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

STATE OF TEXAS, ET AL. *Plaintiffs*, v. U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL. *Defendants*.	§ § § § § § § § § §	Civil Action No. 3:23-cv-00017

STATES' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

Constitutional Provisions

NATURE AND STAGE OF PROCEEDING

Plaintiffs, the State of Texas, the State of Idaho, and their state agencies (the "States"), challenge the legality of the final administrative rule titled "Revised Definition of 'Waters of the United States'" (the "2023 Rule") promulgated by the Defendants United States Environmental Protection Agency ("EPA") and the United States Army Corps of Engineers ("Corps" or "USACE") (together, the "Federal Agencies"). On January 18, 2023, the Federal Agencies published the Rule in the Federal Register at 88 Fed. Reg. 3004.[1] On its face, the 2023 Rule exceeds the scope of the Clean Water Act and Supreme Court precedent interpreting the Act because it asserts jurisdiction over wetlands and water features with no continuous surface connection to navigable waters. Accordingly, on March 19, 2023, this Court granted the States' motion for preliminary injunction and enjoined the Federal Agencies from implementing or enforcing the Rule within the boundaries of the States of Texas and Idaho.

In the meantime, the Supreme Court published its opinion in *Sackett v. EPA*, 598 U.S. 651 (2023), where, as anticipated, it rejected the Federal Agencies' broad overuse of authority. Relying on *Sackett* to justify depriving the public, and the States, of notice and the opportunity to comment on a rule with nationwide importance, the Federal Agencies published a new rule, entitled "Revised Definition of 'Waters of the United States'; Conforming" ("Conforming Rule").[2] The Conforming Rule does not add clarity. Instead, it axes certain provisions from the 2023 Rule but leaves the remainder of the 2023 Rule intact. This scheme by which the

[1] The 2023 rule is attached hereto as Exhibit 1.

[2] The Amended 2023 Rule was published in the Federal Register at 88 Fed. Reg. 61,964, on September 8, 2023, attached hereto as Exhibit 2.

Conforming Rule sculpts a regulatory regime out of the 2023 Rule is referred to in this motion as the "Amended 2023 Rule."

By this motion, the States assert that by amending the definition of "waters of the United States," as provided in the Amended 2023 Rule, the Federal Agencies unconstitutionally and impermissibly expand their own authority beyond Congress's delegation in the CWA—intruding into state sovereignty and the liberties of the states and their citizens. The Amended 2023 Rule maintains the ambiguity of the 2023 Rule, leaving those wishing to identify the ambit of federal power over dry land or minor water features at the mercy of an expensive, vague, and arbitrary analysis, lest they face a staggering criminal or civil penalty. The States further assert that they were deprived of the opportunity to comment on the Conforming Rule, in violation of rulemaking requirements. *See* Exhs. 3-10. Accordingly, the States move for summary judgment asking the Court to vacate and remand the 2023 Rule and the Conforming Rule.

Summary judgment is the appropriate mechanism for deciding cases challenging a regulation under the Administrative Procedure Act (the "APA"), 5 U.S.C. §§ 701-706. The parties agree that this litigation may be fully resolved on summary judgment briefing. Dkt. 40 at 39, n. 13. The case turns on the legal issues of whether the Amended 2023 Rule falls outside the Federal Agencies' authority under the Clean Water Act, as interpreted by the Supreme Court, and whether the Rule violates the Constitution.

BACKGROUND

A. The Clean Water Act.

In enacting the Clean Water Act, Congress was clear that primary authority over land and waters belongs with the states.

> It is the policy of the Congress to recognize, preserve, and protect the **primary responsibilities and rights of States** to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.

33 U.S.C. § 1251(b) (emphasis added). The Clean Water Act gives the Federal Agencies limited authority to regulate discharges and dredging in "navigable waters," s*ee*, *e.g.*, 33 U.S.C. § 1251(a), 1342(a), 1344(a). Congress defined "navigable waters" in turn as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Construction of the term "the waters of the United States," thus establishes the scope of "navigable waters" (or land) where the Federal Agencies may administer and enforce their programs.

B. The Supreme Court's historic interpretations of "waters of the United States."

More than 100 years before the Clean Water Act, the Supreme Court defined the phrase "navigable waters of the United States" as "navigable in fact" interstate waters. *The Daniel Ball*, 10 Wall. 77 U.S. 557, 563 (1870). In 1974, USACE issued a rule defining "navigable waters" as those waters that have been, are, or may be used for interstate or foreign commerce. 33 C.F.R. § 209.120(d)(1)(1974). In 1986, USACE issued another rulemaking, expanding its jurisdiction to include traditional navigable waters, tributaries of those waters, wetlands adjacent to those waters and tributaries, and waters used as habitat by migratory birds that

either are protected by treaty or cross state lines. *See* Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206 (Nov. 13, 1986).

In *United States v. Riverside Bayview Homes, Inc.*, the Supreme Court first addressed the proper interpretation of "the waters of the United States." 474 U.S. 121 (1985). *Riverside Bayview* concerned a wetland that "was adjacent to a body of navigable water," because "the area characterized by saturated soil conditions and wetland vegetation extended beyond the boundary of respondent's property to . . . a navigable waterway." *Id.* at 131. The Supreme Court upheld the USACE's interpretation of "the waters of the United States" to include wetlands that "actually abut[ted]" traditional navigable waters, finding that "the Corps must necessarily choose some point at which water ends and land begins." *Id.* at 132.

Fifteen years later, in *Solid Waste Agency of N. Cook Cnty. v. Army Corps of Engineers ("SWANCC")*, the Supreme Court rejected USACE's assertion of jurisdiction over any waters "[w]hich are or would be used as habitat" by migratory birds. 531 U.S. 159, 164 (2001) (quoting 51 Fed. Reg. 41,217 (1986)). The Court held that the Clean Water Act cannot be read to confer jurisdiction over physically isolated, wholly intrastate waters or to ponds that are not adjacent to open water. *Id.* at 168. The Court reiterated its conclusion from *Riverside Bayview* that federal jurisdiction extends to wetlands that abut navigable waters, because protection of these adjacent, actually abutting wetlands was consistent with congressional intent to regulate wetlands that are "inseparably bound up with 'waters of the United States.'" *Id.* at 167 (quoting *Riverside Bayview*, 474 U.S. at 134).

