IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

STATES OF TEXAS AND IDAHO, *et al.*,	)	
Plaintiffs,	)	
v.	)	No. 3:23-cv-00017
	)	(consolidated with 3:23-cv-00020)
U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*	)	
Defendants.	)	

BUSINESS PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Business Plaintiffs[1] respectfully move for entry of summary judgment and a declaration that the *Revised Definition of "Waters of the United States"* ("2023 Rule"), 88 Fed. Reg. 3004 (Jan. 18, 2023) (**Exhibit A**), as amended on September 8, 2023 ("Amended Rule"), 88 Fed. Reg. 61964 (September 8, 2023) (**Exhibit B**), violates the Administrative Procedure Act ("APA"), the plain text of the Clean Water Act ("CWA"), and the Constitution. The 2023 Rule and Amended Rule should be remanded to the U.S. Environmental Protection Agency and Army Corps of Engineers (the "Agencies") for further rulemaking consistent with this Court's opinion.[2]

For some 15 years, Business Plaintiffs' members and their clients had to operate under a definition of waters of the United States ("WOTUS") that reached virtually every sometimes-damp patch in the country based on a "significant nexus" test that appeared in the concurring opinion of a single Justice and had no basis in the text of the CWA. That test, and an alternative "relatively permanent" test, forced landowners to undertake costly jurisdictional analyses, seek costly and time-consuming jurisdictional determinations and permits, provide unwarranted mitigation, and abandon or curtail projects, and it led

[1] Plaintiffs are the American Farm Bureau Federation; American Petroleum Institute; American Road and Transportation Builders Association; Associated General Contractors of America; Leading Builders of America; Matagorda County Farm Bureau; 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; Public Lands Council; Texas Farm Bureau; and U.S. Poultry and Egg Association.

[2] The full Rule as revised is at https://www.ecfr.gov/current/title-33/chapter-II/part-328 and is reproduced at **Exhibit C**. The same revisions appear in 40 C.F.R. 120.2.

Business Plaintiffs to pour resources into efforts to undo this injustice in the courts, Congress, and the Agencies.

The Agencies codified the significant nexus test in their January 2023 Rule and then in *Sackett v. EPA*, 598 U.S. 651, 679 (2023), "ask[ed the Supreme Court] to defer to [their] understanding of the [CWA]'s jurisdictional reach as set out in [that] rule." The Supreme Court rejected that plea, holding that the Agencies' "interpretation is inconsistent with the text and structure of the CWA" and with "'background principles of [statutory] construction,'" and so "the EPA has no statutory basis to impose it." *Id.* at 679.

Despite that resounding defeat, the Agencies doubled-down in their post-*Sackett* revision of the Rule. Although dropping the significant nexus test, the Agencies—without seeking notice and comment on other effects of *Sackett*[3]—have promulgated a definition of WOTUS that still vastly exceeds the authority that Congress conferred on them and flatly contradicts Supreme Court precedent, including *Sackett* itself. The Rule's numerous serious defects necessitate a remand for a substantial redefinition of WOTUS.

The Rule as amended eliminates the "significant nexus" test and redefines the concept of wetland adjacency. It now relies solely on the "relatively permanent" test—a

[3] Plaintiff States argue that the Rule is procedurally defective because the Agencies failed to make the post-*Sackett* revision available for notice and comment. True, the Agencies should have done so. Business Plaintiffs' submissions explaining how to conform the Rule to *Sackett* and the CWA were ignored by the Agencies and excluded from the Administrative Record. *See* Dkt. 103; Docket EPA-HQ-OW-2023-0346-0009 (submissions of ARTBA, NMA, NSSGA, and Waters Advocacy Coalition, which the Agencies "did not consider"). But a remand for notice and comment on a Rule the Agencies are intransigently defending would prolong decades of uncertainty and unlawful agency overreach. Business Plaintiffs urge this Court to decide the merits of plaintiffs' claims that the Rule is substantively unlawful, not merely remand to cure the procedural defect.

standard that the Agencies admitted in the preamble to the 2023 Rule has in the past led to "arbitrary results." 88 Fed. Reg. 3052. That test remains undefined and impermissibly vague, leaving the regulated community to guess at what "relatively permanent" means.

And that is far from the only problem with the new Rule. It ignores *Sackett*'s requirement that the relatively permanent test can apply only to those "bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" 598 U.S. at 671 (quoting *Rapanos v. U.S.*, 547 U.S. 715, 739 (2006) (plurality)). The Agencies contravene *Sackett*'s mandate that the CWA covers only wetlands that "as a practical matter [are] indistinguishable from waters of the United States'" such that it is "'difficult to determine where the 'water' ends and the 'wetland' begins.'" 598 U.S. at 678-79 (quoting *Rapanos*, 547 U.S. at 742 (plurality)). And the Rule persists in reading "navigability" out of the definition of "navigable waters" by capturing all interstate waters regardless of navigability. *See* 598 U.S. at 672 ("[W]e 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'" (quoting *Solid Waste Agency of Northern Cook Cnty. v. Army Corp of Eng'rs*, 531 U.S. 159, 172 (2001) ("*SWANCC*")).

