality explained, do not fall within the Agencies' jurisdiction. *Id.* at 742.

Writing separately, Justice Kennedy asserted the Agencies' jurisdiction extends to "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, Justice Kennedy argued the other waters must "significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780.

On January 18, 2023, the Agencies published the Final Rule. The Final Rule asserted federal jurisdiction over waters through either a modified relatively permanent standard or a modified significant nexus standard. *See* Final Rule at 3,084, 3,089–90, 3,142–44. The Final Rule also 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, asserted

jurisdiction over "perennial, intermittent, and ephemeral streams," *id.* at 3,030, and redefined tributaries to cover any water so long as it eventually made its way to a traditional navigable water*, id.* at 3,080.

Later that year, a unanimous Supreme Court in *Sackett* clarified the scope of the CWA, stating:

> [T]he *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."

598 U.S. at 671 (cleaned up, citation omitted). The Court again refused 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). Relatedly, the Court repeatedly noted that States, not the Agencies, have the primary responsibility for regulating water. *See, e.g., id.* at 674, 680, 683.

Specific to the Final Rule, the *Sackett* Court found the Agencies' interpretation of "waters of the United States" 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 of the Final Rule. *Id.* at 679. It also said 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.

After *Sackett*, and without any notice or comment period, the Agencies published the Amended Rule. At barely five pages in length, it made only a handful

of revisions,[1] all of which fail to resolve the problems in the Final Rule. The Amended Rule still allows the Agencies to assert jurisdiction over waters and lands that are not within the Agencies' authority under the CWA. It also fails to provide clarity for landowners to determine whether their lands contain jurisdictional waters. The Amended Rule[2] should be vacated and set aside because it exceeds the Agencies' statutory authority, is contrary to constitutional rights and powers, is arbitrary and capricious, and failed to observe the procedures required by law.

STANDARD OF REVIEW

"Summary judgment is proper if the record shows that no genuine dispute exists as to any material fact, and the movant is entitled to judgment as a matter of law." *Kentucky Riverkeeper, Inc. v. Rowlette*, 714 F.3d 402, 407 (6th Cir. 2013) (citing Fed. R. Civ. P. 56(a)). For a challenge under the Administrative Procedure Act ("APA"), the record is the administrative record, and the APA standard of review determines whether the movant is entitled to judgment as a matter of law. *See id.; Norton v. Beasley*, 564 F. Supp. 3d 547, 569 (E.D. Ky. 2021) (vacated on other grounds). Therefore, the Court should hold unlawful and set aside the Amended Rule if it finds any aspect of it is: (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) contrary to constitutional right, power,

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[1] The Amended Rule made just four substantive changes to the Final Rule. First, the Amended Rule eliminates the various references to the significant nexus test, Amended Rule at 61,969, which the Supreme Court held in *Sackett* was inconsistent with the Agencies' authority under the CWA, 598 U.S. at 680. Second, it deleted language explicitly claiming interstate wetlands were waters of the United States. Amended Rule at 61,969. Third, it deleted the explicit reference to "streams" and "wetlands" in the fifth category of waters. *See id*. Fourth, it amended the definition of "adjacent." *See id*.

[2] The limited nature of the Amended Rule means it must be read in conjunction with the Final Rule. References to the Amended Rule from this point forward refer to the regulatory scheme established through both the Final Rule and the Amended Rule.

privilege, or immunity; (c) in excess of statutory jurisdiction, authority, or limitations or short of statutory right; or (d) without observance of procedure required by law. 5 U.S.C. § 706(2)(A)–(D).

STANDING

"Regulation of land and water use lies at the core of traditional state authority." *Sackett*, 598 U.S. at 679; *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."). Congress has honored the primary role of the States by showing "purposeful and continued deference to state water law." *See California v. United States*, 438 U.S. 645, 653 (1978); 33 U.S.C. § 1251(b). But with the Amended Rule, the Agencies flout the intent of Congress and the demands of federalism. Kentucky's sovereignty is harmed as a result. *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).

