IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION
No. 2:24-CV-00013-BO-RJ

ROBERT D. WHITE, Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; et al., Defendants.	PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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SUMMARY OF THE NATURE OF THE CASE

This is a lawsuit for declaratory judgment and injunctive relief, challenging the "adjacent wetlands" provisions of a final rule issued by Defendants Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Corps) (together, the "Agencies"), purporting to interpret the term "navigable waters," for purposes of the Clean Water Act, 88 Fed. Reg. 3004 (Jan. 18, 2023), *as amended*, 88 Fed. Reg. 61,964 (Sept. 8, 2023) (the "Amended Rule"). These "adjacent wetlands" provisions are codified at 33 C.F.R. § 328.3(a)(4), (c)(2); and 40 C.F.R. § 120.2(a)(4), (c)(2). Plaintiff Robert D. White filed suit on March 14, 2024. *See* ECF No. 1. Pursuant to Federal Rule of Civil Procedure 65 and Local Civil Rule 7.1, Plaintiff now respectfully moves for a preliminary injunction enjoining all Defendants from giving effect to, implementing, or enforcing the Amended Rule's "adjacent wetlands" provisions as to Plaintiff and his properties.

INTRODUCTION

Robert White is a landowner and businessman who has dedicated a lifetime of hard work to building a successful commercial seafood business. That hard work is now under serious threat. Mr. White finds himself unable to develop or improve multiple properties he owns to their highest and best use. And he finds himself subject to a financially devastating federal civil enforcement action.

The source of these threats to Mr. White's properties and livelihood is the unlawful authority that the Agencies have claimed to regulate land use pursuant to the Clean Water Act ("CWA"). The CWA regulates discharges of "pollutants" from "point sources" into "navigable waters," 33 U.S.C. §§ 1311(a), 1362(12)—defined as "the waters of the United States," *id.* § 1362(7). This definition functions as an absolute limitation on the Agencies' authority to regulate—they may regulate discharges of pollutants to "navigable waters," but no further. For

over fifty years, however, the Agencies have steadily expanded their claimed authority over private property by broadly—and implausibly—interpreting the term "navigable waters" to reach isolated wetlands and other dry land features. *See infra* 4-8. This is no small matter. Because the CWA "can sweep broadly enough to criminalize mundane activities like moving dirt, [an] 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." *Sackett v. EPA*, 598 U.S. 651, 669-70 (2023).

In 2023, that expansion of authority was definitively brought to a halt by the United States Supreme Court. In *Sackett*, the Supreme Court unanimously rejected the Agencies' historically broad approach to wetlands regulation. And a majority of the Court set forth a clear and substantially narrowed standard for federal wetlands jurisdiction derived from the CWA's plain text. Now, the Agencies may regulate only (1) "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 v. United States*, 547 U.S. 715, 739 (2006) (plurality opinion)); and (2) "wetlands" (i) with a "continuous surface connection" to such waters and (ii) 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,'" *id.* at 678 (quoting *Rapanos*, 547 U.S. at 742).

This resounding defeat for the Agencies necessitated a dramatic break from their prior approaches to regulating wetlands. *See Lewis v. United States*, 88 F.4th 1073, 1078 (5th Cir. 2023) (confirming that *Sackett*'s "test significantly tightens the definition of federally regulable wetlands"). Yet no such revision has been forthcoming. Instead, on September 8, 2023, the Agencies issued an amended rule purporting to redefine the scope of "navigable waters." *See* 88

Fed. Reg. 61,964. This Amended Rule does not comport with *Sackett*. Rather, it continues to assert staggeringly broad CWA authority over private land—in particular by continuing to assert authority over many types of isolated wetlands and other dry lands. Among other material defects, the Amended Rule unlawfully omits *Sackett*'s "indistinguishability" requirement, *see* 40 C.F.R. § 120.2(a)(4)(ii); 33 C.F.R. § 328.3(a)(4)(ii), and relies upon various asserted "connections" that are not "continuous" according to any plausible understanding of that word, *see* 88 Fed. Reg. at 3090-96.

Such a response from two agencies "whose disregard for the statutory language has been so long manifested," *Rapanos*, 547 U.S. at 756 n.15 (plurality), is sadly characteristic of the approach taken following every agency loss at the Supreme Court over the CWA's scope, *see Sackett*, 598 U.S. at 666-67 (recounting prior attempts by the Agencies to evade express limitations placed upon their authority by the Supreme Court). Lamentably, it is a continuing practice. *See Lewis*, 88 F.4th at 1080 n.7 (observing the Corps' "utter unwillingness to concede its lack of regulatory jurisdiction in this case following *Sackett* . . .").

This Court must intervene now to remedy the Agencies' disregard for the statutory limitations placed upon their authority. Mr. White is likely to succeed on the merits of his claims. *See infra* 11-20. And he faces imminent, ongoing, and irreparable harms stemming from the enormous economic and personal costs that the Agencies' unlawful implementation of the Amended Rule is imposing upon him. *See infra* 20-25. Moreover, the equities and public interest weigh in favor of enjoining the unlawful Amended Rule. *See infra* 25-26. For these reasons, discussed further below, this Court should preliminarily enjoin all Defendants from further unlawful regulation of Mr. White's property, and restore the express, mandatory limitations on their authority definitively established by *Sackett*.

STATEMENT OF FACTS

I. The Clean Water Act

The CWA regulates discharges of "pollutants" from "point sources" to "navigable waters." 33 U.S.C. §§ 1311(a), 1362(12). The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas." *Id.* § 1362(7). Although the CWA defines "territorial seas," *id.* § 1362(8), it does not define "waters of the United States," *see id*. Nonexempt point source discharges of pollutants into "navigable waters" require a permit from either EPA (called a National Pollutant Discharge Elimination Program permit) or, if the discharge involves "dredged or fill material," from the Corps (commonly called a Section 404 permit). *See id.* §§ 1342(a), 1344(a).