Aside from these inconsistencies with the text of the CWA and Supreme Court precedent, the Rule suffers from constitutional flaws. It is unconstitutionally vague, subjecting the regulated community to the threat of criminal and civil penalties and activist suits for failure to comply with ill-defined terms that give the Agencies unpredictable discretion to determine whether features may be deemed jurisdictional under the CWA.

And the Rule's expansive reach—even as constrained after *Sackett*—affronts federalism by trampling the primary authority of the States over the use of land and water. Decades of litigation over the meaning of WOTUS, courts' repeated invalidation of the Agencies' attempts to define that term, and the Agencies' refusal to heed precedent have left Business Plaintiffs' members and their clients facing uncertain rules for the use of their land and huge risks for guessing wrong. It is time for courts to instruct the Agencies in the clearest terms as to the limits of their jurisdiction over WOTUS.

NATURE AND STAGE OF PROCEEDINGS

These consolidated actions for declaratory and injunctive relief against the Agencies brought by Texas and Idaho and the Business Plaintiffs challenge the legality of the Rule under the APA, the CWA, and the Constitution. The 2023 Rule and Amended Rule purport to clarify the Agencies' definition of WOTUS as used in the CWA (*see* 33 U.S.C. § 1362(7)), and as such define the geographic reach of the CWA. On March 19, 2023, before the 2023 Rule became effective, this Court entered a preliminary injunction enjoining enforcement of the Rule in Texas and Idaho. Dkt. 60. The Agencies appealed that decision. Dkt. 73. That appeal was dismissed by the Agencies on October 6, 2023 (5th Cir. No. 23-40306), Dkt. 44. The Rule has also been enjoined in 25 additional States.[4]

After *Sackett* invalidated elements of the 2023 Rule, this Court stayed proceedings pending publication of the Amended Rule. Dkt. 80. After the Amended Rule was

[4] *See* https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update. On April 12, 2023, the District Court of North Dakota enjoined application of the Rule in 24 states. On May 12, 2023, the Sixth Circuit granted Kentucky a stay of enforcement of the Rule pending appeal from a district court decision.

published, the States and Business Plaintiffs filed Second Amended Complaints (Dkts. 90-91), which the Agencies and Intervenors answered. Dkts. 99-102.

BACKGROUND

A. The Rule's definition of 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, for discharges of dredged or fill material. 33 U.S.C. § 1311(a). The "discharge of a pollutant" is 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). 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 and penalties.

The Rule as amended 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." 40 C.F.R. § 120.2(a)(1); 33 C.F.R. § 328.3(a)(1).

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." 40 C.F.R. § 120.2(a)(2); 33 C.F.R. § 328.3(a)(2).

Paragraph (a)(3) states that WOTUS includes tributaries of waters identified in paragraphs (a)(1) and (a)(2) if the tributaries are "relatively permanent, standing or continuously flowing bodies of water." 40 C.F.R. § 120.2(a)(3); 33 C.F.R. § 328.3(a)(3).

Paragraph (a)(4) states that WOTUS includes "[w]etlands adjacent to" (i) paragraph (a)(1) waters or (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." 40 C.F.R. § 120.2(a)(4); 33 C.F.R. § 328.3(a)(4). "Adjacent" is defined as "having a continuous surface connection." 40 C.F.R. § 120.2(c)(2); 33 C.F.R. § 328.3(c)(2). The Agencies do not define "having a continuous surface connection."

Paragraph (a)(5) defines WOTUS to include intrastate lakes and ponds not identified in paragraphs (a)(1)-(a)(4) that are "relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3)." 40 C.F.R. § 120.2(a)(5); 33 C.F.R. § 328.3(a)(5).

The Agencies' preamble explains 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. Apparently a connecting swale, rill, pipe, or ditch, even if usually dry, will do.

B. This Court preliminarily enjoined the 2023 Rule.

On May 19, 2023, this Court granted the States' motion for preliminary injunction. Dkt. 60. The Court declined to give deference to the Agencies' interpretation of WOTUS because the CWA implicates criminal penalties (citing *Cargill v. Garland*, 57 F.4th 447, 468, 471 (5th Cir. 2023) (en banc)) and because the Agencies' "effort to read navigability out of the statute's text to permit categorical encroachment on States' rights raises constitutional questions this court should—if any other reasonable interpretation of the Act exists—avoid." Dkt. 60 at 18-19 (citing *SWANCC*, 531 U.S. at 173).