The Amended Rule also harms Kentucky as a landowner. The Commonwealth owns thousands of acres. *See* Doc. 78.5, PageID.2655; Doc.78-6, PageID.2658. Given the water-abundant character of the Commonwealth, much of this property has some form of water feature. *See* Doc. 78-6, PageID.2658. Therefore, the Amended Rule's overbroad definition of "waters of the United States" limits the freedom of the Commonwealth as a landowner to engage in projects on many of its properties and increases the costs (time, money, and resources) the Commonwealth must bear. *See* Doc. 78-5, PageID.2655–56.

Permitting is costly. "For a specialized 'individual' permit . . . one study found that the average applicant 'spends 788 days and $271,596 in completing the process,' without 'counting costs of mitigation or design changes.'" *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 578 U.S. 590, 594–95 (2016) (quoting *Rapanos*, 547 U.S. at 721). "Even more readily available 'general' permits took applicants, on average, 313 days and $28,915 to complete." *Id.* at 595. And, as *Sackett* noted, "Success 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.'" 598 U.S. at 661 (quoting 33 C.F.R. § 320.4(a)(1)). Yet, landowners incur these costs because discharging materials into the "waters of the United States" without a permit can result in criminal penalties and civil penalties of thousands of dollars per violation, per day. *See* 33 U.S.C. §§ 1319; 40 C.F.R. § 19.4; *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, e.g., Hanousek v. United States*, 528 U.S. 1102, 1102 (2000) (Thomas, J., dissenting from the denial of certiorari).

These burdens and risks delay or impede the construction of new infrastructure and buildings. This, in turn, causes the Commonwealth an economic injury because it loses the additional tax revenue from property, employment, and sales tax from the businesses that would operate out of these buildings.

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. As a sovereign, Kentucky is the object of the Rule because the Agencies' interpretation redefines the scope of the States' authority to regulate intrastate waters. Additionally, Kentucky's state agency tasked with completing § 401 reviews must apply the Agencies' interpretation. *See* Doc. 78, Page ID.2394–95. 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. Hwy. Admin.*, 728 F. Supp. 3d 501, 507 (W.D. Ky. 2024).

ARGUMENT

Despite the Supreme Court's clear ruling in *Sackett* narrowing the Agencies' jurisdictional reach, the Agencies continue to issue regulations exceeding their statutory authority. The Agencies insist on asserting jurisdiction over non-navigable interstate waters and adjacent tributaries, wetlands, and impoundments, as well as distant water features that do not bear a continuous surface connection to traditionally navigable waters. The Agencies thereby exceed their authority under the CWA, intrude upon Kentucky's sovereignty, fail to adhere to constitutional due process requirements, and act in a way that is arbitrary and capricious. The Court should vacate the Amended Rule.

I. The Amended Rule exceeds the authority of the Clean Water Act.

Under the APA, a final agency action, like the Amended Rule, 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). In other words, the Amended Rule must be consistent with its authorizing statute. *See West Virginia v. EPA*, 597 U.S. at 723. Authority for the CWA comes from the Commerce Clause, which allows Congress to 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). Therefore, Congress expressly limited federal jurisdiction under the CWA to only "navigable waters," defined as "waters of the United States." *See* 33 U.S.C. §§ 1311, 1342, 1344, 1362(7), (12). The Amended Rule flouts this most basic limitation.

First, the Agencies incorrectly assert jurisdiction over all "interstate waters," that is, "all rivers, lakes, and other waters that flow across, or form a part of, State boundaries" "regardless of their navigability." Final Rule at 3,072, 3,143; Amended Rule at 61,968. The classification of all interstate waters as waters of the United States impermissibly ignores the foundation of the CWA's jurisdiction. And it is contrary to *Sackett*, where the Supreme 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. The Agencies exceed their authority under the CWA when they assert jurisdiction over waters without regard to navigability.

Second, the Amended Rule's treatment of impoundments similarly exceeds statutory authority, both by claiming jurisdiction over waters regardless of their hydrological connection to jurisdictional waters and by claiming permanent jurisdiction if the impounded water body was once jurisdictional. Final Rule at 3,077–78. This framework directly conflicts with *Sackett's* holdings that the Agencies did not have jurisdiction over wetlands lacking a continuous surface connection to a navigable water and 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; *id*. at n.16. The Agencies offer no compelling explanation for why impoundments should be treated differently from wetlands in this regard, particularly given the Supreme Court's emphasis in *Rapanos* that the CWA's reference to "waters" cannot be interpreted to include "transitory puddles or ephemeral flows." *Rapanos,* 547 U.S. at 733 (plurality opinion).

