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

STATE OF WEST VIRGINIA, *et al.,* Plaintiffs, and AMERICAN FARM BUREAU FEDERATION, *et al.,* Intervenor-Plaintiffs, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*, Defendants.	)	Civil No. 3:23-cv-0032

INTERVENOR-PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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Pursuant to Federal Rule of Civil Procedure 56, intervenor-plaintiffs[1] respectfully move for entry of summary judgment, vacatur of the *Revised Definition of "Waters of the United States"* ("Rule"), 88 Fed. Reg. 3004 (Jan. 18, 2023) (Dkt. 114-2), and an order requiring EPA and the Army Corps of Engineers ("the Agencies") to apply the Supreme Court's decision in *Sackett v. EPA*, 143 S. Ct. 1322 (2023) as the operative framework for approved jurisdictional determinations ("AJD") and permit applications pending prompt promulgation of a new rule.

INTRODUCTION

Sackett establishes that the Rule is unlawful. In *Sackett*, EPA "ask[ed the Supreme Court] to defer to its understanding of the [Clean Water Act]'s jurisdictional reach as set out in its most recent rule defining" the "waters of the United States" ("WOTUS"). 143 S. Ct. at 1341. The Court declined, holding that the Agencies' "interpretation is inconsistent with the text and structure of the CWA" and "'background principles of [statutory] construction." *Id.* Yet plaintiffs' members and their clients—who operate in every State—remain subject to that Rule in the 23 States in which it is not enjoined. Worse, although *Sackett* determines the Agencies' jurisdiction in the vast majority of circumstances, the Corps has announced that it will not issue AJDs anywhere until the Agencies promulgate a new rule, putting intervenor-plaintiffs' members and their clients at continuing risk of criminal and civil penalties for ordinary use of their property. Only vacatur of

[1] Intervenor-plaintiffs are the American Farm Bureau Federation; American Petroleum Institute; American Road and Transportation Builders Association; Associated General Contractors of America; Cass County Farm Bureau; Leading Builders of America; National Apartment Association; the National Association of Home Builders of the United States; National Association of REALTORS®; National Cattlemen's Beef Association; National Corn Growers Association; National Mining Association; National Multifamily Housing Council; National Pork Producers Council; National Stone, Sand and Gravel Association; North Dakota Farm Bureau; Public Lands Council; and U.S. Poultry and Egg Association.

the Rule, agency adherence to *Sackett* to process AJDs and permits, and prompt promulgation of a new rule can end this arbitrary roadblock to the lawful use of the land.

The Supreme Court's decision in *Sackett* directly invalidates major portions of the Rule. As the Court explained, "the meaning of 'waters' is more limited than the EPA believes." *Sackett*, 143 S. Ct. at 1342. The Court held that the significant nexus test at the heart of the Rule "is particularly implausible" because "the CWA never mentions the 'significant nexus' test, so the EPA has no statutory basis to impose it." *Id*. Therefore, paragraphs (a)(3)(ii), (a)(4)(iii), and (a)(5)(ii) of the Rule, which use the Agencies' illegal significant nexus test to define covered tributaries, wetlands, and intrastate lakes and ponds, streams, and wetlands as part of WOTUS, must be invalidated.

Additionally, as this Court recognized in granting the States' motion for preliminary injunction, the Agencies' categorical extension of jurisdiction over all "interstate waters, regardless of their navigability" (88 Fed. Reg. at 3072) in paragraph (a)(1)(iii) of the Rule "is problematic" and raises "serious questions" because the Rule "essentially reads non-navigability out of the Act." Dkt. 131 at 20.

Given these fundamental flaws, the entire Rule should be vacated. Although the Agencies included a severability provision in the final Rule preamble, that provision was not included in the proposed rule and was never subject to notice and comment. In any event, the provisions of the Rule are so inter-connected that severability is infeasible.

Instead, the Agencies—pending prompt promulgation of a new rule that follows *Sackett*—should apply *Sackett* directly in the vast majority of circumstances in which it plainly supplies the jurisdictional rule, and should process AJD and permit applications accordingly. There is no reason why the Agencies should not immediately supply clear directions to Corps offices and other

stakeholders that ephemeral and isolated waters are no longer jurisdictional and that AJDs should be determined accordingly. Delay in providing clear direction perpetuates the conduct for which the Agencies were admonished in *Sackett*.

The Agencies have said they intend to issue a new rule by September 1, 2023 and request this Court to stay these proceedings in the meantime (a motion to which intervenor-plaintiffs will file an opposition). Dkt. 143. That motion makes no mention of AJDs, and would leave land users in regulatory limbo for at least two months, halting projects and disrupting investments. As explained in this brief, that delay, and failure to process AJDs in the interim, thwarts *Sackett*. Further, a ruling from this Court on the issues raised in this summary judgment motion will guide the Agencies in their consideration of a new rule and potentially avert further litigation once that rule is promulgated. There is no warrant for the Agencies, after nearly two decades during which they unlawfully expanded their authority by imposing a significant nexus test on land users, to continue to hold the threat of criminal and civil sanctions over businesses for ordinary land uses now that the Supreme Court has established clear jurisdictional rules.

STATEMENT OF UNDISPUTED FACTS

A. Background

A coalition of 24 States sued the Agencies for declaratory judgment and injunctive relief challenging the legality of the Rule under the Administrative Procedure Act and the Constitution. Dkt. 1. Magistrate Judge Senechal granted intervenor-plaintiffs leave to intervene in that suit to challenge the Rule.[2] Dkt. 110. The Rule purports to clarify the Agencies' definition of WOTUS as used in the CWA (*see* 33 U.S.C. § 1362(7)), and as such defines the geographic reach of the CWA. On April 12, 2023, this Court entered a preliminary injunction enjoining enforcement of the Rule

[2] The Agencies' appeal of the magistrate's order permitting intervention is fully briefed and pending. *See* Dkts. 129, 133.

in the 24 plaintiff States. Dkt. 131. The Agencies appealed that decision. Dkt. 141. The Rule has since been enjoined in three additional States.[3]

B. The Rule broadly defines WOTUS.

Under the CWA, a person may not "discharge" "any pollutant" without a permit issued under Section 402 of the statute, for discharges covered by the National Pollution Discharge Elimination System ("NPDES"), or Section 404, permitting discharges of dredged or fill material. 33 U.S.C. § 1311(a). The CWA defines "discharge of a pollutant" as the "addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12)(A). "Navigable waters" are defined to mean "the waters of the United States, including the territorial seas." *Id.* § 1362(7). Thus, if a water or land feature falls within the definition of WOTUS, it is within the Agencies' jurisdiction and subject to the CWA's permitting regime.

