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RE: Docket ID No. EPA-HQ-OW-2025-0093

Dear Ms. Jensen and Mr. Boyd:

I appreciate this opportunity to provide comments on the notice "Implementation of the Definition of Waters of the United States" and commend the Environmental Protection Agency (EPA) and the U.S. Department of the Army (Army) for seeking public feedback before you take your next steps in defining "Waters of the United States" (WOTUS).

For decades, the agencies have promulgated vague and overbroad rules when determining what waters are jurisdictional under the Clean Water Act (CWA). The U.S. Supreme Court has repeatedly struck down the agencies' implementation of the law, most recently under *Sackett v. Environmental Protection Agency*.[1]

In *Sackett*, the Supreme Court finally provided the clarity that property owners have long needed. It is now up to the agencies to finalize a WOTUS rule that is consistent with *Sackett* and relevant Supreme Court precedent.

The Biden administration did not do this. Before the *Sackett* opinion was published, the Biden administration inexplicably finalized a WOTUS rule[2] knowing very well that within a few

[1] *Sackett v. EPA*, 598 U.S. 651 (2023) accessed April 23, 2025, https://supreme.justia.com/cases/federal/us/598/21-454/.
[2] Department of the Army, Corps of Engineers, Department of Defense; and Environmental Protection Agency, "Revised Definition of 'Waters of the United States,'" final rule, *Federal Register*, Vol. 88, No. 11 (January 18,

months, the Supreme Court would likely render much of its proposed WOTUS rule moot. Sure enough, that is exactly what happened.

In response, after the *Sackett* opinion was issued, the Biden administration simply amended its flawed final WOTUS rule without taking any public comment and not ensuring that the rule was in fact consistent with *Sackett*.[3] Now the agencies have the chance to rectify this situation.

This comment discusses what waters should constitute jurisdictional waters, and in so doing, responds to many of the issues the agencies seek feedback on in the notice.

1) Properly defining relatively permanent waters

As explained in *Sackett*, covered waters include "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.'"[4]

The Biden administration's 2023 conforming rule[5] inexplicably drops the second part of this definition. When defining the scope of what are "relatively permanent" waters, the ordinary parlance language is critical. It provides specific examples and clarity as to the scope of what waters are regulated. It also captures the point that figuring out what waters are jurisdictional should not be difficult. Bright line rules, as this language helps to establish, are critical to making implementation of the CWA feasible for the agencies and compliance feasible for property owners.

As applied, this language should mean: would a reasonable person look at a water and call it a stream, an ocean, a river, or a lake? If not, then it should not be jurisdictional. A reasonable person-type approach is consistent with *Sackett* and helps to develop a workable framework for understanding what waters are covered under the CWA.

2023), pp. 3004-3144, accessed April 23, 2025, https://www.federalregister.gov/documents/2023/01/18/2022-28595/revised-definition-of-waters-of-the-united-states.

[3] Department of the Army, Corps of Engineers, Department of Defense; and Environmental Protection Agency, "Revised Definition of 'Waters of the United States'; Conforming," final rule, *Federal Register*, Vol. 88, No. 173 (September 8, 2023), pp. 61964-61969, accessed April 23, 2025, https://www.federalregister.gov/documents/2023/09/08/2023-18929/revised-definition-of-waters-of-the-united-states-conforming and "Amendments to 40 CFR 120.2 and 33 CFR 328.3," August 14, 2023, accessed April 23, 2025, https://www.epa.gov/system/files/documents/2023-08/Regulatory%20Text%20Changes%20to%20the%20Definition%20of%20Waters%20of%20the%20United%20States%20at%2033%20CFR%20328.3%20and%2040%20CFR%20120.2.pdf.

[4] *Sackett v. EPA*, 598 U.S. 651 (2023), accessed April 23, 2025, https://supreme.justia.com/cases/federal/us/598/21-454/.

[5] Department of the Army, Corps of Engineers, Department of Defense; and Environmental Protection Agency, "Revised Definition of 'Waters of the United States'; Conforming," final rule, *Federal Register*, Vol. 88, No. 173 (September 8, 2023), pp. 61964-61969, accessed April 23, 2025, https://www.federalregister.gov/documents/2023/09/08/2023-18929/revised-definition-of-waters-of-the-united-states-conforming and "Amendments to 40 CFR 120.2 and 33 CFR 328.3," August 14, 2023, accessed April 23, 2025, https://www.epa.gov/system/files/documents/2023-08/Regulatory%20Text%20Changes%20to%20the%20Definition%20of%20Waters%20of%20the%20United%20States%20at%2033%20CFR%20328.3%20and%2040%20CFR%20120.2.pdf.

Further, a relatively permanent water must have the ordinary presence of water, as explained in *Sackett* and the plurality in *Rapanos v. United States*,[6] which as the agencies have explained "the Sackett Court 'conclude[d] that the Rapanos plurality was correct.'"[7] This does not mean the ordinary presence of water by itself makes a water jurisdictional. However, it does mean for a relatively permanent water to be jurisdictional, there must be the ordinary presence of water.

