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Submission via OW-Docket@epa.gov and www.regulations.gov

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Adam Telle,
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U.S. Environmental Protection Agency
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**Re: 2026 Supplemental Notice of Proposed Rulemaking: Updated Definition of
“Waters of the United States,” Docket ID No. EPA-HQ-OW-2025-0322**

Dear Administrator Zeldin and Assistant Secretary Telle:

Waterkeeper Alliance and the undersigned U.S. Waterkeeper groups (collectively “Commenters”) submit the following comments in opposition to the U.S. Environmental Protection Agency’s (“EPA”) and U.S. Army Corps of Engineers’ (“Corps”) (collectively, the “agencies”) supplemental notice of proposed rulemaking¹ announcing additional regulatory options for certain aspects of a November 2025 proposed rule² revising the regulatory definition of “waters of the United States” (“WOTUS”) under the Federal Water Pollution Control Act (“Clean Water Act” or “Act”).³ On behalf of our organizations and respective individual members and supporters from across the United States, we call upon the agencies to reject all of the alternative options for redefining “waters of the United States” set forth in the 2025 Proposed Rule Notice⁴ and 2026 Supplemental Notice. We collectively urge the agencies to withdraw this shockingly extreme and indefensible proposed rule that would preclude achievement of the Clean Water Act’s objective,

¹ Updated Definition of “Waters of the United States,” Dkt. ID No. EPA-HQ-OW-2025-0322, 91 Fed. Reg. 57284 (Sept. 9, 2026) (“2026 Supplemental Notice”).

² Updated Definition of “Waters of the United States,” Dkt. ID No. EPA-HQ-OW-2025-0322, 90 Fed. Reg. 52498 (Nov. 20, 2025) (“2025 Proposed Rule Notice,” or “2025 Proposed WOTUS Definition”).

³ 33 U.S.C. § 1251 *et seq.*

⁴ Waterkeeper Alliance, Environmental Integrity Project, and nearly 100 U.S. Waterkeeper groups previously submitted comments with numerous attachments on the 2025 Rulemaking Notice, which are hereby incorporated into these comments by reference. *See* Waterkeeper Alliance Comments on 2025 Updated WOTUS Definition, Dkt. ID No. EPA-HQ-OW-2025-0322 (Jan. 5, 2026), available at: <https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-0856> (“Waterkeeper January 2026 Comments”).

endanger all of the nation's waters, disempower state and tribal governments, and have devastating impacts on people, businesses, the economy, and aquatic life throughout the country.

Both of the notices for this proposed rulemaking contain multiple underdeveloped, competing alternatives for refashioning the WOTUS regulatory definition in order to eliminate longstanding Clean Water Act protections for the overwhelming majority of the nation's rivers, streams, lakes, wetlands, and other waters contrary to the purpose, intent, and mandates of the law and binding legal precedents, including the Supreme Court's 2023 decision in *Sackett v. EPA*.⁵ The Supreme Court has repeatedly recognized that Congress passed the Clean Water Act with a singular objective—to “restore and maintain the chemical, physical, and biological integrity of the Nation's waters”⁶—and that it intended to achieve that objective, primarily, by regulating pollution at its source.⁷ Regulation of pollution at its source is “one of the key regulatory innovations of the Clean Water Act,” and the agencies lack authority to adopt interpretations of the Act that “facilitate evasion of the law,”⁸ yet that is exactly what the agencies are attempting to do with this proposed rulemaking.

The scope of jurisdiction over relatively permanent waters and adjacent wetlands has already been resolved by the Supreme Court in *Sackett v. EPA*, and the agencies have incorporated any changes to the regulatory definition that were required or authorized by that decision into the agencies' September 2023 Definition.⁹ In developing the January 2023¹⁰ and September 2023 Definitions, the agencies engaged in extensive evaluations of the legal and technical issues relevant to defining “waters of the United States,” including multiple outreach efforts to stakeholders, and the results of those evaluations are already reflected in the September 2023 Definition and its extensive supporting administrative record.¹¹

⁵ *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023) (“*Sackett v. EPA*” or “*Sackett*”)

⁶ *PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology*, 511 U.S. 700, 704 (1994) (quoting 33 U.S.C. § 1251(a)).

⁷ See, e.g., *County of Maui v. Haw. Wildlife Fund*, 590 U.S. 165, 178-79 (2020) (“*County of Maui*”) (citing “*EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 202-04 (1976) (basic purpose of the Clean Water Act is to regulate pollution at its source); *The Emily*, 9 Wheat. 381, 390, 6 L.Ed. 116 (1824) (rejecting an interpretation that would facilitate “evasion of the law.”)).

⁸ *Id.* (“We do not see how Congress could have intended to create such a large and obvious loophole in one of the key regulatory innovations of the Clean Water Act.”) (citations omitted).

⁹ Revised Definition of “Waters of the United States”; Conforming, 88 Fed. Reg. 61964 (Sept. 8, 2023) (codified at 33 C.F.R. § 328.3 (U.S. Army Corps of Engineers) and 40 C.F.R. § 120.2 (EPA)) (“September 2023 Definition”).

¹⁰ Revised Definition of “Waters of the United States,” 88 Fed. Reg. 3004 (Jan. 18, 2023) (“January 2023 Definition”).

¹¹ See, e.g., January 2023 Definition, 88 Fed. Reg. at 3084-88 (approach, basis, and tools for identifying relatively permanent tributaries), 3095-96 (approach, basis, and tools for identifying adjacent wetlands under the relatively permanent standard), 3102 (implementing the relatively permanent standard for (a)(5) waters).

By contrast, in the current proposed rulemaking, the agencies are proposing amendments to the definition that go far beyond what is required or authorized by *Sackett v. EPA*, including arbitrary provisions that are completely unrelated to that decision, to achieve their current deregulatory policy goals, including “narrowing the scope of waters that are jurisdictional under the Clean Water Act” to ensure that “fewer Clean Water Act permits will be required, which will result in cost savings and reduced regulatory burden.”¹² Given this represents the agencies’ policy objective for revising the definition of “waters of the United States,” the agencies can only propose arbitrary definitional terms that are contrary to law and Supreme Court precedent because the objective and text of the Clean Water Act is diametrically opposed to reducing clean water protections for the nation’s waters. In fact, rather than aiming to achieve the objective of the Act *consistent with* the text and Supreme Court precedent, the agencies state that “the basis for this proposed rulemaking is the text of the Clean Water Act, **as informed by Supreme Court precedent, taking into account agency policy choices and other relevant factors.**”¹³ However, the agencies do not possess the authority to exclude waters that Congress intended to cover from the definition of “waters of the United States” to achieve their own independent (and ever-shifting) bureaucratic policy goals, particularly their current goal of ensuring that only a small percentage of the nation’s waters are protected against unpermitted pollutant discharges, dredging, and filling.¹⁴

Contrary to the clear and well-settled objective of the Clean Water Act, all of the agencies’ proposed alternative regulatory options would redefine “waters of the United States” in vague and arbitrary ways that create barriers to controlling pollution in historically protected waters, obstruct regulation of pollution at its source across the country, and preclude achievement of the Act’s fundamental objective.¹⁵ It would obviously be impossible for the Clean Water Act to control pollution at its source and achieve the objective of the Act if the majority of the nation’s waters are excluded from the definition of “waters of the United States” as proposed by the agencies.

Instead of adopting yet another legally and technically flawed regulatory definition in an attempt to eliminate Clean Water Act protections for most of the nation’s waters, we urge the agencies to provide clarity and certainty, as well as consistency with the law, by maintaining the protections provided in the current regulatory definition and restoring longstanding protections for the nation’s

¹² 2026 Supplemental Notice, 91 Fed. Reg. at 57299.

¹³ *Id.* (emphasis added).

¹⁴ See, e.g., *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 134–35 (1990) (Agency did “not have the power to adopt a policy that directly conflicts with its governing statute.”); *Heckler v. Chaney*, 470 U.S. 821, 833 (1985) (“Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers.”); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 325, 328 (2014) (“An agency has no power to ‘tailor’ legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. . . . We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.”)

¹⁵ 33 U.S.C. § 1251(a).

waters wherever possible, consistent with the entire body of Supreme Court precedent. The nation's waters have already lost significant protections as a result of the *Sackett v. EPA* decision and the September 2023 amendments to the WOTUS definition conforming it to that decision. As explained in detail throughout our previous comments, the reductions in Clean Water Act protections for the nation's waters proposed by the agencies are not required or authorized by the *Sackett* decision or any other Supreme Court precedent and would be inconsistent with the text of the Act, its legislative history, and extensive case law confirming the breadth of the Act. This is even more true for the alternative definitions of "relatively permanent," "continuous surface connection," and "perennial," as well as the additional vaguely described alternatives and potential implementation approaches, in the 2026 Supplemental Notice.

The Clean Water Act regulatory definition of "waters of the United States" must fully encompass waters necessary to adequately control pollution at its source and protect the chemical, physical, and biological integrity of the nation's waters as intended by Congress. Thus, it is imperative that, at a minimum, the waters included in the current regulatory definitions be maintained and that any amendments or reinterpretations of those regulatory definitions through rulemaking, guidance, memoranda, or other means, fully maintain and restore longstanding protections consistent with the objective, structure, and text of the Clean Water Act, the entire body of case law interpreting the Act, and the best available hydrologic and water quality science.¹⁶

A. The Supplemental Notice Definitions are Legally and Technically Deficient

As explained in great detail in our comments on the 2025 Proposed Rule Notice, which are incorporated here by reference, the proposed alternative definitional provisions in that notice, including the myriad vaguely described alternative approaches and potential implementation measures associated with those provisions, are among other things, based on impermissible agency policy goals that run counter to the objective and text of the Clean Water Act and are being pursued without observance of procedures required by law; exceed the agencies' statutory authority; are inconsistent with the Clean Water Act, Endangered Species Act ("ESA"),¹⁷ and National Environmental Policy Act ("NEPA");¹⁸ and are arbitrary, capricious, an abuse of discretion, and contrary to law in violation of the Administrative Procedure Act ("APA").¹⁹ Nothing in the law or science supports the definitional limitations the agencies have proposed, and as a result, neither the agencies nor the public can discern precisely which waters would remain protected under the 2025 Proposed WOTUS Definition or the numerous alternative approaches the agencies are considering for adoption in a final rule. In fact, the proposed definition and alternatives are so

¹⁶ See, e.g., *County of Maui*, 590 U.S. at 185-86 (2020).

