

October 9, 2026

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Submitted via Regulations.gov

RE: Docket ID No. EPA-HQ-OW-2025-0322

Dear Ms. Jensen and Mr. Boyd:

On behalf of the Competitive Enterprise Institute, I appreciate this opportunity to provide comments on the supplemental proposed rule "Updated Definition of 'Waters of the United States.'"[1]

The definition of "waters of the United States" (WOTUS) is critical because it clarifies what waters can be regulated under the Clean Water Act (CWA). Unfortunately, developing a workable and legally defensible definition has been a longstanding challenge for the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps).

That challenge will no longer exist if the agencies finalize the regulatory options proposed in this supplemental rule. The revised definitions of "relatively permanent" and "continuous surface connection," along with the proposed definition of "perennial," will help put an end to the unpredictability and create a legally durable rule.

[1] Department of the Army, Corps of Engineers, Department of Defense; and Environmental Protection Agency, "Updated Definition of 'Waters of the United States,'" supplemental proposed rule, *Federal Register*, Vol. 91, No. 173 (September 9, 2026), pp. 57284-57301, https://www.federalregister.gov/documents/2026/09/09/2026-18317/updated-definition-of-waters-of-the-united-states.

To state from the outset, I support the definition of "perennial," which is clear and understandable. The rest of this comment will discuss the "relatively permanent" and "continuous surface connection" definitions, as well as adding some additional recommendations. Instead of restating the concerns I had with the definitions in the proposed rule, I have attached my comment to the proposed rule as an appendix to this comment.[2] The key concern in that comment related to the "wet season" language in the definitions of "relatively permanent" and "continuous surface connection." The agencies' new proposed definitions of these terms as listed in the supplemental rule rightfully drop the "wet season" language.

In *Sackett v. EPA*,[3] the US Supreme Court provided much-needed clarity on what waters are regulable and therefore "waters of the United States." The agencies' role now is to promulgate a rule that properly implements this opinion. The supplemental proposed rule achieves that objective.

"Relatively Permanent" Waters

The Supreme Court explained in Sackett:

> [W]e conclude 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.'"[4]

The idea of relative permanence is a central requirement for regulable waters under the CWA. On its face, "relatively permanent" does not mean permanence but it does indicate something very close to permanence. There is language throughout Sackett and the plurality opinion of *Rapanos v. United States* that supports this understanding of the term.

The Court requires that covered waters must have the "ordinary presence of water."[5] The plurality opinion in *Rapanos*, which the majority in Sackett adopted, explained:

> On this definition, "the waters of the United States" include only relatively permanent, standing or flowing bodies of water. The definition refers to water as found in "streams," "oceans," "rivers," "lakes," and "bodies" of water "forming geographical features." 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

[2] There are still parts of the previous comment incorporated into the text of this comment.
[3] *Sackett v. EPA*, 598 U.S. 651 (2023).
[4] *Sackett v. EPA*, 598 U.S. 651, 671 (2023).
[5] *Rapanos v. United States*, 547 U.S. 715 (2006). 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 at least be the ordinary presence of water.

> flow of water in a permanent channel—especially when used in company with other terms such as "rivers," "lakes," and "oceans."[6] [internal citations omitted]

As the plurality discussed these "relatively permanent" waters, it did so by explaining that the terms listed "connote continuously present, fixed bodies of water."[7] This indicates permanence. The Court also made a special point of stating that even streams "connotes a continuous flow of water in a permanent channel."[8]

Footnote five of the plurality opinion is the most direct explanation as to what non-permanent waters would be included under "relatively permanent." This footnote is located right after the sentence, "On this definition, 'the waters of the United States' include only relatively permanent, standing or flowing bodies of water." The footnote states:

> 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.[9]

The Court is explaining that there *may* be two very narrow exceptions to the general rule of permanence: waters drying up in extraordinary circumstances and the seasonal river such as the 290-day continuously flowing stream. The plurality did not state that these waters must be included, but only that they are *not necessarily* excluded from the WOTUS definition.