II. Decades of unlawful wetlands regulation

The significant costs and liabilities that the CWA can impose underscore the vital importance of clearly demarcating its geographic reach—that is, the meaning of the term "navigable waters." *See Sackett*, 598 U.S. at 661 ("Due to the CWA's capacious definition of 'pollutant,' its low *mens rea*, and its severe penalties, regulated parties have focused particular attention on the Act's geographic scope."). Unfortunately, since the early days of the CWA's implementation, the Agencies have made it their mission to construe their own authority in the broadest and most opaque terms possible.

In a series of rulemakings culminating in a set of revised regulations commonly known as the "1986 Regulations," *see* 88 Fed. Reg. at 3005 & nn.3-4, the Agencies extended the scope of their claimed authority to regulate "navigable waters" to the outer limits of Congress's power to regulate interstate commerce, *see Rapanos*, 547 U.S. at 724 (citing 42 Fed. Reg. 37,122, 37,144 n.2 (July 19, 1977)). Federal authority was asserted not just over interstate waters, but also intrastate waters with various relationships to interstate or foreign commerce, as well as all

tributaries of such waters, and all "wetlands" that are "adjacent" to, *i.e.*, bordering, contiguous, or neighboring, any regulated water. 33 C.F.R. § 323.2(a)(2)-(5), (d) (1978). *See Rapanos*, 547 U.S. at 724.

Between 1985 and 2006, the Supreme Court addressed the Agencies' CWA authority three times. The Agencies responded to each decision by expanding their powers further.

First, in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), the Supreme Court concluded that the Agencies could regulate those wetlands that are "inseparably bound up with the 'waters' of the United States," *id*. at 134—but cautioned that its affirmance of the Agencies' authority was limited to the regulation of such inseparably bound up wetlands, *see id*. at 131 & n.8. Notwithstanding this narrow affirmance, the Agencies "responded to *Riverside Bayview* by expanding their interpretations even further." *Sackett*, 598 U.S. at 665.

Second, in *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), the Court rebuffed the Agencies' attempt to regulate "nonnavigable, isolated, intrastate waters," *id.* at 167-68. Undeterred, and mere "[d]ays" after the Supreme Court issued its decision, the Agencies "issued guidance that sought to minimize *SWANCC*'s impact." *Sackett*, 598 U.S. at 666.

***Third*,** in *Rapanos v. United States*, 547 U.S. 715, five members of the Court held the Agencies' 1986 Regulations to be invalid insofar as they purport to regulate all tributaries of traditionally navigable waters and all wetlands adjacent to such tributaries. *Id.* at 728 (plurality opinion); *id.* at 759 (Kennedy, J., concurring in the judgment). But no opinion garnered a majority of the Court. Writing for a plurality of four Justices, Justice Scalia noted that the scope of the Agencies' authority can extend no further than "waters," *id*. at 731, and that the ordinary meaning of "waters" includes "only those relatively permanent, standing or continuously flowing bodies of

water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes,'" *id*. at 739 (quoting Webster's Second at 2882). "Wetlands" would not normally fall under such a definition. *See Riverside Bayview*, 474 U.S. at 132. But the plurality reasoned there was a difference between considering a wetland on its own to be a "water," and concluding that some wetlands may be regulated as "waters," given the "ambiguity in drawing the boundaries of any 'waters.'" *Rapanos*, 547 U.S. at 740. Thus, according to the latter concession, "*only* those wetlands with 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, are 'adjacent to' such waters and covered by the Act." *Id*. at 742. Justice Kennedy provided the fifth vote, but he disagreed with the plurality's rationale. *Id.* at 759 (Kennedy, J., concurring in the judgment). Justice Kennedy proposed a broader "significant nexus" standard—under which a wetland may be federally regulated if it "significantly" affects the physical, chemical, and biological integrity of "waters more readily understood as 'navigable.'" *Id.* at 780.

Shortly after *Rapanos*, the Agencies issued guidance purporting to explain how jurisdiction was to be established. *See* EPA & Army Corps, Memorandum re: Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States* (Dec. 2008) (the "Post-*Rapanos* Guidance").[1] This guidance combined aspects of both Justice Scalia's *Rapanos* plurality and Justice Kennedy's concurrence. *See id.* By its own terms, it did "not impose legally binding requirements on EPA, the Corps, or the regulated community . . . ." *See id.* at 4 n.17. The Agencies then embarked upon two major rulemakings to define "navigable waters." *See* 80 Fed. Reg. 37,054, 37,056 (June 29, 2015) (the "2015 Rule"); 85 Fed. Reg. 22,250 (Apr. 21, 2020) (the "2020 Rule"). The 2015 Rule asserted "sweeping[ly]" broad

[1] *Available at* https://perma.cc/JNN9-HKEG.

authority over all manner of features, wet or otherwise—"a muscular approach that would subject 'the vast majority of the nation's water features' to a case-by-case jurisdictional analysis," *Sackett*, 598 U.S. at 668, whereas the 2020 Rule was more circumscribed, *see id.* Each rule failed. *See West Virginia v. EPA*, 669 F. Supp. 3d 781, 792 (D.N.D. 2023) (recounting history of preliminary injunctions and final judgments entered against these rules).

III. Certiorari is granted in *Sackett* but the Agencies persist with yet another broad rule

On January 24, 2022, the Supreme Court granted certiorari in *Sackett* to determine the "proper test for determining whether wetlands [are] 'waters of the United States' under the Clean Water Act, 33 U.S.C. § 1362(7)." *Sackett v. EPA*, 142 S. Ct. 896, 896 (2022). Notwithstanding their dismal post-*Rapanos* track record and *Sackett*'s promise of much-needed guidance, on January 18, 2023, the Agencies persisted in defining "navigable waters" again. *See* 88 Fed. Reg. 3004. Predictably, that 2023 Rule attempted to expand the Agencies' authority even further. *See Sackett*, 598 U.S. at 668-69. It allowed for wetlands regulation pursuant to a test superficially inspired by Justice Scalia's *Rapanos* plurality—the so-called "relatively permanent standard." 88 Fed. Reg. at 3004-07. But it primarily relied upon a broadly defined "significant nexus standard"—superficially inspired by Justice Kennedy's concurrence. *Id.* The 2023 Rule quickly met the same fate as its predecessors.[2]