Third, the Amended Rule's treatment of tributaries exceeds the Agencies' authority under the CWA. 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 a traditional navigable water, the territorial seas, or an interstate water." 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 navigable water, the territorial seas, or an interstate water." *Id.* (emphasis added). The Agencies also assert manmade features may be tributaries "so long as they contribute flow to" a traditional water, *id.*, and flow can include standing water and waters that flow only at "certain times of the year," *id.* at 3,084–85. Indeed, the Agencies would consider a tributary jurisdictional even if it does not "have a surface flowpath all the way down to the [traditional navigable] water." *Id.* at 3,084. Again, the Agencies are impermissibly ignoring navigability, the foundational predicate to Congress'—and thereby, their own—authority under the CWA. This they cannot do.

Fourth, regarding wetlands, the Amended Rule fails to harmonize the Final Rule with *Sackett*. In response to *Sackett,* the Agencies removed language that made wetlands automatically jurisdictional, instead defining "adjacent" as "having a continuous surface connection." Amended Rule at 61,969. However, the Agencies left the Final Rule's imaginative explanation that a continuous surface connection "does not require surface water to be continuously present." Final Rule at 3,096. This cannot be reconciled with *Sackett*'s straightforward requirement that wetlands be "indistinguishable from waters of the United States," while allowing for temporary interruptions for low tides or dry spells. 598 U.S. at 678.

Finally, the Amended Rule retains the problematically vague and broad catchall category of other jurisdictional intrastate waters. This category purports to assert jurisdiction over intrastate waters that are not traditional navigable waters, territorial seas, interstate waters, impoundments, or wetlands. *See* Amended Rule at

61,969. In doing so, the Agencies fail to grapple with the fact that the Agencies' authority under the CWA is unavoidably linked to Congress' authority under the Commerce Clause and, therefore, to navigability. *See Sackett*, 598 U.S. at 672. 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. And 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*. It is abundantly clear after *Sackett* that these attenuated connections exceed the Agencies' authority under the enabling statute. *See* 598 U.S. at 676 ("Wetlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby.").

Each of these instances of the Agencies exceeding their statutory authority result in the capture of innumerable water features that should be under Kentucky's exclusive control. *See* Doc. 78-7. The Agencies' complete failure to respect the foundation and the scope of their authority under the CWA means the Amended Rule must be set aside.

II. The Amended Rule must be vacated because it is impermissibly vague.

Under the APA, agency actions must be set aside if they are contrary to a constitutional right. 5 U.S.C. § 706(2)(B). The Amended Rule violates fundamental due process principles protected by the Fifth Amendment by failing to provide fair notice of what constitutes "waters of the United States."

The Due Process Clause prohibits the government from "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); *see also Connally v. Gen. Constr.* Co., 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law"). This constitutional protection extends to civil regulations carrying significant penalties. *See FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253–56 (2012); *see also Tennessee v. Cardona*, No. 2:24-cv-072, 2024 WL 3631032, at *9 (E.D. Ky. July 10, 2024).

The Amended Rule violates due process in several respects. First, it employs impermissibly vague terminology in defining what constitutes "relatively permanent" waters. The Amended Rule claims jurisdiction over waters that have "flowing or standing water year-round or continuously during certain times of the year," but provides only the cryptic explanation that this means "extended periods" of water "occurring in the same geographic feature year after year, except in times of drought." Final Rule at 3,084–85. While this accomplishes the Agencies' goal of "establish[ing] a more flexible approach to implementing" the relatively permanent standard to tributaries, *id.* at 3,085, it does not give the landowner a reasonable opportunity to know what is prohibited.