¹⁷ Endangered Species Act, 16 U.S.C. § 1531 *et seq.*

¹⁸ National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*

¹⁹ Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*, 706.

novel and unsupported by law and science that the agencies cannot even assess the impact of their proposals on the nation's waters or Clean Water Act programs. The agencies proposed adoption of a vague, unscientific definition of "waters of the United States," which they do not know how to implement, and for which data and tools are not readily available, is particularly alarming because the agencies state that they will have the burden to prove a water is jurisdictional, and if they cannot meet their burden, the water will simply be deemed non-jurisdictional.²⁰

In the 2026 Supplemental Notice, the agencies are proposing additional alternative definitions for the core terms "relatively permanent" and "continuous surface connection," as well as adding a definition of "perennial," but the notice does not resolve any of the legal and technical deficiencies identified in our comments on the 2025 Proposed Rule Notice.²¹ To the contrary, the proposed definitions magnify and expand upon the deficiencies, including the failure to provide a reasoned basis for the proposed definitions, failure to meaningfully evaluate the impacts of the proposed alternative definitions on the nation's waters and Clean Water Act programs, failure to complete required governmental consultations,²² and failure to prepare an adequate Regulatory Impact Analyses consistent with EPA's Guidelines for Preparing Economic Analyses²³ and Office of Management and Budget (OMB) Circular A-4.²⁴ Additionally, the agencies do not explain or evaluate how these new alternative definitions would interface with or impact any of the other multiple alternative definitions and implementation approaches that remain unchanged in the 2025 Proposed Rule Notice. Accordingly, the 2026 Supplemental Notice does not provide the public with a meaningful opportunity to review and provide comment on the proposed alternative definitions. The notice lacks adequate information and analysis to support the supplemental proposed rule and allowed a mere 30 days for public comment on these complex proposals contrary to the requirements of the Clean Water Act and APA.²⁵

²⁰ 2025 Proposed Rule Notice, 90 Fed. Reg. at 52515.

²¹ 2026 Supplemental Notice, 91 Fed. Reg. at 57286.

²² See, e.g., Executive Order 13132, 64 Fed. Reg. 43255, § 3(d)(4) (Aug. 10, 1999); U.S. EPA, EPA's Action Development Process: Guidance on Executive Order 13132: Federalism, at 9 (Nov. 2008), available at: <https://downloads.regulations.gov/EPA-HQ-OLEM-2016-0177-0030/content.pdf>; Executive Order 13175, 65 Fed. Reg. 67249, § 3(c)(3) (Nov. 6, 2000); and U.S. EPA, *U.S. Environmental Protection Agency Plan for Implementing the Policies and Directives of Executive Order 13175: Consultation and Coordination with Indian Tribal Governments*, available at: <https://www.epa.gov/system/files/documents/2021-08/epa-plan-to-implement-eo-13175.pdf>.

²³ EPA, Guidelines for Preparing Economic Analyses, EPA-240-R-24-001, at 1-1 (Dec. 2024), Dkt. ID No. EPA-HQ-OW-2025-0322-0100 ("EPA Guidelines for Preparing Economic Analyses").

²⁴ Office of Management and Budget Circular A-4, Regulatory Analysis (Sept. 17, 2003), available at: https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4 ("OMB Circular A-4").

²⁵ See, e.g., 33 U.S.C. § 1251(e); 5 U.S.C. § 553; 40 C.F.R. § 25.3, Executive Order 12866 – Regulatory Planning and Review, 58 Fed. Reg. 51735 (October 4, 1993); Executive Order 13563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821, 3822, § 2(b) (Jan. 21, 2011).

The new alternative non-scientific and arbitrary definitions in the 2026 Supplemental Notice directly impact three categories of waters in the 2025 Proposed WOTUS Definition and would cause an unprecedented elimination of Clean Water Act protections for tributaries (rivers, streams, lakes, canals, ditches, and other waters that directly or indirectly flow into traditional navigable waters or the territorial seas), wetlands, and lakes and ponds that do not fall into other jurisdictional categories. These alternative definitions are even more extreme and unmoored from the law, science, and reality than the agencies' initial proposal, such as stripping protections against pollution and destruction from tributaries and wetlands if they lack standing or flowing water for even a single day during the year under ordinary conditions.²⁶

If "waters of the United States" is redefined as proposed in the 2026 Supplemental Notice, not only would most of the nation's waters directly lose Clean Water Act protections against pollution and destruction, but the loss of protections will also cause unevaluated and unconsidered ripple effects that undermine Clean Water Act protections for all other waters across the country, which are interconnected with the waters that the agencies seek to abandon. This represents an extreme departure from the agencies', the courts', the states', and tribal governments' understanding of the scope of federal jurisdiction over waters under the Clean Water Act and will cause significant and unevaluated adverse impacts on dischargers, the broader regulated community, the public, the states, and tribal governments. For example, it will determine which point source water pollutant discharges require a National Pollutant Discharge Elimination System ("NPDES") permit under Clean Water Act Section 402,²⁷ which bodies of water may be destroyed through dredging or filling without a permit issued under Section 404,²⁸ and whether citizens or the EPA can bring an enforcement action to address unpermitted pollutant discharges to a particular water.²⁹

As a unanimous Supreme Court determined in *United States v. Riverside Bayview Homes*, "[p]rotection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' . . . In keeping with these views, Congress chose to define the waters covered by the [Clean Water] Act broadly."³⁰ Simply put, the agencies do not possess legal authority to redefine the waters covered by the Clean Water Act narrowly to exclude most rivers, streams, lakes, wetlands, and other waters and preclude federal authority to control

²⁶ See, e.g., 2026 Supplemental Notice, 91 Fed. Reg. at 57288, 57294.

²⁷ 33 U.S.C. §1342.

²⁸ 33 U.S.C. §1344.

²⁹ See, e.g., 33 U.S.C. §§1319, 1365.

³⁰ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33 (1985) ("*Riverside Bayview*") (citation omitted).

pollutants at their source.³¹ Doing so would allow unregulated pollutant discharges into waters that fall outside the agencies' regulatory definition (i.e. most of the waters in the country), harming not only those receiving waters but also allowing unregulated pollutants to travel through well-known hydrologic processes and harm the remaining jurisdictional waters, including drinking water supplies, recreational waters, fisheries, industries, agriculture, endangered and threatened species, and, ultimately, human beings.³²

Unfortunately, this outcome is the agencies' transparent policy objective for this proposed rulemaking, but administrative policy objectives cannot nullify statutory objectives and text, judicial precedent, and Congressional intent. The regulatory definition of "waters of the United States" must be consistent with all relevant legal precedent, the objective of the Clean Water Act, and the text and legislative history of the Act.³³ Rather than redefining "waters of the United States" to eliminate water quality protections for the nation's waters to achieve the agencies' deregulatory agenda, the agencies' actions are required to be guided by their mission to protect human health and the environment, as well as to comply with the requirements of the Clean Water Act, APA, ESA, and NEPA. In particular, the objective of the agencies' rulemaking must be "to advance, in a manner consistent with the statute's language, the statutory purposes that Congress

³¹ Cf. *NRDC v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977) (striking down an EPA rule that attempted to exempt certain categories of point sources from the permit requirements of Clean Water Act section 402 where contrary Congressional intent was clear).

³² See, e.g., U.S. EPA, *Where Nutrient Pollution Occurs*, <https://www.epa.gov/nutrientpollution/where-nutrient-pollution-occurs> ("Nutrient pollution affects air and water around the country. The impacts of excess nutrients are found in all types of water bodies. Pollutants often enter upstream waters like creeks and streams and then flow downstream into larger water bodies like lakes, rivers and bays. Excess nitrogen and phosphorus can also travel thousands of miles to coastal areas where the effects of the pollution are felt in the form of massive dead zones, such as those in the [Gulf of America](#) and [Chesapeake Bay](#)." (last accessed Sept. 24, 2026) (Attachment 1); U.S. EPA, *The Effects: Economy*, <https://www.epa.gov/nutrientpollution/effects-economy> ("Nitrates and algal blooms in drinking water sources can drastically increase treatment costs. For example, nitrate-removal systems in Minnesota caused supply costs to rise from 5-10 cents per 1000 gallons to over \$4 per 1000 gallons. It can also cost billions of dollars to clean up polluted water bodies. Every dollar spent on protecting sources of drinking water saves in water treatment costs . . . The tourism industry loses close to \$1 billion each year, mostly through losses in fishing and boating activities, as a result of water bodies that have been affected by nutrient pollution and harmful algal blooms." (last accessed Sept. 24, 2026) (Attachment 2); U.S. EPA, *The Effects: Human and Animal Health* ("Excess nutrients and [harmful algal blooms](#) (HABs) create toxins and other chemical compounds in water that can be dangerous to people, pets and livestock that are exposed to them . . . Infants are more susceptible to the health effects posed by nitrates, which can be serious and sometimes fatal . . . When nutrient pollution leads to the formation of toxic algae blooms in rivers, lakes and reservoirs that serve as sources of drinking water, the toxins can enter drinking water treatment plants. Disinfectants used to treat pathogens in drinking water react with the algal toxins, creating harmful chemical byproducts called dioxins. These byproducts have been linked to serious health risks, including reproductive and developmental problems." (last accessed Oct. 9, 2026) (Attachment 3).

³³ See, e.g., *County of Maui*, 590 U.S. at 183-84 (interpreting the Clean Water Act "in light of the statute's language, structure, and purposes . . .").

sought to achieve.”³⁴ As the agencies recently acknowledged, “[t]wo recent Supreme Court Clean Water Act decisions, *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1476 (2020) (“*Maui*”) and *Nat’l Ass’n of Mfrs. v. Dep’t of Defense*, 138 S. Ct. 617, 624 (2018) (“*National Association of Manufacturers*”), affirm that Congress used specific language in the definitions of the Act in order to meet the objective of the Act, that the definition of ‘waters of the United States’ is fundamental to meeting the objective of the Act, and, therefore, that the objective of the Act must be considered in interpreting the term ‘waters of the United States.’”³⁵ The agencies have completely failed to meet these standards in this proposed rulemaking.