In *Rapanos v. United States*, the Supreme Court again rejected USACE's assertion of expanded authority over non-navigable, intrastate waters that are not significantly connected

to navigable, interstate waters. 547 U.S. 715 (2006). Writing for the plurality, Justice Scalia emphasized that the traditional concept of "navigable waters" must inform and limit the construction of the phrase "the waters of the United States." The plurality found that in going beyond this "commonsense understanding" and classifying waters like "ephemeral streams," "wet meadows," "man-made drainage ditches," and "dry arroyos in the middle of the desert" as "waters of the United States," USACE stretched the statutory text "beyond parody." *Id.* at 734. The plurality also rejected the view that wetlands adjacent to ditches, when those ditches do not meet the definition of "waters of the United States," may nevertheless be subjected to federal regulation on the theory that they are "adjacent to" the remote "navigable waters" into which the ditches ultimately drain. *Id.* at 739-40. Justice Kennedy concurred in the judgment but instead employed a "significant nexus" analysis when determining jurisdictional waters. Justice Kennedy concluded that wetlands possess the requisite nexus if they "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780 (Kennedy, J., concurring in the judgment).

C. The 2023 Rule.

In December 2021, the Federal Agencies published a proposed rule entitled "Revised Definitions of 'Waters of the United States.'"[3] After providing the public an opportunity to comment, the Federal Agencies published the 2023 Rule on January 18, 2023. 88 Fed. Reg. 3004. Among other things, the Federal Agencies added a new severability section to the 2023

[3] The Proposed Rule was published in the Federal Register at 86 Fed. Reg. 69,372 and is attached hereto as Exhibit 13.

Rule that was entirely absent in the proposed rule. 88 Fed. Reg. 3135. The Federal Agencies claimed to "clarify" their intent regarding the severability of the 2023 Rule, but the Federal Agencies failed to express any intent for the 2023 Rule to be severable in the Proposed Rule. 88 Fed. Reg. 3135.

Texas challenged the 2023 Rule the day it was published, and this Court preliminarily enjoined the Rule before it became effective. Dkt. 1, and 60. In granting the preliminary injunction, the Court observed "at least two" aspects of the 2023 Rule are unlikely to withstand judicial review: its adoption of Justice Kennedy's "significant nexus" analysis from *Rapanos* and the categorical inclusion of interstate waters regardless of navigability. Dkt 60 at 26.

D. *Sackett*.

On the first day of the 2022 term, the Supreme Court heard oral argument in *Sackett*, a petition brought by Idaho landowners. That case asked the Supreme Court to directly address the proper test for determining "waters of the United States" with respect to USACE's claim of authority over soggy land in a mostly built-out subdivision in North Idaho. No. 21-454 (argued Oct. 3, 2022). On May 25, 2023, the Supreme Court announced its decision in *Sackett v. EPA*, with all nine justices agreeing that USACE exceeded its authority.

In *Sackett*, the Justice Alito-led majority removed any doubt about the scope of the Clean Water Act:

> the *Rapanos* plurality was correct: the CWA's use of "waters" encompasses only those relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes.

Sackett, 598 U.S. at 671. As to wetlands in particular, the Court settled on a jurisdictional test for wetlands adjacent to navigable waters and therefore subject to the Clean Water Act, those wetlands that are:

> as a practical matter indistinguishable from waters of the United States, such that it is difficult to determine where the 'water' ends and the 'wetland' begins. That occurs when wetlands have a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands.

Id. at 678 (citing *Rapanos*, 547 U.S. at 742, 755). "Wetlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby." *Id.* at 676. And "a barrier separating a wetland from a water of the United States would ordinarily remove that wetland from federal jurisdiction" unless constructed illegally. *Id.* at 678, n. 16.

The Court continued to articulate that "we have refused to read 'navigable' out of the statute, holding that it at least shows that Congress was focused on 'its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.'" *Id.* at 672. The Court repeatedly reaffirmed that states, not the Federal Agencies, have the primary responsibility of water protection. *Id.* at 674, 680, 683.

The majority criticized the Federal Agencies' interpretation of the CWA that 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" and even "if a property appears dry, application of the guidance in a complicated manual ultimately decides whether it contains wetlands." *Sackett*, 598 U.S. at 669. The Supreme Court recognized that "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 Supreme Court also spoke directly to the 2023 Rule,[4] finding that the 2023 Rule "gives rise to serious vagueness concerns in light of the CWA's criminal penalties" because the definition lacked "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Id.* at 680.

E. The Amended 2023 Rule.

After the *Sackett* opinion, this Court granted the Federal Agencies' motion to stay this litigation to afford the Federal Agencies an opportunity to amend the 2023 Rule consistent with *Sackett*. Dkt. 81. On September 8, 2023, without providing the public, or Plaintiffs, an opportunity to comment on any proposed rule, the Federal Agencies published another final rule entitled "Revised Definition of 'Waters of the United States'; Conforming." Exh. 2; *see also* Dkt. 84. The Federal Agencies rely on the 2023 Rule's severability section and allege that this new rule amends the 2023 Rule so it conforms with the Supreme Court's decision in *Sackett*. 88 Fed. Reg. 61,964; 88 Fed. Reg. 3135. The so-called "Conforming Rule" must be read in conjunction with the 2023 Rule to attempt to understand how the Federal Agencies might define "waters of the United States." 88 Fed. Reg. 3004.

The Conforming Rule makes two significant modifications to the 2023 Rule. First, it cuts away the Significant Nexus Standard—the centrally operative feature of the 2023 Rule

[4] The Supreme Court declined EPA's request for deference in part because Congress would have needed to enact "exceedingly clear language if it wishe[d] to significantly alter the balance between federal and state power and the power of the Government over private property," which an overly broad definition of "waters of the United States" would do. *Sackett*, 598 U.S. at 679-680.

and leaves the Relatively Permanent Standard as it was described in the 2023 Rule. 88 Fed. Reg. 61,966. Second, it modifies the definition of adjacent wetlands to assert jurisdiction over those with a continuous connection to other jurisdictional waters. *Id.* For purposes of this motion, the States refer to the combination of the 2023 Rule and the Conforming Rule as the "Amended 2023 Rule."

