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

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| ROBERT D. WHITE,<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; et al.,<br><br>Defendants,<br><br>NATIONAL WILDLIFE FEDERATION; NORTH CAROLINA WILDLIFE FEDERATION,<br><br>Intervenor-Defendants. | **PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**<br><br>Federal Rule of Civil Procedure 56<br>Local Civil Rules 7.1(e), 7.2 |

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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 (CWA), 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 56, Local Civil Rule 7.1, and this Court's July 23, 2024, scheduling order [DE 52], Plaintiff Robert D. White respectfully moves for summary judgment as to both Claims in his Complaint.

## INTRODUCTION

Robert White has dedicated a lifetime of hard work to building a successful commercial seafood business. To ensure financial security for himself and his children, Mr. White has invested much of his wealth in real property. That hard work is now under 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 is the unlawful authority that the Agencies have claimed to regulate land use pursuant to the Clean Water Act. 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—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* 4–7. 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. U.S. Env't Protection Agency*, 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. 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 respecting *Sackett*'s clear jurisdictional limitations 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*—in particular by continuing to assert staggeringly broad 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" under 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*").

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, 5 U.S.C. § 706(2)(A), (C), the CWA's limited grant of authority to the Agencies to regulate "navigable waters," 33 U.S.C. §§ 1311(a), 1362(7), 1362(12). This Court should therefore grant Mr. White's Motion for Summary Judgment as to both Claims in his complaint and vacate the "adjacent wetlands" provisions of the Amended Rule. *See* 5 U.S.C. § 706(2).

## BACKGROUND[1]

### 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 discharges require a permit from either EPA (called a National Pollutant Discharge Elimination System 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 construed 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

[1] Because this is an action for review on an administrative record, the Court excused the parties from Local Civil Rule 56.1(a)'s requirement for separate statements of material facts. *See* DE 52 at 2. Mr. White instead provides the following summary of the pertinent legal and regulatory history leading up to the Agencies' adoption of the Amended Rule.

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," *i.e.*, bordering, contiguous, or neighboring, thereto. 33 C.F.R. § 323.2(a)(2)–(5), (d) (1978). *See also 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 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. But even with this 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").[2] 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

[2] *Available at* Exhibit A to Third Declaration of Charles T. Yates (Third Yates Decl.).

"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 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. U.S. Env't Protection Agency*, 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. U.S. Env't Protection Agency*, 142 S. Ct. 896, 896 (2022). Notwithstanding the Agencies' 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"—inspired by Justice Kennedy's concurrence. *Id.* The 2023 Rule quickly met the same fate as its predecessors.[3]

[3] *Texas v. U.S. Env't Protection Agency*, 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 states); Order, *Kentucky v. U.S. Env't Protection Agency*, Nos. 23-5343 and 23-5345 (6th Cir. May 10, 2023), Doc. 24, *available at* DE 10-2 (enjoining pending appeal 2023 Rule in Kentucky and nationwide as to several trade associations).

## 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' claim of authority over the Sacketts' property. *Id.* 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 CWA. The majority "conclude[d] that the *Rapanos* plurality was correct: the CWA's use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water "forming geographic[al] features" that are described in ordinary parlance as "streams, oceans, rivers, and lakes."'" *Id.* at 671 (quoting *Rapanos*, 547 U.S. at 739). As for wetlands, the Court concluded that "wetlands must qualify as 'waters of the United States' in their own right." *Id.* at 676. Thus, the Agencies' may only regulate wetlands (i) with a "continuous surface connection" to covered 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.").

## V. The Amended Rule

On September 8, 2023, the Agencies issued an amended version of the 2023 Rule, purporting to bring it 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)[4] ("[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.").