This Court then concluded that "the Rule is unlikely to withstand judicial review." Dkt. 60 at 21. Presaging the result in *Sackett*, this Court explained that it "has considerable concerns with the significant nexus test" because "it misreads and misapplies Supreme Court precedent interpreting the Act." Dkt. 60 at 22 n.10 (citing *Rapanos*, 547 U.S. at 753-56 (plurality)). Further, the Court expressed its "concer[n] that the significant-nexus test poses due-process concerns" because of the Rule's "numerous factors and malleable application." Dkt. 60 at 23 n.11.

The Court also determined that plaintiffs are likely to succeed on their challenges to the Rule's categorical inclusion of interstate waters, regardless of whether they are navigable. Dkt. 60 at 23-26. The Court reasoned that "[t]he Agencies' interpretation of the Act to include all interstate waters irrespective of any limiting principle raises serious federalism questions; accordingly, the court will prefer any 'otherwise acceptable construction' not 'plainly contrary' to Congress's intent." *Id*. at 24-25 (citing *SWANCC*, 531 U.S at 173). The Court noted that "a Georgia district court vacated and set aside the

Agencies' previous attempt to extend their jurisdiction to 'all interstate waters … regardless of navigability,'" and opined that "[t]he Agencies' most recent attempt to read navigability out of the Act's plain text is unlikely to fare better." *Id.* at 25-26 (quoting *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1358-60 (S.D. Ga. 2019)).

C. *Sackett* confirmed that core aspects of the 2023 Rule violate the CWA.

Subsequently, *Sackett* addressed "what the Act means by 'the waters of the United States.'" 598 U.S. at 659. 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 661-62. That tributary flowed into a non-navigable creek, which fed into Priest Lake. *Id.* at 662-63. The Agencies claimed there was a "significant nexus" between the Sacketts' wetland and Priest Lake and the wetland thus counted as WOTUS. *Id.* at 663.

The Court explained that correcting the Agencies' misunderstanding of WOTUS is necessary because the stakes are high for landowners. The CWA is "a potent weapon" that imposes "'crushing' consequences 'even for inadvertent violations.'" *Id.* at 660 (quoting *Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S 590, 602 (Kennedy, J., concurring)). "Property owners who negligently discharge 'pollutants' into covered waters may face severe criminal penalties including imprisonment." *Id.* (citing 33 U.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)). And "these civil penalties can be nearly as crushing as their criminal counterparts." *Id.* For example, the Ninth Circuit has upheld 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.* at 660-61 (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 661 (citing 33 U.S.C. § 1319(a)). The Agencies are also "empowered to issue permits exempting activity that would otherwise by unlawful under the [CWA]." *Id.* "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). Compounding the risks faced by the regulated community, the Court noted that the CWA "also authorizes private plaintiffs to sue to enforce its requirements." *Id.* (citing 33 U.S.C. § 1365(a)).

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*, 598 U.S. at 661.

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.* at 669. 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.* at 669-70.

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*, 598 U.S. at 671 (quoting *Rapanos*, 574 U.S. at 739 (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*. 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*.

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 676. 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*. For the Agencies to exercise CWA jurisdiction over a wetland, the wetland must be, "as a practical matter[,] indistinguishable from waters of the United States," such that 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 678-79 (quoting *Rapanos*, 547 U.S. at 742 (plurality)).

In reaching this conclusion, the Court 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.* at 679 (cleaned up). 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." *Id.* at 680. 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.* (quoting 33 U.S.C. § 1251(b)).

Because wetlands on the Sacketts' property "are distinguishable from any possibly covered waters," the Agencies could not assert CWA jurisdiction over them. *Id.* at 684.

ISSUE & STANDARD OF DECISION

The issue for decision is whether the Court should grant summary judgment to the Business Plaintiffs and remand the Rule to the Agencies for further rulemaking. 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).

SUMMARY OF ARGUMENT

Sackett conclusively rejects inclusion of all interstate waters, regardless of navigability, as WOTUS, but the Rule as amended still purports to grant federal jurisdiction

over all interstate waters. And as *Sackett* makes clear, WOTUS are only "relatively permanent bod[ies] of water" that are or are connected to "traditional interstate navigable waters." But the Rule's relatively permanent test fails to provide the clarity *Sackett* requires, instead forcing landowners to guess whether their property contains jurisdictional features based on vague factors applied at the Agencies' broad discretion. And with respect to wetlands, the Fifth Circuit held in *Lewis v. U.S.*, 88 F.4th 1073, 1078 (5th Cir. 2023), that *Sackett* requires that a covered wetland must be indistinguishable from a covered water—yet the Amended Rule does not even try to implement that requirement.