IV. The Supreme Court unanimously rebukes the Agencies in *Sackett*

On May 25, 2023, the Supreme Court issued its decision in *Sackett*. *See* 598 U.S. 651. In *Sackett*, the Supreme Court unanimously rejected the significant nexus test and the Agencies'

[2] *Texas v. EPA*, 662 F. Supp. 3d 739, 745 (S.D. Tex. 2023) (preliminarily enjoining 2023 Rule in Texas and Idaho); *West Virginia*, 669 F. Supp. 3d 781 (preliminarily enjoining 2023 Rule in twenty-four additional states); Order, *Kentucky v. EPA*, Nos. 23-5343 and 23-5345 (6th Cir. May 10, 2023), ECF No. 24 (Exhibit A to Declaration of Charles Yates) (enjoining 2023 Rule in Kentucky and nationwide as to membership of several trade associations).

claim of authority over the parcel of land at issue in that case. *Sackett*, 598 U.S. at 684; *id.* at 715-16 (Kavanaugh, J., concurring). In addition to the Court's unanimous judgment, the majority set forth a clear test for wetlands jurisdiction derived from the plain text of the Act. Under this clear test, the Agencies may regulate only (1) "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 opinion)); and (2) "wetlands" (i) with a "continuous surface connection" to such waters and (ii) 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,'" *id.* at 678 (quoting *Rapanos*, 547 U.S. at 742).

Sackett made clear that the CWA exists to protect "waters"—rivers, lakes, and streams—while land, wet or otherwise, is presumptively outside the scope of the statute. *See Sackett*, 598 U.S. at 671-78. *See also Rapanos*, 547 U.S. at 734 ("The plain language of the statute simply does not authorize this 'Land Is Waters' approach to federal jurisdiction."). *Sackett*'s bottom line is that regulable wetlands "must be indistinguishably part of a body of water that itself constitutes 'waters' under the CWA." 598 U.S. at 676.

V. The Amended Rule

On September 8, 2023, the Agencies issued an amended version of the 2023 Rule, attempting to bring that defective rule into compliance with *Sackett*. *See* 88 Fed. Reg. at 61,964-65. The Amended Rule deletes those provisions of the 2023 Rule codifying the significant nexus test but leaves the remainder of the rule intact. *See* 88 Fed. Reg. at 61,968-69, *codified at* 33 C.F.R. § 328.3; 40 C.F.R. § 120.2. With respect to wetlands, the Amended Rule authorizes regulation of wetlands "adjacent to" other covered waters. 33 C.F.R. § 328.3(a)(4); 40 C.F.R.

§ 120.2(a)(4). It defines "adjacent" as "having a continuous surface connection." 33 C.F.R. § 328.3(c)(2); 40 C.F.R. § 120.2(c)(2). Those portions of the unamended 2023 Rule's preamble explaining the Agencies' approach to the "relatively permanent test" for wetlands authority still generally govern the Agencies' implementation of the Act. *See* Joint Coordination Memo. to the Field Between the U.S. Dep't of the Army, U.S. Army Corps of Eng'rs & the U.S. Env't Prot. Agency 1 (Sept. 27, 2023), https://www.epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-amended-2023-rule_508c.pdf ("[T]he implementation guidance and tools in the 2023 rule preamble that address the regulatory text that was not amended by the conforming rule, including the preamble relevant to the *Rapanos* plurality standard . . . generally remain relevant to implementing the 2023 rule, as amended.").

STANDING

Mr. White has standing to maintain this challenge to the Amended Rule. To demonstrate standing, a plaintiff must prove: (1) "a 'concrete and particularized' injury"; (2) that is "fairly traceable to the challenged conduct of the defendant"; and (3) "is likely to be redressed by a favorable judicial decision." *Ansley v. Warren*, 861 F.3d 512, 517 (4th Cir. 2017) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). Where "the legality of government action or inaction" is being challenged, "there is ordinarily little question" of standing for a plaintiff who is the "object of the action (or forgone action)." *Lujan*, 504 U.S. at 561-62. *See also United States v. Texas*, 599 U.S. 670, 678 n.2 (2023) (reaffirming this principle). Indeed, other courts—in substantially similar contexts—have "suggested that standing is usually self-evident when the plaintiff is a regulated party or an organization representing regulated parties." *Am. Petroleum Inst. v. Johnson*, 541 F. Supp. 2d 165, 176 (D.D.C. 2008) (citing *S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 895-96 (D.C. Cir. 2006)).

Mr. White owns numerous properties throughout eastern North Carolina. *See* Declaration of Robert Dean White (White Decl.) ¶ 3. Many of these properties are relatively low-lying, and portions of them border Big Flatty Creek, the Pasquotank River, and other bodies of water. *Id*. In January 2023, on behalf of EPA the United States sued Mr. White in this Court, alleging, among other things, that portions of some of Mr. White's properties contain "wetlands" regulated as "navigable waters" under the CWA. *See* Complaint, *United States of America v. Robert White*, Case No. 2:23-cv-00001-BO-RN, ECF No. 1 (Jan. 6, 2023). Despite Mr. White's requests, the United States has not dropped its suit, or otherwise modified its claims of authority over significant portions of Mr. White's properties in the wake of the Agencies' finalizing the Amended Rule. *See* White Decl. ¶ 15. Because the Amended Rule constitutes the Agencies' controlling view of their wetlands authority, *cf. Cross v. United States*, 512 F.2d 1212, 1218 n.9 (4th Cir. 1975) ("An agency must follow its regulations as well as statutory mandates." (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954)), the government's position[3] is evidently that all of the portions of Mr. White's properties where the Agencies previously had asserted jurisdiction remain subject to the Agencies' authority under the Amended Rule. Mr. White—and his properties—are the "object" of the Amended Rule. As long as the government maintains its erroneous claims of authority over the properties in question, there is "little question" that the Amended Rule has caused Mr. White injury, and that a judgment enjoining the Amended Rule will "redress" Mr. White's injuries. *Lujan*, 504 U.S. at 561-62.