All of this language regarding "relatively permanent" indicates that the Court is generally discussing permanent waters allowing for the possibility of two narrow exceptions. This interpretation is consistent with all the language discussed and gives effect to the qualifier "relatively" when discussing permanent.

Proposed "Relatively Permanent" Definition in the Supplemental Rule. The agencies have developed a definition in the supplemental rule that is consistent with *Sackett*. The definition states:

> *Relatively permanent* means perennial bodies of water. A body of water does not lose its relatively permanent status if it dries up as a result of anomalous events such as drought or dry spell. A body of water also does not lose its relatively permanent status if it dries up for no more than a single period of up to 30 consecutive days in any given year as a

[6] *Rapanos v. United States*, 547 U.S. 715 (2006).
[7] Ibid.
[8] Ibid.
[9] *Rapanos v. United States*, 547 U.S. 715 (2006).

result of non-anomalous events resulting in a temporary interruption such as low tide or a regularly occurring dry spell.[10]

This definition rightfully makes perennial waters the baseline for what constitute "relatively permanent" waters. As explained, there is no requirement that the specific exceptions in footnote five must be included. However, to give effect to "relatively," it makes sense to look to these specific exceptions listed by the Court.

The proposed definition does this by stating that a water does not lose its relatively permanent status due to anomalous events. It also addresses the seasonal river mentioned in the footnote through the language exempting a body of water that dries up for up to 30 consecutive days as a result of non-anomalous events.

The Court in footnote five did not say that the 290-day stream must be exempted, so providing this 30-day exemption is likely more than what is required by the Court. Given that a top priority though should be a legally durable rule, the agencies may want to increase the consecutive days to 75 days, thereby being consistent with the 290-day stream. To clarify, the agencies are not required to do this, but by giving the broadest reading of this exception's express language, it would be a way to counter any notion that the agencies are being too narrow. Further, there is a clear and objective basis for the 75-day threshold.[11]

Continuous Surface Connection

The final rule should clarify that a continuous surface connection means a continuous surface "water" connection. In addition, a continuous connection should mean all the time, except in limited circumstances.

Water Connection. Wetlands are only regulated to the extent "that the wetland has a continuous surface connection with that water [of the United States], making it difficult to determine where the 'water' ends and the 'wetland' begins."[12] Wetlands are not WOTUS independent of their relationship with an actual WOTUS. As explained in *Sackett*, citing the plurality opinion in *Rapanos*, "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.'"[13] In addition, the Court explained regulable wetlands "must be indistinguishably *part* of a body of water that itself constitutes 'waters' under the CWA."[14] [Emphasis added].

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[10] Department of the Army, Corps of Engineers, Department of Defense; and Environmental Protection Agency, "Updated Definition of 'Waters of the United States,'" supplemental proposed rule, *Federal Register*, Vol. 91, No. 173 (September 9, 2026), p. 57301, https://www.federalregister.gov/documents/2026/09/09/2026-18317/updated-definition-of-waters-of-the-united-states.

[11] To clarify, I believe a 30-day exemption would be legally durable. This point regarding 75 days is simply to minimize any legal risks.

[12] *Sackett v. EPA*, 598 U.S. 651, 678 (2023).

[13] Ibid.

[14] *Sackett v. EPA*, 598 U.S. 651, 676 (2023).

The Court explains in detail what it means by "continuous surface connection" and that starts with the difficulty in being able to tell where a water ends and a wetland begins. If a reasonable or ordinary person can tell where there is a demarcation, then there is no continuous surface connection. So, when would a continuous surface connection be indistinguishable? The connection would need to be a continuous surface *water* connection. 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.

Exceptions to the Continuous Requirement. The Court in *Sackett* does provide very limited exceptions to the continuous requirement, "We also acknowledge that temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells."[15] For all practical purposes, the general rule is "continuous" means all the time except in very rare situations. It should be noted that "dry spells" refers to sometimes occurring phenomena, not regularly occurring and predictable dry seasons.