To ensure consistency with these requirements, the agencies must evaluate scientific and other evidence regarding how the proposed revisions to the definition will affect the physical, chemical, and biological integrity of the nation’s waters, as well as the Clean Water Act’s programs and requirements, and reject all inconsistent regulatory options.³⁶ As was the case with the 2025 Proposed Rule Notice, the 2026 Supplemental Notice does not meaningfully evaluate the impact of the various regulatory options in the proposed rule on the nation’s waters and the Clean Water Act’s objective and programs, instead providing only vague generalizations like “more bodies of water would be captured as relatively permanent under the baseline”³⁷ and “the potential impacts of the definitions of ‘continuous surface connection’ and ‘relatively permanent’ would be significant for Clean Water Act jurisdiction of streams and wetlands relative to the baseline.”³⁸ The agencies’ refusal to consider how their proposed WOTUS definition will impact the nation’s waters—i.e., whether it will restore and maintain the nation’s waters or degrade and destroy the nation’s waters—amounts to a failure to ensure that the definition is consistent with the text of the Clean Water Act and will carry out Congress’ overall objective for the Act.

For the agencies to finalize such extreme and unprecedented reductions to the scope of federal protections for the nation’s waters flies in the face of the Clean Water Act’s objective, goals, requirements, and text. To do so without a clear understanding and demonstration of the public

³⁴ Cf., *id.* at 184 (Finding that the EPA must ensure consistency “with the statute’s language, the statutory purposes that Congress sought to achieve” when making functional equivalent determinations under the Clean Water Act.”).

³⁵ Revised Definition of “Waters of the United States,” 86 Fed. Reg. 69372, 69387 (Dec. 7, 2021) (“2021 Proposed Definition”).

³⁶ See, e.g., *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“*State Farm*”) (“Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”) (citations omitted); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167–68, (1962) (“The Commission must exercise its discretion under s 207(a) within the bounds expressed by the standard of [the statute] . . . And for the courts to determine whether the agency has done so, it must ‘disclose the basis of its order’ and ‘give clear indication that it has exercised the discretion with which Congress has empowered it.’ . . . The agency must make findings that support its decision, and those findings must be supported by substantial evidence.”) (citations omitted).

³⁷ 2026 Supplemental Notice, 91 Fed. Reg. at 57297.

³⁸ 2026 Supplemental Notice, 91 Fed. Reg. at 57298.

health, environmental, and economic costs of that action, reflects a startling indifference to the agencies' missions and the law. The agencies' action "should not create serious risks . . . [of] creating loopholes that undermine the statute's basic federal regulatory objectives."³⁹ The proposed rule, however, will intentionally create loopholes in the Clean Water Act that will preclude, not merely undermine, achievement of the Act's objectives and regulatory directives. Every proposed definition in the 2026 Supplemental Notice would be detrimental to the statute's objective and disrespect Congressional intent. In fact, not a single change to the regulatory WOTUS definition that the agencies have proposed in the 2026 Supplemental Notice would even arguably help to restore and maintain the chemical, physical, and biological integrity of the nation's waters.

In sum, for all of the reasons explained in our comments on the 2025 Proposed Rule Notice and herein, the proposed amendments to the WOTUS definition in the 2026 Supplemental Notice exceed the agencies' statutory authority; violate the Clean Water Act, APA, ESA,⁴⁰ and NEPA; and are arbitrary, capricious, an abuse of discretion, and contrary to law.⁴¹ For example, under the APA, the agencies must give adequate reasons for their decisions and, after examining the relevant data, they must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."⁴² Agency rules are arbitrary and capricious when , among other things, "the agency . . . entirely failed to consider an important aspect of the problem" that its rulemaking purports to address, such as the core objective of the Clean Water Act.⁴³ Where, as here, agencies are attempting to completely reverse course, dramatically alter the scope of the Clean Water Act, and disregard their own longstanding findings and interpretations in a rule of national significance, the APA requires agencies to "show that there are good reasons" for revising the WOTUS regulatory definition in the manner proposed by the agencies and to provide a "reasoned explanation" for "disregarding facts and circumstances that underlay or were engendered by" the agencies' prior determinations.⁴⁴ Further, as the agencies noted, "[t]he Supreme Court recognizes that an agency must 'provide a more detailed justification that would

³⁹ Cf., *County of Maui*, 590 U.S. at 185 (Holding that the underlying statutory objectives should guide EPA's decisions implementing the functional equivalent standard under the Clean Water Act).

⁴⁰ See, e.g., U.S. EPA, Office of Research and Development, *The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest*, EPA/600/R-08/134 ARS/233046 (Nov. 2008), available at: https://www.epa.gov/sites/default/files/2015-03/documents/ephemeral_streams_report_final_508-kepner.pdf (Attachment 4).

⁴¹ 5 U.S.C. § 706(2).

⁴² *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (quoting *State Farm*, 462 U.S. at 43).

⁴³ *State Farm*, 462 U.S. at 43.

⁴⁴ See, e.g., *FCC v. Fox Television Stations, Inc.* 556 U.S. 502, 515-16 (2009) ("*Fox*").

suffice for a new policy . . . when . . . its prior policy has engendered serious reliance interest that must be taken into account.”⁴⁵

The agencies have completely failed to meet these burdens in both the 2025 Proposed Rule Notice and the 2026 Supplemental Notice. The agencies did not generate and examine the relevant data about the impacts of the proposed rule; provide a rational connection between the available evidence, the facts found by the agencies, and the choices made in the proposed rule; provide a reasoned basis and explanation for the proposed rule; meaningfully consider reliance interests; or demonstrate that there are good reasons for revising the WOTUS definition in the manner they have proposed. Moreover, the agencies did not meaningfully assess the costs and benefits of the proposed rule, indicating that they may undertake a more substantial evaluation for the final rule,⁴⁶ which also improperly denies the public any opportunity to review and comment on a core aspect of the proposed rulemaking in violation of the APA. For all of these and the following reasons, we urge the agencies to withdraw the proposed rulemaking.

B. Definitions of “Relatively Permanent” and “Perennial”

Under the September 2023 Definition, *Sackett*, and the *Rapanos*⁴⁷ plurality standard, a tributary to a traditional navigable water, interstate water, the territorial seas, or a jurisdictional impoundment is itself jurisdictional for the purposes of the Clean Water Act if it is a relatively permanent, standing or continuously flowing body of water.⁴⁸ Additionally, under the September 2023 Definition, intrastate lakes and ponds that do not fall into any other category are jurisdictional if they are “relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to” a traditional navigable water, interstate water, the territorial seas, or jurisdictional tributary.⁴⁹

In the 2026 Supplemental Notice, in addition to the proposed changes described in the 2025 Proposed WOTUS Definition, the agencies now propose to narrow Clean Water Act jurisdiction by amending the September 2023 Definition to define “relatively permanent” to mean “perennial bodies of water.”⁵⁰ The agencies would also define “perennial” in an arbitrary, unscientific manner to mean “having standing or continuously flowing water *every day of the year* during ordinary

⁴⁵ See, e.g., 2026 Supplemental Notice, 91 Fed. Reg. at 57292, 57296 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

⁴⁶ See, e.g., 2025 Proposed WOTUS Rule, 90 Fed. Reg. at 52500.

⁴⁷ *Rapanos v. United States*, 547 U.S. 715 (2006) (“*Rapanos*”).

⁴⁸ See, e.g., 40 C.F.R. § 120.2(a)(3).

⁴⁹ See, e.g., 40 C.F.R. § 120.2(a)(5).

⁵⁰ 2026 Supplemental Notice, 91 Fed. Reg. at 57288, 57301.

conditions.”⁵¹ The agencies’ definition was rather simplistically “informed by” a U.S. Geological Survey Water Basics Glossary which defined perennial stream as “[a] stream that *normally* has water in its channel at all times.”⁵² First, the U.S. Geological Survey glossary provides only an elementary definition that applies to streams, not to every type of water as proposed by the agencies. Second, the agencies changed that elementary definition from *normally* having water to having water *every day of the year* without explanation or reasonable basis. Third, the term “perennial” has far more complex definitions that do not require flow every day of the year when used by scientists and regulators to classify streams and rivers.⁵³ Fourth, the term “perennial” is not commonly used to scientifically classify the presence of flow or standing water in lakes, reservoirs, wetlands, and other bodies of water besides rivers and streams, and the agencies do not provide any meaningful evaluation or explanation of how the term would be applied to make jurisdictional determinations for those other types of waters, let alone evaluate the impact of doing so.

⁵¹ *Id.* (emphasis added). The agencies also seek comment on whether they should “instead define ‘perennial’ consistent with the 2020 Navigable Waters Protection Rule to mean ‘surface water flowing continuously year-round,’ citing 85 FR 22250, 22339 (April 21, 2020). For the reasons set forth in our previous comments and herein, the agencies should not attempt to readopt all or part of the Navigable Waters Protection Rule’s (“NWPR”) approach to jurisdiction over relatively permanent waters. This regulatory definition was vacated by two federal district courts *Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949 (D. Ariz. 2021) and *Navajo Nation v. Regan*, 563 F. Supp. 3d 1165 (D.N.M. 2021), resulting in restoration of the longstanding pre-2015 regulatory definition text. Additionally, the NWPR definition of perennial was not a stand-alone limitation but rather part of a larger regulatory framework in which rivers and streams with perennial and intermittent flow, and which directly or indirectly contributed surface water flow to a traditional navigable water or the territorial seas in a ‘typical year,’ were considered jurisdictional. *See, e.g.,* Economic Analysis for the Final “Revised Definition of ‘Waters of the United States’” Rule, (Dec. 2022), at 16, Dkt. ID No. EPA-HQ-OW-2025-0322-0110. (Under the NWPR, “tributaries were jurisdictional if they were perennial or intermittent and contributed surface water flow to a traditional navigable water or the territorial seas in a ‘typical year’ either directly or through one or more waters that were jurisdictional under that rule, and excluded ephemeral features,” but impoundments, lakes, and ponds were assessed under a different category.)