[3] Mr. White disputes the Agencies' claim of authority over any alleged wetlands on his property. *See* White Decl. ¶ 14.

Additionally, Mr. White has presented specific evidence of immediate and ongoing injuries caused by the Amended Rule, which would be redressed by a favorable judgment from this Court. *See infra* 20-25 (discussing irreparable harm).

STANDARD OF REVIEW

To obtain a preliminary injunction, a movant must establish four factors: "(1) that he's likely to succeed on the merits; (2) that he's likely to suffer irreparable harm if preliminary relief isn't granted; (3) that the balance of equities favors him; and (4) that an injunction is in the public interest." *Frazier v. Prince George's Cnty.*, 86 F.4th 537, 543 (4th Cir. 2023) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

ARGUMENT

I. Mr. White is likely to prevail on the merits

Agency action is unlawful where it is not in accordance with law or exceeds statutory authority. 5 U.S.C. § 706(2)(A), (C). *See also FEC v. Cruz*, 596 U.S. 289, 301 (2022) ("An agency . . . 'literally has no power to act' . . . unless and until Congress authorizes it to do so by statute." (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986))). Because the "adjacent wetlands" provisions of the Amended Rule do not require wetlands to be "indistinguishable," *Sackett*, 598 U.S. at 684, from covered waters, they violate *Sackett*'s test for wetlands authority. As a result, they are contrary to and exceed the CWA's limited grant of authority to the Agencies to regulate "navigable waters." *See infra* 12-16. Additionally, the Agencies' interpretation of "navigable waters" set forth in the Amended Rule must be rejected pursuant to the federalism clear statement canon, as well as the constitutional avoidance canon. *See infra* 16-20.

A. The "adjacent wetlands" provisions of the Amended Rule disregard *Sackett*

1. The Amended Rule unlawfully omits *Sackett*'s "indistinguishability" requirement for wetlands authority

The text of the CWA authorizes the Agencies to exercise authority only over "navigable waters," defined as "the waters of the United States." 33 U.S.C. § 1362(7), (12). In *Sackett*, the Supreme Court held that this provision authorizes the Agencies to regulate only: (1) "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); and (2) "wetlands" (i) with a "continuous surface connection" to such waters and (ii) 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,'" *id.* at 678 (quoting *Rapanos*, 547 U.S. at 742). If a wetland does not satisfy these mandatory conditions, it is, as a matter of law, not among the regulable "navigable waters."

Central to *Sackett*'s test is that regulable wetlands "must be indistinguishably part of a body of water that itself constitutes 'waters' under the CWA." *Id.* at 676. "Wetlands that are separate from traditional navigable waters" on the other hand, "cannot be considered part of those waters, even if they are located nearby." *Id. See also id.* at 684 ("the CWA extends to only those 'wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right,' so that they are 'indistinguishable' from those waters," 598 U.S. at 684 (quoting *Rapanos*, 547 U.S. at 742). This is so because the CWA exists to protect "waters"—rivers, lakes, and streams—while lands, wet or otherwise, are presumptively outside the scope of the statute. *Sackett*, 598 U.S. at 671-78. *See also Rapanos*, 547 U.S. at 734 ("The plain language of the statute simply does not authorize this 'Land Is Waters' approach to federal jurisdiction."). Indeed, such is the centrality of *Sackett*'s indistinguishability requirement, that the word "indistinguishable" is used

more often than the phrase "continuous surface connection" in the Court's recitation of the test—including in the Court's ultimate reasoning that the land at issue in the case was not jurisdictional. *See Sackett*, 598 U.S. at 684 ("The wetlands on the Sacketts' property are distinguishable from any possibly covered waters."). Lower courts applying *Sackett*'s test have similarly confirmed the centrality of *Sackett*'s "indistinguishability" requirement. *See Lewis*, 88 F.4th at 1078 (confirming that the Agencies must prove "indistinguishability"); *Glynn Env't Coal., Inc. v. Sea Island Acquisition, LLC*, No. CV 219-050, 2024 WL 1088585, at *4 (S.D. Ga. Mar. 1, 2024), *appeal filed* No. 24-10710 (11th Cir. Mar. 7, 2024) (confirming that "[t]he CWA only extends to wetlands that are indistinguishable from 'waters of the United States' as a practical matter" (citing *Sackett*, 598 U.S. at 678)).

The Amended Rule unlawfully omits *Sackett*'s central indistinguishability requirement. Instead, the Agencies assert that they may regulate any wetland "adjacent" to a relatively permanent body of water, so long as the wetlands have "a continuous surface connection." 40 C.F.R. § 120.2(a)(4)(ii); 33 C.F.R. § 328.3(a)(4)(ii). By defining "navigable waters" as covering "wetlands with a continuous surface connection" to a covered water, *id.*, but failing to include the requirement that such wetlands be "indistinguishable" from those waters, *Sackett*, 598 U.S. at 684, the Amended Rule regulates far beyond what *Sackett* allows.

2. The portions of the 2023 Rule's preamble pertaining to the so-called "relatively permanent" test show the Agencies' disregard for *Sackett*

The Agencies' disregard of *Sackett*'s requirements is demonstrated by those portions of the preamble to the 2023 Rule pertaining to the so-called "relatively permanent test," 88 Fed. Reg. at 3090-96—which the Agencies, post-*Sackett*, have confirmed still generally govern, *see supra* 9.

For example, despite the touchstone of *Sackett*'s test being a "difficult[y]" in "determin[ing] where the 'water' ends and the 'wetland' begins," *Sackett*, 598 U.S. at 678 (quoting

Rapanos, 547 U.S. at 742), the Agencies contend that the connection between water and wetland need not be based upon the continuous presence of surface water. *See* 88 Fed. Reg. at 3095-96. *Sackett*, however, is clear that surface water must be continuously present, absent "temporary interruptions . . . because of phenomena like low tides or dry spells." *Sackett*, 598 U.S. at 678. Indeed, it is logically impossible for two jurisdictional *water* features to be "indistinguishable" absent a continuous aquatic connection.