## VI. This lawsuit

To protect his significant interests in the development, use, and enjoyment of his properties, on March 14, 2024, Mr. White filed this lawsuit challenging the "adjacent wetlands" provisions of the Amended Rule. *See* DE 1. On April 2, 2024, Mr. White moved for a preliminary injunction, *see* DE 10. On May 16, 2024, the National Wildlife Federation and North Carolina Wildlife Federation were granted leave to intervene as defendants. DE 35. This Court held a hearing on Mr. White's motion for preliminary injunction on June 4, 2024, DE 38, and on June 18, 2024, entered an order denying that motion, DE 41. The Court agreed that Mr. White has standing to challenge the Amended Rule, that Mr. White's claims are ripe, and that it has jurisdiction to hear Mr. White's challenge under 5 U.S.C. § 704. *See* DE 41 at 9–14. The Court, however, determined that Mr. White failed to demonstrate a likelihood that he would succeed on the merits of his claims,

[4] *Available* at Exh. B to Third Yates Decl.

and accordingly denied his motion. *See id.* at 24. The Court did not reach the other preliminary injunction factors. *See id*.

Pursuant to 28 U.S.C. § 1292(a)(1), Mr. White noticed an interlocutory appeal from that order on July 8, 2024, DE 43, and Pursuant to Federal Rule of Civil Procedure 62(d), on July 12, 2024, he moved for an injunction pending appeal, DE 48. This Court denied Mr. White's motion on August 20, 2024, DE 56, and Mr. White moved for the same relief at the Fourth Circuit on August 27, 2023, *see* Plaintiff–Appellant's Motion for Injunction Pending Appeal, *White v. EPA*, No. 24-1635 (4th Cir. Aug. 27, 2024), Doc. 18-1. Mr. White's interlocutory appeal, and motion for injunction pending appeal, remain pending at the Fourth Circuit. Pursuant to Federal Rule of Civil Procedure 56, Local Civil Rule 7.1, and this Court's July 23, 2024, scheduling order [DE 52], Mr. White now respectfully moves for summary judgment as to both Claims in his Complaint.

## STANDING

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)).

### I. The enforcement action demonstrates that Mr. White is the object of the regulation

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. U.S. Env't Protection Agency*, 472 F.3d 882, 895–96 (D.C. Cir. 2006)).

Mr. White owns numerous properties throughout eastern North Carolina. *See* Second Declaration of Robert Dean White (Second White Decl.) ¶ 3.[5] 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 id.* ¶ 12. *See also* DE 24-6 (Complaint in *United States v. White*). Despite Mr. White's requests, the United States has not dropped its suit, or otherwise modified its claims of authority over these portions of Mr. White's properties in the wake of the Agencies' finalizing the Amended Rule. *See* Second White Decl. ¶ 16. 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[6] is evidently that the portions of Mr. White's properties where the Agencies previously asserted jurisdiction remain subject to the Agencies' authority under the Amended Rule. Mr. White—and his properties—are therefore the "object" of the Amended Rule. Because the government maintains its erroneous claims of authority over the properties in question in the enforcement action, 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.

[5] The Court may consider evidence outside the administrative record for purposes of the standing inquiry. *See Sierra Club v. U.S. Env't Protection Agency*, 292 F.3d 895, 899–900 (D.C. Cir. 2002).

[6] Mr. White disputes the Agencies' claim of authority over any alleged wetlands on his properties. *See* Second White Decl. ¶¶ 13, 15.

## II. Irrespective of the enforcement action, Mr. White has standing

### A. Mr. White is suffering an injury in fact due to the Amended Rule's frustrating existing projects on his properties

Many of Mr. White's properties are relatively low-lying and portions border the Pasquotank River, Big Flatty Creek, and other water bodies. Second White Decl. ¶ 3. 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 jurisdiction. *Id.* ¶¶ 4–5. As a result, 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. Because the Amended Rule is expansive in describing "navigable waters," and will require time-consuming, costly, and unpredictable case-by-case determinations, Mr. White cannot know which features on his properties lawfully are covered by the CWA, and which are not, without further expending extraordinary resources. *See id.* ¶ 20. Although the Corps provides a process to seek a determination as to the status of one's property—a so-called "approved jurisdictional determination" (AJD), *see* 33 C.F.R. § 320.1(a)(6)—this process is time-consuming and expensive, *see Sackett*, 598 U.S. at 670–71 ("[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."); *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 1003 (8th Cir. 2015) (Kelly, J., concurring) ("This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property."); Obtaining a Jurisdictional Determination, U.S. Army Corps of Engineers: Wilmington District 3 (July 2017)[7] ("recommend[ing] that [a landowner] contract with an environmental consultant" in