The Amended Rule's treatment of "continuous surface connection" suffers from similar defects. While the Supreme Court in *Sackett* clearly contemplated that a continuous surface connection requires the presence of water—explaining that such a connection exists where it is "difficult to determine where the 'water' ends and the [water feature] begins," 598 U.S. at 678—the Amended Rule creates confusion by leaving unchanged the Final Rule's contradictory explanations. These explanations suggest that a continuous connection can exist even without water and may be satisfied by any discrete feature, including a pipe. *See* Final Rule at 3,051, 3,095, 3,096. The contradictions leave landowners unable to determine whether water is required for a continuous surface connection or if some other connection is sufficient to trigger the CWA's permitting requirements and criminal penalties.

The constitutional infirmity is further compounded by the Agencies' failure to reconcile their criticism of the "relatively permanent" standard with the Supreme Court's decision in *Sackett*. While *Sackett* made clear that the relatively permanent standard is central to determining CWA jurisdiction, *see* 598 U.S. at 671, the Agencies left untouched their description of the standard as only "administratively useful," Final Rule at 3,007. This, coupled with the Agencies' refusal to provide meaningful benchmarks like minimum flow durations or references to sources, *see id*. at 3,085–87, leaves the Commonwealth without clear guidance about when waters fall within federal jurisdiction. 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 (cleaned up, citations omitted). Due process demands more than that. *See id.* at 680–81; *see also FCC,* 567 U.S. at 253.

III. The Amended Rule must be vacated because it violates the Tenth Amendment and the Major Questions Doctrine.

The Amended Rule should also be set aside under 5 U.S.C. § 706(2)(B) because it unconstitutionally infringes upon state sovereignty. 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. These are traditionally areas of state authority. *See Sackett*, 598 U.S. at 679 (explaining that "[r]egulation of land and water use lies at the core of traditional state authority," and finding that any "overly broad interpretation of the CWA's reach would impinge on [traditional state] authority"); *SWANCC*, 531 U.S. at 174.

"It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority." *Printz v. United States*, 521 U.S. 898, 928 (1997). Therefore, the Supreme Court requires "exceedingly clear language if [Congress] wishes to significantly alter the balance between federal and state power and the power of the Government over private property." *Sackett*, 598 U.S. at 679. Nothing in the CWA indicates Congress wished to alter the balance of power. Rather, the CWA makes clear that the regulation of land and water resources shall remain "the primary responsibilities of States." 33

U.S.C. § 1251(b). Without "exceedingly clear language," the Agencies have no authority to impinge on the States' authority over land and water use.

Similarly, under the major questions doctrine, an agency's claim of authority must be clearly authorized 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 722–23 (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).

Whether a body of water qualifies as one of the "waters of the United States" is an issue of "vast 'economic and political significance'" because status as a water of the United States imparts "significant" costs on the landowner, who must undergo a permitting process that "can be arduous, expensive, and long." *Sackett*, 598 U.S. at 680 (citing *Hawkes Co.*, 578 U.S. at 594–595, 601). And non-compliance carries the risk of severe civil and criminal penalties, magnifying the Rule's economic impact on regulated parties. *Id.* at 560 ("Property owners who negligently discharge 'pollutants' into covered waters may face severe criminal penalties including imprisonment. These penalties increase for knowing violations. On the civil side, the CWA imposes over $60,000 in fines per day for each violation." (internal citations omitted)).

The Agencies have asserted jurisdiction far beyond what the Commerce Clause or the CWA permits. Because Congress has not clearly authorized such expansive federal jurisdiction, the Amended Rule must be set aside.

IV. The Amended Rule must be vacated because it is arbitrary and capricious.

Under the APA, an agency action is unlawful and must 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 action 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 U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983). The Amended Rule is arbitrary and capricious for several reasons.

A. The Agencies failed to fully consider the impact of *Sackett*.

First, the Agencies failed to fully consider the impact of *Sackett*, which has resulted in the adoption of internally contradictory positions. One example is the Agencies' treatment of wetlands. After the Court held in *Sackett* that a continuous surface connection between a wetland and a jurisdictional water was required, the Agencies redefined adjacent as "having a continuous surface connection." Amended Rule at 61,969. However, the Agencies did not retract or revise other language in the Final Rule that conflicted with the holdings in *Sackett*.