The Agencies further contend that, even after *Sackett*, they may still assert authority through daisy-chain "connections" between a wetland and a "water" via "discrete feature[s] like a non-jurisdictional ditch, swale, pipe, or culvert." 88 Fed. Reg. at 3093, 3095. And, given the Agencies view that the connection need not be aquatic, presumably even dry intermediate features are sufficient to establish authority. *See id.* at 3095-96. But *Sackett*'s requirement that there exist "no clear demarcation between 'waters' and wetlands," *Sackett*, 598 U.S. at 678, would mean nothing if the Agencies could establish jurisdiction through a series of typically dry intermediate features. Indeed, this mode of analysis subjects landowners to precisely the sort of "freewheeling inquiry" the Court in *Sackett* sharply criticized. *Id.* at 681. The only reported appellate decision to apply *Sackett*'s test for wetlands jurisdiction confirms that such claims are no longer permissible. *See Lewis*, 88 F.4th at 1078 (determining the Agencies could not assert jurisdiction 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"). And district courts have reached similar conclusions. *See Glynn Environmental Coalition, Inc.*, 2024 WL 1088585, at *5 ("Plaintiffs' contention that water will eventually reach Dunbar Creek by 'surface runoff and groundwater' and Plaintiffs' expert's statement that the Subject Property and nearby salt marsh are

directly connected 'via culverts and pipes' do not sufficiently allege the Subject Property is a 'wetland' under *Sackett*.").

Most egregiously, the Agencies maintain that they may regulate even where a natural or artificial physical barrier separates a wetland from a covered water. *See* 88 Fed. Reg. at 3090 ("A natural berm, bank, dune, or similar natural landform between an adjacent wetland and a relatively permanent water does not sever a continuous surface connection to the extent it provides evidence of a continuous surface connection."); *id.* 3095-96 (explaining that an artificial barrier does not sever jurisdiction where it permits flow through culverts, pipes, or waterfalls). The Agencies advance this position despite *Sackett*'s express holding 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.

3. The Amended Rule is inconsistent with the *Rapanos* plurality

The Agencies may argue that *Sackett* merely adopted the *Rapanos* plurality test, *see* 88 Fed. Reg. at 61,964-66, and that, because the 2023 Rule adopted a so-called "relatively permanent" test purportedly inspired by the *Rapanos* plurality, the Amended Rule's reenactment of those provisions of the 2023 Rule should be upheld. Any such argument is untenable, for at least two reasons.

First, although the 2023 Rule's "relatively permanent" standard for wetlands jurisdiction bears some superficial resemblance to the test set forth by the *Rapanos* plurality, the Agencies were *explicit* that they were not applying or adopting either test from *Rapanos*. *See* 88 Fed. Reg. at 3021 ("while the agencies' interpretation of the statute is informed by Supreme Court decisions, including *Rapanos*, it is not an interpretation of the multiple opinions in *Rapanos* . . ."). Indeed, the Agencies' position in the 2023 Rule as to the *Rapanos* plurality can only described as one of

outright hostility. *See id.* at 3034 ("[E]xclusive reliance on the [relatively permanent] standard for all determinations is inconsistent with the text of the statute and Supreme Court precedent and is insufficient to advance the objective of the Clean Water Act."); *id.* at 3039 ("the *Rapanos* plurality relied on a strained reading of the Act that is inconsistent with the text of the statute"). To the extent that the Agencies were willing to concede *anything* to the "relatively permanent" standard, it was merely to assume that wetlands meeting this test would typically be jurisdictional under the 2023 Rule's primary "significant nexus"-inspired test, such that the "relatively permanent" standard would serve administrative convenience. *See id.* at 3034. The Agencies cannot now recast—for purposes of this litigation—their prior dismissal of the *Rapanos* plurality as somehow constituting a faithful codification of it.

Second, even assuming arguendo that *Sackett* is nothing more than an adoption of the *Rapanos* plurality's test for wetlands jurisdiction, the Amended Rule's omission of *Sackett*'s indistinguishability requirement remains illegal. Despite the Agencies' avoidance of it, indistinguishability was likewise integral to the *Rapanos* plurality's test for federal wetlands jurisdiction. *See Rapanos*, 547 U.S. at 755 (plurality) ("Wetlands are 'waters of the United States' if they bear the 'significant nexus' of physical connection, which makes them as a practical matter *indistinguishable* from waters of the United States.") (emphasis in original); *id.* at 742 (requiring "that there is no clear demarcation between 'waters' and wetlands). *Cf. id.* at 776 (Kennedy, J., concurring) (understanding the plurality's test to "foreclose[] jurisdiction over wetlands that abut navigable-in-fact waters" absent a "surface-water connection").

B. The Agencies' interpretation of "navigable waters" must be rejected pursuant to the federalism clear statement canon

In addition to ignoring the text of the CWA and the Supreme Court's decision in *Sackett*, the Agencies' insistence that they may regulate enormous areas of land that can be readily

distinguished from covered waters raises serious federalism questions. It is an axiomatic rule of construction that "Congress must be explicitly clear if it wishes to 'alter[] the federal-state framework by permitting federal encroachment upon a traditional state power.'" *N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC*, 76 F.4th 291, 298 (4th Cir. 2023) (quoting *SWANCC*, 531 U.S. at 172-73).

"Regulation of land and water use lies at the core of traditional state authority." *Sackett*, 598 U.S. at 679. As a result, the Supreme Court has repeatedly "required a clear statement from Congress when determining the scope of 'the waters of the United States.'" *Id.* at 680. Yet, by eschewing *Sackett*'s indistinguishability requirement and thus asserting control over isolated wetlands with no clear or continuous connection to covered waters, the Agencies assert direct federal control over enormous areas of private land in North Carolina and every corner of the country. *See id.* ("The area covered by wetlands alone is vast—greater than the combined surface area of California and Texas."). Such an interpretation presses the Agencies' assertions of regulatory authority well into the states' traditional domain. Yet, the Agencies have not pointed, and cannot point, to any clear statement sufficient to justify this expansive foray. Indeed, to the contrary, the CWA explicitly admonishes *against* the Agencies' conduct here. In enacting the CWA, "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources[.]'" *SWANCC*, 531 U.S. at 174 (quoting 33 U.S.C. § 1251(b)). *See also N.C. Coastal Fisheries Reform Grp.*, 76 F.4th at 299 ("[W]e must read the Clean Water Act . . . against a backdrop where Congress has time-and-time again confirmed that primary authority resides with the states.").