Sackett makes clear that the Agencies' still-staggeringly broad definition of WOTUS is predicated on a basic misconception: Congress intended to preserve traditional state authority over land and water use, and that limiting principle must be read into the jurisdictional reach of WOTUS under the CWA.

ARGUMENT

I. THE BUSINESS PLAINTIFFS HAVE STANDING TO CHALLENGE THE RULE.

Business Plaintiffs have standing to challenge the Rule, as amended, because their members and members' clients are likely to sustain injuries as a result of the Rule. *See Alliance for Hippocratic Med. v. U.S. Food & Drug Admin.*, 78 F.4th 210, 228 (5th Cir. 2023) (organizations had associational standing "because their members are likely to sustain injuries as a result of" the challenged administrative action). As the Supreme Court recognized in *Sackett*, when it comes to the definition of WOTUS, the stakes are high for landowners and users like Business Plaintiffs' members and their clients. The CWA is "a

potent weapon" with "'crushing' consequences 'even for inadvertent violations.'" 598 U.S. at 660 (quoting *Hawkes*, 578 U.S. at 602 (Kennedy, J., concurring)). Even negligent violations may result in "severe criminal penalties including imprisonment." *Id.* And the Agencies may impose "over $60,000 in fines per day for each violation"—penalties "nearly as crushing as their criminal counterparts." *Id.*

Furthermore, the difficulty in determining whether a feature is WOTUS imposes significant costs and delay. An owner or user generally has to pay consultants to make the decision whether to seek a jurisdictional determination, and to assist with that determination. If a permit is needed, "[t]he costs of obtaining such a permit are 'significant,' and both agencies have admitted that 'the permitting process can be arduous, expensive, and long.'" *Sackett*, 598 U.S. at 661 (quoting *Hawkes*, 578 U.S at 594-95).

Despite these "crushing consequences," the Rule imposes impossible—and unpredictable—burdens on Business Plaintiffs' members and their clients. It requires them to obtain CWA permits to work around features that are simply not WOTUS, such as isolated interstate waters and certain impoundments. And to assess whether a feature is WOTUS, it requires them to assess not only their own land, but also land well beyond their own holdings, using vaguely defined connections to potentially remote features. The consequence of the Agencies' misreading of the CWA and precedent is a sweeping and unwieldy regulation that leaves the identification of jurisdictional waters so opaque and uncertain that Business Plaintiffs and their members and clients cannot determine whether and when the most basic activities undertaken on land will subject them to drastic criminal and civil penalties and activist suits.

Business Plaintiffs' members will be injured because the impermissible breadth of the Rule will require them to obtain costly permits when none should be needed or forego certain uses of their land altogether. *See* Cianbro Corp. Decl. ¶ 7(ii); Hart Decl. ¶ 6; Pilconis Decl. ¶¶ 27-28.[5] Take ditches as just one example. As the result of the Rule, *every* roadside ditch will need to be evaluated under the Agencies' nebulous standards. Briggs Decl. ¶¶ 49-50; Pilconis Decl. ¶ 19. And because the criteria for the ditch exclusion are uncertain, companies undertaking construction projects must pay more in resource impact compensation fees for impacts to previously non-jurisdictional areas such as ditches, drainage and ephemeral streams, and impoundments. Cianbro Corp. Decl. ¶ 7(v). The construction industry already faces a limited supply of mitigation banks for wetlands and species habitat compensation, and the need to implement such features for expanded WOTUS further strains those resources. *Id*. The Rule will likely delay or completely derail infrastructure or renewable energy projects. *Id*.

Likewise, home builders are injured by the Rule's unclear exclusion of ditches that applies only if the ditch was "excavated wholly in and draining only dry land" and lacks a "relatively permanent flow of water." Gear Decl. ¶ 8. Home builders rely on a wide variety of ditches each day as part of the construction and maintenance of homes, and the Rule's definition of excluded ditches will require home builders to either avoid projects or obtain permits for such ditches which are in no way a "river or stream" in ordinary parlance such that they would be jurisdictional under *Sackett. Id.*

[5] Declarations are attached to this motion as **Exhibits D-F**.

The same problem will affect farmers, such as Robert Reed, who uses ditches on his farm land. Reed Decl. ¶ 10. Because those naturally occurring ditches are often formed in erosional features on his land, there is a serious risk that the Agencies will deem them jurisdictional tributaries under the Rule. *Id*. ¶ 11. If so, Reed will need to take many acres out of production to build buffers around the ditches to avoid the possibility of pollutant discharge. *Id*. ¶ 15; *see also* Wolle Decl. ¶ 8; Bredwell Decl. ¶ 10.

These harms are neither speculative nor *de minimis* and apply to each vague and otherwise improper element of the Rule described below, and they are traceable to the standards set forth in the Rule. Therefore, Business Plaintiffs have standing to defend their members' interests that will be harmed by the Rule. *See Alliance*, 78 F.4th at 235-36.