The Amended 2023 Rule, defines "waters of the United States" to include five categories, each of which contain sub-categories and additional defined terms:

i. Traditional navigable waters, territorial seas, and interstate waters; ("Traditional Waters");

ii. Impoundments of any other "waters of the United States," whether or not the impoundment demonstrates a connection to a jurisdictional water feature by the Relatively Permanent Standard, ("Jurisdictional Impoundments");

iii. Tributaries to Traditional Waters or Jurisdictional Impoundments that demonstrate a connection to the Traditional Water or Jurisdictional Impoundment by the Relatively Permanent Standard, ("Jurisdictional Tributaries");

iv. Wetlands adjacent to Traditional Waters; or wetlands adjacent to Jurisdictional Impoundments or Jurisdictional Tributaries that demonstrate a connection to the Jurisdictional Tributaries or Jurisdictional Impoundment by the Relatively Permanent Standard; and

v. Intrastate lakes and ponds not already identified in the other four categories but satisfy the Relatively Permanent Standard with Traditional Waters and Jurisdictional Tributaries.

The Federal Agencies justify skipping the required notice and comment period by invoking the APA's good cause exception, claiming the opportunity for the public to comment on the Amended 2023 Rule is unnecessary because it did not involve the agencies' discretion and merely removed what they contend are the invalid portions of the 2023 Rule consistent with *Sackett*. 88 Fed. Reg. 61,964-65. The Federal Agencies further claim the Amended 2023

Rule does not impose any burdens on the regulated community and the quick implementation provides regulatory certainty and clarity. 88 Fed. Reg. 61,965.

STANDARD OF REVIEW

The Court should hold unlawful and set aside the Amended 2023 Rule if it finds any aspects are:

(A) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) Contrary to constitutional right, power, privilege, or immunity;

(C) In excess of statutory jurisdiction, authority, or limitations or short of statutory right; or

(D) without observance of procedure required by law.

5 U.S.C. §§ 706(2)(A)-(C).

SUMMARY OF ARGUMENT

Despite repeated admonishment by the Supreme Court, and this Court, the Federal Agencies refuse to abide the constitutional and statutory limits on their jurisdiction. The Federal Agencies insist on asserting jurisdiction over non-navigable interstate waters (and so-called tributaries, wetlands and impoundments thereto) and distant water features that do not bear a continuous surface connection to traditionally navigable waters. In doing so, the Federal Agencies exceed their authority derived from the Clean Water Act, intrude upon Texas's and Idaho's sovereignty, and fail to adhere to due process requirements. And compounding errors, the Federal Agencies' adoption of this new jurisdictional scheme with no public comment betrays their contempt of the notice and comment procedures requisite under the Administrative Procedure Act. The Court should vacate the Amended Rule and require the

Federal Agencies to limit their jurisdiction to traditionally navigable waters and those bearing a continuous surface connection to bodies that are "waters of the United States" in their own right, as the Supreme Court has instructed.

ARGUMENT

A. Every jurisdictional category of the Amended 2023 Rule exceeds the Clean Water Act and is unconstitutionally vague.

Even though the Amended 2023 Rule does away with the unlawful Significant Nexus Standard, it still runs afoul of *Sackett*, *Rapanos*, and the plain language of the Clean Water Act by asserting jurisdiction over non-navigable land and water features with no continuance surface connection to any navigable stream.

1. The "Traditional Waters" category asserts jurisdiction over non-navigable interstate waters.

Traditional Waters, sometimes referred to as "(a)(1) waters" include waters that are "currently 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," "the territorial seas," and "interstate waters." 88 Fed. Reg. 3143, 88 Fed. Reg. 61,968. The Federal Agencies identify "interstate waters" as "all rivers, lakes, and other waters that flow across, or form a part of, State boundaries," which expressly includes all types of waters "regardless of their navigability," and does not consider whether the interstate water supports commerce. 88 Fed. Reg. 3027. According to the Federal Agencies, "[i]f a waterbody is determined to be a [Traditional Water], **then it is jurisdictional with no need for further evaluation**." 88 Fed. Reg. 3067 (emphasis added). Therefore, the Federal Agencies do not have to perform any