The ordinary presence of water requirement indicates that at minimum a water should contain water for a majority of the year. When combined with "relatively permanent," "standing," and "continuously flowing," this language suggests something a lot more than a majority of the year. The plurality in *Rapanos* helped to inform how often water should be present when it did not preclude seasonal waters from being jurisdictional:

> By describing "waters" as "relatively permanent," we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months—such as the 290-day, continuously flowing stream postulated by Justice Stevens' dissent (hereinafter the dissent), *post*, at 15.[8]

When determining how often water should be present, it should be at minimum a majority of the year (otherwise the agencies would be ignoring the "ordinary presence of water" language from the Supreme Court) and should likely be 290 days of the year, allowing for the seasonal river and more accurately capturing the idea of what is "ordinary" and "relatively permanent."

Ephemeral and Intermittent Waters. The *Rapanos* plurality opinion, which is supported by *Sackett*, makes it clear that waters with ephemeral and intermittent flow are not jurisdictional:

> All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows. Even the least substantial of the definition's terms, namely "streams," connotes a continuous flow of water in a permanent channel—especially when used in company with other terms such as "rivers," "lakes," and "oceans."[9]

The notice discusses the 2020 Navigable Waters Protection Rule, explaining "intermittent tributaries that contributed flow downstream in a typical year to a traditional navigable water or

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[6] *Rapanos v. United States*, 547 U.S. 715 (2006), accessed April 23, 2025, https://supreme.justia.com/cases/federal/us/547/715/.

[7] Robyn S. Colosimo and Benita Best-Wong, Memorandum to the Field Between the U.S. Department of the Army, U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency Concerning the Proper Implementation of "Continuous Surface Connection" Under the Definition of "Waters of the United States" Under the Clean Water Act, March 12, 2025, accessed April 23, 2025, https://www.epa.gov/system/files/documents/2025-03/2025cscguidance.pdf.

[8] *Rapanos v. United States*, 547 U.S. 715 (2006), accessed April 23, 2025, https://supreme.justia.com/cases/federal/us/547/715/.

[9] *Rapanos v. United States*, 547 U.S. 715 (2006), accessed April 23, 2025, https://supreme.justia.com/cases/federal/us/547/715/.

the territorial seas were considered jurisdictional." The agencies at the time did not have the benefit of the *Sackett* case or the Court's blessing of the *Rapanos* plurality. If the agencies did have those cases as precedent, they would not have asserted any intermittent tributaries as jurisdictional, at least if they sought to be consistent with the Supreme Court opinions.

2) Adjacent wetlands

In *Sackett*, the Supreme Court is clear on what wetlands are jurisdictional and what is meant by adjacent:

> In sum, we hold that the CWA extends to only those wetlands that are "as a practical matter indistinguishable from waters of the United States." *Rapanos*, 547 U. S., at 755 (plurality opinion) (emphasis deleted). This requires the party asserting jurisdiction over adjacent wetlands to establish "first, that the adjacent [body of water constitutes] . . . 'water[s] of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."[10]

The Court, citing the plurality in *Rapanos*, explains that wetlands are adjacent when "there is no clear demarcation between 'waters' and wetlands."[11]

The central reason for adjacent wetlands being covered in the first place is the problem of distinguishing "where the 'water' ends and the 'wetland' begins" due to the continuous surface connection between the two. If there is a clear demarcation, then the wetlands is not "adjacent" and therefore not covered under the CWA.

So when would a continuous surface connection be indistinguishable? The connection would need to be a continuous surface *water* connection. In the 2023 WOTUS final rule, the agencies disagreed that there needs to be this water connection.[12] Such an interpretation makes no sense unless the agencies simply want to improperly ignore the indistinguishable requirement. If there is water and then there is land, then that is a clear demarcation. It is because of the water connection that there could be a demarcation problem.

Similarly, if there is a natural or artificial barrier between the water and the wetland, there is clear demarcation. In addition, when a water abuts a wetland, this by itself would not be enough to show adjacency. Once again, the agencies have to go back to the central reason for why

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[10] *Sackett v. EPA*, 598 U.S. 651 (2023), accessed April 23, 2025, https://supreme.justia.com/cases/federal/us/598/21-454/.
[11] Ibid.
[12] Department of the Army, Corps of Engineers, Department of Defense; and Environmental Protection Agency, "Revised Definition of 'Waters of the United States,'" final rule, *Federal Register*, Vol. 88, No. 11 (January 18, 2023), pp. 3004-3144, accessed April 23, 2025, https://www.federalregister.gov/documents/2023/01/18/2022-28595/revised-definition-of-waters-of-the-united-states.

adjacent wetlands are covered: the problem of distinguishing "where the 'water' ends and the 'wetland' begins."