[7] *Available at* DE 36-2.

order "[t]o expedite" any AJD request). Making matters worse, even were Mr. White to seek an AJD, the Corps maintains that it is not obligated to issue one, *see Sackett*, 598 U.S. at 670–71 ("the Corps maintains that it has no obligation to provide jurisdictional determinations"), and there is no avenue to compel the issuance of one, *see Mashni v. U.S. Army Corps of Eng'rs*, 535 F. Supp. 3d 475, 485 (D.S.C. 2021) (determining that landowner could not challenge Corps' withholding AJD).

These costs will 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 than two years and $270,000 in consulting costs to secure). And any permit would still likely result in costly changes to Mr. White's intended operations. *See 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 run this regulatory gauntlet, he would face "'crushing' consequences," *Sackett*, 598 U.S. at 660 (quoting *Hawkes*, 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; (2) engage in the time-consuming and expensive process of paying others to investigate the Agencies' potential claim of authority, 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 by frustrating at least two specific projects on his properties.

***First***, Mr. White plans to construct a sand mine on the northern portion of his Wades Point property in Pasquotank County. *See* Second White Decl. ¶ 7. At considerable expense he hired a consultant and secured the necessary state permit. *Id*. As a condition of the permit, Mr. White was required to post and maintain a security bond in the amount of $88,100.00, and he must submit annual reports which he pays a consultant to prepare. *Id*. Relying on the overly broad view of their authority as codified in the Amended Rule, the Agencies specifically prohibited Mr. White from further developing this mine—under threat of additional enforcement. *See id*. ¶ 22. This has been financially devastating. 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.* And his $88,100.00 security bond—money that could be profitably invested elsewhere—continues to be tied up. *See id*. ¶ 7. While it is true that the sand mine is located on one of the properties subject to the enforcement action, *see id*. ¶ 23, Mr. White's operation of the mine is not the subject of any alleged violation, *see* DE 24-6, and the resolution of the enforcement action therefore does not bear directly on Mr. White's ability to operate it. The bottom line is that Mr. White would operate his sand mine but for the scope of authority codified in the Amended Rule, and the Agencies' threats of *additional* enforcement. *See* Second White Decl. ¶ 23.

***Second***, Mr. White is currently engaged in a crop-sharing arrangement on various portions of his Pasquotank County properties. *See 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 current and future revenue. *See id*. ¶ 24. Moreover, Mr. White's inability to perform crucial erosion control measures on these properties—due to uncertainty in the CWA's application—means his farmlands continue to erode at high rates. *See id*. ¶ 25. In fact, Mr. White is daily losing arable farmland. *See id*.

Although these projects would constitute an otherwise lawful use of Mr. White's properties, the Amended Rule presents him with no choice but to alter his plans due to the possibility that one or more Defendants will deem these activities to constitute unlawful "discharges" of "pollutants" into wetlands determined to be "navigable waters." *See id.* ¶¶ 28–30. Mr. White would pursue the activities—and many others—if not for the Amended Rule. *Id.* ¶ 31. Mr. White has forgone many tens of thousands of dollars in revenue already, with that figure mounting each day. *See id.* ¶ 36.

These costs and regulatory burdens constitute an injury in fact for standing purposes. *See Contender Farms, LLP v. U.S. Dep't of Agric.*, 779 F.3d 258, 266 (5th Cir. 2015) ("An increased regulatory burden typically satisfies the injury in fact requirement." (citing *Ass'n of Am. Railroads v. U.S. Dep't of Transp.*, 38 F.3d 582, 585 (D.C. Cir. 1994))); *Am. Farm Bureau Fed'n v. U.S. Env't Protection Agency*, 792 F.3d 281, 293 (3d Cir. 2015) (referring to economic injury in the form of "compliance costs" as "a classic injury-in-fact"). *Cf. also Texas v. U.S. Env't Protection Agency*, 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))).