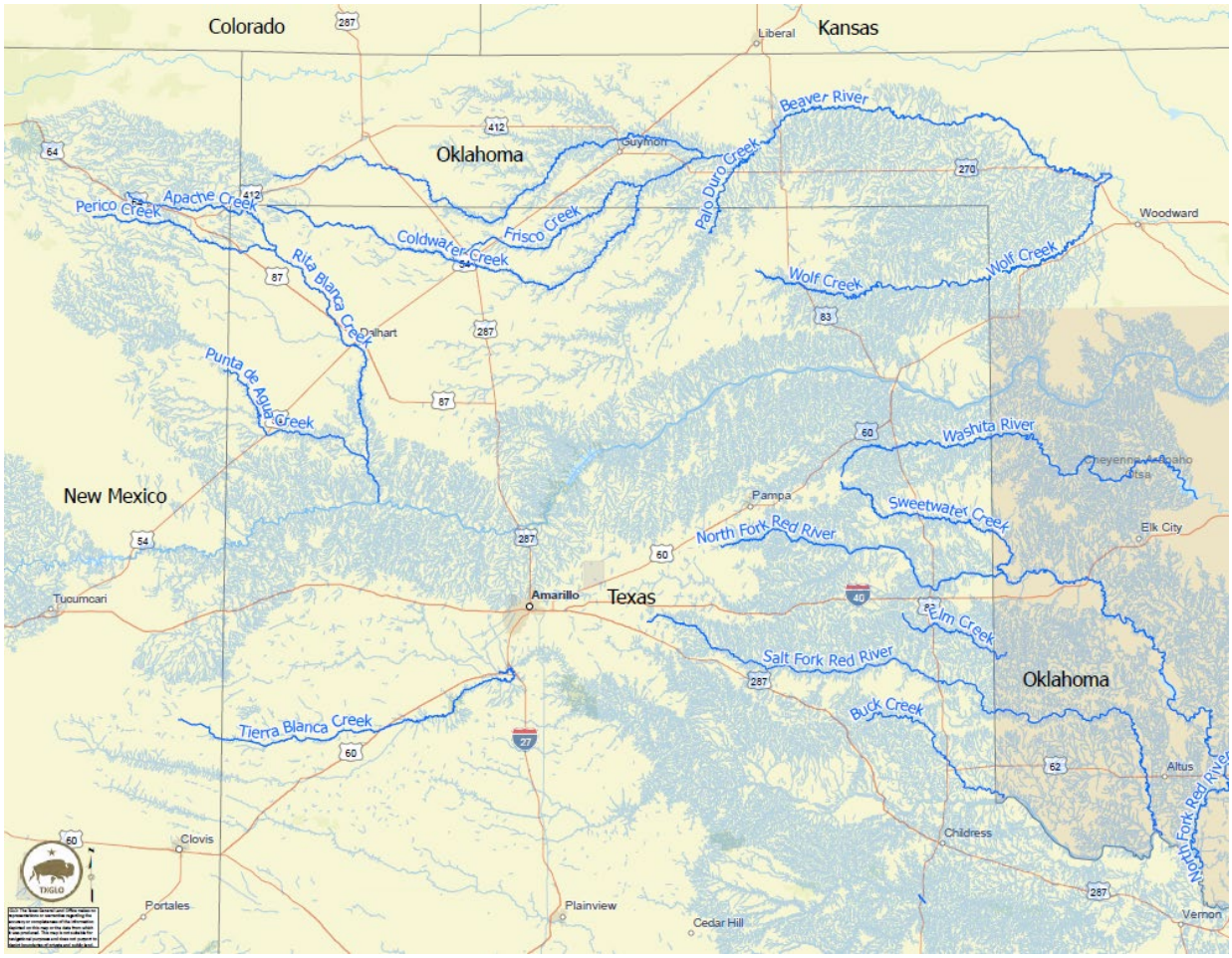
jurisdictional evaluation on "interstate waters" prior to exerting federal authority, including those that are not navigable.[5]

Classifying all "interstate waters"—even a minor water features[6] (like a ditch, ephemeral stream, or pond—as "waters of the United States," the Federal Agencies read out the cornerstone of the CWA's jurisdiction: "**navigable** waters." *See* 33 U.S.C. §§ 1251(a), 1342(a), 1344(a). Blanket jurisdiction over non-navigable, "interstate waters" is inconsistent with *Sackett*. *See* 598 U.S. at 679. The Supreme Court provided "[a]lthough we have acknowledged that the CWA extends to more than traditional navigable waters, we have refused to read 'navigable' out of the statute, holding that it at least shows that Congress was focused on 'its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.'" *Id.* In fact, the Court noted that "[w]hile its 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.'" *Id.* at 661.

[5] Although the Federal Agencies removed "interstate wetlands" from this category in the Amended 2023 Rule, the Federal Agencies confirmed the rest of this category would not change. 88 Fed. Reg. 61,966.

[6] The Amended 2023 Rule expressly provides that exclusions for ditches do not apply to these non-navigable "interstate waters" "even if the water would otherwise meet the criteria for an exclusion." 88 Fed. Reg. 3067.

By way of example, Texas's border features many minor, non-navigable water features that just happen to cross state lines as depicted by these highlighted minor water features in the Texas panhandle.[7]



None of the above-depicted water features meet the test for traditional federal navigability (*i.e.*, use for interstate commerce), according to the USACE, which maintains a list of water features considered navigable under the traditional navigability analysis for purposes of the Rivers and Harbors Act.[8]

[7] *See* Exh. 11.

[8] Exh. 12 - For the purposes of the Rivers and Harbors Act list, USACE identifies those navigable waters "that are subject to the ebb and flow of the tide and/or are presently being used, or have been used, in the past, or

Even worse, the Amended 2023 Rule authorizes the cascading expansion of federal authority from these non-navigable "interstate waters" by lumping these minor water features in with Traditional Waters, expanding the Federal Agencies' authority to all tributaries, impoundments, adjacent wetlands, or other waters connected to these minor water features.

2. "Jurisdictional Impoundments" include impoundments of non-navigable waters and impoundments with no continuous surface connection to a navigable water.

Although the Amended 2023 Rule includes "impoundments," it does not define the term.[9] Jurisdictional Impoundments, referred to as "(a)(2) impoundments," include all impoundments of Traditional Waters (including interstate waters), Jurisdictional Tributaries, or Jurisdictional Wetlands.

The Federal Agencies claim federal jurisdiction over impoundments "regardless of the water's jurisdictional status at the time the impoundment was created." 88 Fed. Reg. 3078. If the water body impounded was not a "water of the United States" at the time it was impounded but has since become a "water of the United States" (as a result of its impoundment), then the impoundment is jurisdictional, even many years later. 88 Fed. Reg. 3078. And, in the case of an impoundment for which the water body impounded was jurisdictional at the time of impoundment, but is no longer jurisdictional, the impoundment remains jurisdictional—even if the contributing water body is not. 88 Fed. Reg. 3078. Thus, the Amended 2023 Rule necessarily encompasses impoundments that, in present day, do not

may be susceptible for use to transport interstate or foreign commerce." This is the same definition used in the Amended 2023 Rule to define Traditional Waters under (a)(1)(i). *See* 88 Fed. Reg. 3069.

[9] The Federal Agencies provide that "impoundments are distinguishable from natural lakes and ponds because they are created by discrete structures (often human-built) like dams or levees that typically have the effect of raising the water surface elevation, creating or expanding the area of open water, or both." 88 Fed. Reg. 3075.

bear on interstate commerce. This catch-all approach requires landowners to both monitor hydrological developments related to tanks and ponds after their creation, and also research the historical classifications of water features located on their properties. Rather than add clarity, the Amended 2023 Rule creates complication and confusion.