At one point the Final Rule says a continuous surface connection does not mean "a continuous surface *water* connection." Final Rule at 3,096 (emphasis in original). In another, it explains that ground water can suffice for the connection. *See id*. These explanations remain even though the Supreme Court held in *Sackett* that "the CWA extends to only those wetlands that are 'as a practical matter indistinguishable from waters of the United States,'" and have a "continuous surface connection," meaning it is "difficult to determine where the 'water' ends and the 'wetland' begins." 598 U.S. at 678–89.

Similarly, the Final Rule allows the Corps to approximate the area of wetlands rather than specifically determine the boundaries. *See* Final Rule at 3,093. According to the Agencies, wetlands can include "wetland mosaics" which are "landscapes where wetland and non-wetland components are too closely associated to be easily delineated." *Id*. For these, the Agencies "consider the entire mosaic and estimate percent wetland in the mosaic." *Id.* Under the Final Rule, the wetland mosaic need not abut a jurisdictional water; merely "bordering" or "neighboring" a jurisdictional water is sufficient. *Id.* The Agencies fail to consider how this language fares in light of the Supreme Court's holdings in *Sackett*, 598 U.S. at 678–79. This failure means they have failed to consider an important aspect of the problem.

B. The Agencies considered factors Congress did not intend for them to consider.

Second, the Agencies considered factors Congress did not intend for them to consider by attempting to regulate waters they do not have any control over and to address issues they have no authority to address.

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." *The Daniel Ball*, 77 U.S. at 563. Congress cannot delegate regulatory authority beyond its own authority. It is clear, therefore, 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." *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.

Additionally, the Agencies note in the Final Rule and in the Technical Support Document for the Final Rule[3] several issues they are attempting to address with the regulatory scheme. First, the Agencies say they "considered the impact of climate change on water resources." *Technical Support Document* at 145. The Agencies also explained in the Technical Support Document that they were committed to "assessing impacts of a revised definition of 'waters of the United States' on population groups of concern" to further the goal of seeking "environmental justice." *Id.* at 148–49. The Agencies also attempt to assert jurisdiction over wetlands based on an ecological interconnection. *Id.* at 186. But determining a wetland jurisdiction based on ecology directly contradicts *Sackett,* which stated, "the CWA does not define the EPA's

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[3] *Technical Support Document for the Final "Revised Definition of 'Waters of the United States'" Rule*, U.S. ENVIRONMENTAL PROTECTION AGENCY AND DEPARTMENT OF THE ARMY (Dec. 2022), *available at* https://perma.cc/8WN7-NFKD [hereinafter *Technical Support Document*].

jurisdiction based on ecological importance, and we cannot redraw the Act's allocation of authority." *Sackett,* 598 U.S. at 683. Indeed, nowhere in the CWA does the text indicate Congress intended for the Agencies to consider any of these extraneous policy objectives.

Because the Amended Rule fails to consider important aspects of the problem and considers factors Congress did not intend for the Agencies to address, it represents precisely the kind of arbitrary and capricious agency action that must be set aside under 5 U.S.C. § 706(2)(A).

V. The Amended Rule must be held unlawful and set aside because it violates the APA's procedural requirements.

The Amended Rule fundamentally violates the APA's procedural requirements. Before issuing a rule, 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 notice 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 affected by the proposed rulemaking. *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007).

The only exception to the notice and comment requirement for final agency actions 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." *See United States 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 generally must 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).

The Agencies assert the exception should apply here because notice and comment were "unnecessary." Amended Rule at 61,964. 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) (citation omitted); *see also* Wright & Miller, FEDERAL PRACTICE AND PROCEDURE (2d ed.) § 8204.

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 (noting the area covered by wetlands alone is "greater than the combined surface area of California and Texas"). Rather, it is without doubt, "something about which . . . the public [is] greatly interested," *Util. Solid Waste Activities Grp.*, 236 F.3d at 755, as evidenced by the thousands of comments on the proposed rule submitted to the Agencies, Final Rule at 3,019, and the legal challenges to the Final Rule filed by 26 States, *see* Doc. 78, PageID.2384. Therefore, the Amended

Rule should be held unlawful and set aside because it is "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

VI. The Court should grant Kentucky relief through vacatur and a declaratory judgment.

Vacatur is the ordinary remedy for a violation of the APA. *See Tennessee v. Cardona*, No. 2:24-cv-00072-DCR-CJS (E.D. Ky. Jan. 9, 2024), Exhibit 1 at 12–13[4] ("When a reviewing court declares that the challenged action of an administrative agency violates the law, vacatur is the 'normal remedy.'" (cleaned up, citations omitted)); *Kentucky*, 728 F. Supp. 3d at 522. And it is appropriate here.