Likewise, these compliance-related injuries are "'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Hutton v. Nat'l Bd. of Examiners in Optometry, Inc.*, 892 F.3d 613, 621 (4th Cir. 2018) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016)).

As discussed above, Mr. White has concrete plans that involve dredging and filling relatively low-lying lands bordering waters. *See supra* 14–15. The Amended Rule presents a significant impediment to these plans—Mr. White must unquestionably abide by the Amended Rule's delineation of what is or is not lawful, or face "'crushing' consequences" for even an inadvertent violation. *Sackett*, 598 U.S. at 660 (quoting *Hawkes*, 578 U.S. at 602 (Kennedy, J., concurring)). Indeed, given that the Agencies are already pursuing a civil enforcement action as to portions of his properties, *see* Second White Decl. ¶ 12, Mr. White's fears of additional enforcement are far from hypothetical—and the steps he has taken to comply with the Amended Rule are certainly reasonable, *cf. Abbott v. Pastides*, 900 F.3d 160, 176 (4th Cir. 2018) ("The most obvious way to demonstrate a credible threat of enforcement in the future, of course, is an enforcement action in the past.").

### B. Mr. White's injuries are caused by the Amended Rule and would be redressed by an order from this Court setting it aside

Mr. White likewise meets the causation and redressability prongs of the standing analysis. To satisfy the causation requirement, "the alleged injury must be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *DiCocco v. Garland*, 52 F.4th 588, 592 (4th Cir. 2022) (quoting *Lujan*, 504 U.S. at 560)). There is no doubt that Mr. White's injuries are "fairly traceable" to the Amended Rule. But for the Agencies' erroneous view of their own authority as codified in the Amended Rule, many, if not all, of Mr. White's properties—being distinguishable from, and lacking any surface water connection to, covered waters, *see* Second White Decl. ¶¶ 13, 15—would be definitively non-jurisdictional under the CWA, *see infra* 19–24. But for the scope of authority codified in the Amended Rule, Mr. White would operate his sand mine, expand his crop

sharing arrangement, engage in crucial erosion control measures to protect his farmlands, and pursue many other profitable projects on his properties. *See* White Decl. ¶¶ 31, 33–36.

It is also "likely, as opposed to merely speculative" that Mr. White's injuries "will be redressed by a favorable decision." *Sierra Club v. U.S. Dep't of Interior*, 899 F.3d 260, 284 (4th Cir. 2018) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000)). Here, Mr. White asks the Court to vacate the "adjacent wetlands" provisions of the Amended Rule. *See* DE 1 at 29–31. Such relief would redress Mr. White's injuries by immediately removing the significant regulatory burdens imposed by those provisions.[8]

**STANDARD OF REVIEW**

A motion for summary judgment must be granted when there is no genuine issue of material fact, such that the movant is entitled to judgment as a matter of law. *Nieves v. McHugh*, 111 F. Supp. 3d 667, 679 (E.D.N.C. 2015) (citing Fed. R. Civ. P. 56(a)). When summary judgment is sought in an action that is based on an administrative record, the motion serves as the

[8] This case is likewise prudentially ripe for review. First, because this case presents a purely legal question—whether final agency action (the Amended Rule) was issued in accordance with the CWA and within the bounds of the Agencies' statutory authority—it is fit for judicial decision. *See Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006) ("A case is fit for judicial decision when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties."). Indeed, there can be no further factual development for purposes of adjudicating the merits of Mr. White's APA challenge to the Amended Rule. *See Shipbuilders Council of Am. v. DHS*, 770 F. Supp. 2d 793, 802 (E.D. Va. 2011) ("The Administrative Procedure Act . . . confines judicial review of executive branch decisions to the administrative record of proceedings before the pertinent agency." (citations omitted)). *Cf. also Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2455 n.5 (2024) (emphasizing "the defendant-focused *substance* of an APA claim"). Second, the significant compliance costs the Amended Rule imposes upon Mr. White as a directly regulated member of the public are a "hardship" for purposes of the ripeness inquiry. *See Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 440 F.3d 459, 465 (D.C. Cir. 2006) (determining hardship prong was met where regulated entities were presented with the choice of applying for a permit based on activities they contended were outside the Agencies' authority or risking civil and criminal penalties). *Cf. also Miller*, 462 F.3d at 319 ("[I]n practice there is an obvious overlap between the doctrines of standing and ripeness." (quoting Erwin Chemerinsky, *Federal Jurisdiction* § 2.4 (4th ed. 2003))).

"mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and consistent with the APA standard of review." *Id.* at 679–80 (quoting *Ohio Valley Env't Coal. v. Hurst*, 604 F. Supp. 2d 860, 879 (S.D. W. Va. 2009)). Under the APA standard of review, a reviewing court "shall . . . hold unlawful and set aside" agency actions that are arbitrary and capricious, not in accordance with law, or in excess of statutory authority. 5 U.S.C. § 706(2)(A), (C). "[A]gencies, as mere creatures of statute, must point to explicit Congressional authority justifying their decisions." *Clean Water Action v. U.S. Env't Protection Agency*, 936 F.3d 308, 313 n.10 (5th Cir. 2019). *See also Nat'l Fed'n of Indep. Bus. v. U.S. Dep't of Lab.*, 595 U.S. 109, 117 (2022) (same); *Fed. Election Comm'n 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 *La. Pub. Serv. Comm'n v. Fed. Commc'ns Comm'n*, 476 U.S. 355, 374 (1986))). Accordingly, when reviewing an agency's construction of a federal statute pursuant to the APA's standard of review, "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority . . . ." *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024).

## ARGUMENT

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* 19–25. 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* 25–29.

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

### A. The Amended Rule omits *Sackett*'s indistinguishability requirement

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). *Accord* Royal C. Gardner, *What the US Supreme Court Decision Means for Wetlands*, 618 Nature 215, 215 (2023), *available* at DE 28-1 at 30 ("First, [the Court] declared that the Clean Water Act applies to wetlands only when they have a continuous surface connection to a permanent body of water . . . . Second . . . the court decreed that, to qualify as a water of the United States, a wetland must be so inseparably bound to an ocean, river, stream or lake that it is 'difficult to determine where the "water" ends and the "wetland" begins.'"). 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." 598 U.S. 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 ("[T]he 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." (quoting *Rapanos*, 547

U.S. at 742). This is so because *Sackett*'s central holding is that the CWA exists to protect "waters"—rivers, lakes, and streams—so that features like wetlands that are typically regarded as non-waters, *see id*. at 674, are presumptively outside the scope of the statute, and can be regulated only in those rare instances when they "qualify as 'waters . . .' in their own right," *id.* at 676. That the CWA "expressly references adjacent wetlands," DE 24 at 24 (citing 33 U.S.C. § 1344(g)(1)), does not counsel otherwise. The Supreme Court held that this reference to "adjacent wetlands" must be "harmonize[d]" with the "operative" term "waters." *Sackett*, 598 U.S. at 676. And thus, to be regulated, an "adjacent wetland" must be "indistinguishably part of a body of water." *Id*. In other words, regulation of "indistinguishable" adjacent wetlands is permissible—but only incidentally to the CWA's regulation of "waters." *Cf. id*.

So central is *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 its ultimate reasoning that the Sacketts' property was non-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" and concluding that "it is not difficult to determine where the 'water' ends and any wetlands on Lewis's property 'begin'"); *Glynn Env't Coal., Inc. v. Sea Island Acquisition, LLC*, No. 2:19-CV-00050, 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" and concluding that plaintiffs had failed to allege the land in question "has *such a* continuous surface connection to [the creek] that it is 'indistinguishable' from it" (citing *Sackett*,

598 U.S. at 678) (emphasis added)); *United States v. Chameleon, LLC*, No. 3:23-CV-00763, 2024 WL 3835077, at *3 (E.D. Va. Aug. 15, 2024) ("[T]he Supreme Court clarified that WOTUS includes traditional navigable waters, 'relatively permanent' tributaries of such waters, and wetlands that are indistinguishable from such waters." (quoting *Sackett*, 598 U.S. at 678–79)).