Furthermore, the Federal Agencies qualify impoundments as jurisdictional whether or not the impoundment is hydrologically connected to the Traditional Water, Jurisdictional Tributary, or Jurisdictional Wetland it impounded. The Amended 2023 Rule would include off-channel impoundments ("an impoundment with no outlet or hydrologic connection to the tributary network"), 88 Fed. Reg. 3077-78, and waters wholly separated by dams because "dams generally do not prevent all water flow, but rather allow seepage under the foundation of the dam and through the dam itself," 88 Fed. Reg. 3076. By including impoundments that under normal operation may, at most, allow seepage, the Federal Agencies show no regard for whether the impoundment bears a relatively permanent connection to a jurisdictional water. This directly contradicts the *Sackett* opinion, which recognizes, in the context of wetlands, that unless constructed illegally, "a barrier separating a wetland from a water of the United States would ordinarily remove that wetland from federal jurisdiction." *Sackett*, 598 U.S. at 678, n. 16. The same principle that restricts jurisdiction over wetlands lacking "a continuous surface connection" to proper waters of the United States should equally apply to impoundments. *See* Exh. 4, at 3.

3. The operational standards for "Jurisdictional Tributaries" are vaguely and obscurely defined.

Jurisdictional Tributaries, or "(a)(3) waters," includes "rivers, streams, lakes, ponds, and impoundments, regardless of their flow regime, that flow directly or indirectly through another

water or waters to" Traditional Waters and satisfies the undefined Relatively Permanent Standard. 88 Fed. Reg. 3083. When the Federal Agencies note that a tributary can flow "indirectly" to a Traditional Water, they acknowledge that "indirect" flow could be through "a number" of downstream waters including non-jurisdictional tributaries, ephemeral streams, impoundments, ditches, or waste treatment systems, "so long as part of a tributary system that **eventually** flows to" a Traditional Water.[10] 88 Fed. Reg. 3080. (emphasis added). Manmade features like ditches[11] or canals may be tributaries—notwithstanding that those features are supposedly excluded from jurisdiction—"so long as they contribute flow to" a Traditional Water. 88 Fed. Reg. 3080. This would include roadside ditches that carry water only in response to rain events. The Federal Agencies explain "a tributary may flow through another stream that flows infrequently, and only in direct response to precipitation, and the presence of that stream is sufficient to demonstrate that the tributary flows to a [Traditional Water]. Tributaries are not required to have a surface flowpath all the way down to the [Traditional Waters]". 88 Fed. Reg. 3084.

Finding that the *Sackett* decision "cleared the air" regarding the "exegesis of the statutory term 'waters of the United States,'" the Fifth Circuit recently declared certain land was not jurisdictional when USACE had issued a jurisdictional determination based in part on

[10] To guess at whether a stream is part of a tributary system, the Federal Agencies suggested the public engage in direct observation or try their hand at "various remote sensing resources" like stream gauge data, elevation maps, flood zone maps, and satellite imagery. 88 Fed. Reg. 3084, n. 99. This insistence of the use of computer software encourages the Federal Agencies to assign their own jurisdiction without ever viewing the supposed "water" in real world, present-day conditions.

[11] The Federal Agencies purported to make a concession to the many commenters opposed to federal jurisdiction over ditches by excluding ditches, but the exclusion extends only to ditches "excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water." 88 Fed. Reg. 3144; *see also* Exh. 3, at 4.

a similarly convoluted tributary scheme that the Federal Agencies pursue in the Amended 2023 Rule. *Lewis v. United States*, No. 21-30163, 2023 WL 8711318, at *2 (5th Cir. Dec. 18, 2023). There, USACE's jurisdictional assertion "derived from connecting (a) roadside ditches and (b) a culvert to (c) an unnamed non-"relatively permanent water" tributary, then to (d) Colyell Creek (a "relatively permanent water") several miles away, and ultimately to (e) the traditionally navigable waterway of Colyell Bay ten to fifteen miles from the Lewis property." *Id.* The Relatively Permanent Standard as applied to tributaries described in the Amended 2023 Rule would allow a similarly attenuated analysis–stringing together ditches, culverts, and non-relatively permanent waters to extend jurisdiction for miles and miles.

Furthermore, as implemented by the Federal Agencies, the Relatively Permanent Standard, as discussed in further detail *infra*, "encompasses surface waters that have flowing or standing water year-round or continuously during certain times of the year." 88 Fed. Reg. 3084. To understand its application, one must analyze a variety of murky phrases to know if the Federal Agencies can claim jurisdiction. *See* Exh. 3, at 1-2; Exh. 4, at 3-4; Exh. 6, at 2. For example, "flowing water," counterintuitively includes "still water." Or the phrase "certain times of the year" remains entirely undefined, and may be impacted by water flowing only in response to artificial water management regimes. 88 Fed. Reg. 3084-85. As was endemic in the 2023 Rule, and remains in the Amended 2023 Rule, these additional layers of indeterminate analysis create another cascading effect—causing impoundments of these ditches and canals, and wetlands adjacent to these ditches and canals—to become jurisdictional.

4. "Jurisdictional Wetlands" are defined in contradiction to Sackett.

Jurisdictional Wetlands, or "(a)(4) waters," include any wetland "adjacent" to Traditional Waters, and any wetland "adjacent" to a Jurisdictional Impoundment or Jurisdictional Tributary if it meets the Relatively Permanent Standard. 88 Fed. Reg. 3143.

The Amended 2023 Rule abandons the 2023 Rule's definition of "adjacent," defining the term as "having a continuous surface connection." 88 Fed. Reg. 61,969. But inexplicably, the Federal Agencies conclude that "a continuous surface connection," "does not require surface water to be continuously present between the wetland and the tributary." 88 Fed. Reg. 3096. This practice contradicts *Sackett*, which only permits that "temporary interruptions in surface connection may sometimes occur because of **phenomena** like low tides or dry spells." *Sackett*, 598 U.S. at 678 (emphasis added). The Federal Agencies approach flies in the face of the admonition in *Sackett* that wetlands "must be indistinguishable from waters of the United States." *Sackett*, 598 U.S. at 678-79.