Proposed Continuous Surface Connection Definition in Supplemental. The agencies have developed a definition in the supplemental rule that is consistent with *Sackett.* The definition states:

> *Continuous surface connection* means perennial surface water in a wetland that is continuously connected with the surface water in the jurisdictional water such that it is difficult to determine where the jurisdictional water ends and the wetland begins. Temporary interruptions in the surface water connection may occur as the result of anomalous events such as drought or dry spell. A temporary interruption in the surface water connection lasting no more than a single period of up to 30 consecutive days in any given year may also occur as a result of non-anomalous events such as low tide or a regularly occurring dry spell.[16]

The surface water connection requirement is critical and consistent with *Sackett.* Also, the agencies are correct in providing the exceptions as listed. It should be noted that 30 days is more than appropriate for non-anomalous events. The agencies should not increase this number, even if the number of dry days from non-anomalous events related to relatively permanent waters is increased. These numbers address completely different issues.

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[15] *Sackett v. EPA*, 598 U.S. 651 (2023). The Court also clarifies in footnote 16 of the opinion, "Although a barrier separating a wetland from a water of the United States would ordinarily remove that wetland from federal jurisdiction, a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA. Whenever the EPA can exercise its statutory authority to order a barrier's removal because it violates the Act, see 33 U. S. C. §§1319(a)–(b), that unlawful barrier poses no bar to its jurisdiction."

[16] Department of the Army, Corps of Engineers, Department of Defense; and Environmental Protection Agency, "Updated Definition of 'Waters of the United States,'" supplemental proposed rule, *Federal Register*, Vol. 91, No. 173 (September 9, 2026), p. 57301, https://www.federalregister.gov/documents/2026/09/09/2026-18317/updated-definition-of-waters-of-the-united-states.

Additional Points

The agencies should finalize a rule that clarifies that they have the burden of proof to establish that a water is a "waters of the United States." Further, any final rule should ensure that property owners do not need to have hydrologists, fancy software, or aerial photography, or be required to take other unreasonable actions, to ascertain whether a water is regulable. An ordinary person with their naked eyes should be able to make such a determination.

Conclusion

For decades, there has been confusion over what is meant by "waters of the United States." This has hindered Americans from engaging in normal activities on their properties, such as farmers hoping to grow crops to homebuilders seeking to construct houses for families. It has undermined property rights and restricted development.

The agencies have a chance to put an end to these problems by finalizing a rule that is genuinely consistent with *Sackett*. The proposed language in the supplemental rule would achieve this objective and be improved by the recommendations in this comment.

I urge you to finalize the alternatives in the supplemental rule.

Sincerely,

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Appendix: CEI January 5, 2026 Comment



January 5, 2026

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RE: Docket ID No. EPA-HQ-OW-2025-0322

Dear Ms. Jensen and Mr. Boyd:

On behalf of the Competitive Enterprise Institute, I appreciate this opportunity to provide comments on the proposed rule "Updated Definition of 'Waters of the United States.'"[1] I commend the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) for proposing a new "Waters of the United States" (WOTUS) rule.

Past agency overreach has undermined any chance of a durable rule consistent with the rule of law. Any final rule should change this pattern especially since our nation now has the 2023 U.S. Supreme Court case *Sackett v. EPA*.[2] This case provides clear and specific guidance to the agencies on how to define WOTUS. The agencies merely need to follow the Court's lead and provide any additional clarity in a manner consistent with the opinion.

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[1] Department of the Army, Corps of Engineers, Department of Defense; and Environmental Protection Agency, 'Updated Definition of "Waters of the United States,'" proposed rule, *Federal Register*, Vol. 90, No. 222 (November 20, 2025), pp. 52498-52546, https://www.federalregister.gov/documents/2025/11/20/2025-20402/updated-definition-of-waters-of-the-united-states.
[2] *Sackett v. EPA*, 598 U.S. 651 (2023).