3) Additional points

When examining both *Sackett* and the plurality in *Rapanos*, the Court is saying that the following is the full extent of jurisdictional waters: 1) traditional navigable waters;[13] 2) relatively permanent tributaries connected to these traditional navigable waters, and 3) wetlands that are adjacent to either of these two waters due to the continuous surface connection making it difficult to distinguish where the water ends and the wetland begins. Anything beyond this goes too far.

The scope of jurisdictional waters does not include waters solely because they are "interstate." The 2023 final rule included "interstate waters" as a separate category and then the conforming rule failed to remove it.[14]

Ditches should be excluded unless a ditch is able to somehow meet the relatively permanent tributary definition. The conforming rule still improperly includes impoundments and intrastate lakes and ponds as separate categories. They should not be listed separately and even if they were to somehow be jurisdictional, it would be because they meet the relatively permanent tributaries definition.

The overreach of the agencies during the Biden administration is exemplified by "intrastate lakes and ponds" being jurisdictional if they are connected to tributaries *or* traditional navigable waters.[15] Relatively permanent tributaries must be connected to traditional navigable waters, yet the confirming rule would allow intrastate lakes and ponds to have no connection to traditional navigable waters.

4) Conclusion

The agencies have a chance to develop a durable rule that is consistent with *Sackett*, the plurality of *Rapanos*, and other relevant cases. I encourage them to do so and follow the Supreme Court's

[13] The Court in *Sackett v. EPA* does in places reference "traditional interstate navigable waters." Whether this has a different meaning than traditional navigable waters is unclear.

[14] For a good discussion of the "interstate water" issue, see *West Virginia et. al v. EPA*, Case No. 3:23-cv-00032-DLH-ARS, Plaintiff States' Memorandum in Support of Motion for Summary Judgment, (D.N.D.), accessed April 23, 2025, https://aglaw.psu.edu/wp-content/uploads/2024/05/WV-v.-EPA-Memo-in-support-for-P-motion-for-summary-judgment-2.26.24.pdf.

[15] Department of the Army, Corps of Engineers, Department of Defense; and Environmental Protection Agency, "Revised Definition of 'Waters of the United States'; Conforming," final rule, *Federal Register*, Vol. 88, No. 173 (September 8, 2023), pp. 61964-61969, accessed April 23, 2025, https://www.federalregister.gov/documents/2023/09/08/2023-18929/revised-definition-of-waters-of-the-united-states-conforming and "Amendments to 40 CFR 120.2 and 33 CFR 328.3," August 14, 2023, https://www.epa.gov/system/files/documents/2023-08/Regulatory%20Text%20Changes%20to%20the%20Definition%20of%20Waters%20of%20the%20United%20States%20at%2033%20CFR%20328.3%20and%2040%20CFR%20120.2.pdf.

language very closely. This language is well-suited to a rule and helps to establish the bright line rules necessary for proper implementation and enforcement of the CWA.

To the extent that there is a need for interpretation of the Court's opinions, the agencies should still act consistently with the opinions. In addition, the agencies should act consistently with the important point that Congressional power for the rule is derived from the Commerce Clause and trying to regulate waters without an appropriate connection to interstate commerce is problematic.

Further, the CWA does not merely say that states play an important role when it comes to addressing water pollution. The statute explains, "it is the policy of the Congress to recognize, *preserve*, and *protect* the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution…"[16] (Emphasis added). The agencies should respect the will and intent of Congress by not trying to use federal power to intrude into what is the responsibility of the states.

There is too often a false dichotomy between federally protected waters and unprotected waters. The federal government may regulate some waters consistent with the U.S. Constitution and the CWA. There are many other waters that fall outside what are federally jurisdictional waters. This does not mean those waters will not be protected. These waters may not need governmental intervention to protect them and if they do, it may not need to be regulatory. If regulation is warranted, states and local governments will fill that role based on their needs and interests. They are closer to water quality problems than federal agencies and have greater knowledge about their waters and more interest in protecting these waters than the federal government.

Finally, the agencies should strive to develop bright lines rules and make it possible for ordinary Americans to understand how to comply with the CWA. If it requires aerial photographs or hydrology experts to figure out if a water is jurisdictional, then as a practical matter, it should not be jurisdictional. If reasonable bright lines rules are developed consistent with *Sackett* and the plurality in *Rapanos*, such measures to determine jurisdiction should inherently be a thing of the past.

I commend the agencies again for this notice period prior to you taking your next administrative steps. I encourage you to move efficiently while also ensuring that any rule will survive legal scrutiny. The need for a new rule[17] is self-evident, as the agencies must act to develop a rule that is consistent with case law, something the Biden administration failed to do. So long as the agencies develop a rule that is consistent with the now well-developed perspective of the Supreme Court on what waters are regulated under the CWA, this should not be a difficult exercise.

[16] 33 U.S. Code § 1251(b) accessed April 23, 2025, https://www.law.cornell.edu/uscode/text/33/1251.
[17] The agencies should develop a detailed legislative rule and not rely on guidance.

Sincerely,

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