II. THE RULE VIOLATES THE CWA.

Because the Rule is inconsistent with the CWA in multiple ways, and thus in excess of the Agencies' statutory authority, it violates the APA. 5 U.S.C. § 706(2)(C).

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 deference. Dkt. 60 at 18-19. The Supreme Court agreed. In *Sackett*, the Court rejected the Agencies' attempt to rely on the Rule to support the assertion of jurisdiction over the Sacketts' property, and in doing so the Court did not view the Rule through a deferential lens. To the contrary, it 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*, 598

U.S. at 679 (quoting *U.S. Forest Serv. v. Cowpasture River Preservation Ass'n*, 140 S. Ct. 1837, 1849-50 (2020)). Deference to the Agencies' interpretation also 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," which "gives rise to serious vagueness concerns in light of the CWA's criminal penalties." *Id*. at 681.

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

Paragraph (a)(1)(iii) declares that "[i]nterstate waters" are WOTUS. That includes "*all* rivers, lakes, and *other waters* that flow across, or form a part of, State boundaries." 88 Fed. Reg. 3072 (emphasis added). The Agencies claim that "Congress intended" to assert jurisdiction over interstate waters "without reference to navigability." 88 Fed. Reg. 3073. While the Amended Rule eliminated "wetlands" as covered interstate waters, a water will be a WOTUS if it crosses a state line, no matter how isolated it is and regardless of whether it is navigable. The Agencies give the Amargosa River, which flows from Nevada into a dry playa in Death Valley, California, as an example: "The Amargosa River is not a traditional navigable water and does not otherwise flow to a traditional navigable water or the territorial seas," but is a WOTUS under paragraph (a)(1)(iii). 88 Fed. Reg. 3072.

Sackett, however, confirmed the holding in *Wheeler*, 418 F. Supp. 3d at 1359, and this Court's finding in its preliminary injunction order, Dkt. 60 at 25-26, that categorically including interstate waters improperly reads the term "navigable" out of the CWA. The Supreme Court explained that the focus of WOTUS are "bodies of navigable water like rivers, lakes, and oceans." 598 U.S. at 672. Although the CWA covers "more than

traditional interstate navigable waters," WOTUS cannot be defined without reference to such waters. *Id*. A WOTUS therefore is "*a relatively permanent body of water connected to traditional interstate navigable waters*." *Id.* at 678 (emphasis added) (cleaned up). Moreover, traditional interstate navigable waters are (1) "*interstate* waters" that (2) are "either navigable in fact *and* used in commerce or readily susceptible to being used this way." *Id*. at 659 (emphasis added). The Rule's inclusion of intrastate waters and interstate waters that are not navigable and used in commerce violates the CWA.

The fact that the CWA's predecessor statute expressly granted federal jurisdiction over interstate waters shows that Congress's decision in the CWA to omit that term was deliberate. Had Congress intended to cover interstate waters, the prior statute shows that it knew how to do so. As the Supreme Court observed, while the prior statute "encompassed 'interstate or navigable waters,' 33 U.S.C. § 1160(a) (1970 ed.), the CWA's geographical reach is only to "'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 661. That omission in the CWA is deliberate—and determinative.

The Agencies assert that interstate waters are waters of the "several States" under the Constitution. 88 Fed. Reg. 3073 (citing U.S. Const., sec. 8). That is a non-sequitur; the Framers were not describing the exercise of broad federal regulatory jurisdiction over "navigable waters." The Agencies also rely on Section 303(a) of the CWA, which states that "any water quality standard applicable to interstate waters which was adopted by any State and submitted to" the EPA will remain in effect after the effective date of the CWA. 33 U.S.C. § 1313(a)(1). That provision does not mean interstate waters are categorically

within the CWA, only that certain state rules were grandfathered and to remain effective regardless of whether the waters would be within federal jurisdiction under the CWA.

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

Sackett establishes that the relatively permanent test from *Rapanos* defines WOTUS: "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*, 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739 (plurality), in turn quoting Webster's New Int'l Dictionary 2882 (2d ed. 1954)). The Rule's relatively permanent test—which defines covered tributaries ((a)(3)), wetlands ((a)(4)(ii)), and intrastate waters ((a)(5)), as well as impoundments of (a)(3) and (a)(4) waters (88 Fed. Reg. 3143)—does not comply with *Sackett*.

In the 2023 Rule, the Agencies punted on defining "relatively permanent" waters because they assumed that, for the most part, such waters would be jurisdictional under the Rule's significant nexus 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. For instance, the Agencies wrote that "under this rule the relatively permanent standard encompasses surface waters that have flowing or standing water year-round or continuously during certain times of the year" and does not include "surface waters with flowing or standing water for only a short duration in

direct response to precipitation." 88 Fed. Reg. 3084. The Agencies did not explain how short a duration must be to exclude a water under the test. 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 meaningful guidance.