The Rule interprets WOTUS to include five categories, each with subparts. Paragraph (a)(1) states that WOTUS includes waters that are (i) "[c]urrently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide"; (ii) the territorial seas; or (iii) "[i]nterstate waters, including interstate wetlands." 88 Fed. Reg. 3143.

Paragraph (a)(2) states that WOTUS includes "[i]mpoundments of waters otherwise defined as waters of the United States under this definition, other than impoundments of waters identified under paragraph (a)(5) of this section." *Id*.

Paragraph (a)(3) states that WOTUS includes tributaries of waters identified in paragraphs (a)(1) and (a)(2) if (i) the tributaries are "relatively permanent, standing or continuously flowing

[3] *See* https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update. On March 19, 2023, the Southern District of Texas enjoined application of the Rule in Texas and Idaho. On May 12, 2023, the Sixth Circuit granted Kentucky a stay of enforcement of the Rule pending appeal from a district court decision.

bodies of water"; or (ii) the tributaries "either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of" paragraph (a)(1) waters. *Id.*

Paragraph (a)(4) states that WOTUS includes "[w]etlands adjacent to" (i) paragraph (a)(1) waters; (ii) "[r]elatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3)(i) of this section and with a continuous surface connection to those waters"; or (iii) waters in paragraphs (a)(2) or (a)(3) "when the wetlands either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical or biological integrity of" paragraph (a)(1) waters. *Id*.

Paragraph (a)(5) states that WOTUS includes intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (a)(4) that (i) meet the relatively permanent test; or (ii) "either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of waters identified in" paragraph (a)(1). *Id*.

According to the Agencies, this definition of WOTUS employs the "relatively permanent standard" and the "significant nexus standard." 88 Fed. Reg. 3006. The Agencies define the "relatively permanent standard" to mean "waters that are relatively permanent, standing or continuously flowing waters" connected to paragraph (a)(1) traditional navigable waters, interstate waters, the territorial seas, "and waters with a continuous surface connection to such relatively permanent waters or to paragraph (a)(1) waters." 88 Fed. Reg. 3038. The Rule does not define "relatively permanent." While the Rule states that there "must be a continuous surface connection on the landscape for waters" to meet the "relatively permanent" standard, the continuous surface connection need not be "a constant hydrologic connection." 88 Fed. Reg. 3102.

The Agencies define the "significant nexus standard" as "waters that, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, or interstate waters." 88 Fed. Reg. 3006. The Agencies interpret "similarly situated" to mean "waters are providing common, or similar, functions for paragraph (a)(1) waters such that it is reasonable to consider their effects together." 88 Fed. Reg. 3127. The Agencies interpret "in the region" to mean that the feature in question "lie[s] within the catchment area of the tributary of interest." 88 Fed. Reg. 3088. The Rule defines "significantly affect" as a "material influence on the chemical, physical, or biological integrity" of a paragraph (a)(1) water. 88 Fed. Reg. 3143. To apply this standard, the Agencies look to "distance from a paragraph (a)(1) water," "hydrologic factors," waters that have been determined to be "similarly situated," and "climatological variables." *Id*.

For "adjacent wetlands," "adjacent" is defined as "bordering, contiguous, or neighboring." 88 Fed. Reg. 3089. The Rule also states that "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are 'adjacent wetlands.'" *Id*.

C. This Court preliminarily enjoined the Rule.

On April 12, 2023, this Court granted the States' motion for preliminary injunction. Dkt. 131. With regard to the likelihood of the success on the merits of the States' challenges, the Court first concluded that the Agencies' interpretation of WOTUS in the Rule is not entitled to deference because the CWA implicates criminal penalties (citing *Texas v. EPA*, 2023 WL 2574591 (S.D. Tex. Mar. 19, 2023); *United States v. Parker*, 762 F.3d 801, 806 (8th Cir. 2014)). Dkt. 131 at 17.

The Court explained that Congress "must, at a minimum, 'lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform.'" *Id*. at 23 (quoting *Mistretta v. U.S.*, 488 U.S. 361, 372 (1989)). The Court

then concluded that "the new 2023 Rule is neither understandable nor 'intelligible,' and its boundaries are unlimited. Beyond the many problems with the new 2023 Rule recognized by the considered decision of the federal district court in Texas, this Court is of the opinion the 2023 Rule raises a litany of other statutory and constitutional concerns." Dkt. 131 at 19. The Court held that "[t]he phrase 'waters of the United States', a term that has been hopelessly defined for decades, remains even more so under the 2023 Rule. It is doubtful Congress endorsed the current efforts to expand the limits of the Clean Water Act." *Id*. Indeed, "[t]here is little that is intelligible about the 2023 Rule and the broad scope of its jurisdiction. The EPA's interpretation of the 2023 Rule does not provide any clarity nor equate with an intelligible principle to which the [regulated community] can easily conform." *Id*. at 23-24. Further, "the Rule does not provide fair notice to the States as to what will be considered 'waters of the United States.'" *Id*. at 24.

Presaging the Supreme Court's decision in *Sackett*, this Court explained that the Rule's significant nexus test is riddled with "murky definitions" that "are unintelligible and provide little guidance to parties impacted by the regulations." *Id*. at 23. The Court noted that "[t]he 2023 Rule's 'significant-nexus' standard poses important due process concerns which may not be clarified until the United States Supreme Court issues a decision in *Sackett* this term." *Id*. at 27-28. And the Court agreed with Judge Brown's statement in *Texas v. EPA* that the significant nexus test as interpreted in the Rule "with its numerous factors and malleable application seems to muddy the waters even more." *Id*. at 28 (internal quotation marks omitted).