5. The catch-all "Other Jurisdictional Intrastate Waters" category exceeds federal jurisdiction.

The Amended 2023 Rule continues to assert jurisdiction over the troublingly broad catch-all unnamed category that can be described as "Other Jurisdictional Intrastate Waters" or "(a)(5) waters." This category includes "intrastate lakes and ponds" not already identified in the other four categories but satisfy the Relatively Permanent Standard. 88 Fed. Reg. 3143, 88 Fed. Reg. 61,968-69. By definition, these Other Jurisdictional Intrastate Waters are not traditional navigable waters, interstate waters, and the territorial seas, nor are they impoundments, adjacent wetlands, or even tributaries to traditional navigable waters, interstate waters, and the territorial seas, impoundments, or wetlands. Instead, the Other Jurisdictional

Intrastate Waters are any lakes or ponds that do not fall into another broad category that meets the Relatively Permanent Standard (to Traditional Waters or Jurisdictional Tributaries). 88 Fed. Reg. 61,968-69. Of course, the Supreme Court already determined that the CWA does not extend to "ponds that are not adjacent to open water." *SWANCC*, 531 U.S. at 168.

Due to the overly broad definitions and application of the other four categories to determine jurisdictional waters and standards, this category for Other Jurisdictional Intrastate Waters swallows up any potential remaining waters not already under the Federal Agencies' authority.

6. The Relatively Permanent Standard adopted in the Amended 2023 Rule is broader and vaguer than the relatively permanent standard described in Sackett and Rapanos.

The "Relatively Permanent Standard" is undefined but purports to identify relatively permanent, standing or continuously flowing waters connected to Traditional Waters, and waters with a continuous surface connection to such relatively permanent waters. 88 Fed. Reg. 3006. The 2023 Rule gave the Federal Agencies their pick of the Relatively Permanent Standard or the Significant Nexus Standard for purposes of asserting jurisdiction over tributaries, wetlands, and other intrastate waters. The Amended 2023 Rule removed the Significant Nexus Standard, but the Federal Agencies did not provide any additional definition, information, or guidance on the implementation of the Relatively Permanent Standard. Exh. 3, at 1-2; Exh. 4, at 3-4; Exh. 6, at 2; Exh. 8, at 5; Exh. 9, at 6; Exh. 10, at 3.

The "Relatively Permanent Standard" includes flows that occur "year-round or continuously during certain times of the year," but also encompasses "tributaries in which extended periods of standing or continuously flowing water are not linked to naturally recurring annual or seasonal cycles," as well as flows driven by water management practices

and effluent-dependent streams. 88 Fed. Reg. 3085. "Certain times of year" apparently includes "extended periods of standing or continuously flowing water occurring in the same geographic feature year after year, except in times of drought." Of course, the Federal Agencies will not say whether that "extended period" is 3 months (as in the pre-2015 implementation),[12] 3 weeks, or 3 days.

Theoretically, the Relatively Permanent Standard does "not include surface waters with flowing or standing water for only a short duration in direct response to precipitation," but the Federal Agencies do not describe how they will implement the contours of that phrase. Tautologically, saying only that the phrase "is intended to distinguish between episodic periods of flow associated with discrete precipitation events versus continuous flow for extended periods of time." 88 Fed. Reg. 3085.

Further complicating the application of this standard, under the Amended 2023 Rule, a continuous surface connection "does not require surface water to be continuously present between the wetland and the tributary." 88 Fed. Reg. 3096. Thus, "relatively permanent" tributaries could include stream beds that remain dry for substantial portions of the year. Paired with the undefined categorical terms of tributaries, adjacent wetlands, or other intrastate waters, this standard is untenable for an ordinary person attempting to identify the outer brim of the Clean Water Act's jurisdiction, which appears to include some areas of dry land that may be affected by unknown water management regimes.

[12] The Federal Agencies abandoned the term "seasonal" from the *Rapanos* Guidance because it was interpreted to establish a specific required flow duration. 88 Fed. Reg. 3085.

B. The Amended 2023 Rule must be vacated because it exceeds the Clean Water Act.

Because the Amended 2023 Rule exceeds the Clean Water Act as described previously, it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law and in excess of statutory jurisdiction, authority, or limitations or short of statutory right, and accordingly, must vacated under the APA. 5 U.S.C. § 706(2)(A), (C).

C. The Rule must be vacated because it is contrary to the States' sovereignty.

Under the APA, a final agency action may be held unlawful and set aside if it is "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B). Under the Tenth Amendment, "[t]he powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or the people." U.S. Const. amend. X. The federal government lacks a general police power and may only exercise powers expressly granted to it by the Constitution. *See* U.S. Const. amend. X; *United States v. Lopez*, 514 U.S. 549, 566 (1995). Although the canon of constitutional avoidance favors construing ambiguous statutory language to avoid constitutional doubts, the legal question of the constitutionality of an agency action is subject to judicial review under the APA. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). An agency order may not stand if the agency has misconceived the law. *See Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 94 (1943).

"It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority." *Printz v. United States*, 521 U.S. 898, 928 (1997). The Clean Water Act itself makes clear that regulation of land and water resources is "the primary responsibilities and rights of States," well within the States'

sphere of authority. 33 U.S.C. § 1251(b). In discussing the Rule in *Sackett*, the Supreme Court reaffirmed the States' authority:

> [T]his Court "require[s] Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property." Regulation of land and water use lies at the core of traditional state authority. An overly broad interpretation of the CWA's reach would impinge on this authority. The area covered by wetlands alone is vast—greater than the combined surface area of California and Texas. And the scope of the EPA's conception of "the waters of the United States" is truly staggering when this vast territory is supplemented by all the additional area, some of which is generally dry, over which the Agency asserts jurisdiction. Particularly given the CWA's express policy to "preserve" the States' "primary" authority over land and water use, this Court has required a clear statement from Congress when determining the scope of "the waters of the United States."

Sackett, 598 U.S. at 679-80 (internal citations omitted). The phrase "the waters of the United States" does not constitute such a clear and manifest statement. *Rapanos*, 547 U.S. at 738 (citing *BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 544 (1994)).

The Clean Water Act was enacted pursuant to Congress's authority to regulate interstate commerce under Article I, Section 8 of the Constitution. As a result, the Federal Agencies violate the Constitution when their enforcement or application of the Clean Water Act extends beyond the regulation of interstate commerce. *See SWANCC*, 531 U.S. at 173. But the Amended 2023 Rule regulates intrastate and interstate waters without regard to whether those waters may have a substantial relation—or any relationship at all—to interstate commerce. *Cf. Lopez*, 514 U.S. at 558-59.