This comment will provide background and discuss the importance of finally having a rule that properly defines "Waters of the United States" (WOTUS) under the Clean Water Act (CWA). It will then discuss important facets of the proposed rule and make specific recommendations, as well as discuss concerns. Of particular concern is the agencies' use of "at least during the wet season" to define "relatively permanent" and "continuous surface connection." While the proposed rule is a step forward, there is still much that needs to be done for a final rule to be clear, durable, and consistent with *Sackett*.

I. Background and Importance of the Rule

For decades, the agencies have failed to provide a workable and durable WOTUS definition. Instead of sticking to the plain language of the CWA, following the intent of Congress, and staying well within the bounds of Supreme Court opinions, the agencies have continually tried to expand their jurisdiction covering waters that go beyond what is authorized. This eagerness for broadening what is meant by WOTUS is reflected in numerous actions. For example, as the majority explained in *Sackett*, "Days after our decision [in Solid Waste Agency of Northern Cook County v. Army Corps of Engineers, referred to as SWANCC], the agencies issued guidance that sought to minimize SWANCC's impact."[3]

In January 2023, the agencies inexplicably promulgated a final WOTUS rule even though the Supreme Court was soon expected to issue its *Sackett* opinion to help inform the meaning of WOTUS.[4] This led to the agencies then having to develop a conforming rule, an after-the-fact attempt to fix its flawed final rule, without receiving any public comment.[5]

There have been three Supreme Court cases between 2001 and 2023 where the Court has rejected the agencies' overreach on what waters are regulated under the CWA. In 2001, there was SWANCC,[6] in 2006 there was *Rapanos v. United States*,[7] and finally there was *Sackett v. EPA*[8] in 2023. This is quite a legal feat to be continually rejected by the Court on what are regulable waters, especially pre-*Loper Bright Enterprises v. Raimondo*[9] when agencies were still afforded deference for their interpretations of the statutes that they administer.

Over this time, the agencies' regulations and guidance on WOTUS have constantly been changing. There is no predictability for property owners or for that matter the agencies. This is

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[3] Ibid.
[4] 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, https://www.federalregister.gov/documents/2023/01/18/2022-28595/revised-definition-of-waters-of-the-united-states.
[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, https://www.federalregister.gov/documents/2023/09/08/2023-18929/revised-definition-of-waters-of-the-united-states-conforming.
[6] *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).
[7] *Rapanos v. United States*, 547 U.S. 715 (2006).
[8] *Sackett v. EPA*, 598 U.S. 651 (2023).
[9] *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).

especially problematic "Due to the CWA's capacious definition of 'pollutant,' its low mens rea, and its severe penalties."[10] A clear and workable definition consistent with the rule of law is a must. The Supreme Court has now made this possible with *Sackett v. EPA* providing clarity on what waters are WOTUS and expressly adopting the plurality opinion in *Rapanos*.

The agencies in this current rulemaking do not need to nor should they get creative. They merely need to follow the law and the framework established by the Court that provides little in the way of wiggle room when it comes to what it means for a water to be a WOTUS.

The Court has done the work that the agencies should have done themselves. Now the agencies need to take what is already detailed language from the Court about what waters are WOTUS and implement this, while providing additional regulatory clarity consistent with *Sackett*.

Any final rule should be durable, consistent with the statute and court precedent, and predictable. As can be seen by the Court's concerns in *Sackett* and the plurality opinion in *Rapanos*, a final rule should place an emphasis on clarity and not requiring property owners to be hydrologists to know what they can do with their property. What would a reasonable person think is a lake, stream, or river? That is a question that should inform the agencies' thinking. If there is talk of needing aerial maps, sophisticated software, or experts to figure out what is a WOTUS, then the agencies have failed in the promulgation of a final rule.

II. The "Wet Season" Concept is Inconsistent with "Relatively Permanent" Waters

Relatively Permanent Waters. One of the primary issues that needs to be resolved is what is meant by "relatively permanent." As the Court explained in Sackett:

> [W]e conclude 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.'"[11]

Even when taking the term "relatively permanent" in isolation, the plain language meaning would constitute something that may not be permanent but is close to it. At a minimum, it would mean a majority of the year, but even this majority threshold is likely inconsistent with the meaning and the level of permanence expected when reading the term by itself and especially when considering the term in its broader context.