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.

The Agencies have argued—and this Court agreed—that indistinguishability is not a central component of *Sackett*'s test, but rather the necessary outcome of a continuous surface connection. *See* DE 24 at 24–26; DE 41 at 17–21. Mr. White respectfully requests that the Court reconsider this conclusion. To render "indistinguishability" merely the logical outcome of the operative test—as opposed to an integral component of it—makes a wash of *Sackett*'s central holding: that 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. *Accord* Rebecca L. Kihslinger, et al., *Unpacking the Revised WOTUS Rule, Panel Before the Environmental Law Institute* (Aug. 29, 2023), 53 Env't L. Rep. 10887, 10892 (2023)[9] (comments of Royal C. Gardner) (emphasizing that the word "indistinguishable" in *Sackett* is "not a mere rhetorical flourish").

[9] *Available at* Exh. C to Third Yates Decl.

### B. The Amended Rule's omission of the indistinguishability requirement is inconsistent with the *Rapanos* plurality

The Agencies have argued that, because the 2023 Rule adopted a so-called "relatively permanent" test purportedly inspired by the *Rapanos* plurality, *see* 88 Fed. Reg. at 61,964–66, and because *Sackett* adopted the *Rapanos* plurality's test for wetlands authority, the Amended Rule's reenactment of those provisions of the 2023 Rule should be upheld, *see* DE 24 at 30–31. 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, in the 2023 Rule, the Agencies repeatedly dismissed the *Rapanos* plurality as unlawful. *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 provide an administrative shortcut for assessing jurisdiction under the "significant nexus" test. *See id.* at 3034. This Court should view with skepticism any contention that the Agencies' prior dismissal of the *Rapanos* plurality, now embodies a faithful codification of it.

***Second***, despite the Agencies' studied avoidance of it in the 2023 Rule, 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").

### C. The Agencies' disregard for *Sackett's* indistinguishability requirement is confirmed by their extreme contention that any "continuous surface connection" need not even be aquatic

Confirming the Agencies' disregard for *Sackett*'s central indistinguishability requirement is their extreme contention that they may assert jurisdiction even over wetlands lacking a continuous *aquatic* connection to a regulable water. *See* DE 24 at 27–29. *See also* 88 Fed. Reg. at 3095–96. Such a position plainly conflicts with *Sackett*, which expressly contemplates that any surface connection between water and wetland be aquatic. *Sackett*, 598 U.S. at 678 (contemplating that surface water must be continuously present, absent "temporary interruptions . . . because of phenomena like low tides or dry spells"); *id.* (providing example of a wetland that has an "unimpaired connection with the open sea up to the head of tidal influence" as an example of a covered wetland (quoting 33 U.S.C. § 2802(5))). Indeed, it is logically impossible for two jurisdictional *water* features to be "indistinguishable" absent a continuous aquatic connection.

The Agencies' position is also plainly inconsistent with prior authorities opining on, or applying, the *Rapanos* plurality's test. *Cf. Rapanos*, 547 U.S. at 776 (Kennedy, J., concurring) ("when a surface-water connection is lacking, the plurality forecloses jurisdiction over wetlands that abut navigable-in-fact waters"); *United States v. Cundiff*, 555 F.3d 200, 211–13 (6th Cir. 2009) ("the [*Rapanos*] plurality's test requires a topical flow of water"); *United States v. Donovan*, No. 1:96-CV-00484, 2010 WL 3000058, at *5 (D. Del. July 23, 2010) ("unbroken surface water

connection"); *Simsbury-Avon Pres. Soc'y, LLC v. Metacon Gun Club, Inc.*, 472 F. Supp. 2d 219, 224 (D. Conn. 2007), *aff'd sub nom. on other grounds Simsbury-Avon Pres. Club, Inc. v. Metacon Gun Club, Inc.*, 575 F.3d 199 (2d Cir. 2009) ("Plaintiffs do not dispute defendant's reading that *Rapanos* requires a continuous surface water connection between the wetland and an adjacent, relatively permanent water of the United States[.]").