⁵² 2026 Supplemental Notice, 91 Fed. Reg. at 57288 n. 2. (emphasis added)

⁵³ *See, e.g.,* U.S. EPA and Corps, Technical Support Document for the Final “Revised Definition of ‘Waters of the United States’” Rule, at 188 (Dec. 2022), available at: <https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-2500> and in the Waterkeeper January 2026 Comments, Attachment 7, *supra* n. 3 (“TSD for the January 2023 Definition”) (“Because there are only three classes, most reaches will fall within specified ranges, but because flow duration itself is a gradient and the factors driving flow duration and its temporal variation are complex, there will be some reaches that fall near the interface between two flow duration classes and will be above a specified threshold one year but below it for another year, even when both years are considered ‘typical years.’”); Fritz KM, et al., *Classifying Streamflow Duration: The Scientific Basis and an Operational Framework for Method Development*. Water, 12(9), 1–2545 (Sept. 11, 2021) <https://doi.org/10.3390/w12092545> (“Similarly, while there is not a universally accepted length of record needed to classify streamflow duration, it is generally accepted that streamflow duration classes represent the typical regime at a reach over many years. While a reach may change streamflow duration classes in the long term due to any number of factors (e.g., long-term water withdrawal or augmentation, channel headcutting, changing climatic conditions), the streamflow duration classification of a reach represents the typical regime and, therefore, does not change year to year.”). (Attachment 5)

In the 2025 Proposed WOTUS Definition, the agencies also proposed an alternative approach that would limit the definition of “relatively permanent waters” to only “perennial” waters, which they claimed are the “most obviously ‘permanent,’ consistent with the *Sackett* decision and the *Rapanos* plurality opinion.”⁵⁴ In the 2026 Supplemental Notice, the agencies also claim that they arrived at the decision to propose this option based on their “consideration of public and stakeholder input” on the 2025 Proposed WOTUS Definition, including “some commenters” that noted “waters that are perennial are most obviously ‘permanent,’ and thus meet any ‘relatively permanent’ threshold consistent with the *Sackett* decision” and the agencies’ “thorough review of the language in *Sackett* and the *Rapanos* plurality.”⁵⁵ However, as explained in detail in our previous comments and below, the agencies do not explain or demonstrate that their unscientific formulation of the term “perennial” includes the waters that are most obviously permanent and, in any event, defining “relatively permanent” as “perennial” (i.e. permanent) is not consistent with those two Supreme Court opinions.

Additionally, the agencies propose two extremely limited, wholly vague and arbitrary exceptions to the requirement that jurisdictional waters have standing water or flow every day of the year—one for “anomalous” events and one for “non-anomalous” events—with which very few waters are likely to qualify. In other words, the agencies’ proposed definitions are intended to require “relatively permanent” waters to actually be permanent waters that flow every day of the year contrary to the Clean Water Act, *Sackett*, and the *Rapanos* plurality opinion.

First, the agencies propose that “[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.” The agencies do not propose definitions or even meaningfully explain the terms “anomalous events,” “drought,” or “dry spell,” and do not provide any explanation for what other types of “anomalous events” would constitute an exception, rendering the exception impermissibly vague. Additionally, this exception is irrational and nonsensical because droughts and dry periods are not anomalous events. To the contrary, they are an ordinary, expected, and recurring feature of the hydrologic cycle that impacts all of the nation’s waters—features that are increasing in frequency, length, and scope due to climate change.⁵⁶ Because this exception requires a drought, dry spell, or some other undefined

⁵⁴ 2025 Proposed Rule Notice, 90 Fed. Reg. at 52519.

⁵⁵ 2026 Supplemental Notice, 91 Fed. Reg. at 57288.

⁵⁶ See, e.g., U.S. EPA, *Climate Adaptation and Drought*, https://19january2021snapshot.epa.gov/arc-x/climate-adaptation-and-drought_.html (last accessed Oct. 5, 2026) (“Climate change is projected to intensify short-term (seasonal or shorter) drought risk across most of the U.S. as well as intensify long-term droughts in large areas of the Southwest, southern Great Plains, and Southeast.”) (Attachment 6); National Oceanic and Atmospheric Administration, *Study: heat, not lack of precipitation, is driving western U.S. droughts*, <https://research.noaa.gov/new-study-finds-heat-not-lack-of-precipitation-is-driving-western-u-s-droughts/> (last accessed Oct. 5, 2026) (“Higher temperatures caused by anthropogenic climate change made an ordinary drought into an exceptional drought that parched the American West from 2020-2022, according to a new study by UCLA,

event to be “an extraordinary departure from ordinary climactic conditions,”⁵⁷ the exception is likely a nullity that would rarely or never render a water jurisdictional.

Additionally, without providing any scientific or any other reasoned basis, the agencies are considering allowing only “extreme (D3) and exceptional (D4) droughts” identified by the U.S. Drought Monitor to “qualify as anomalous drought conditions that can temporarily interrupt perennial flow, and can extend continuously across no more than a five-year timeframe, after which the drought condition would be nullified for purposes of identifying ‘relatively permanent’ waters, and that water would no longer be jurisdictional under its ordinary conditions as the interruption has ceased to be ‘anomalous.’”⁵⁸ The agencies provided no basis for interpreting “drought” as only the most extreme droughts identified by the U.S. Drought Monitor, which is a weekly “snapshot” tool designed for wholly different purposes than evaluating the relative permanence of the nation’s waters and the authors, including four federal agencies and a university, “don’t recommend using it to infer specifics about local conditions.”⁵⁹ Additionally, the agencies selected the five-year time frame based on the “effective period of an approved jurisdictional determination” solely because it would be easy to administer and understand,⁶⁰ which in addition to being arbitrary and unrelated to the textual objective of the Clean Water Act, is contrary to Congressional intent that “the term navigable waters be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.”⁶¹

Second, the agencies propose that “[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 result of non-anomalous events resulting in a temporary interruption such as low tide or a regularly occurring dry spell.”⁶² The agencies irrationally lifted and then arbitrarily modified this concept from the *Sackett* decision’s approach to wetlands and “continuous surface connection”

NOAA and CIRES scientists.”) (Attachment 7); U.S. Geological Survey, *River’s End: Mapping Patterns of Stream Drying in the Western United States*, <https://www.usgs.gov/programs/climate-adaptation-science-centers/science/rivers-end-mapping-patterns-stream-drying> (“Water in the western United States is disappearing, and several states are facing severe water shortages as drought conditions worsen. Many streams are drying up, and there is growing concern that this trend will only continue as climate change produces warmer and drier conditions.”) (Attachment 8).

⁵⁷ 2026 Supplemental Notice, 91 Fed. Reg. at 57288.

⁵⁸ *Id.* at 57290.

⁵⁹ Nat’l Drought Mitigation Ctr., Drought Classification, <https://droughtmonitor.unl.edu/About/AbouttheData/DroughtClassification> (last visited Oct. 5, 2026). (Attachment 9)

⁶⁰ 2026 Supplemental Notice, 91 Fed. Reg. at 57290.

⁶¹ 118 Cong. Rec. 33, 756-57 (Oct. 4, 1972); 1972 Legislative History at 250-51.

⁶² 2026 Supplemental Notice, 92 Fed. Reg. at 57288.

despite the fact that the Court gave no indication that the concept had any application to relatively permanent waters.⁶³ Arbitrarily, the “single period” of “interruption of flow can only occur once in any given year, up to 30 consecutive days” such that if, for example, there is no flow for a single day in March and a single day in August, or there is no flow on August 1 and no flow on August 5 or there is no flow for 31 days, the waterway would be rendered non-jurisdictional even if it had standing water or flow every other day of the year.⁶⁴ The notice indicates the agencies chose a single period of 30 *consecutive* days in a given year based on the unsupported, nonsensical, and circular assertion that “it most closely aligns with the regular and predictable nature of a ‘non-anomalous’ dry spell event that, for example, may occur over the course of a month in any given year.”⁶⁵ This is not a reasoned basis for that limitation. Additionally, the agencies do not define or explain what events would qualify as “non-anomalous,” providing only two examples in the proposed definition—low tides and a “regularly occurring” dry spell, indicating only that it should “ordinarily occur.”⁶⁶ Further, the notice does not meaningfully define what constitutes a dry spell beyond saying that it is a “predictable period of dry weather that typically happens around the same time every year” nor does it explain what makes it a regularly occurring one, indicating only that it must be “generally predictable and expected.”⁶⁷

In addition to the fact that these limitations are exceptionally random, arbitrary, and vague, there is no valid legal or scientific basis for the establishment of these limitations on jurisdictional waters. In fact, the agencies acknowledge that they are unaware of any “precise, scientifically-grounded, nationally consistent time limits for the durations of the temporary interruption due to non-anomalous events” and that they are selecting the 30-day limit because it is “a bright line duration that would be predictable, transparent, and easy to administer.”⁶⁸ Because the agencies did not evaluate how this limitation would impact the nation’s waters, and the information necessary to apply the limitation to the nation’s waters does not exist, it is not possible to determine how many waters would happen to only lose flow within a single consecutive 30-day period each year. But it is possible to say that very few, if any, of the nation’s waters would qualify because the agencies’ have concocted a limitation that is wholly unrelated to the way that rivers, streams, lakes, and other waters variably flow as part of a larger, diverse hydrological system in reality.⁶⁹

⁶³ *Id.* at 57289.

⁶⁴ *See, e.g., id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 57290.

⁶⁹ TSD for the January 2023 Definition, *supra* n. 53, at 120, (“individual streams often transition longitudinally between flow duration classes, from ephemeral to intermittent to perennial, creating patchworks of ephemeral, intermittent, and perennial reaches within a single segment or tributary of a stream network.”).

In addition, as explained in our comments on the 2025 Proposed Rule Notice, many rivers and stream temporarily go subsurface, have altered flow at varying times due to man-made conditions like dams, and have variable flow due to wastewater effluent discharges and water withdrawals that agencies have not evaluated or considered in proposing this rule. These realities are why the agencies do not have adequate scientific information to establish or apply this standard, which in turn means that it would not be predictable, transparent, and easy to administer simply because it is easy to understand what constitutes a consecutive 30-day period.

In the 2025 Proposed Rule Notice, the agencies admitted a very serious flaw with limiting protections to perennial waters by acknowledging that "it may be more challenging to identify whether a stream flows year-round or a few days less than year-round. Such methods or the use of remote tools may require repeated or continuous monitoring over the course of a year or longer to ensure water is standing or flowing year-round."⁷⁰ In the 2026 Supplemental Notice, the agencies just brush aside this fundamental problem they identified only a few months ago and unreasonably claim that they "do not believe that this supplemental option would require continuous monitoring" simply because they have a history of assessing flow regimes (but under completely different regulatory standards).⁷¹ Additionally, Clean Water Act jurisdiction should not turn on whether a water is flowing for 365 or 363 days per year, the overwhelming majority of rivers and streams do not have either repeated or continuous monitoring necessary to make such a determination, and even for the small percentage of rivers and streams where gages are present, they may not accurately detect zero-flow days or may not have adequate temporal or spatial coverage to determine whether a river or stream meets this definition.

According to the U.S. Geological Survey, the nation's stream gage network "covers less than 1% of rivers and streams across the country" and "the current spatial and temporal resolution of streamgages are not sufficient to address challenging questions, such as the long-term and short-term risks of floods and droughts."⁷² Further:

Approximately 3% of the 9,322 US Geological Survey (USGS) gages in the contiguous United States are located on streams with seasonally prolonged zero-flow readings, and 10% have recorded zero-flow for at least 1 day in their period of record In the simplest case, a record of zero-flow at the gage indicates the true lack of flowing water at the gage and, presumably, upstream in the basin. This is a natural phenomenon across river networks in arid and semiarid landscapes and

⁷⁰ 2025 Proposed Rule Notice, 90 Fed. Reg. at 52519.