The term is being used in conjunction with language like "continuously flowing bodies of water," which indicates permanence. The Court requires that covered waters must have the

[10] *Sackett v. EPA*, 598 U.S. 651 (2023).
[11] Ibid.

"ordinary presence of water."[12] The presence of water therefore should be what is normal and usual. It may mean less than permanent, but it would at least mean that water would be around most of the time and certainly at least a majority of the year. If water was present for less than half of the year, then water is not ordinarily present.

The plurality opinion in *Rapanos*, which the majority in Sackett adopted, explained:

> On this definition, "the waters of the United States" include only relatively permanent, standing or flowing bodies of water. The definition refers to water as found in "streams," "oceans," "rivers," "lakes," and "bodies" of water "forming geographical features." 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."[13] [internal citations omitted]

As the plurality discusses these "relatively permanent" waters, it does so by explaining that the terms listed "connote continuously present, fixed bodies of water."[14] This indicates permanence. The Court also makes a special point of stating that even streams "connotes a continuous flow of water in a permanent channel."[15]

Footnote five of the plurality opinion is the most direct explanation as to what non-permanent waters would be included under "relatively permanent." This footnote is located right after the sentence, "On this definition, "the waters of the United States" include only relatively permanent, standing or flowing bodies of water." The footnote states:

> 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.[16]

The Court is explaining that there *may* be two very narrow exceptions to the general rule of permanence: waters drying up in extraordinary circumstances and the seasonal river such as the 290-day continuously flowing stream. The plurality did not state that these waters must be included, but only that they are *not necessarily* excluded from the WOTUS definition.

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[12] *Rapanos v. United States*, 547 U.S. 715 (2006). 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 at least be the ordinary presence of water.
[13] *Rapanos v. United States*, 547 U.S. 715 (2006).
[14] Ibid.
[15] Ibid.
[16] *Rapanos v. United States*, 547 U.S. 715 (2006).

All of this language regarding "relatively permanent" indicates that the Court is generally discussing permanent waters allowing for the possibility of two narrow exceptions. This interpretation is consistent with all the language discussed and gives effect to the qualifier "relatively" when discussing permanent.

Wet Season. The proposed rule defines "relatively permanent" as *"*standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season."

By including "at least during the wet season," the agencies would be covering waters that have no surface water and can appear like dry land for most of the year. It should be noted that wet season is not defined in the rule, but its length can be as little as a handful of months like the monsoon season in the arid west (from June through September) discussed in the proposed rule.

The agencies claim that because the term "relatively" qualifies "permanent," this "suggests that Clean Water Act jurisdiction may not be limited to waters that are standing or continuously flowing every day or that always have standing water." Even if assuming this to be true, it does not authorize the agencies to ignore the meaning of relatively permanent as discussed earlier in this comment by asserting that waters with standing or continuous flowing water a small part of the year constitute relatively permanent.

While the agencies are concerned with the qualifier, they fail to give proper weight to the word being qualified: "permanent." If the Court wanted regulable waters to include those with standing or continuous flow for anything less than the vast majority of the year, it would have chosen a different word to qualify.

The agencies in the proposed rule rely heavily on footnote 5 of the plurality opinion in *Rapanos*, explaining:

> Moreover, limiting the scope of relatively permanent waters to perennial streams would exclude waters that the Rapanos plurality stated are ''not necessarily exclude[d]'' (emphasis added): ''streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought,'' or ''seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months.''"[17]

This is an incomplete discussion of footnote five because it excludes critical language. Specifically, when discussing "seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months," the plurality states in the very next clause "—such as the 290-day, continuously flowing stream postulated by Justice Stevens' dissent." That is a far cry from a seasonal river that has standing or continuous flow for as little as four