The Agencies also made clear that they define covered tributaries to include much more than *Sackett* permits. The Court held that "waters" under the CWA includes only bodies that would be identified as "streams, oceans, rivers, and lakes." 598 U.S. at 671. But the Agencies are explicit that their interpretation of the relatively permanent test "is meant to encompass" in addition "ponds" and "impoundments that are part of the tributary system." 88 Fed. Reg. 3085. Under *Sackett*, that approach is not permissible.

The relatively permanent test also 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." 598 U.S. at 681. 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"

create 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. *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 for how much flow in response to a precipitation event is sufficient to trigger relatively permanent status, property owners are left "feel[ing] their way on a case-by-case basis." *Sackett*, 598 U.S. at 681.

Many commenters on the proposed 2023 Rule asked the Agencies to set minimum flow duration periods for relatively permanent waters. But, preferring "flexibility" in the form of nearly unchecked agency discretion, the Agencies rejected this approach based on a strawman, claiming that because "flow duration varies extensively by region" establishing "a uniform number equally applicable to the deserts in the arid West, the Great

Lakes region, and New England forests would not be scientifically sound." 88 Fed. Reg. 3085. But they offer no reason why a "stream, river, or lake" would mean something different in different parts of the country or why a specified duration would be insufficient to cover all such bodies. Nor do the Agencies explain why different areas could not have different set standards of flow duration if it is appropriate to treat areas of the country differently. Instead of providing guidance to the regulated community, the Agencies gave themselves discretion to determine what constitutes a river or a stream in Vermont without consideration of what constitutes a river or a stream in Arizona, even though the *Sackett* test is whether "in ordinary parlance" the feature would be considered a river or a stream.

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; some 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.

D. The Rule's definition of jurisdictional wetlands contradicts *Sackett*.

The Agencies define covered wetlands to include wetlands adjacent to relatively permanent bodies of water to which the wetland has "a continuous surface connection." 40

C.F.R. § 120.2(a)(4)(ii); 33 C.F.R. § 328.3(a)(4)(ii). The Agencies offer no guidance on what "continuous surface connection" is required under the test other than to state that it "does not require a constant hydrologic connection." 88 Fed. Reg. 3102. But this test cannot be squared with *Sackett*'s definition of covered wetlands.

Sackett adopted the *Rapanos* plurality's definition of adjacent wetlands, holding that "the CWA extends only to those wetlands that are 'as a practical matter indistinguishable from [WOTUS].'" 598 U.S. at 678 (quoting *Rapanos*, 547 U.S. at 755 (plurality)). Thus, to be covered, a wetland must (1) be adjacent to a WOTUS (2) in such a way that "the wetland has a continuous surface connection with that water, making it difficult to determine where the water ends and the wetland begins." *Id*. (internal quotation marks omitted). The Fifth Circuit recently agreed that *Sackett* requires a wetland to be "indistinguishable from those waters" that meet the definition of WOTUS. *Lewis*, 88 F.4th at 1078. According to the court, "[t]his formulation represents the *Sackett* 'adjacency' test." *Id*.

In *Lewis*, the Fifth Circuit held that the Agencies could not assert jurisdiction over a wetland where the "nearest relatively permanent body of water [was] removed miles away from the Lewis property by roadside ditches, a culvert, and a non-relatively permanent tributary." *Id*. at 1079. Because "it is not difficult to determine where the 'water' ends and any 'wetlands' on Lewis's property begin," exercise of jurisdiction was foreclosed. *Id*. Yet the Agencies' broad language and failure to adopt the *Sackett* test means that land users must assume that any physical connection—even a rill, swale, pipe or ditch, even if usually dry—may create jurisdiction. Because paragraph (a)(4)(ii) does not require

a connection sufficient to render the wetland "indistinguishable" from the covered water, it is an impermissibly broad interpretation of the CWA.

E. The Rule's coverage of impoundments is impermissibly broad.

Subsection (a)(2) of the Rule defines as WOTUS impoundments not only of traditional navigable waters, but also of interstate waters and jurisdictional tributaries and wetlands. To the extent the underlying WOTUS is not properly jurisdictional, impoundments of those waters that are not independently WOTUS cannot be WOTUS. For example, an impoundment of an isolated, non-navigable interstate water cannot be WOTUS unless it independently qualifies as such.

Furthermore, the Rule captures impoundments of WOTUS "based on this rule's definition at the time it was impounded," regardless "of the water's jurisdictional status at the time the impoundment was created." 88 Fed. Reg. 3078. That is improper. It means that the impoundment "could currently be located off-channel (*e.g.*, due to changes in hydrology)" (88 Fed. Reg. 3085), and thus could be an isolated pond unconnected to a WOTUS. See *id.* at 3077-78 (definition requires "no outlet or hydrologic connection to the tributary network"). That is precisely the type of feature that the Court held could not fall within the CWA in *SWANCC*. 531 U.S. at 171-72.