The Court also determined that plaintiffs are likely to succeed on their challenges to the Rule's categorical inclusion of interstate waters in paragraph (a)(1)(iii), regardless of whether those waters are navigable. Dkt. 131 at 28. The Court reasoned that the Rule "seems to ignore the 'navigable waters' requirement under the Clean Water Act. The Rule impermissibly covers 'all

interstate waters, including 'wetlands' and 'all rivers, lakes, and other waters that flow across, or form a part of, State boundaries.'" *Id*. (quoting 88 Fed. Reg. 3072). As other courts have recognized, "the EPA's assertion of jurisdiction over all interstate waters is not a permissible construction of the Clean Water Act because they assert jurisdiction over waters that are not navigable-in-fact waters." *Id*. (citing *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1359 (S.D. Ga. 2019)). Additionally, the Rule's extension of federal jurisdiction "to include all interstate waters irrespective of any limiting principle raises serious federalism concerns and questions" because the Agencies' Commerce Clause authority "has some limits, and the regulations must in some manner be tied to navigability to withstand a constitutional challenge." *Id*. at 28-29.

Additionally, the Rule's "treatments of impoundments presents conflicts [with] the text of the Clean Water Act" because paragraph (a)(2) covers impounded waters that were jurisdictional under the Rule at the time the impoundment was created, regardless of whether the waters are presently WOTUS. *Id*. at 20-21."The Court is skeptical that Congress intended the Clean Water Act to empower the EPA to regulate impounded waters merely because they were once 'waters of the United States.'" *Id*. at 21.

The Court also held that the paragraph (a)(3) category of tributaries "is suspect" because the "extremely broad" definition of tributary includes "[e]phemeral and intermittent streams." *Id*. And the Rule's "treatment of wetlands is plagued with uncertainty" because the requirement that wetlands need be "neighboring" to be considered "adjacent" to a jurisdictional water permitted exercise of jurisdiction over remote wetlands, which are not covered under the CWA. *Id*. at 21-22. The Court also found that the Rule's case-specific assertion of jurisdiction over paragraph (a)(5) waters was "troublesome" because that category "encompasses intrastate, non-navigable features that were previously considered to be 'isolated' and not with the Clean Water Act's jurisdiction."

Id. at 23 (citing *Solid Waste Agency of N. Cook Cnty v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 167, 171 (2001)).

D. Sackett confirmed that core aspects of the Rule violate the CWA.

Subsequently, *Sackett* addressed "what the Act means by 'the waters of the United States.'" 143 S. Ct. at 1329; *see id*. at 1331 ("The meaning of this definition is the persistent problem that we must address."). In that case, the Agencies asserted jurisdiction over the Sacketts' property, which contained a wetland that was separated from a tributary by a 30-foot road. *Id.* at 1331-32. That tributary flowed into a non-navigable creek, which fed into Priest Lake. *Id*. at 1332. The Agencies claimed there was a "significant nexus" between the Sacketts' wetland and Priest Lake and the wetland thus counted as WOTUS. *Id*.

The Court explained that correcting the Agencies' misunderstanding of WOTUS is necessary because the stakes are so high for property owners. The Court described the CWA as "a potent weapon. It imposes what have been described as 'crushing' consequences 'even for inadvertent violations.'" *Id.* at 1330 (quoting *Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S 590, 602 (2016) (Kennedy, J., concurring)). Under the CWA, "[p]roperty owners who negligently discharge 'pollutants' into covered waters may face severe criminal penalties including imprisonment." *Id*. (citing 33U.S.C. § 1319(c)). Additionally, the CWA "imposes over $60,000 in fines per day for each violation." *Id*. (citing Note following 28 U.S.C. § 2461; 33 U.S.C. § 1319(d); 88 Fed. Reg. 989). The Court observed that "these civil penalties can be nearly as crushing as their criminal counterparts." *Id*. For example, the Ninth Circuit has upheld the EPA's decision "to count each of 348 passes of a plow by a farmer through 'jurisdictional' soil on his farm as a separate violation." *Id.* (citing *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 813, 818 (9th Cir. 2001), *aff'd by an equally divided Court*, 537 U.S. 99 (2002) (per curiam)).

The EPA "is tasked with policing violations after the fact, either by issuing orders demanding compliance or by bringing civil actions." *Id*. at 1330-31. The Agencies are also "empowered to issue permits exempting activity that would otherwise by unlawful under the [CWA]." *Id*. at 1331. For example, the Army Corps "controls permits for the discharge of dredged or fill material into covered waters." *Id*. (citing 33 U.S.C. § 1344(a)). "The costs of obtaining such a permit are 'significant,' and both agencies have admitted that 'the permitting process can be arduous, expensive, and long.'" *Id*. (quoting *Hawkes*, 578 U.S at 594-95).

In "defining the meaning of" WOTUS, the Supreme Court explained that while the CWA's predecessor "encompassed 'interstate or navigable waters,' 33 U.S.C. § 1160(a) (1970 ed.), the CWA prohibits the discharge of pollutants into only 'navigable waters,' which it defines as 'the waters of the United States, including the territorial seas,' 33 U.S.C. 1311(a), 1362(7), (12)(A) (2018 ed.)." *Sackett*, 143 S. Ct. at 1331, 1332.

In defending their assertion of jurisdiction over a wetland on the Sacketts' property, the Agencies relied on the 2023 Rule's significant nexus test, under which, EPA admitted, "'almost all waters and wetlands' are potentially susceptible to regulation." *Id.* at 1335 (quoting 80 Fed. Reg. 37056). The significant nexus test "puts many property owners in a precarious position because it is 'often difficult to determine whether a particular piece of property contains waters of the United States.'" *Id*. (quoting *Hawkes*, 578 U.S. at 594). The Court explained that, under the Agencies' interpretation of WOTUS, "[e]ven if a property appears dry, application of the guidance in a complicated manual ultimately decides whether it contains wetlands." *Id*. Further, "because the CWA can sweep broadly enough to criminalize mundane activities like moving dirt, this unchecked definition of 'the waters of the United States' means that a staggering array of landowners are at risk of criminal prosecution or onerous civil penalties." *Id*.

The Court concluded that "the *Rapanos* plurality was correct: the CWA's use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" *Sackett*, 143 S. Ct. at 1336 (quoting *Rapanos*, 574 U.S. at 739 (plurality)). "This meaning is hard to reconcile with classifying 'lands, wet or otherwise, as waters.'" *Id*. at 1337 (cleaned up) (quoting *Rapanos*, 547 U.S. at 740 (plurality)).