There is no doubt that the Amended 2023 Rule goes beyond the Clean Water Act's reach: navigable waters. *See supra* Section A*; Sackett*, 598 U.S. at 679-80. The Amended 2023 Rule's assertion of authority over non-navigable waters directly interferes with state sovereignty. The most glaring example is in the Texas panhandle, where small streams, with

no impact on interstate commerce are swept into federal jurisdiction merely because they meander across a state line.[13] Similarly, federalization of impoundments of non-jurisdictional water, attenuated ditches and tributaries, wetlands not qualifying under *Sackett*, and ponds and "other waters" exceeds the Clean Water Act. This reappropriation of regulatory jurisdiction infringes on the States' sovereignty in violation of the Tenth Amendment.

Accordingly, the Amended 2023 Rule is contrary to the Clean Water Act's protection of state sovereignty, and therefore, is contrary to the States' constitutional rights, powers, and privileges recognized by the Tenth Amendment and must be vacated. 5 U.S.C. § 706(2)(B).

D. The 2023 Amended Rule must be vacated because it violates due process afforded by the Constitution.

"[A] vague law is no law at all." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019). The Due Process Clause of the Fifth Amendment requires adequate notice of what conduct is forbidden before criminal penalties may attach. And, the Supreme Court has consistently stated a law's language may not be so incomplete, vague, indefinite, or uncertain that ordinary people cannot understand the prohibitive conduct and does not encourage arbitrary and discriminatory enforcement. *Sackett,* 598 U.S. at 680-81; *McDonnell v. United States*, 579 U.S. 550, 576 (2016).

The Clean Water Act authorizes criminal and civil enforcement, which includes the potential assessment of penalties at more than $60,000 per violation, the possibility of imprisonment, or both. *See* 33 U.S.C. § 1319; 40 C.F.R. § 19.4. It is a "a potent weapon" with "'crushing' consequences 'even for inadvertent violations.'" *Sackett*, 598 U.S. at 660 (quoting

[13] *Compare* Texas Panhandle Map at *supra* p. 13, prepared by the Texas GLO, Exh. 11 *with* Exh. 12 USACE's Federal Navigable Waters List.

U.S. Army Corps of Engineers v. Hawkes Co., 578 U.S. 590, 602 (2016) (Kennedy, J., concurring)). Furthermore, citizens also wield the power of the Clean Water Act through the commencement of an enforcement action that seeks severe penalties. 33 U.S.C. § 1365. Therefore, the Clean Water Act, and the federal rules implementing it, must provide sufficient definiteness to comply with constitutional due process protections.

A plain reading of the Amended 2023 Rule identifies several vague terms and dynamic phrases used to allegedly establish various categories of jurisdictional waters under the Clean Water Act, and accordingly the scope of the Federal Agencies' power. And, unfortunately, a review of the 141-page Federal Register publication accompanying the 2023 Rule and then overlaying the equally unclear Conforming Rule only exacerbates the uncertainty. Exh. 3, at 1-4; Exh. 4, at 3-4; Exh. 5, at 2-4; Exh. 6, at 2; Exh. 7, at 3; Exh. 8, at 4-6; Exh. 9, at 7; Exh. 10, at 5. For example, the 2023 Rule never defines the terms "Relatively Permanent Standard," "certain times of the year," "extended period" "short duration," "impoundments," and "wetlands." These terms do not pass muster and cannot be salvaged by lengthy circuitous interpretations, as explained *supra*.

In *Sackett*, the Court criticized the Federal Agencies' use of "vague concepts" and "open-ended factors" when implementing the significant nexus test. 598 U.S. at 681 ("This freewheeling inquiry provides little notice to landowners . . ."). This uncertainty opens the door for arbitrary or discriminatory enforcement, which does not comport with due process. *Id.* The Amended 2023 Rule equally suffers from the Federal Agencies' ongoing use of undefined terms, vague concepts, and contradictory explanations, resulting in little notice or understanding of the Federal Agencies' scope of authority, in violation of due process.

E. The Amended 2023 Rule must be held unlawful and set aside because it was adopted through unlawful procedure.

An agency must follow the requirements in the APA when promulgating a rule, which often requires a "[g]eneral notice of proposed rulemaking" and provide "interested persons an opportunity to participate in the rulemaking through submission" of information. 5 U.S.C. §§ 553(b)-(c). The proposed rule must contain "either the terms or substance of the proposed rule or a description of the subjects and issues involved." *Id.* § 553(b)(3). The objective is for the agency to provide fair notice in the proposed rulemaking. *Tex. Ass'n of Mfrs. v. Consumer Prod. Safety Comm'n*, 989 F.3d 368, 381-82 (5th Cir. 2021) (citing *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007)). An agency's final rule may only differ from the proposed rule to the extent it is a "logical outgrowth" of the proposed rule. *Id.* A proposed rule must adequately frame the subjects for discussion so an interested party should have anticipated an agency's final decision. *Huawei Techs. USA, Inc. v. FCC*, 2 F.4th 421, 447 (5th Cir. 2021). Under the APA, a final agency action may be held unlawful and set aside if it is "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

When an agency amends a prior rule, it must generally use the same procedures it used to issue the first rule. *Clean Water Action v. EPA*, 936 F.3d 308, 316 (5th Cir. 2019) (citing *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 101 (2015)). However, an agency may invoke an exception to the notice and comment requirement when an agency finds a good cause that the process is impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. § 553(b)(B). The agency invoking the exception must provide a brief statement of reasons supporting the finding that good cause exists. *Id.* The good cause exception must be "narrowly construed" and reluctantly accepted "to avoid providing agencies with an 'escape clause'" from the

requirements established by Congress. *United States v. Johnson*, 632 F.3d 912, 928 (5th Cir. 2011) (quoting *New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980)); *see also Texas v. United States*, 809 F.3d 134, 171 (5th Cir. 2015) ("the full panoply of notice-and-comment requirements must be adhered to scrupulously. The 'APA's notice and comment exemptions must be narrowly construed.'").