⁷¹ 2026 Supplemental Notice, 91 Fed. Reg. at 57292.

⁷² U.S. Geological Survey, *The Past, Present and Future of USGS Streamgages*, <https://www.usgs.gov/news/featured-story/past-present-and-future-usgs-streamgages> (last accessed Sept. 24, 2026). (Attachment 10)

in low-order streams in humid regions, and can occur due to transmission losses and evapotranspiration that result in isolated surface water and subsurface flow bypass. Anthropogenic influences such as surface and groundwater abstraction can also cause zero-flow. However, zero-flow readings when there is water flowing at the gage can also occur due to frozen surface water, flow reversals, and equipment uncertainty and error. It is often challenging to reconcile these different causes from flow observations alone.⁷³

For example, the primary limitation in an evaluation of the prevalence of ephemeral, intermittent, and perennial rivers and streams in Arizona “was the limited number of long-term stream gages in Arizona . . . [the researchers] analyzed 70 stream reaches (0.1%) of the more than 70,000 different stream reaches that exist in Arizona . . . Aside from [unassessed] drainage area and stream length, stream types (based on size and flow) were not proportionally represented. [The] sample was biased towards large perennial streams because of the gage-selection criteria used by USGS.”⁷⁴ The researchers further noted that “trying to characterize flow regimes of arid region rivers without long-term flow records will likely lead to mischaracterizations,” that flows in all of the gaged watersheds they evaluated were influenced by human activities such as “irrigation withdraws, irrigation return flows, water supply pumping, wastewater treatment plant return flows, diversions, and dams farther upstream in the watershed,” and that “Arizona streams exhibited wide ranges of intra-annual and inter-annual variability in their flow regimes and flow permanence, so much so that there was not a typical year for any of the gage sites.”⁷⁵

⁷³ Zimmer MA, et al., *Zero or not? Causes and consequences of zero-flow stream gage readings*, WIREs Water, 7(3):10.1002/wat2.1436 (Apr. 27, 2020), <https://pmc.ncbi.nlm.nih.gov/articles/PMC7425737/> (internal citations omitted). (Attachment 11).

⁷⁴ Julian, J. P., Stuhldreher, C., & Wade, M. T., *What Is Relatively Permanent? Flow Regimes of Arizona Streams within the Context of the 2023 Conforming Rule on the Revised Definition of “Waters of the United States,”* Water, 16(18), 2641, at 13 (Sept. 16, 2024), <https://doi.org/10.3390/w16182641>. (Attachment 12)

⁷⁵ *Id.* at 14; see also, Ayers, J. R., et al., (2024). *Perennial and non-perennial streamflow regime shifts across California, USA*. *Water Resources Research*, 60, e2023WR035768. <https://doi.org/10.1029/2023WR035768> (“Despite the proliferation of flow regime classifications at regional (Auerbach et al., 2016; Beaufort et al., 2019; Begou et al., 2015) and national (e.g., Archfield et al., 2014; Merritt et al., 2021) scales, non-perennial streams are often not explicitly classified. Classifying non-perennial streams has been difficult, in part, because gages have primarily been placed on mainstem, perennial rivers (Krabbenhoft et al., 2022). Gages also contain significant error in measuring low and zero flow (Costigan et al., 2017; Zimmer et al., 2020), making it difficult to determine if, when, and for how long a stream is non-perennial. Additionally, definitions for non-perennial streams are inconsistent. For example, some studies define intermittency in streams when a single zero flow day occurs within the record period (e.g., Messenger et al., 2021; Reynolds et al., 2015; Snelder et al., 2013). Others use 5–20 days of zero flow per year (e.g., Eng et al., 2015; N. Poff, 1996; Sauquet et al., 2021; Zipper et al., 2021), and some distinguish ephemeral streams as those that flow only briefly in response to precipitation (e.g., Borg Galea et al., 2019; Costigan et al., 2017; Datry et al., 2017; Goodrich et al., 2018). As a result, key dimensions of stream intermittency are often overlooked in streamflow regime classifications (Acuña et al., 2020), despite their unique role in sustaining biodiversity and other ecosystem services.” (Attachment 13)

The importance of protecting intermittent and ephemeral rivers and streams is well-documented, indisputable, and addressed in detail in our comments on the 2025 Proposed Rule Notice.⁷⁶ For example, as of 2009, EPA reported that “[i]n the continental United States, about 117 million people, over one third of the total U.S. population, get some or all of their drinking water from public drinking water systems that rely at least in part on intermittent, ephemeral, or headwater streams. In the continental U.S., 357,404 total miles of streams provide water for public drinking water systems. Of that total, 58% (207,476 miles) are intermittent, ephemeral, or headwater streams.”⁷⁷ As the agencies acknowledge, they are proposing a definition of “waters of the United States” that would exclude “most intermittent streams” from the protections of the Clean Water Act, whereas “many intermittent streams are considered to be relatively permanent” under the current status quo.⁷⁸ In reality, the agencies’ proposed definitions of “relatively permanent” and “perennial” would likely leave nearly all of the rivers and streams in the United States without any protections under the Clean Water Act and this, in turn, leaves all or nearly all of the nation’s waters unprotected from uncontrolled pollution discharges contrary to the Clean Water Act

⁷⁶ See also, e.g., Price, A. N., & Kaiser, K. E. (2026). *Process-based hydrologic model representations of non-perennial streamflow in the Pacific Northwest, USA*. *Water Resources Research*, 62, e2025WR040626. <https://doi.org/10.1029/2025WR040626> (“Non-perennial rivers and streams are globally pervasive systems that cease to flow, either spatially and/or temporally, and make up the majority of river and stream miles globally and in the Pacific Northwest (Figure 1; Messenger et al., 2021). Non-perennial systems are important mediators of water quality and quantity and provide important ecosystem services and across landscapes (Datry et al., 2023; Price et al., 2024; Zimmer et al., 2022). In the Pacific Northwest, tribal governments, land managers, and community members depend on non-perennial systems as sources of drinking and irrigation water as well as refugia for first foods and other aquatic species. However, there is a paucity of streamflow data in non-perennial systems that give us insights into flow regimes (*sensu* Poff et al., 1997) and other relevant streamflow proxies important to managers and rights-holders.”) (Attachment 14); Mo. Dept. of Conservation, *Vanishing Veins of the Watershed*, (Feb. 17, 2011) (“Some endangered and economically important species rely on intermittent streams for spawning and nursery sites, and many more species depend on these streams for critical stages in their life cycles. Missouri’s rarest crayfish species, the Mammoth Spring crayfish, occurs in only three streams in the state, two of which are intermittent. Reptiles, birds and mammals use the vegetated corridors around intermittent streams and feed on the abundant life within them. Intermittent streams are not only tremendous meeting places for swimming, crawling and flying wildlife to gather, but their other functions are equally vital to wildlife and people. Intermittent streams recycle important nutrients and energy that sustain the biological productivity of downstream rivers and lakes, keeping fish populations healthy and strong. These streams recharge surface and groundwater supplies for our drinking, bathing, irrigation and industrial uses. This water recycling keeps our river and lake water-clarity high, ideal for sport fishing and other recreation. Intermittent streams help control floods by slowing flows and providing floodplains for floodwaters to disperse and recede faster. So, these small streams also hold critical economic value to our society.”) available at: <https://mdc.mo.gov/magazines/conservationist/2011-03/vanishing-veins-watershed> (last accessed Oct. 8, 2026). (Attachment 15)

⁷⁷ U.S. EPA, *Geographic Information Systems Analysis of the Surface Drinking Water Provided by Intermittent, Ephemeral, and Headwater Streams in the U.S.*, <https://www.epa.gov/cwa-404/geographic-information-systems-analysis-surface-drinking-water-provided-intermittent> (last accessed Oct. 5, 2026) (Attachment 16); U.S. EPA, *Geographic Information Systems Analysis of the Surface Drinking Water Provided by Intermittent, Ephemeral and Headwater Streams in the U.S.*, (July 2009), https://www.epa.gov/sites/default/files/2015-04/documents/2009_12_28_wetlands_science_surface_drinking_water_surface_drinking_water_study_summary.pdf (Attachment 17)

⁷⁸ 2026 Supplemental Notice, 91 Fed. Reg. at 57297.

because tributaries, including intermittent and ephemeral tributaries, are the dominant source of water in most larger rivers, which in turn feed into other “waters of the United States.”⁷⁹

For example, EPA has determined that “intermittent and ephemeral streams conservatively account for 59% of the total length of streams in the contiguous United States, most of which are comprised of headwater networks.”⁸⁰ Additionally, a recent detailed GIS-based analysis of waters at risk nationwide conducted by the Natural Resources Defense Council (“NRDC”)⁸¹ using NHD-mapped rivers and streams evaluated a scenario that closely mirrors the proposed definitions in the 2026 Supplemental Notice and found that limiting Clean Water Act protections to perennial rivers and streams could render 8,093,939 miles (79.3%) of NHD mapped rivers and streams non-jurisdictional.⁸² The percentage of loss could likely be even greater if all waters throughout the country were accurately mapped and classified in the NHD and data existed to apply the definitions that the agencies are proposing in the 2025 Proposed Rule Notice and 2026 Supplemental Notice.

⁷⁹ See, e.g., NRDC, *Mapping Destruction: Using GIS Modeling to Show the Disastrous Impacts of Sackett v. EPA on America's Wetlands*, (Mar. 2025), at 14-16, available at: https://www.nrdc.org/sites/default/files/2025-03/Wetlands_Report_R_25-03-B_05_locked.pdf and Waterkeeper January 2026 Comments, Attachment 11 (“NRDC: Mapping Destruction”); (The exclusion of ephemeral and intermittent rivers and streams would equate to the elimination of 77% of the NHD-mapped rivers and streams in 48 continental U.S. states and Washington, D.C.); TSD for the January 2023 Definition, *supra* n. 53, at 153 (“The scientific literature unequivocally demonstrates that tributaries exert a strong influence on the physical integrity of larger downstream waters. Tributaries, even when seasonal, are the dominant source of water in most rivers, rather than direct precipitation or groundwater input to main stem river segments . . . In the northeastern United States headwater streams contribute greater than 60% of the water volume in larger tributaries, including navigable rivers . . . a study of ephemeral tributaries to the Río Grande in New Mexico found that after a storm event contributions of the stormflow from ephemeral tributaries accounted for 76% of the flow of the Río Grande.”); EPA, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (2015), <https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-0074> (“2015 Science Report”), Waterkeeper January 2026 Comments, Attachment 34; U.S. EPA Science Advisory Board Review of the Draft EPA Report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* (2014), <https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-0101> (“2014 SAB Review of Draft Science Report”) Waterkeeper January 2026 Comments, Attachment 35; U.S. EPA Science Advisory Board, *Consideration of the Scientific and Technical Basis for the EPA and Department of the Army's Proposed Rule titled "Revised Definition of Waters of the United States"* (2022), <https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-2503> (“SAB Review of January 2023 Definition TSD”), Waterkeeper January 2026 Comments, Attachment 36.