The Court acknowledged that "the CWA extends to more than traditional navigable waters" so as to include some wetlands, but it "refused to read 'navigable' out of the statute." *Id*. Indeed, Congress's use of "navigable" "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*. (quoting *SWANCC*, 531 U.S. at 172). Thus, "[a]t minimum" the use of "navigable" to define WOTUS means that the term "principally refers to bodies of navigable water like rivers, lakes, and oceans." *Id*.; *see id*. at 1338 ("Ever since *Gibbons v. Ogden*, [9 Wheat. 1 (1824)], this Court has used 'waters of the United States' to refer to similar bodies of water, almost always in relation to ships.").

Sackett held that the CWA covers only wetlands "adjacent" to a WOTUS such that they are "indistinguishably part of a body of water that itself constitutes" WOTUS. *Id*. at 1339. In other words, "[w]etlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby." *Id*. at 1340. For the Agencies to exercise CWA jurisdiction over a wetland, the adjacent body of water must be a WOTUS, meaning that it is a "'relatively permanent body of water connected to traditional interstate navigable waters'" and the wetland has a "continuous surface connection with that water, making it difficult to determine

where 'water' ends and the 'wetland' begins." *Id*. at 1341 (quoting *Rapanos*, 547 U.S. at 742 (plurality)).

In reaching this conclusion, the Court explicitly rejected the Agencies' reliance on the Rule, which the Agencies characterized as providing jurisdiction over wetlands if they "possess a 'significant nexus' to traditional navigable waters." *Id*. (cleaned up) (citing Agencies Br. 32). The Court explained that "[r]egulation of land and water use lies at the core of traditional state authority," but "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" under the Rule. *Id*. at 1341-42. Congress, however, did not provide a clear statement to permit this impingement on traditional state regulatory authority, "[p]articularly given the CWA's express policy to 'preserve' the States' 'primary' authority over land and water use." *Id*. at 1342 (quoting 33 U.S.C. § 1251(b)).

The Agencies' use of the significant nexus test "to reduce the clash between its understanding of 'the waters of the United States' and the term defined by that phrase, *i.e.*, 'navigable waters'" is "particularly implausible." *Id*. Instead, "the meaning of 'waters' is more limited than the EPA believes" and "the CWA never mentions the 'significant nexus' test, so the EPA has no statutory basis to impose it." *Id*.

Because wetlands on the Sacketts' property "are distinguishable from any possibly covered waters," the Agencies could not assert CWA jurisdiction over them. *Id*. at 1344.

E. The Army Corps has stopped issuing approved jurisdictional determinations.

On June 22, 2023, Michael Connor, Assistant Secretary for the Army for Civil Works, testified before the House Committee on Transportation and Infrastructure that the Army Corps is

not making any AJDs until it issues a final rule accounting for *Sackett*.[4] The EPA has publicly stated that it will follow *Sackett* but has provided no details on how it will apply that decision, has given Corps offices no direction as to how to apply *Sackett*, and instead has stated that it plans to issue a new rule by September 1, 2023. See p.4, n.3, *supra*.

SUMMARY OF ARGUMENT

Now that *Sackett* has disapproved many aspects of the Rule, it should be vacated in its entirety. *Sackett* conclusively rejects inclusion of all interstate waters regardless of navigability as WOTUS; instead, *Sackett* makes clear, to be WOTUS, a waterbody must be a "relatively permanent body of water" connected to "traditional interstate navigable waters."

Sackett also expressly rejects the Rule's significant nexus test used to define whether tributaries, impoundments of tributaries, wetlands, and intrastate features are WOTUS. As *Sackett* explained, the CWA does not contain a significant nexus test and therefore the Agencies have no authority to impose it.

Sackett also squarely rejects the Rule's interpretation of "adjacency" to define whether wetlands are WOTUS. Wetlands that are neighboring or near but not abutting jurisdictional waters cannot be WOTUS because they are not indistinguishable from those waters.

Further, the Rule's relatively permanent test fails to provide the clarity *Sackett* requires, instead requiring landowners to determine whether their property contains jurisdictional features based on vague factors applied at the Agencies' broad discretion. Indeed, *Sackett* makes clear that the Agencies' vision of federal jurisdiction under the CWA that underlies their staggeringly broad definition of WOTUS in the Rule is predicated on a basic misconception: Congress intended to preserve traditional state authority over land and water use, and that limiting principle must be

[4] Available at: transportation.house.gov/calender/eventsingle.aspx?EventID=406736. Assistant Secretary Connor's relevant testimony begins at 1:00.

read into the jurisdictional reach of WOTUS under the CWA. For these reasons, the Rule should be vacated in its entirety.

ARGUMENT

I. THE RULE VIOLATES THE CWA.

The Court should hold unlawful and set aside the Rule if it finds any aspect of the Rule is (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; or (C) in excess of statutory jurisdiction, authority, or limitations or short of statutory right. 5 U.S.C. § 706(2)(A)-(C).

Under *Sackett*, the Rule's categorial inclusion of all interstate waters in paragraph (a)(1)(iii) violates the CWA because it includes non-navigable waters. Further, the Rule's use of the significant nexus test in paragraphs (a)(3)(ii), (a)(4)(iii), and (a)(5)(ii) was expressly rejected by *Sackett* as contrary to the CWA. Additionally, the Rule's definition of "adjacency" to define covered wetlands under paragraph (a)(4) was rejected by *Sackett*. And paragraph (a)(2), which covers impoundments of WOTUS under the other provisions of the Rule must fail because those other provisions are invalid.

An agency regulation that is inconsistent with the enabling statute violates the Administrative Procedure Act because it is an act in excess of the agency's statutory authority. 5 U.S.C. § 706(2)(C). Statutory interpretation begins with the text. *Ross v. Blake*, 578 U.S. 632, 638 (2016). The "'cardinal principle' of interpretation [is] that courts 'must give effect, if possible, to every clause and word of a statute.'" *U.S. v. Zam Lian Mung*, 989 F.3d 639, 642 (8th Cir. 2021) (quoting *Loughrin v. U.S.*, 573 U.S. 351, 358 (2014). The *Sackett* decision did just that, and held that the core elements of the Rule are at odds with the CWA.