For a finding of good cause based on the unnecessary prong, the rule must be "insignificant in nature," "inconsequential to the industry and public," or "a minor rule in which the public is not particularly interested." *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754-55 (D.C. Cir. 2001) (quoting *South Carolina v. Block*, 558 F. Supp. 1004, 1016 (D. S.C. 1983) and *U.S. Dept. of Justice, Attorney General's Manual on the Administrative Procedure Act* 30-31, (1947)). The unnecessary prong to the good cause exception cannot be relied on for a rule that is "without a doubt, something about which . . . the public [is] greatly interested." *Util. Solid Waste Activities Grp.*, 236 F.3d at 755. A "mere recital of good cause does not create good cause. Similarly, a desire to provide immediate guidance, without more, does not suffice for good cause." *Mobil Oil Corp. v. Dep't of Energy*, 610 F.2d 796, 803 (Temp. Emer. Ct. App. 1979).

Between the Proposed Rule and the 2023 Rule, the Federal Agencies added a section regarding the 2023 Rule's severability.[14] The Federal Agencies claim to clarify their intent for the 2023 Rule to be severable with each category and subcategory operating independently if one provision is held invalid by judicial review or operation of law. 88 Fed. Reg. 3135. But the Proposed Rule never presented this subject of severability for the public to comment on before including it in the 2023 Rule. Exh. 4, at 3. Severability of a rule predicated on cascading

[14] *Compare* Exh. 13 Proposed Rule *with* Exh. 1 2023 Rule adding the severability clause at 88 Fed. Reg. 3135.

undefined definitions defies logic and is not a "logical outgrowth" of the Proposed Rule and should thus be set aside. 5 U.S.C. § 706 (C), (D).

When the Federal Agencies modified the 2023 Rule with the Conforming Rule, they did not provide any opportunity for interested parties to comment on a proposed amendment. *See* Exh. 3, at 1; Exh. 4, at 3-4; Exh. 5, at 4; Exh. 6, at 2; Exh. 8, at 6. Instead, the Federal Agencies rely on the severability section from the 2023 Rule to sculpt a new rule and invoke the good cause exception by claiming notice and comment is unnecessary. 88 Fed. Reg. 61,964-65. The Federal Agencies explain the sole purpose of the amendment is to be consistent with *Sackett* and this process did not involve the agencies' discretion for the public to opine. *Id.* While changing the unlawful 2023 Rule was certainly necessary, the determination of how to change the 2023 Rule was subject to decision-making and should have been open to the public for comment.

Even the Federal Agencies recognize they "have a wide range of available approaches to address such issues," and they "intend to hold stakeholder meetings to ensure the public has an opportunity to provide the agencies with input on other issues they would like the agencies to address."[15] 88 Fed. Reg. 61,966. Here, the Federal Agencies exercise their discretion to keep overly broad jurisdictional categories, failed to define important key terms, and inserted language which did not match the actual holding found in *Sackett*.

[15] The Agencies state that such opportunity for input will be provided after the Conforming Rule became effective. *See U.S. Steel Corp. v. U.S. E.P.A.*, 595 F.2d 207, 214 (5th Cir. 1979) (rejecting argument that non-compliance with the notice and comment requirements can be cured with post-promulgation comments, "[p]ermitting the submission of views after the effective date is no substitute for the right of interested persons to make their views known to the agency in time to influence the rule making process in a meaningful way").

The Court and the States questioned the wisdom of the Federal Agencies rushing to publish the 2023 Rule with the *Sackett* decision forthcoming. *See* Dkt. 13 at 25; Dkt. 60 at 30, n. 12. But the addition of a severability section, combined with the Federal Agencies stubborn refusal to adhere to required notice and comment procedures, paints a clearer picture of their objective: to use the *Sackett* opinion to sculpt a new rule without ever giving the public a fair chance to consider the implications and seek to escape the purview of the APA by invoking the good cause exception. The Federal Agencies have simply decided that they had enough of the public's participation.

Now the Federal Agencies claim that notice and comment would be unnecessary given the nationwide attention every rule attempting to define "waters of the United States" and the CWA's jurisdiction has received. The Federal Agencies recognized the 2023 Rule sparked great public interest and "the agencies reviewed and considered approximately 114,000 comments received on the proposed rulemaking from a broad spectrum of interested parties." 88 Fed. Reg. 3019. Contrary to the Federal Agencies' conclusion that they already received enough comments, and no further opportunity was necessary before finalizing the Amended 2023 Rule, the APA's "good cause exception" does not apply to a rule of such great import and interest. *Util. Solid Waste Activities Grp.*, 236 F.3d at 755. Moreover, the mere presence of a prior notice and comment period does not render the solicitation of new comments unnecessary. *See Action on Smoking and Health v. Civil Aeronautics Board*, 713 F.2d 795, 800 (D.C. Cir. 1983) ("It cannot be presumed that no new evidence relevant to the problem" have

developed in the interim[16]). And "bald assertions that the agency does not believe comments would be useful cannot create good cause to forego notice and comment procedures . . . To hold otherwise would permit the exceptions to carve the heart out of the statute." *Texas Food Indus. Ass'n v. U.S. Dep't of Agric.*, 842 F. Supp. 254, 259 (W.D. Tex. 1993) (citing *Action on Smoking and Health*, 713 F.2d at 800).

Accordingly, the Conforming Rule should be set aside because the Federal Agencies have not supported their arbitrary decision to invoke the good cause exception in order to avoid further public comment. 5 U.S.C. § 706 (C), (D).

CONCLUSION AND PRAYER

There are many reasons to vacate the 2023 Rule and Conforming Rule. It cannot be supported by the plain language of the Clean Water Act, it is inconsistent with Supreme Court precedent, it cannot be justified as a valid exercise of congressional authority under the Commerce Clause, it cannot be excused in the face of the Tenth Amendment, and it infringes on the due process rights afforded under the Fifth Amendment. And even if it were not substantially unlawful, it was adopted through unlawful procedure. The States pray for vacatur now.

Dated: February 2, 2024

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[16] The comments solicited under the 2023 Rule are now at least one to two years old. The ramifications of *Sackett* represent new information to which the public should be afforded an opportunity to comment.

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CERTIFICATE OF SERVICE

I certify that on February 2, 2024, a copy of the foregoing document was electronically filed on the CM/ECF system, which will automatically serve a Notice of Electronic Filing on all attorneys in this case.

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