Because the Rule does not require a continuous surface connection to a WOTUS, an impoundment may be separated from a covered water by a barrier and, as with wetlands, *Sackett* precludes jurisdiction in such cases. 598 U.S. at 678 n.16 ("a barrier separating a wetland from a water of the United States would ordinarily remove that wetland from

federal jurisdiction"). And the Agencies improperly treat unquantified "seepage" to a WOTUS across a barrier as a "continuous surface connection." 88 Fed. Reg. 3076.

The result is that land users cannot know from reasonable inquiry if a pond or reservoir is a jurisdictional impoundment. Was it at some time in the distant past impounded from a water that would under the current rule be a WOTUS (even if it was not a WOTUS at the time)? Is there some de minimus physical connection now to a WOTUS, including a non-navigable interstate water, or occasionally-flowing tributary? The lack of discernible standards means that land users must seek costly jurisdictional determinations and permits, or avoid the use of their land altogether.

F. The tributary rule is vague and ignores *Sackett*'s requirements.

In paragraph (a)(3), the Agencies assert jurisdiction over tributaries of (a)(1) waters and (a)(2) impoundments. At the outset, and as discussed above, the tributary rule is invalid because it is linked to interstate waters or impoundments that are non-navigable. Further, the definition ignores the requirement in *Sackett* that a WOTUS must be a relatively permanent body of water that would be considered a river or stream in ordinary parlance. For instance, the Agencies clearly consider many ditches to be tributaries under the Rule, but these often man-made structures typically bear no resemblance to a river or stream.

Additionally, under the Rule's definition of tributary, it is impossible to know whether particular features qualify as jurisdictional without a case-specific and subjective determination by the Agencies. The Rule's criteria require subjective determinations such as whether the feature at issue possesses the relevant indicia of a bed, bank, and Ordinary High Water Mark, and the Agencies may use "remote sensing and mapping information"

to determine from a desk whether a feature is a tributary, without viewing the feature and using software unavailable to the general public. 88 Fed. Reg. 3083, 3087. In other words, this provision permits the sort of freewheeling inquiry *Sackett* rejected. 598 U.S. at 671.

G. The exclusion for ditches provides inadequate guidance.

While the Rule excludes "ditches," including "roadside ditches," it does so only if they are "excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water." 88 Fed Reg. 3142. These vague standards provide insufficient guidance to enable the regulated community to discern whether a feature is a covered tributary or non-jurisdictional ditch. For example, the exclusion requires analysis of the historical circumstances in which the ditch was excavated—potentially decades ago and long before the current land user would know of the circumstances of the excavation.

H. 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 reiterated that the Agencies' broad interpretation of WOTUS is not supported by the clear congressional statement needed to so fundamentally alter the States' traditional authority over land and water use within their boundaries—much less State authority that Congress expressly declared was being preserved. *See* 33 U.S.C. § 1251(b) (stating 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"). 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." 598 U.S. at 674; *SWANCC*, 531 U.S. at 174.

The Agencies arrived at their broad interpretation of federal power by "subordinat[ing]" § 1251(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.

III. THE 2023 RULE AND AMENDED RULE ARE UNCONSTITUTIONAL.

A. The Rule is an improper exercise of authority under the Commerce Clause.

SWANCC rejected the Agencies' claim to regulate water to the limits of Congress's Commerce Clause power, pointing out that the basis of the CWA was not the broadest "affects commerce" reach of the commerce power but instead Congress's authority over water as a channel of interstate commerce. 531 U.S. at 172-73. Now, the Agencies claim to be regulating WOTUS to the full extent of Commerce Clause authority to regulate

channels of interstate commerce. 88 Fed. Reg. 3045. But the exercise of Commerce Clause authority under the CWA has limits, as *SWANCC* unmistakably 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. The Rule violates not only that limit, but also the constraint in the "channels" authority that it address navigability. The Agencies fail to tie the Rule to protecting navigability, revealing this reliance on the "channels" authority as a ruse.

B. The Rule is unconstitutionally vague.

As described above, the Rule is replete with terms that define WOTUS but leave the regulated community guessing at their meaning. Vague terms that allow the Agencies to "know it when they see it" but deprive the regulated community of fair notice are all the more constitutionally repugnant because the CWA is a criminal statute.

"A fundamental principle in our legal system is that laws … must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). A law that is "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.'" *Id.* A law is unconstitutionally vague if it "(1) fails to provide those targeted … a reasonable opportunity to know what conduct is prohibited, or (2) is so indefinite that it allows arbitrary and discriminatory enforcement." *Women's Med. Ctr. of Northwest Houston v. Bell*, 248 F. 3d 411, 421 (5th Cir. 2001). The Rule fails on both these grounds.