C. The Agencies' interpretation of "navigable waters" must be rejected because it raises additional constitutional problems

The term "navigable waters," is not susceptible to more than one meaning. *See supra* 12-15. *See also Sackett*, 598 U.S. at 679-82 (rejecting EPA's plea for deference). Nevertheless, even assuming that the term "navigable waters" *could* be construed as it is in the Amended Rule, that interpretation must be rejected pursuant to the canon of constitutional avoidance, because it raises serious nondelegation and due process concerns. *See Williams v. Kincaid*, 45 F.4th 759, 772 (4th Cir. 2022) ("When a statute 'raises "a serious doubt" as to its constitutionality,' we must 'first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" (quoting *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001))).

First, to interpret the Act in the manner suggested by the Agencies runs afoul of the nondelegation doctrine. The nondelegation doctrine forbids Congress from delegating its legislative power to any other branch. *See Mistretta v. United States*, 488 U.S. 361, 371-72 (1989). Hence, prior to delegating discretionary power to an administrative agency, Congress must first provide an "intelligible principle" to guide its exercise. *See Panama Refining Co. v. Ryan*, 293 U.S. 388, 429-30 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-32 (1935). As a matter of ordinary usage, reading "waters," 33 U.S.C. § 1362(7), as including "'lands,' wet or otherwise[,]" is quite dubious. *See Riverside Bayview*, 474 U.S. at 132. *Sackett* recognized this linguistic problem. *Sackett*, 598 U.S. at 673 ("wetlands are not included in 'traditional notions of "waters."'" (quoting *Riverside Bayview*, 474 U.S. at 133)). But the decision resolved the difficulty by holding that "wetlands" may be regulated only where they "are 'as a practical matter indistinguishable from waters of the United States.'" *Id.* at 678 (quoting *Rapanos*, 547 U.S. at 742). To regulate "'lands,' wet or otherwise," *Riverside Bayview*, 474 U.S. at 132, as "waters" without this requirement removes any principle to guide the Agencies. It is difficult to

imagine a more obvious example of unlawful delegation of legislative power to an administrative agency than a grant of authority to regulate "lands" as "waters," unbounded by any principle enunciating the relationship between said lands and waters—especially since the term "wetlands" is itself undefined in the CWA, *see* 33 U.S.C. § 1362. *Cf. Gundy v. United States*, 139 S. Ct. 2116, 2131-37 (2019) (Gorsuch, J., dissenting) (determining that the most important inquiry for purposes of the nondelegation doctrine is whether Congress, and not the agency, has made the overarching policy choice).

Second, "[d]ue process requires Congress to define penal statutes 'with sufficient definiteness that ordinary people can understand what conduct is prohibited' and 'in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Sackett*, 598 U.S. at 680-82 (quoting *McDonnell v. United States*, 579 U.S. 550, 576 (2016)). Accordingly, "[w]here a penal statute could sweep so broadly as to render criminal a host of what might otherwise be considered ordinary activities, we have been wary about going beyond what 'Congress certainly intended the statute to cover.'" *Id.* (quoting *Skilling v. United States*, 561 U.S. 358, 404 (2010)). The CWA authorizes criminal and strict civil liability *for all manner of otherwise lawful private activities*. *Id.* at 681. Yet the Agencies' position is that they may regulate pursuant to this punitive scheme, with reference to nothing more than a vaguely defined "continuous surface connection," which may be divined in numerous ways that cannot be readily understood by the regulated public, *see supra* 13-15. Indeed, the Agencies' interpretation perpetuates the intolerable situation observed in *Sackett*, whereby property owners—"[f]acing severe criminal sanctions for even negligent violations"—"are left 'to feel their way on a case-by-case basis.'" *Sackett*, 598 U.S. at 681 (quoting *Sackett v. EPA*, 566 U.S. 120, 124 (2012)). The only way to avoid these significant due process problems is to interpret the CWA with reference to *Sackett*'s central indistinguishability

requirement—only then will "ordinary people . . . understand what conduct is prohibited." *Id.* at 680-81 (quoting *McDonnell*, 579 U.S. at 576).

* * *

The CWA only regulates "waters," *Sackett*, 598 U.S. at 671, so that features like wetlands that are typically regarded as non-waters, *see id*. at 674, can be regulated only in those rare instances when they "qualify as 'waters . . .' in their own right." *Id.* at 676. Because the "adjacent wetlands" provisions of the Amended Rule do not require a connection sufficient to render regulated wetlands "indistinguishable" from covered "waters," *id.* at 684 (quoting *Rapanos*, 547 U.S. at 742), they violate and exceed the CWA's limited grant of authority to the Agencies to regulate "navigable waters," *see* 33 U.S.C. § 1362(7), (12).

II. Mr. White will suffer irreparable harm absent an injunction

Mr. White has incurred, and will continue to incur, extraordinary economic and personal costs as a result of the Agencies' implementation of the Amended Rule. *See* White Decl. ¶¶ 18-35. These constitute irreparable harm.

Mr. White is the owner of numerous parcels of land throughout eastern North Carolina. *See* White Decl. ¶ 3. Many of these lands are relatively low-lying and portions border the Pasquotank River, Big Flatty Creek, and other bodies of water. *Id*. These lands are utilized for a variety of longstanding commercial purposes, and require regular maintenance and erosion control, which can raise questions of state and federal wetlands permitting jurisdiction. *Id.* ¶¶ 4-5.