### D. Those portions of the 2023 Rule's preamble pertaining to the "relatively permanent" test further demonstrate the Agencies' disregard for *Sackett*

The Agencies' disregard of *Sackett*'s requirements is demonstrated further 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 have confirmed still generally govern, *see supra* 9. *Cf. also Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999) ("[T]he preamble to a regulation is evidence of an agency's contemporaneous understanding of its proposed rules."); *HRI, Inc. v. U.S. Env't Protection Agency*, 198 F.3d 1224, 1244 n.13 (10th Cir. 2000) (noting that the preamble "therefore provides guidance in evaluating whether the agency's interpretation of its regulation is consistent with the structure and language").

For example, the Agencies 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. *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 Env't Coal.*, 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.

## II. 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. "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 water 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."). Indeed, as evidenced in this case alone: the Agencies' broad interpretation has resulted in the regulation of sand mining, *see* Second White Decl. ¶ 22; the regulation of crop production, *see id.* ¶ 24; and the regulation of a bulkheading project's alleged impacts landward of waters, *see* DE 24-6. Each of these activities is firmly within the states' traditional domain. *See Sackett*, 598 U.S. at 679. 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. 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.").

## III. The Agencies' interpretation raises additional constitutional problems

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 ("[W]etlands 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 *Sackett*'s indistinguishability requirement—which ensures only those lands fairly characterized as "part of a [covered] body of water" can be regulated. *Sackett*, 598 U.S. at 676. *Cf. Gundy v. United States*, 588 U.S. 128, 149–59 (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). This is especially true, since the term "wetlands" is itself undefined in the CWA. *See* 33 U.S.C. § 1362.

***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.* at 681 (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* 88 Fed. Reg. at 3095–96 (disavowing requirement that any surface connection between water and wetland be aquatic); *id.* at 3093, 3095 (asserting that even after *Sackett*, the Agencies 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"); *id.* at 3090, 3095–96 (maintaining that the Agencies may regulate even where a natural or artificial physical barrier separates a wetland from a covered water). 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. U.S. Env't Protection Agency*, 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 requirement—that regulated wetlands be "*as a practical matter* indistinguishable from waters of the United States." *Sackett*, 598 U.S. at 678 (quoting *Rapanos*, 547 U.S. at 755) (emphasis added). Only then will "ordinary people . . . understand what conduct is prohibited." *Id.* at 680–81 (quoting *McDonnell*, 579 U.S. at 576).

To be clear: Mr. White's federalism, nondelegation, and due process arguments are not directed towards the Supreme Court's formulation of the operative test in *Sackett*. *Contra* DE 41 at 21–22. Rather, Mr. White's argument is directed towards the unlawful *gloss* that *the Agencies* have put on that test through the Amended Rule—namely, that they need not prove "indistinguishability," *see supra* 19–23, and that they may regulate even wetlands lacking a continuous *water* connection to covered waters, *see supra* 23–24.

* * *

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 omit *Sackett*'s central "indistinguishability" requirement and thus do not require a connection sufficient to render regulated wetlands "part of a [covered] body of water," *id.* at 676, 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).

## CONCLUSION

This Court should grant Mr. White's Motion for Summary Judgment as to both Claims and vacate the "adjacent wetlands" provisions of the Amended Rule. *See* 5 U.S.C. § 706(2) (a court "shall" "hold unlawful and set aside" unlawful agency action). *See also Sierra Club v. U.S. Army Corps of Eng'rs*, 909 F.3d 635, 655 (4th Cir. 2018) ("The Supreme Court has recognized that

Section 706(2)(A) 'requires federal courts to set aside federal agency action' that is 'not in accordance with law.'" (quoting *Fed. Commc'ns Comm'n v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 300 (2003))); *City of Columbus v. Cochran*, 523 F. Supp. 3d 731, 772 (D. Md. 2021) ("Where agency action is found contrary to law, it is clear that vacatur is required.").

This 30th day of August 2024.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 30, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such to the attorneys of record.

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