A. The Agencies' interpretation of WOTUS is not entitled to deference.

As this Court recognized in granting the preliminary injunction, the Agencies' interpretation of WOTUS should not receive deferential review. Dkt. 131 at 17. The Supreme Court agreed. In *Sackett*, the Court considered and rejected the Agencies' attempt to rely on the Rule to support the assertion of jurisdiction of the Sacketts' property, and in doing so the Court did not view the Rule through a deferential lens. To the contrary, the Court explained that the Agencies' could not issue a broad interpretation of WOTUS because the CWA lacks the "'exceedingly clear language'" needed to "'significantly alter the balance between federal and state property and the power of the Government over private property.'" *Sackett*, 143 S. Ct. at 1341 (quoting *U.S. Forest Serv. v. Cowpasture River Preservation Ass'n*, 140 S. Ct. 1837, 1849-50 (2020)). Additionally, deference to the Agencies' interpretation was improper because the CWA is "a penal statute" that "could sweep so broad as to render criminal a host of what might otherwise be considered ordinary activities." *Id*. at 1342. Indeed, the Agencies' broad interpretation "gives rise to serious vagueness concerns in light of the CWA's criminal penalties." *Id*.

B. The Rule's categorical inclusion of all interstate waters regardless of navigability violates the CWA.

Sackett confirmed the district court's holding in *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1359 (S.D. Ga. 2019), and this Court's finding in its preliminary injunction order, Dkt. 131 at 28, that categorical inclusion of all interstate waters improperly reads the term "navigable" out of the statute. Paragraph (a)(1)(iii) starkly declares that "[i]nterstate waters, including interstate wetlands," are WOTUS. 88 Fed. Reg. 3142. In the Preamble, the Agencies explain that they consider this category to include "*all* rivers, lakes, and *other waters* that flow across, or form a part of, State boundaries." 88 Fed. Reg. 3072 (emphasis added). These "[i]nterstate waters may be streams, lakes or ponds, or wetlands." *Id*. According to the Agencies, "Congress intended" that

they assert jurisdiction over all interstate waters "without reference to navigability." 88 Fed. Reg. 3073. Therefore, a water or wetland is a WOTUS if it crosses a state line, no matter how isolated it might be and regardless of whether the water is navigable. The Agencies provide the Amargosa River, which flows from Nevada into a dry playa in Death Valley, California, as an example of the breadth of this category. They state: "The Amargosa River is not a traditional navigable water and does not otherwise flow to a traditional navigable water or the territorial seas" but nonetheless is included as a WOTUS under paragraph (a)(1)(iii). 88 Fed. Reg. 3072.

The CWA grants the Agencies jurisdiction over "navigable waters," which the statute defines as "the waters of the United States." 33 U.S.C. § 1362(7). The Supreme Court made clear that "Congress' separate definitional use of the phrase 'waters of the United States' [does not] constitute[] a basis for reading the term 'navigable waters' out of the statute." *SWANCC*, 531 U.S. at 172. In his concurrence in *Rapanos*, Justice Kennedy explained that if "navigable" is to have any meaning, the CWA cannot be understood to "permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters." 547 U.S. at 778; *see also id*. at 733-34 (plurality).

The Court in *Sackett* emphasized the importance of navigability in defining WOTUS. The Court stated that "navigable" in the CWA means that WOTUS "principally refers to bodies of navigable water like rivers, lakes, and oceans." 143 S. Ct. at 1337. Although the Court has interpreted the CWA to cover "more than traditional navigable waters," meaning that the CWA also covers wetlands that are indistinguishable from covered waters, Congress nonetheless "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 1337 (quoting *Rapanos*, 547 U.S. at 731 (plurality)). In explaining the scope of wetland coverage under the CWA, the Court made clear that "[w]etlands

that are separate from *traditional navigable waters* cannot be considered part of those waters, even if they are located nearby." *Id*. at 1340 (emphasis added). Thus, an agency "asserting jurisdiction over adjacent wetlands" must first establish that the wetland is adjacent to a "water of the United States" which is "a relatively permanent body of water connected to *traditional interstate navigable waters*." *Id*. at 1341 (emphasis added) (cleaned up). Moreover, the Court explained that traditional navigable waters are "interstate waters that [are] either navigable in fact *and* used in commerce or readily susceptible to being used this way." *Id*. at 1330 (emphasis added). The Rule's inclusion of interstate waters that are not navigable and not used in commerce, as well as relatively permanent waters connected to solely interstate waters, violates the CWA.

C. Sackett invalidated the Rule's significant nexus test.

A cornerstone of the Rule is the Agencies' latest version of the significant nexus test, purportedly adopted from Justice Kennedy's *Rapanos* concurrence. *See* 88 Fed. Reg. 3006. The Rule uses that test to define (a)(3) tributaries, (a)(4) wetlands, and (a)(5) intrastate lakes, ponds, streams, and wetlands. 88 Fed. Reg. 3143. Additionally, paragraph (a)(2) impoundments include impoundments of all WOTUS as defined in paragraphs (a)(3) and (a)(4), so necessarily includes impoundments of waters that are WOTUS only because they satisfy the significant nexus test. *Id*.

Sackett expressly held that the significant nexus test violates the CWA: "the CWA never mentions the 'significant nexus' test, so the EPA has no statutory basis to impose it." 143 S. Ct. at 1342. Indeed, Assistant Secretary Conner admitted to the House Committee on Transportation and Infrastructure that *Sackett* invalidated the use of the significant nexus test in the Rule.[5] Therefore, paragraphs (a)(3)(ii), (a)(4)(iii), and (a)(5)(ii), as well as paragraph (a)(2) insofar as it applies to waters that are WOTUS through application of the significant nexus test, are invalid.

[5] https://transportation.house.gov/calendar/eventsingle.aspx?EventID=406736

D. The Rule's relatively permanent test cannot be squared with *Sackett*.

Another aspect of the Rule is the use of the relatively permanent test to define covered tributaries (paragraph (a)(3)(i)), wetlands (paragraph (a)(4)(ii)), and intrastate waters (paragraph (a)(5)(i)), as well as impoundments of (a)(3) and (a)(4) waters that meet the relatively permanent test. 88 Fed. Reg. 3143. *Sackett* now establishes that the relatively permanent test from *Rapanos* properly defines WOTUS: "[W]e conclude that the *Rapanos* plurality was correct: the CWA's use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" *Sackett*, 143 S. Ct. at 1336 (quoting *Rapanos*, 547 U.S. at 739 (plurality), in turn quoting Webster's New Int'l Dictionary 2882 (2d ed. 1954)).