[17] Department of the Army, Corps of Engineers, Department of Defense; and Environmental Protection Agency, 'Updated Definition of "Waters of the United States,'" proposed rule, *Federal Register*, Vol. 90, No. 222 (November 20, 2025), pp. 52498-52546, https://www.federalregister.gov/documents/2025/11/20/2025-20402/updated-definition-of-waters-of-the-united-states.

months.[18]

The plurality in this footnote was explaining that this 290-day stream is *not necessarily* excluded from the meaning of relatively permanent waters. The outer bounds of what is included *may be* a 290-day stream. Bringing in the concept of "wet season" is not merely inconsistent with *Sackett* but also adds yet another level of confusion and complexity that is unnecessary and goes against the very goal the Court is trying to achieve by providing clear bright line definitions.

Recommendations

In defining "relatively permanent," the agencies should keep the language "standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round" and *at most* include limited exceptions for waters drying up in extraordinary circumstances and the seasonal river such as the 290-day continuously flowing stream. To stress, the agencies should eliminate the unauthorized and confusing wet season concept.

III. The Continuous Surface Connection Definition is Problematic

Indistinguishable and "Where the 'Water' Ends and the 'Wetland' Begins." Wetlands are only regulated to the extent "that the wetland has a continuous surface connection with that water [of the United States], making it difficult to determine where the 'water' ends and the 'wetland' begins."[19] Wetlands are not WOTUS independent of their relationship with an actual WOTUS. As explained in *Sackett*, citing the plurality opinion in *Rapanos*, "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.'"[20] In addition, the Court explained regulable wetlands "must be indistinguishably *part* of a body of water that itself constitutes 'waters' under the CWA."[21] [Emphasis added].

The Court explains in detail what it means by "continuous surface connection" and that starts with the difficulty in being able to tell where a water ends and a wetland begins. If a reasonable or ordinary person can tell where there is a demarcation, then there is no continuous surface connection. So when would a continuous surface connection be indistinguishable? The connection would need to be a continuous surface *water* connection. 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 a clear demarcation. Thus, the agencies' proposal to regulate wetlands containing only a

[18] The 290-day stream does not appear to be mentioned anywhere in the proposed rule.
[19] *Sackett v. EPA*, 598 U.S. 651 (2023).
[20] *Rapanos v. United States*, 547 U.S. 715 (2006).
[21] Ibid.

hydrologic connection to covered waters through culverts, is infirm. The existence of an elevated barrier between water and wetland is what makes a culvert necessary. 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 adjacent wetlands are covered: the problem of distinguishing "where the 'water' ends and the 'wetland' begins."

Continuous is Required. The proposed rule defines "continuous surface connection" to mean "having surface water at least during the wet season and abutting (*i.e.,* touching) a jurisdictional water." Once again, there is the problem of "at least during the wet season." If a reasonable person can tell where the water ends and the wetland begins for most of the year, this is certainly not a *continuous* surface connection.

The Court in *Sackett* does provide very limited exceptions to the continuous requirement, "We also acknowledge that temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells."[22] For all practical purposes, the general rule is "continuous" means all the time except in very rare situations. It should be noted that "dry spells" refers to sometimes occurring phenomena, not regularly occurring and predictable dry seasons.

The agencies assert:

> Requiring permanent indistinguishability based on permanent surface water in both the paragraphs (a)(1) through (3) and (a)(5) water and the adjacent wetland would read the modifier "relatively" out of the interpretation of "relatively permanent" (as discussed in section V.C.2 of this preamble) and render the vast majority of wetlands nonjurisdictional, which the agencies propose is not the best reading of the Clean Water Act under Sackett. It would also ignore the Rapanos plurality's statement that "relatively permanent" includes "seasonal" waters, such as those that do not flow during dry months.[23]

The agencies are conflating the definition for covered waters with the continuity requirement. The "relatively permanent" language refers to what waters are covered and does not inform the continuous requirement between a covered water and a wetland.