⁸⁰ TSD for the January 2023 Definition, *supra* n. 53, at 118 (“A recent global model by Messager *et al.* (2021) estimated that 44-53% of stream reach length dries for at least 1 month per year, and that the wettest climate zone still had up to 30% of stream length being non-perennial whereas the driest climate zone had 99% of stream length being non-perennial.”).

⁸¹ See NRDC, Comments on Docket ID No. EPA-HQ-OW-2025- 0322, (May 21, 2026) (“NRDC 2026 GIS Analysis”), available at: <https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-15443>; NRDC, U.S. Wetlands and Streams Are Already Losing Protections—Why Make It Worse?, (Sept. 2, 2026) (“NRDC GIS Map”), available at <https://www.nrdc.org/resources/us-wetlands-and-streams-are-already-losing-protections-why-make-it-worse>. (Attachment 18)

⁸² NRDC 2026 GIS Analysis, *supra* n. 81, at 8-9, Table 2.

In the 2025 Proposed Rule Notice, the agencies acknowledged that perennial streams are rare in the arid West but stated that it may simplify implementation to adopt this approach anyway.⁸³ Simplification is not a valid justification for excluding most of the rivers and streams in the arid West from the Clean Water Act. Additionally, the impacts of limiting Clean Water Act protections to perennial rivers and streams would be extremely severe in many states—not just the arid West. For example, NRDC’s latest state level analysis⁸⁴ indicates that many states could lose Clean Water Act protections for nearly all of their rivers and streams under the approach in the 2026 Supplemental Notice, such as Arizona (98.8%), Arkansas (83.8%) California (90.8%), Colorado (88.9%), Kansas (90%), Missouri (88.8%),⁸⁵ Montana (88.5%),⁸⁶ Nebraska (89.4%), New Mexico (98.2%), North Dakota (93.6%), Oklahoma (81.6%),⁸⁷ Oregon (76.1%),⁸⁸ South Dakota (93.9%), and Utah (93.8%).⁸⁹

The addition of these definitions of “relatively permanent” and “perennial” to the September 2023 Definition would be arbitrary and capricious, inconsistent with the agencies’ prior interpretations of “relatively permanent” in the Navigable Waters Protection Rule,⁹⁰ January 2023 Definition, and September 2023 Definition, and with the Clean Water Act, Supreme Court and lower court precedent, including *Sackett v. EPA*. Rather than grounding the proposed definition in the law, the agencies impermissibly arrived at this definition ostensibly because they assert it “would provide transparency and regulatory certainty for landowners, is easy to understand, and responds to comments that requested a bright line approach,”⁹¹ but actually to establish a non-scientific jurisdictional hurdle that will be nearly impossible to overcome. The agencies lack authority to define “waters of the United States” in this manner and for these reasons.

The scope of jurisdiction over relatively permanent waters has already been resolved by the Supreme Court and the definitions of “relatively permanent” and “perennial” proposed by the agency are inconsistent with Supreme Court precedent. The Court in *Sackett* found the plurality in

⁸³ 2026 Supplemental Notice, 91 Fed. Reg. at 57290, 57297, 57298, 57300.

⁸⁴ NRDC 2026 GIS Analysis, *supra* n. 81.

⁸⁵ NRDC GIS Map, Missouri Impacts of Supplemental Definitions, *supra* n. 81, (Attachment 19); *id.* Missouri Historically Protected Waters. (Attachment 20).

⁸⁶ NRDC GIS Map, Montana Impacts of Supplemental Definitions (Yellowstone and Downstream), *supra* n. 81. (Attachment 21).

⁸⁷ NRDC GIS Map, Oklahoma Impacts of Supplemental Definitions (Spring River, Grand River, Tar Creek), *supra* n. 81. (Attachment 22)

⁸⁸ NRDC GIS Map, Oregon Impacts of Supplemental Definitions (Columbia River), *supra* n. 81. (Attachment 23)

⁸⁹ NRDC 2026 GIS Analysis, *supra* n. 81, at 8-9, Table 2.

⁹⁰ The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22250 (Apr. 21, 2020) (“NWPR”).

⁹¹ *Id.* at 57289

Rapanos to be “correct,”⁹² and the *Rapanos* plurality defined waters as “relatively permanent, standing or flowing bodies of water . . . as found in ‘streams,’ ‘oceans,’ ‘rivers,’ ‘lakes,’ and ‘bodies’ of water ‘forming geographical features.’”⁹³ By adding the term “relatively permanent” to “standing or flowing bodies of water,” the *Rapanos* plurality opinion makes clear that streams, oceans, rivers, lakes, and other bodies of water forming geographical features are not required to have standing or flowing water every day of the year in order to be protected by the Clean Water Act. In addition, excluding waters merely because they lack surface flow for more than 30 consecutive days or lack surface flow on one or more days in different months would be inconsistent with the *Sackett* and *Rapanos* plurality opinions. The *Sackett* court endorsed the *Rapanos* plurality opinion, which clarified that “relatively permanent” waters do not necessarily exclude “streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought”⁹⁴ or “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 . . . Common sense and common usage distinguish between a wash and seasonal river.”⁹⁵ There is an enormous gap between excluding “a wash” from the Clean Water Act as indicated by the Supreme Court and excluding all waters that do not have standing or flowing water every day of the year under ordinary conditions as currently proposed by the agencies. Moreover, *Rapanos* and *Sackett* do not support the agencies’ proposed requirement that a lack of water must be anomalous or that the lack of water must only be present for no more than a continuous 30-day period due to non-anomalous conditions.

The agencies have also long recognized that the Clean Water Act protects far more than perennial waters and have interpreted the *Sackett* and *Rapanos* plurality opinions consistent with that understanding and the language in those decisions. Because the Clean Water Act is designed to achieve its objective by ensuring broad protections for the nation’s waters so that pollution is controlled at its source, it is imperative that the regulatory definition broadly encompass all of

⁹² *Sackett*, 598 U.S. at 671 (“And for the reasons explained below, we 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.”’). (internal citations omitted).

⁹³ *Rapanos*, 547 U.S. at 732-33. Specifically, the *Rapanos* plurality concluded that “[o]n 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.” *Id.* (internal citations omitted).

⁹⁴ *Id.* at 732 n.5.

⁹⁵ *Id.* (internal citations omitted); see also, e.g., *San Francisco Baykeeper v. City of Sunnyvale*, No. 5:20-CV-00824-EJD, 2023 WL 8587610, at *4 (N.D. Cal. Dec. 11, 2023) (finding creeks to be “waters of the United States” because “they flow seasonally, whereby they contain a continuous flow during some months and no flow during dry months, and more than in direct response to precipitation, which *Rapanos* explicitly does not exclude from the definition of [waters of the United States].”) (citing *Rapanos*, 547 U.S. at 732 n.5.).

those connected waters—both to protect their physical, chemical, and biological integrity and to protect the integrity of any downstream surface waters to which they are connected.⁹⁶

In response to the *Sackett* decision, the agencies amended the January 2023 Regulatory Definition so that it includes only: “[t]ributaries of waters identified in paragraph (a)(1) or (2) of this section that are relatively permanent, standing or continuously flowing bodies of water.”⁹⁷ This includes relatively permanent streams, rivers, lakes, ponds, impoundments, ditches, canals, and other bodies of water forming geographical features consistent with *Sackett*. The agencies adopted the requirement for flow “continuously during certain times of the year” because they determined “it is consistent with the *Rapanos* plurality opinion, it reflects and accommodates regional differences in hydrology and water management, and it can be implemented using available, easily accessible tools.”⁹⁸

In the January 2023 Notice, the agencies noted that the *Rapanos* plurality held that “relatively permanent” did “‘not necessarily exclude 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.’”⁹⁹ Accordingly, the agencies determined:

The phrase “certain times of the year” is intended to include extended periods of standing or continuously flowing water occurring in the same geographic feature year after year, except in times of drought. The defining characteristic of relatively permanent waters with flowing or standing water continuously during only certain times of the year is a temporary lack of surface flow, which may lead to isolated pools or dry channels during certain periods of the year. The phrase “direct response to precipitation” is intended to distinguish between episodic periods of flow associated with discrete precipitation events versus continuous flow for extended periods of time.¹⁰⁰

Further, under the Pre-2015 Definition and *Rapanos* Guidance, “tributaries are considered relatively permanent if they typically flow year-round or have continuous flow at least seasonally

⁹⁶ See, e.g., NRDC GIS Map, Missouri and Mississippi Rivers Impacts of Supplemental Definitions (Near St. Louis, MO), *supra* n. 81. (Attachment 24)

⁹⁷ See, e.g., 40 C.F.R. § 120.2(a)(3) (2023); see also January 2023 Definition, 88 Fed. Reg. at 3080; Economic Analysis for the Final “Revised Definition of ‘Waters of the United States’” Rule, (Dec. 2022), at 15, Dkt. ID No. EPA-HQ-OW-2025-0322-0110.

⁹⁸ See, e.g., January 2023 Definition, 88 Fed. Reg. at 3084-3085 (citing *Rapanos*, 547 U.S. at 739, 742).

⁹⁹ *Id.* at 3084 (citing *Rapanos*, 547 U.S. at 732 n.5 and the NWPR, 85 Fed. Reg. at 22289) (emphasis added).

¹⁰⁰ *Id.* at 3085.