When considering whether to grant vacatur, courts look at two factors: the "seriousness of the agency error" and the likelihood of vacatur having a disruptive effect. *See Sierra Club v. EPA*, 60 F.4th 1008, 1022 (6th Cir. 2023). Both factors weigh in favor of vacatur here. First, because the Amended Rule is unlawful on numerous fronts, it is not possible for the Agencies on remand to simply adopt the same rule by "offering better reasoning" or "complying with procedural rules." *See Cardona*, No. 2:24-cv-00072-DCR-CJS (cleaned up) (citing *Sierra Club*, 60 F.4th at 1022), Exhibit 1 at 13. Therefore, the seriousness of the Agencies' error weighs heavily in favor of vacating the Rule. Second, vacatur is not likely to have an unnecessarily disruptive effect such that this factor weighs against granting vacatur. Certainly, the Agencies will need to promulgate new regulations,[5] but this kind of "regulatory uncertainty

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[4] This decision is not yet available on Westlaw, so it is attached as an exhibit to this motion.

[5] The pre-2015 definition of "waters of the United States"—which the Agencies are currently using to make jurisdictional determinations in Kentucky, *see, e.g.,* "Memorandum for Record, U.S. Army Corps of Engineers Pre-2015 Regulatory Regime Approved Jurisdictional Determination in Light of *Sackett v. EPA*" (Apr. 19, 2024), *available at* https://perma.cc/KAV5-TQCJ—also cannot be used

that typically attends vacatur" is not a sufficiently disruptive consequence to weigh against vacatur. *See Sierra Club*, 60 F.4th at 1023. Moreover, any disruption that results from vacatur here is only what is necessary to ensure the definition of "waters of the United States" does not exceed the authority granted to the Agencies through the CWA and does not violate the Constitution. Accordingly, this second factor also weighs in favor of granting vacatur.

Further, Rule 57 of the Federal Rules of Civil Procedure provides that "the existence of another adequate remedy does not preclude a declaratory judgment that is otherwise appropriate." Therefore, it is also appropriate for the Court to grant the declaratory relief requested by the Commonwealth. *See, e.g., Cardona*, No. 2:24-cv-00072-DCR-CJS, Exhibit 1 at 14.

CONCLUSION

This Court should grant Kentucky's motion for summary judgment, vacate the Amended Rule, and remand it to the Agencies.

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because it violates *Sackett* in at least seven ways. First, it includes within the definition of jurisdictional waters all waters that were used in commerce in the past, even if no longer used in commerce. *See Pre-2015 Regulatory Definition of "Waters of the United States,"* https://perma.cc/CU6A-84ZD; 40 C.F.R. § 230.3(s)(1) (2014), *available at* https://perma.cc/6NCN-PYKY. Second, it includes all interstate waters, including non-navigable interstate waters. *Id.* at (s)(2). Third, it includes all interstate wetlands. *Id.* Fourth, it includes all other waters that could affect interstate commerce, regardless of whether there is a continuous surface connection. *Id.* at (s)(3). Fifth, it includes all impoundments of waters, regardless of navigability or continuous surface connection. *Id.* at (s)(4). Sixth, it includes all tributaries, regardless of navigability or continuous surface connection. *Id.* at (s)(5). The Agencies have even asserted that "tributaries include natural, man-altered, or man-made bodies that carry flow directly or indirectly into traditional navigable waters," and ponds that "contribute flow directly or indirectly through . . . waters . . . along the flowpath to traditional navigable water[s] . . . ." *Memorandum On Evaluating Jurisdiction For LRL-2023-00466* (Mar. 12, 2024), https://perma.cc/G7HA-TKVK. Seventh, it includes wetlands lacking a continuous surface connection. 40 C.F.R. § 230.3(s)(6) (2014).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on January 10, 2025, the above document was filed with the CM/ECF filing system, which electronically served a copy to all counsel of record.

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