Many of Mr. White's property holdings and all possible future plans—indeed, his very livelihood—were placed in jeopardy when the Agencies finalized the Amended Rule. That rule codifies an unlawfully broad view of the Agencies' authority and purports to establish jurisdiction over a wide range of wetland features that are not properly defined as "navigable waters." *See*

supra 12-20. And because the Amended Rule represents the Agencies' controlling view of their own regulatory authority in North Carolina,[4] and because the Agencies refuse to concede that *Sackett* impacts their assertions of regulatory authority over Mr. White and his properties, it constitutes a direct, unlawful federal regulation of Mr. White's properties. *See supra* 9-10.[5]

The Amended Rule's direct regulation of Mr. White's properties has caused, and will continue to cause, significant injury to Mr. White. But for the Agencies' erroneous view of their own authority, as set forth in the Amended Rule, many, if not all, of Mr. White's properties would be definitively non-jurisdictional under the CWA. *See* White Decl. ¶ 14. However, because the Amended Rule is expansive in describing features that are purportedly "navigable waters," and will require time-consuming, costly, and unpredictable case-by-case determinations, Mr. White does not and cannot know which features on his properties lawfully are covered by the Act's permitting requirements and which are not, without further expending extraordinary resources. *See Id.* ¶ 19. Although the Corps provides a process to seek a determination as to the jurisdictional status of one's property, *see* 33 C.F.R. § 320.1(a)(6), this so-called "approved jurisdictional determination" process is time-consuming and expensive, *see Sackett*, 598 U.S. at 670 ("Even if the Corps is willing to provide a jurisdictional determination, a property owner may find it necessary to retain an expensive expert consultant who is capable of putting together a presentation that stands a chance of persuading the Corps."). These costs would balloon further should Mr. White be required to seek a CWA permit. *See U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 594-95 (2016) (observing that an individual Section 404 permit typically takes more

[4] Although the 2023 Rule—and thus the Amended Rule—has been preliminarily enjoined by several courts, these injunctions do not apply generally in North Carolina, or as to Mr. White's properties. *See supra* note 2.

[5] Mr. White disputes the Agencies' claim of authority over any alleged wetlands on his property. *See* White Decl. ¶ 14.

than two years and $270,000 in consulting costs to secure). And any permit would still likely result in significant and costly changes to Mr. White's intended operations. *See generally Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 52-53 (1987). Raising the stakes even higher is the fact that should Mr. White—even inadvertently—fail to successfully run this regulatory gauntlet, he would face "'crushing' consequences," *Sackett*, 598 U.S. at 660 (quoting *Hawkes Co.*, 578 U.S. at 602 (Kennedy, J., concurring)). A first-time criminal offense for even *negligently* discharging into "navigable waters" without a permit is punishable by criminal penalties of up to $25,000 per violation per day, and up to one year in prison. 33 U.S.C. § 1319(c)(1). EPA may also impose civil penalties of up to $64,618 per discharge, per day, per offense, without regard to any knowledge of a feature's jurisdictional status. 33 U.S.C. § 1319(g)(2)(A); 40 C.F.R. § 19.4.

The Amended Rule therefore presents Mr. White with an impossible choice: (1) let his lands lay undeveloped—severely reducing his income from the properties; (2) engage in the time-consuming and expensive process of paying others to investigate the Agencies' potential claim of authority over his property, and then endure an even more time-consuming and expensive permitting process, with uncertain results; or (3) face severe penal consequences. This "unappetizing menu of options," *Sackett*, 598 U.S. at 671, has caused—and will continue to cause—Mr. White substantial economic injury in numerous ways. *See* White Decl. ¶¶ 18-34.

For example, Mr. White has plans to construct a sand mine on one of his properties. White Decl. ¶ 7. At considerable expense he hired a consultant and secured the necessary state permit to develop the mine. *Id*. The permit was issued on June 22, 2016, and expires on June 22, 2026. *Id*. As a condition of the permit, Mr. White was required to post, and must maintain, a security bond in the amount of $88,100.00, and must submit annual reports which he pays a consultant to prepare.

Id. Yet, due to the overbroad authority asserted by the Agencies—as codified in the Amended Rule—the Agencies have specifically prohibited Mr. White from further developing this lawfully permitted sand mine. *Id.* ¶ 21. This has been financially devastating. Each day, the permit's expiration in 2026 draws closer. And with each day of non-operation, the chances increase that Mr. White may never recoup his substantial investment in the mine, much less generate any profit from it. *Id*.

Similarly, Mr. White is currently engaged in a crop-sharing arrangement with one or more local farmers on various portions of his properties. *Id.* ¶ 9. To ensure compliance with the Agencies' broad view of their CWA authority—as set forth in the Amended Rule—Mr. White has been compelled to fallow certain areas of cropland and refrain from further improvements on these lands, thus diminishing future revenue. *Id.* ¶ 22. Moreover, Mr. White's inability to perform erosion control measures on several of these farmland properties—due to uncertainty in the CWA's application created by the Amended Rule—means these farmlands continue to erode at high rates. *Id.* ¶ 23. In fact, Mr. White is losing arable farmland every day. *Id*.

Although these activities would constitute an otherwise lawful use of Mr. White's property, the Amended Rule presents him with no choice but to alter his plans to accommodate the possibility that one or more Defendants will deem these activities to constitute unlawful "discharges" of "pollutants" into wetlands determined by the Agencies to be "navigable waters." *Id.* ¶¶ 26-28. Mr. White would pursue the activities—and many others—if not for the Amended Rule. *Id.* ¶ 29. Mr. White has forgone many tens of thousands of dollars in revenue already, with that figure mounting each day. *Id.* ¶ 28.