(e.g., typically three months).”¹⁰¹ However, the agencies expressly rejected that approach for the September 2023 Definition for numerous reasons, including that “directly describing the scenarios in which waters would be ‘relatively permanent’ is clearer than using the term ‘seasonal,’ the meaning of which can vary and could be misunderstood to establish a specific required flow duration.”¹⁰² Similarly, the agencies noted that many factors may affect the period in which relatively permanent flow may occur and the factors are climatically and geographically specific (e.g. likely to vary by region such as where precipitation is distributed somewhat uniformly during the year or where streams are fed by high elevation snowpack melt).¹⁰³

The agencies also determined that there are “challenges associated with requiring a specific flow duration,” and that it is important to also encompass waters that have relatively permanent flow that is not linked to recurring annual or seasonal cycles, such as tributaries with flow that is driven by water management regimes like those “with extensive flow alteration (e.g., diversions, bypass channels, water transfers) and effluent-dependent streams.”¹⁰⁴ With regard to establishing flow duration and timing requirements, such as a minimum of three months, the agencies determined not to include such requirements “because flow duration varies extensively by region . . . [and] [e]stablishing a uniform number equally applicable to the deserts in the arid West, the Great Lakes region, and New England forests would not be scientifically sound.”¹⁰⁵ The agencies further noted that “[m]oreover, it would often be infeasible for the regulated community or agency staff to determine whether a stream ordinarily flows or whether a lake contains standing water, for example, 12 weeks as opposed to 11 weeks per year. Even if this determination was possible, such a bright line cutoff would not reflect hydrological diversity among different regions and alterations in flow characteristics.”¹⁰⁶

The agencies also determined that not including a minimum duration is consistent with both the NWPR and Pre-2015 approaches.¹⁰⁷ For example, in the NWPR, the agencies decided not to provide a specific duration like the number of days, weeks, or months “of surface flow that constitutes intermittent flow, as the time period that encompasses intermittent flow can vary widely

¹⁰¹ *See, e.g., id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 3086.

¹⁰⁴ *Id.* at 3085.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 3085-3086.

¹⁰⁷ *Id.* at 3086 (“The agencies’ conclusion that a minimum duration is not feasible is consistent with the pre-2015 regulatory regime, which did not establish a bright line cutoff (though provided three months as an example of seasonal flow) and with the approach of the 2020 NWPR. See 85 Fed. Reg. 22292 (April 21, 2020)”)

across the country based upon climate, hydrology, topography, soils, and other conditions.”¹⁰⁸ Under the September 2023 Definition, the agencies also evaluate the entire reach of the tributary that is of the same Strahler stream order and lakes, ponds, and impoundments that are part of a tributary network are assessed in conjunction with the stream they connect to.¹⁰⁹ This is, in part, because “individual streams often transition longitudinally between flow duration classes, from ephemeral to intermittent to perennial, creating patchworks of ephemeral, intermittent, and perennial reaches within a single segment or tributary of a stream network.”¹¹⁰

As noted above, in the 2026 Supplemental Notice, the agencies implausibly claim that the supplemental proposed “relatively permanent” definition “would provide transparency and regulatory certainty for landowners, is easy to understand, and responds to comments that requested a bright line approach.”¹¹¹ The notice further claims that these definitions provide landowners with “clear notice of their obligations under the Clean Water Act” and “does not leave property owners ‘to feel their way on a case-by-case basis.’” Additionally, the notice absurdly asserts that “[i]f members of the public see that waters dry up in circumstances other than during anomalous events (e.g., drought and non-regularly occurring dry spells) or non-anomalous events (e.g., low tides, regularly occurring dry spells), they would know those waters would not be jurisdictional under this supplemental option simply by observation, without the need for any further analysis or professional consultation.”¹¹² After making this unsupported assertion, the notice proceeds to a lengthy discussion of a host of complex tools and methods that could potentially be used to make such jurisdictional determinations—tools and methods that would not be necessary if anyone could simply “see that waters dry up” in anomalous or non-anomalous events and know whether a water is jurisdictional. Additionally, as detailed in our previous comments, even these tools and methods are not appropriate for making Clean Water Act jurisdictional determinations.

For a landowner or anyone else to know whether a river is jurisdictional under this approach, for example, they would not only have to know daily information about flow, drought, dry spells, tides, and what are anomalous or non-anomalous conditions at the location of interest but also at every downstream location until the river reaches a traditional navigable water or territorial sea, plus they would also have to know, among other things, whether there are channelized non-jurisdictional features that do not convey relatively permanent flow at any point downstream.¹¹³

¹⁰⁸ *See id.*

¹⁰⁹ January 2023 Definition, 88 Fed. Reg. at 3086.

¹¹⁰ TSD for January 2023 Definition, *supra* n. 53, at 119.

¹¹¹ 2026 Supplemental Notice, 91 Fed. Reg. at 57289.

¹¹² *Id.* at 57290-57291.

¹¹³ 2025 Proposed Rule, 90 Fed. Reg. at 52546.

Obtaining all of this information is impossible for government agencies, let alone a landowner or any other private party. Scientists across the country have been working for decades, and are still working, to develop and refine reliable methods for evaluating permanence and flow regimes.¹¹⁴ It is absurd for the agencies to assert it can be determined by a person simply observing if the waters dry up and that continuous monitoring would not be required.¹¹⁵

As demonstrated by the fact that the agencies were unable to meaningfully evaluate the impact of this proposed change on the jurisdictional status of waters and on Clean Water Act programs¹¹⁶ and by the fact that, in this notice, the agencies have posed a host of questions about how to implement their proposed definition,¹¹⁷ the agencies' proposed definitions of "relatively permanent" and "perennial" are impermissibly vague, arbitrary, and capricious and are by no means an easy to understand and apply test for landowners. In fact, it is neither understandable nor implementable by the agencies themselves.

C. Definition of Continuous Surface Connection

Under the September 2023 Definition, consistent with *Sackett* and the *Rapanos* plurality, wetlands are "waters of the United States" if they are adjacent to traditional navigable waters, interstate waters, the territorial seas, or adjacent to jurisdictional impoundments or tributaries and have a continuous surface connection to those waters, adjacent being defined as a "continuous surface connection."¹¹⁸ The 2026 Supplemental Notice proposes to virtually eliminate Clean Water Act protections for the nation's adjacent wetlands through adoption of arbitrary, non-scientific definitional requirements for "continuous surface connection" that the agencies know most wetlands lack and that are wholly inconsistent with the Clean Water Act, Supreme Court precedent, and longstanding agency interpretations. In fact, in the 2026 Supplemental Notice, the agencies expressly acknowledge that they "anticipate that the majority of wetlands that are jurisdictional as adjacent wetlands under current regimes would not satisfy the supplemental definition of 'continuous surface connection,' as most wetlands do not contain perennial surface water."¹¹⁹ According to NRDC's latest analysis, the 2026 Supplemental Notice approach could preclude Clean Water Act protections for at least 79,234,092 acres (94.3%) of wetlands mapped

¹¹⁴ See, e.g., U.S. Geological Survey, *Streamflow Permanence, Projects*, <https://webapps.usgs.gov/streamflow-permanence/projects.html>, (Attachment 25); *Classifying Streamflow Duration: The Scientific Basis and an Operational Framework for Method Development*, *supra* n. 53.

¹¹⁵ 2026 Supplemental Notice, 91 Fed. Reg. at 57292.

¹¹⁶ See, e.g., 2026 Supplemental Notice, 91 Fed. Reg. at 57296-57298.

¹¹⁷ See, e.g., 2025 Proposed Rule, 90 Fed. Reg. at 52519-52521, 52525-52526; 2026 Supplemental Notice, 91 Fed. Reg. at 57291-57292.

¹¹⁸ See, e.g., 40 C.F.R. § 120.2(a)(4).

¹¹⁹ 2026 Supplemental Notice, 91 Fed. Reg. at 57298.

in the National Wetlands Inventory, with several states losing protections for 100 percent of their mapped wetlands (Colorado, North Dakota, Nebraska, Utah, and Wyoming) and many more losing protections for nearly all of their wetlands.¹²⁰

Specifically, using many of the same flawed, arbitrary terms and requirements employed for “relatively permanent” waters described above, the agencies are proposing that:

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.¹²¹

Additionally, the notice states, without providing a reasonable basis, that “[o]nly the portion of the wetland that is indistinguishably part of the jurisdictional water would be itself jurisdictional.”¹²²

Neither this definition nor anything similar to it has ever been employed by the agencies or the Supreme Court to determine the jurisdictional status of wetlands under the Clean Water Act. Although the agencies attempt to shoehorn their proposed definition into consistency with the *Sackett* decision, nothing in that opinion, or in any other Supreme Court decision, supports the idea that only wetlands “having standing or continuously flowing water every day of the year during ordinary conditions” that are continuously connected with the surface water in another jurisdictional water qualify as “waters of the United States.”

This is because wetlands are not characterized by the perennial presence of surface water, but rather constitute “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.”¹²³ Despite this, the agencies propose establishing a requirement that wetlands have perennial surface water “for the sake of consistency

¹²⁰ NRDC 2026 GIS Analysis, *supra* n. 81, at 7-8, Table 1. Wetlands included in the table as “Potentially Protected Wetland Acres Pre-Sackett” are those expected to meet the regulatory definition of “wetland.”

¹²¹ 2026 Supplemental Notice, 91 Fed. Reg. at 57301. (emphasis added)

¹²² *Id.* at 57294.

¹²³ *See, e.g.*, 40 C.F.R. § 120.2(c)(1).

with the supplemental proposed definition of ‘relatively permanent.’”¹²⁴ This is not a reasonable basis or good reason for establishing the requirement that all jurisdictional wetlands have perennial surface water, especially with the knowledge that such a requirement is directly at odds with the nature and definition of wetlands.

The agencies also state that they are proposing this definition of “continuous surface connection” to “introduce greater clarity.”¹²⁵ In addition to the fact that such a goal does not justify eliminating protections for adjacent wetlands, for the reasons discussed above, the agencies’ mandate for “perennial” surface water and creation of exceptions for “anomalous” and “non-anomalous” events are arbitrary, capricious, and contrary to law and, do not in any sense “further simplify implementation” or allow jurisdictional determinations to be made by the general public with “the naked eye.”¹²⁶ That assertion is unreasonable and unsupportable. As was the case with relatively permanent waters, the agencies do not even know how they will apply this standard themselves and are seeking comment on a wide range of potential complex scientific tools and methods for identifying continuous surface connections.¹²⁷ None of those tools and methods involve a person simply observing the wetland with their “naked eye” and knowing the wetlands jurisdictional status “without any further analysis.”¹²⁸

In any event, the agencies aren’t charged with simplifying the “waters of the United States” definition or making it possible for someone to look at water and know without analysis if it is protected by the Clean Water Act. Instead, the agencies are charged with achieving the Act’s objective of protecting and restoring the chemical, physical, and biological integrity of the nation’s waters and, accordingly, the agencies must define “continuous surface connection” in a way that is consistent with that legal obligation. However, the agencies did not even attempt to ensure that the proposed definition is consistent with achieving the Act’s objective and expressed no reservations about it despite finding that their approach would eliminate Clean Water Act protections for the majority of currently protected wetlands.