In the Rule, however, the Agencies essentially punted on defining "relatively permanent" waters because they assumed that, for the most part, such waters would be jurisdictional under the Rule's significant nexus test. *See* 88 Fed. Reg. at 3034 ("The relatively permanent standard is administratively useful as it more readily identifies a subset of waters that will virtually always significantly affect paragraph (a)(1) waters"). Instead, the Agencies included broad language in the preamble in place of any specific "relatively permanent" standard such as a defined flow duration. *See id.* at 3084-88. Because the Agencies wrongly believed that the "relatively permanent standard . . . is inconsistent with the Act's text and objective" (*id.* at 3039), and could fall back on the expansive significant nexus test, they failed to define "relatively permanent" in a way that provides substantial guidance.

Under *Sackett*, that approach is not permissible. The Agencies' interpretation of the relatively permanent test in the Rule exceeds their statutory authority because it extends WOTUS far beyond "streams, oceans, rivers, and lakes." And it leaves too much uncertainty, and gives too much discretion to the Agencies; as *Sackett* warned, the Agencies cannot interpret WOTUS to

leave "property owners . . . to feel their way on a case-by-case basis." *Sackett*, 143 S. Ct. at 1342. A "freewheeling inquiry" into the jurisdictional status of a feature "provides little notice to landowners of their obligations under the CWA" and so cannot withstand judicial review, given the severe consequences of a WOTUS designation. *Id*.

According to the Rule, the relatively permanent test includes "flow [that] may occur seasonally," but also encompasses features where flow ceases due to "various water management regimes and practices." 88 Fed. Reg. 3085. For instance, in some areas streamflow may be affected by irrigation or groundwater pumping. *Id*. But the Rule arrogates almost unbounded authority to the Agencies to determine whether "these types of artificially manipulated regimes" affect a relatively permanent flowing water: "the agencies may consider information about the regular manipulation schedule and may potentially consider other remote resources of on-site information to assess flow frequency." *Id*. That approach offers no standard that is ascertainable by a property owner potentially subject to criminal penalties. To the contrary, the Agencies expressly declined to provide a minimum flow duration, even though such a standard would provide the necessary certainty to property owners. *See id*. ("The agencies decided not to establish a minimum duration because flow duration varies extensively by region.").

To be sure, the Agencies noted that "[r]elatively permanent waters do not include surface waters with flowing or standing water for only a short duration in direct response to precipitation." 88 Fed. Reg. 3084. Thus, "tributaries in the arid West" that are "dominated by coarse, alluvial sediments and exhibit high transmission losses, resulting in streams that often dry rapidly following a storm event" are not relatively permanent. 88 Fed. Reg. 3086. But the Rule also maintains that "relatively permanent flow may occur as a result of multiple back-to-back storm events throughout a watershed" or even single "larger storm events." 88 Fed. Reg. 3086-87.

Without standards demarcating how much flow in response to a precipitation event is sufficient to trigger relatively permanent status—despite the disclaimer that streams flowing as a direct result of precipitation events are *not* relatively permanent—property owners are again left "feel[ing] their way on a case-by-case basis," under threat of substantial penalties. *Sackett*, 143 S. Ct. at 1342.

Given *Sackett*'s endorsement of the *Rapanos* plurality's analysis, the plurality's explanation that the "relatively permanent" test may encompass "streams, rivers, or lakes that might dry up *in extraordinary circumstances*, such as drought," and "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months—such as [a] *290-day, continuously flowing stream*," must be given considerable weight. *Rapanos*, 547 U.S. at 732 n.5 (plurality opinion; first and third emphases added). As the plurality held, "[c]ommon sense and common usage distinguish between a wash and seasonal river" (*id.*)—but neither support the Agencies' view in the Rule that features that are manipulated to receive only intermittent flow, or that flow only in response to occasional large storm events, or for far less than a "season," can be WOTUS.

E. Sackett invalidated the Rule's concept of adjacency for determining jurisdictional wetlands

Paragraph (a)(4) of the Rule defines wetlands as WOTUS if they are "adjacent" to waters identified in paragraph (a)(1) or if they satisfy the relatively permanent or significant nexus tests. 88 Fed. Reg. 3143. As discussed, paragraph (a)(1) impermissibly includes all interstate waters regardless of their connection to a traditional navigable water, and the Rule's relatively permanent and significant nexus tests violate the CWA. The Rule defines "adjacent" to mean "bordering, contiguous, or neighboring" a covered water, and includes features separated by "man-made dikes or barriers, natural river berms, beach dunes and the like." 88 Fed. Reg. 3117. *Sackett*, however, rejected the extension of adjacency to wetlands that are not directly abutting a covered water so

that the water and the wetland are "indistinguishable" from each other. 143 S. Ct. at 1340-41. And it held that "a barrier separating a wetland from" a WOTUS "ordinarily remove[s] that wetland from federal jurisdiction," with exceptions only for "temporary interruptions" like "low tides or dry spells," or "illegally construct[ed] barriers" that violate the CWA. *Id.* at 1340-41 & n.16. Even the Rule's "continuous surface connection" standard was invalidated by *Sackett*. *See* 88 Fed. Reg. at 3095 ("a natural berm, bank, dune, or similar natural landform between an adjacent wetland and a relatively permanent water does not sever a continuous surface connection"). Because all categories of (a)(4) wetlands are defined with reference to a concept of adjacency that *Sackett* rejected, that paragraph must be invalidated.

F. The Rule is rooted in a misunderstanding of the CWA's protection of traditional state authority over land and water use.

In *Sackett*, the Supreme Court time and again emphasized that the Agencies' broad interpretation of WOTUS is not supported by the kind of clear congressional statement necessary to so fundamentally alter the States' traditional authority over land and water use within their boundaries—still less State authority that Congress expressly intended to preserve. *See* 33 U.S.C. § 1251(b) ("Section 101(b)") (stating a purpose to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources, and to consult with the [EPA] in the exercise of [its] authority"). As *Sackett* pointed out, "[i]t is hard to see how the States' role in regulating water resources would remain 'primary' if the EPA had jurisdiction over anything defined by the presence of water." 143 S. Ct. at 1338; *see id*. at 1343-44 ("[W]e cannot redraw the Act's allocation of authority . . . . The Clean Water Act anticipates a partnership between the States and the Federal Government . . . [and] States can and will continue to exercise their primary authority to combat water pollution by regulating land and water use"); *see also SWANCC*, 531 U.S. at 174

("Permitting respondents to claim federal jurisdiction over ponds and mudflats . . . would result in a significant impingement of the States' traditional and primary power over land and water use" because "regulation of land use [is] a function traditionally performed by local governments").