As discussed above, the Rule is essentially standardless, allowing arbitrary and discriminatory enforcement by the Agencies. For instance, the relatively permanent test is largely undefined, as is the concept of a continuous surface connection, leaving the

regulated community to guess at their meaning. And no one can practically discern whether a feature is a non-jurisdictional ditch or jurisdictional tributary.

As a result of these vague standards and the serious criminal and civil consequences if a landowner violates the CWA, landowners must engage in costly and time-consuming investigations to attempt to determine if a feature on their land is jurisdictional. Chetti Decl. ¶¶ 13, 16; Gear Decl. ¶¶ 9-10; Coyner Decl. ¶ 14; Pilconis Decl. ¶ 25; Sweeney Decl. ¶ 6; Ward Decl. ¶ 12. Obtaining jurisdictional determinations and permits from the Agencies requires paying experts, and incurring mitigation and other compliance costs. Briggs Decl. ¶ 65. And jurisdictional determinations take months to years, during which landowners are in limbo. Briggs Decl. ¶ 65; Coyner Decl. ¶ 14; Pilconis Decl. ¶ 26. Given the vagueness of the Rule, a property user that undertakes its own analysis of WOTUS risks that the Agencies may later challenge its conclusions, exposing it to additional costs and the threat of civil fines and criminal penalties. Rorick Decl. ¶¶ 13-14.

Business Plaintiffs' declarations show the adverse practical effects on the regulated community of the uncertainty created by the impermissibly vague terms in the Rule.

C. The Rule violates the major questions doctrine and is the product of an improper delegation of legislative powers.

The definition of WOTUS determines federal regulatory jurisdiction over countless features in every corner of the Nation. Business Plaintiffs' declarants illustrate the dramatic effects of that broad and uncertain definition on farms, ranches, many types of industry, construction, and infrastructure. An agency, however, is not permitted to make such major policy decisions through rulemaking. Rather, that is the job of Congress. In *West Virginia*

v. EPA, the Supreme Court explained that agencies are not permitted to exercise regulatory power "over a significant portion of the American economy" or "make a 'radical or fundamental change' to a statutory scheme" through rulemaking without clear authorization by Congress. 597 U.S. 697, 723 (2022). Instead, the Court "presumes that 'Congress intends to make major policy decisions itself, and not leave those decisions to agencies." *Id*. Therefore, "both separation of powers principles and a practical understanding of legislative intent make us 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there." *Id*.

The definition of WOTUS involves regulation of a significant portion of the American land mass and economy. The Agencies claim Congress authorized them to define WOTUS by providing an ambiguous definition of the term and generally authorizing the EPA Administrator to promulgate rules to effectuate the statute. But that vague grant of authority to enforce the CWA is not the "clear congressional authorization" required to allow an agency to answer a major question. *See West Virginia*, 597 U.S. at 723-24.

And if Congress did authorize the Agencies to answer the major question of the scope of their own jurisdiction under the CWA, that authorization is an unconstitutional delegation of legislative powers. For Congress to permissibly delegate its exclusive legislative power, it must "'lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform.'" *Mistretta v. United States*, 488 U.S. 361, 372 (1989). As Justice Gorsuch observed, "while Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the nation's chief prosecutor the power to write

his own criminal code. That 'is delegation running riot.'" *Gundy v. United States*, 139 S. Ct. 2116, 2148 (2019) (Gorsuch, J., dissenting) (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring)).

The CWA contains no such intelligible principle. Indeed, the radical shifts among the Agencies' successive interpretations of WOTUS in the 2015 Rule, the 2020 Rule, the 2023 Rule, and the Amended Rule evidence the lack of intelligible principles to guide the Agencies' rulemaking. This is made all the more evident by the courts' repeated rejection of the Agencies' different definitions, most recently seen in *Sackett*'s staunch rejection of core parts of the 2023 Rule. As Justice Gorsuch explained, "[t]he framers knew" that "the job of keeping the legislative power confined to the legislative branch couldn't be trusted to self-policing by Congress; often enough, legislators will face rational incentives to pass problems to the executive branch." *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting). Meaningful judicial enforcement of the nondelegation doctrine is thus needed to "respect[] the people's sovereign choice to vest the legislative power in Congress alone." *Id*. Absent providing a narrowing interpretation of the Rule, this Court should invalidate the Rule because Congress has not adequately delegated legislative power to define WOTUS.

CONCLUSION

This Court should grant Business Plaintiffs summary judgment and remand the Rule to the Agencies for further rulemaking consistent with this Court's opinion.

Dated: February 2, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 2, 2024, all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system.

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