These costs constitute irreparable harm. *See Texas v. EPA*, 829 F.3d 405, 433 (5th Cir. 2016) ("[A] regulation later held invalid almost always produces the irreparable harm of

nonrecoverable compliance costs." (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia, J., concurring in part and in the judgment))). Compliance costs of this nature generally constitute irreparable harm because they are rendered nonrecoverable by the government's sovereign immunity from damages. *See N.C. Growers' Ass'n, Inc. v. Solis*, 644 F. Supp. 2d 664, 670 (M.D.N.C. 2009), *as amended* (July 1, 2009) (finding irreparable harm where "Plaintiffs' economic losses are unrecoverable in that suits for economic damages against the federal government and federal agencies are barred by the sovereign immunity doctrine"); *Odebrecht Constr., Inc. v. Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013) ("In the context of preliminary injunctions, numerous courts have held that the inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable." (collecting cases)). *Cf. also Mountain Valley Pipeline, LLC v. Simmons*, 307 F. Supp. 3d 506, 525-26 (N.D. W. Va. 2018), *aff'd sub nom. Mountain Valley Pipeline, LLC v. 6.56 Acres of Land*, 915 F.3d 197 (4th Cir. 2019) (finding economic costs are irreparable harm where "monetary damages are unavailable or unquantifiable" (quoting *Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc.*, 700 F. App'x 251, 263 (4th Cir. 2017))).

Indeed, courts routinely have held that federal regulation creates irreparable harm when it "places an immediate and irreversible imprint" on the regulated community in the form of compliance costs and diversion of resources, which cannot be recovered. *BST Holdings, LLC v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021). *See also Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) ("The moratorium has put the applicants, along with millions of landlords across the country, at risk of irreparable harm by depriving them of rent payments with no guarantee of eventual recovery."); *Kentucky v. Biden*, 57 F.4th 545, 556 (6th Cir. 2023) (finding irreparable harm where plaintiffs were "likely to incur unrecoverable compliance costs in the absence of a

preliminary injunction"); *West Virginia*, 669 F. Supp. 3d at 809 ("With respect to the compliance costs associated with the implementation of the 2023 Rule, the Court finds the Plaintiffs have easily shown the 2023 Rule poses irreparable harm."); *Cloud Peak Energy Inc. v. U.S. Dep't of Interior*, 415 F. Supp. 3d 1034, 1044 (D. Wyo. 2019) ("lessees' unrecoverable compliance costs suffice to demonstrate irreparable injury").

That is precisely what is occurring here. Mr. White must comply with the Amended Rule's illegal definition of "navigable waters" now, and he must continue to incur extraordinary, immediate, and unrecoverable compliance costs—or risk severe civil and even criminal penalties. *See* White Decl. ¶¶ 18-30. Among other costs, to comply with the Amended Rule Mr. White continues to maintain an $88,100.00 security bond and pay a consultant to submit reports to maintain a permit for a sand mine the Agencies say he cannot operate, *id.* ¶ 21; he continues to forgo significant revenue from that nonoperational sand mine, even as its window of productivity is rapidly closing, *id.*; and he continues to experience diminished revenue from his crop-sharing arrangement and is losing arable farmland to erosion every day, *id.* ¶¶ 22-23. These harms are "'neither remote nor speculative, but actual and imminent.'" *Manning v. Hunt*, 119 F.3d 254, 263 (4th Cir. 1997) (quoting *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991)). They are currently occurring and will continue to occur for as long as the Agencies maintain the unlawful Amended Rule. *See* White Decl. ¶¶ 18-35.

III. The balance of equities and public interest both favor an injunction

The final two factors, the balance of the equities and the public interest, "'merge when the Government is the opposing party.'" *Miranda v. Garland*, 34 F.4th 338, 365 (4th Cir. 2022) (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)). There is no public interest in preserving an unlawful rule. *See Kentucky*, 57 F.4th at 556 ("[A]t bottom, 'the public interest lies in a correct application' of the law." (quoting *Coal. to Def. Affirmative Action v. Granholm*, 473 F.3d 237, 252

(6th Cir. 2006))); *Wages & White Lion Invs., L.L.C. v. FDA*, 16 F.4th 1130, 1143 (5th Cir. 2021) ("'[T]here is generally no public interest in the perpetuation of unlawful agency action.'" (quoting *Texas*, 10 F.4th at 560)); *League of Women Voters of the U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (same).

Moreover, "[t]he principal function of a preliminary injunction is to maintain the status quo," *Di Biase v. SPX Corp.*, 872 F.3d 224, 231 (4th Cir. 2017) (quoting *Pashby v. Delia*, 709 F.3d 307, 319 (4th Cir. 2013)), and in keeping with this principle "a preliminary injunction can also act to restore, rather than merely preserve, the status quo, even when the nonmoving party has disturbed it," *id.* (quoting *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 378 (4th Cir. 2012)). "The *Sackett* decision created a new rule of federal law when it held 'that the CWA extends to only those "wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right," so that they are "indistinguishable" from those waters.'" *Glynn Env't Coal.*, 2024 WL 1088585, at *3 (quoting *Sackett*, 598 U.S. at 684). The Amended Rule unlawfully disturbs the clear "rule of federal law" created by *Sackett*, by deviating from the central requirements of *Sackett*'s test. *See supra* 12-16.

Because Mr. White has shown a likelihood of success on the merits of his claims that the Amended Rule is an unlawful deviation from the rule set forth in *Sackett*, *see supra* 12-16, it follows that the public interest and equities favor an injunction.

IV. No security bond should be required

Federal Rule of Civil Procedure 65(c) requires that issuance of preliminary relief be accompanied by a "security" paid by the movant "in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined." Fed. R. Civ. P. 65(c). However, this Court may waive the security requirement. *Pashby*, 709 F.3d at

332; *Bernstein v. Sims*, 643 F. Supp. 3d 578, 589 (E.D.N.C. 2022). A bond is not necessary where the movant is seeking to enjoin an unlawful agency rule, because "[t]he Government 'cannot suffer harm from an injunction that merely ends an unlawful practice or reads a statute as required to avoid constitutional concerns.'" *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 191 (D.D.C. 2015) (quoting *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013)).

CONCLUSION

This Court should preliminarily enjoin all Defendants from giving effect to, implementing, or enforcing the Amended Rule, as to Mr. White and his properties.

This 2nd day of April 2024.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Civil Rule 7.2(f)(3), I hereby certify this memorandum contains 8,388 words—inclusive of the elements required by Local Civil Rule 7.2(f)(1).

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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2024, I electronically filed the foregoing with the Clerk of the Court by using the Court's CM/ECF system.

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