The Agencies arrived at their broad interpretation of federal power by "subordinat[ing]" Section 101(b) to the "overarching objective" in Section 101(a) of "restoring and maintaining the chemical, physical, and biological integrity of the nation's waters." 88 Fed. Reg. 3043-44. The Agencies asserted that "there is no indication in any text of the statute that Congress established section 101(b) as the lynchpin of defining the scope of 'waters of the United States.'" *Id.* at 3044. The Agencies claimed the Rule nevertheless serves the "congressional policy" of preserving state authority by limiting the definition of WOTUS to "those waters that significantly affect the indisputable Federal interest in the protection of the paragraph (a)(1) waters." *Id.* at 3043. The Agencies got it wrong. *Sackett* rejects their view that Section 101(b) serves a subordinate role. To the contrary, that preservation of traditional state authority provides an important limit on federal jurisdiction that the Agencies completely ignored. This error by the Agencies pervades the entire Rule.

Another foundation for the 2023 Rule is the Agencies' claim that WOTUS jurisdiction reaches to the full extent of Commerce Clause authority to regulate channels of interstate commerce. 88 Fed. Reg. 3045. The exercise of Commerce Clause authority under the CWA, however, has limits—as *SWANCC* held when it refused to allow the Agencies to "readjust the federal-state balance" to regulate land and water use. 531 U.S. at 174. *Sackett* reaffirmed this holding. 143 S. Ct. at 1341-44. The new Rule violates that limit and also the inherent constraint in the "channels" authority that the relevant "channels" must be "navigable." The Agencies fail to tie

their Rule to protecting navigability, revealing this new reliance on the "channels" authority as a mere ruse.

II. THE RULE MUST BE VACATED IN ITS ENTIRETY.

"The APA 'empowers federal courts to hold unlawful and set aside agency action.'" *Iowa League of Cities v. EPA*, 711 F.3d 844, 855 (8th Cir. 2013) (quoting *Marsh v. Oregon Natural Resource Council*, 490 U.S. 360, 375 (1989) (in turn quoting 5 U.S.C. § 706(2)). "The APA contemplates vacatur and remand where, as here, agency action was arbitrary and capricious." *United Food & Commercial Workers Union, Local No. 663 v. U.S. Dep't of Ag.*, 532 F. Supp. 3d 741, 776 (D. Minn. 2021) (citing *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998). "The ordinary practice is to vacate unlawful agency action." *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019); *see Iowa League of Cities*, 711 F.3d at 875-76 (vacating agency rules pursuant to 5 U.S.C. § 706(2)). In considering whether to follow the default rule of vacatur, courts consider the seriousness of the agency's errors and the disruptive consequences of vacatur. *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.3d 146, 150-51 (D.C. Cir. 1993).

Here, the Rule's deficiencies permeate all five categories of WOTUS in ways that could not conceivably be justified after *Sackett*. Under *Sackett*, paragraph (a)(1)'s categorical inclusion of all interstate waters regardless of navigability is invalid. Paragraph (a)(2)'s coverage of impoundments of waters that are WOTUS is unlawful because it rests on invalid criteria for WOTUS—such as non-navigable interstate waters under paragraph (a)(1)(iii) or the significant nexus test under paragraphs (a)(3)(ii) or (a)(4)(iii). Paragraph (a)(3)(i)'s coverage of tributaries that meet the Rule's relatively permanent test is invalid because that test is inconsistent with the test set forth in *Rapanos* and adopted by *Sackett*, and because the version of the test in the Rule leaves property owners at a loss whether features on their property meet this test. Paragraph

(a)(3)(ii)'s coverage of tributaries that meet the significant nexus test is invalid because *Sackett* held that the significant nexus test violates the CWA. Paragraph (a)(4) is invalid in its entirety because the Rule's definition of "adjacency" goes far beyond wetlands that are indistinguishable from protected waters, as required by *Sackett*. Paragraphs (a)(4)(ii) and (a)(4)(iii) are invalid because they rely on a misunderstanding of the relatively permanent test and on the significant nexus test. Paragraph (a)(5) is invalid because it too relies on the relatively permanent and significant nexus tests. Further, the entire Rule is invalid for the additional reason that it is premised upon the Agencies' incorrect understanding of the extent to which the CWA's preserves the States' traditional authority over land and water use. That misconception pervades the entire Rule because it forms the basis for the Agencies' belief that they were entitled to interpret federal jurisdiction under the CWA as broadly as possible, and that misinterpretation infects every part of the Rule.

Vacatur would not be disruptive. The Rule is enjoined in 27 States. The majority of the provisions defining the different categories of WOTUS have been invalidated by *Sackett*. It would be far more disruptive to property owners and States to leave the Rule's illegal provisions in place in those States where the Rule is not currently enjoined. Leaving in place a major, complex Rule with potentially severe civil and criminal consequences for those making ordinary use of their land, which contravenes a Supreme Court decision, and which applies in only half the country, is a recipe for confusion for intervenor-plaintiffs' members and their clients and every other land user.

There is ample precedent for vacatur of faulty WOTUS rules. In district courts in Texas and Georgia, the Agencies supported vacatur of the 2015 Rule rather than abeyance. *See Texas v. EPA*, 3:15-cv-162 (S.D. Tex. 2015), Dkt. 217 (Agencies sought vacatur); Dkt. 221 (Agencies opposed abeyance); *Georgia v. Wheeler*, 2:15-cv-0079 (S.D. Ga. 2015), Dkt. 280 (Agencies

opposed abeyance and sought vacatur). An Arizona district court vacated the 2020 WOTUS Rule, *Pasqua Yaqui Tribe v. EPA*, No. 4:20-cv-00266, Dkt. 99, at 11 (D. Ariz. Aug. 30, 2021), and the Agencies acquiesced in that vacatur. *See* USACE, Navigable Waters Protection Rule Vacatur (Jan. 5, 2022) ("In light of this order, the agencies have halted implementation of the Navigable Waters Protection Rule ("NWPR") nationwide").