Even assuming the agencies' improper definition of "relatively permanent" (regulating waters without surface water for most of the year), requiring a permanent continuous surface connection

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[22] *Sackett v. EPA*, 598 U.S. 651 (2023). The Court also clarifies in footnote 16 of the opinion, "Although a barrier separating a wetland from a water of the United States would ordinarily remove that wetland from federal jurisdiction, a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA. Whenever the EPA can exercise its statutory authority to order a barrier's removal because it violates the Act, see 33 U. S. C. §§1319(a)–(b), that unlawful barrier poses no bar to its jurisdiction."

[23] Department of the Army, Corps of Engineers, Department of Defense; and Environmental Protection Agency, 'Updated Definition of "Waters of the United States,'" proposed rule, *Federal Register*, Vol. 90, No. 222 (November 20, 2025), pp. 52498-52546, https://www.federalregister.gov/documents/2025/11/20/2025-20402/updated-definition-of-waters-of-the-united-states.

is not inconsistent with this flawed definition. Not all covered waters will have a continuous surface connection with wetlands. In fact, most likely will not have this type of connection. The only covered waters that could have a continuous surface connection are those where the Court's clear and express requirement regarding continuity is met: there is a permanent connection except when there are "temporary interruptions in surface connection [that] may sometimes occur because of phenomena like low tides or dry spells." As an aside, if "relatively permanent" was defined properly as discussed earlier in this comment, then there would be fewer situations where a water is regulable, but its adjacent wetlands are not.

Recommendations

1) The agencies should clarify that continuous surface connection means continuous surface *water* connection.

2) The definition should include express language regarding indistinguishability, making it clear that there is no continuous surface water connection when a reasonable person can tell through use of the naked eye where a water ends and a wetland begins.

3) The agencies should stress that the existence of any demarcation, such an artificial or natural barrier—even if it contains culverts—means there is no continuous surface water connection.

4) The agencies should eliminate the "wet season" language and properly define continuous to mean all of the time, except in the narrow circumstances listed by the Court in *Sackett*.

IV. Additional Recommendations

1) The agencies should expressly clarify that intermittent waters are not jurisdictional. The plurality in *Rapanos* opinion made this point very clear:

> In sum, on its only plausible interpretation, the phrase "the waters of the United States" 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." See Webster's Second 2882. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.[24]

2) The agencies should clarify that ditches can only be jurisdictional if they affirmatively meet the definition of a relatively permanent water.

[24] *Rapanos v. United States*, 547 U.S. 715 (2006).

3) The ordinary parlance language should be included when discussing relatively permanent waters. As mentioned earlier, the Court in *Sackett* stated:

> [W]e conclude 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.'"[25]

While the ordinary parlance requirement is not dispositive on what waters are regulated, it is an important element to better understand what waters are jurisdictional.

4) Additional language that has been frequently used by the Supreme Court should be incorporated when defining covered waters, including "open waters," the "ordinary presence of water," and "continuously present, fixed bodies of water."

5) In the proposed rule, "the agencies also solicit comment on an alternative approach to the proposed rule, whereby "waters of the United States" would encompass traditional navigable waters, tributaries that directly flow into these waters, and wetlands with a continuous surface water connection to such waters. All other waters would be excluded." The agencies then explain that this is informed by Justice Clarence Thomas's concurring opinion in *Sackett*.

To respond to this alternative approach, *the answer is yes*, these are the only regulable waters and wetlands that should be included. This framework is not just supported by the Justice Thomas concurrence but follows from *Sackett* and the plurality opinion in *Rapanos*.

Conclusion

The importance of this rulemaking is hard to overstate. The EPA and Corps have a chance to finally develop a WOTUS definition that is consistent with the rule of law and the Clean Water Act. While there are significant problems with the proposed rule as outlined in this comment, the alternative approaches within the proposal appear to generally recognize the listed concerns.

For the reasons discussed, the agencies should adopt the recommendations in this comment.

Sincerely,

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[25] *Sackett v. EPA*, 598 U.S. 651 (2023).