The Rule should be vacated in its entirety. Every category of WOTUS in the Rule suffers from fatal flaws under *Sackett*, and the Rule rests on a basic misunderstanding of the reach of federal authority under the CWA. While the Preamble to the Rule includes an assertion of severability, 88 Fed. Reg. 3135, that assertion was not included in the proposed rulemaking and therefore is invalid. The Administrative Conference of the United States explains that an agency must support severability by explaining its severability claim in the rule proposal, including a severability provision in the proposed rule, addressing comments it receives on the proposal in the final rule preamble, and including a severability provision in the final rule. *Admin. Conference of the United States Recommendation 2018-2*, at 2. The Agencies did none of those things here, so the severability provision was issued "without observance of procedure required by law" in violation of 5 U.S.C. § 706(2)(D).

If the Court nonetheless considers severability, it must "look to agency intent and whether the valid portions can function absent the invalid portions." *Nasdaq Stock Market LLC v. Securities & Exchange Comm'n*, 38 F.4th 1126, 1145 (D.C. Cir. 2022). Here, every category of WOTUS under the Rule is invalid, sometimes for multiple reasons. Further, the sub-categories of WOTUS fit together to form a regulatory whole that realized the Agencies' vision of extremely broad federal jurisdiction which was misguided from the start. Under these circumstances of interwoven rules

predicated on a false understanding of federal authority under the CWA, no provisions of the CWA are severable.

III. THE COURT SHOULD REQUIRE THE AGENCIES TO PROMULGATE A NEW RULE IN 45 DAYS AND TO PROCESS APPROVED JURIS-DICTIONAL DETERMINATIONS AND PERMITS IN THE MEANTIME.

The APA authorizes the Court to issue appropriate mandatory injunctive relief. 5 U.S.C. § 702; *Cohen v. U.S.*, 650 F.3d 717, 723 (D.C. Cir. 2011). Under § 706(1), the Court can order the Agencies to take action that is legally required. 5 U.S.C. § 706(1); *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004). The Agencies have no discretion not to enforce the Act, *see, e.g.*, 33 U.S.C. §§ 1342, 1344, nor do they have authority not to follow *Sackett*. The Court should require them to do both.

The Corps has placed consideration of AJDs on hold pending promulgation of a replacement rule. *Supra*, pp. 12-13. Although the Corps had discretion whether to establish an AJD process, having done so (*see* 33 CFR §§ 331.2, 320.1(a)(6), Pt. 331, App. C) it may not arbitrarily abandon that process. That abdication would be enormously harmful to all those who rely on AJDs to make decisions about how they will use their land. As the Corps has acknowledged, members of the Supreme Court in *Hawkes* "highlighted that the availability of AJDs is important for fostering predictability for landowners." USACE, Regulatory Guidance Letter No. 16-01, at 1 (Oct. 2016). And the Corps "recognizes the value of JDs to the public and reaffirms the Corps commitment to continue its practice of providing JDs when requested to do so." *Id.* AJDs can readily be issued in the large majority of cases in which *Sackett* provides a clear answer to the question whether a feature is WOTUS. Declining to follow *Sackett* immediately by postponing processing AJD requests would unreasonably exacerbate the great harm to intervenor-plaintiffs' members and their clients that has resulted from decades of agency misinterpretations of the CWA.

The Agencies' statement that they (eventually) "will interpret the phrase 'waters of the United States' consistent with the Supreme Court's decision in *Sackett*"[6] provides no comfort to businesses that have watched the Agencies evade the prior decisions in *SWANCC* and *Rapanos*. As the Supreme Court pointed out in *Sackett*, following earlier decisions critical of the Agencies approach to WOTUS, the Agencies have "sought to minimize [the ruling's] impact." *Sackett*, 143 S. Ct. at 1333. Nor do vague statements that the Agencies "will continue to review the decision to determine next steps" provide any guidance or assurance to the regulated community.[7] The resulting uncertainty is prejudicial to countless land users who must know their legal obligations in order to undertake any number of projects and to make long-term investment decisions.

To remedy the problems caused by the regulatory vacuum in the wake of *Sackett*'s gutting of the Rule, this Court should exercise its equitable authority to order the Agencies to continue to process applications for AJDs and permits when the issues presented by those applications are answered by *Sackett*.

Additionally, to safeguard the regulated community, provide the certainty that *Sackett* insists upon, and minimize delay, we urge the Court to direct that the Agencies promulgate a new definition of WOTUS within 45 days, with the opportunity for comment by interested parties. The Court has the authority to order the Agencies to complete rulemaking by a specific deadline. *See* 5 U.S.C. § 555(b) (requiring agency to conclude matters presented to it within reasonable time); 5 U.S.C. § 706(1) (court has authority to compel agency action unreasonably delayed); *Ctr. for Biological Diversity v. Env't Prot. Agency*, 56 F.4th 55, 72-73 (D.C. Cir. 2022). Indeed, "[t]here is a point when the court must let the agency know, in no uncertain terms, that enough is enough."

[6] https://www.epa.gov/wotus/current-implementation-waters-united-states.
[7] *Id.*

In re Int'l Chem. Workers Union, 958 F.2d 1144, 1150 (D.C. Cir. 1992) (internal quotation marks omitted).

The Agencies have had decades to promulgate a reasonable interpretation of WOTUS, but their efforts have repeatedly been invalidated by the courts as impermissible overreaches of federal authority. *Sackett* recognized this problem and clarified the definition of WOTUS, explaining that the Agencies do not have authority under the CWA to apply a broad reading of federal jurisdictional that is untethered from navigability of interstate waters. The intervenor-plaintiffs have been caught in the regulatory whiplash created by the long-running cycle of shifting agency interpretations and judicial disapproval of those interpretations. In light of *Sackett*, it is time for this Court to tell the Agencies "in no uncertain terms, that enough is enough" and order that a new proposed rule be promulgated within 45 days and *Sackett*'s clear rules apply to AJDs in the interim.

CONCLUSION

For the foregoing reasons, this Court should grant intervenor-plaintiffs summary judgment, vacate the Rule in its entirely, order the Agencies to process approved jurisdictional determinations and permits under the rules set forth by *Sackett*, and request that the Agencies promulgate a new rule within 45 days.

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Respectfully submitted,

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