The proposed definition of “continuous surface connection” in the 2026 Supplemental Notice is also contrary to the Court’s holdings in *Sackett, Rapanos*, and *Riverside Bayview* and the agencies’ interpretation of these and other precedents set forth in the Preamble to the January 2023 and

¹²⁴ 2026 Supplemental Notice, 91 Fed. Reg. at 57294.

¹²⁵ *Id.* at 57295.

¹²⁶ *Id.* at 57296.

¹²⁷ See, e.g., *id.* See also, Lane, C.R., et al., *Linking wetlands to relatively permanent flowing waters: a conterminous United States geospatial analysis*, Wetlands Ecol. Manage 33, 30 (2025). <https://doi.org/10.1007/s11273-025-10046-3>, available at: <https://www.regulations.gov/document/EPA-HQ-OW-2025-0322-0058>.

¹²⁸ *Id.*

September 2023 Definitions.¹²⁹ For example, in *Sackett*, the Court expressly announced the following test for asserting jurisdiction over wetlands: “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.”¹³⁰ Neither *Sackett* nor *Rapanos* require, or even support the concept, that both a wetland and its “continuous surface connection” must, with limited exceptions, contain surface water every day of the year as the agencies now propose.

Moreover, both *Rapanos* and *Sackett* build upon the Court’s decision in *Riverside Bayview*, which expressly upheld the Corps’ regulation asserting Clean Water Act jurisdiction over “any adjacent wetlands that form the border of **or are in reasonable proximity to other waters of the United States**, as these wetlands are part of this aquatic system” protected by the Clean Water Act.¹³¹ And by wetlands, the Court did not mean wetlands with perennial surface water but rather actual wetlands where “saturation by either surface or ground water is sufficient to bring an area within the category of wetlands, provided that the saturation is sufficient to and does support wetland vegetation.”¹³² Thus, the unanimous *Riverside Bayview* opinion confirms the breadth of the Clean Water Act and precludes the agencies’ proposal to exclude wetlands that do not contain surface water every day of the year under ordinary conditions as proposed in the 2026 Supplemental Notice. Perhaps it is for this reason that the agencies never mention *Riverside Bayview* in the 2026 Supplemental Notice, except in relation to summarizing certain public comments received by the agencies.

In sum, Supreme Court precedent does not provide any basis for limiting Clean Water Act protection to only wetlands and surface connections that are permanently covered by surface water every day of the year, either with or without the limited exceptions proposed by the agencies. In fact, the agencies’ proposed definition is contrary to that precedent. The 2026 Supplemental Notice definition is also contrary to longstanding agency interpretations and practice, and the agencies have completely failed to provide a reasoned basis for rejecting them in favor of the proposed definition. For example, it is settled that a “continuous surface connection” is a physical-connection requirement,¹³³ as opposed to a constant-hydrologic one as proposed here, and that non-jurisdictional streams, ditches, culverts, and similar features with less than “relatively permanent” flow can “serve as a physical connection that maintains a continuous surface

¹²⁹ See, e.g., January 2023 Definition, 88 Fed. Reg. at 3095-96.

¹³⁰ *Sackett*, 598 U.S. at 678-79.

¹³¹ *Riverside Bayview*, 474 U.S. at 133-34 (emphasis added) (discussing 33 CFR § 323.2(c) (1985)).

¹³² *Id.* at 129-30.

¹³³ See e.g., *Rapanos*, 547 U.S. at 747, 751 n.13; see also, TSD for January 2023 Definition, *supra* n. 53, at 169.

connection between an adjacent wetland and a relatively permanent water.”¹³⁴ The agencies recently confirmed this longstanding view in their review of the NWPR as follows:

A continuous surface connection does not mean a continuous *surface water connection* and **does not require surface water to be continuously present between the wetland and water to which it is adjacent**. The plurality opinion indicates that “continuous surface connection” is a “physical connection requirement.” 547 U.S. at 751 n.13 (referring to “our physical-connect requirement” and later stating that *Riverside Bayview* does not reject “the physical-connection requirement”). The agencies’ approach is consistent with science, as well as the regulatory definition of “wetlands,” which does not require such aquatic resources to have water on the surface . . . While some wetlands are permanently or semipermanently inundated, many aquatic resources that meet the regulatory definition of “wetlands” may never have surface water (i.e., have saturated soils), may only have surface water during or immediately after precipitation events (i.e., are irregularly inundated), or may only have water at the surface seasonally (i.e., are seasonally inundated). **Since wetlands frequently do not contain surface water, a requirement for continuous surface water between a relatively permanent water and adjacent wetlands would be illogical as a scientific and practical matter.** As discussed in section III.B.ii.1, scientific literature and the agencies technical expertise supporting regulating such wetlands with a continuous surface connection to tributaries that meet the relatively permanent standard and to jurisdictional relatively permanent impoundments as “waters of the United State” under the final rule.¹³⁵

According to the January 2023 Preamble, “under the relatively permanent standard for adjacent wetlands, wetlands meet the continuous surface connection requirement if they physically abut, or touch, a relatively permanent paragraph (a)(2) impoundment or a jurisdictional tributary when the jurisdictional tributary meets the relatively permanent standard, or if the wetlands are connected to these waters by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert.”¹³⁶ The

¹³⁴ January 2023 Definition, 88 Fed. Reg. at 3095 (“This approach to the continuous surface connection is supported by the scientific literature, case law, and the agencies’ technical expertise and experience. As the Court of Appeals for the Sixth Circuit has explained, ‘it does not make a difference whether the channel by which water flows from a wetland to a navigable-in-fact waterway or its tributary was manmade or formed naturally.’ *United States v. Cundiff*, 555 F.3d 200, 213 (6th Cir. 2009) (‘Cundiff’) (holding wetlands were jurisdictional under the *Rapanos* plurality where plaintiff created a continuous surface connection by digging ditches to enhance the acid mine drainage into the creeks and away from his wetlands).”).

¹³⁵ TSD for 2023 Definition, *supra* n. 53, at 169-70. (emphasis added)

¹³⁶ January 2023 Definition, 88 Fed. Reg. at 3090; *see also* U.S. EPA and Corps, September 24, 2024, Presentation: Updates on “Waters of the United States” at 26-27, available at https://www.epa.gov/system/files/documents/2024-09/wotus-overview_9-24-24_508c.pdf, Waterkeeper January 2026 Comments, Attachment 23.

agencies stated this “is consistent with science, as well as the regulatory definition of ‘wetlands,’ which does not require such aquatic resources to have water on the surface.”¹³⁷ Additionally, “longstanding practice is that wetlands in the mosaic are not individually delineated, but that the Corps considers the entire mosaic and estimates percent wetland in the mosaic.”¹³⁸

Under the Pre-2015 Definition, adjacent wetlands have a continuous surface connection where they “physically abut or touch a jurisdictional water” (i.e., they are not separated by uplands, a berm, dike, or similar barrier from the OHWM of the water to which they are adjacent) or “are connected to a jurisdictional water by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert (per pre-2015 case law, see *United States v. Cundiff* (2009), and prior practice.”¹³⁹ Similarly, the *Rapanos* Guidance provides that wetlands can be adjacent if “there is an unbroken surface or shallow subsurface connection to jurisdictional waters” and if “their proximity to a jurisdictional water is reasonably close, supporting the science-based inference that such wetlands have an ecological interconnection with jurisdictional waters.”¹⁴⁰

Inexplicably, the agencies specifically solicited comments on an yet another alternative approach that would attempt to elevate language regarding “indistinguishability” from *Sackett* in order to eliminate the “relevance of the terms ‘adjacent’ and ‘abutting,’” resulting in their removal from any definition of “waters of the United States.”¹⁴¹ Because this would be contrary to the text of the Clean Water Act and to three fundamental Supreme Court decisions that have consistently held that the Clean Water Act covers adjacent wetlands, the agencies should not do that.

Clean Water Act Section 404(g)(1) authorizes states and tribes to administer their own individual and general permit program for the discharge of dredged or fill material into certain waters of the United States “including wetlands adjacent thereto.”¹⁴² Based on the inclusion of that language in Section 404(g)(1), the Court in *Riverside Bayview* concluded that “Congress expressly stated that

¹³⁷ TSD for January 2023 at 169-70, *supra* n. 53.

¹³⁸ *Id.* at 258.

¹³⁹ See, e.g., U.S. EPA and Corps, September 24, 2024, Presentation: Updates on “Waters of the United States” at 47, available at https://www.epa.gov/system/files/documents/2024-09/wotus-overview_9-24-24_508c.pdf, Waterkeeper January 2026 Comments, Attachment 23; EPA and Corps, Presentation – November 15, 2023, Updates for Tribes and States on “Waters of the United States,” at 48, available at: https://www.epa.gov/system/files/documents/2023-11/wotus-overview_tribes-and-states_11-15-23_508.pdf, Waterkeeper January 2026 Comments, Attachment 24.

¹⁴⁰ U.S. EPA and Corps, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States and Carabell v. United States*, at 5-6 (Dec. 2, 2008) (“*Rapanos* Guidance”) available at: https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.

¹⁴¹ 2026 Supplemental Notice, 91 Fed. Reg. at 57295.

¹⁴² 33 U.S.C. § 1344(g)(1).

the term ‘waters’ included adjacent wetlands.”¹⁴³ The Court in *Sackett* and the *Rapanos* plurality also confirmed that adjacent wetlands are “waters of the United States” under the Clean Water Act. According to the Court in *Sackett*, “[i]n *Rapanos*, the plurality spelled out clearly when adjacent wetlands are part of covered waters” and the Court adopted that approach in announcing its own test for asserting jurisdiction over adjacent wetlands.¹⁴⁴ Until potentially this moment, the agencies have also consistently recognized that the “waters of the United States” encompass adjacent wetlands. For example, as Justice Kavanaugh noted in his *Sackett* concurrence, “[i]n the years since 1977, no one has seriously disputed that the Act covers adjacent wetlands. And in light of the text of the Act, eight consecutive Presidential administrations have recognized that the Act covers adjacent wetlands.”¹⁴⁵ The agencies have not provided a reasoned basis for disregarding this precedent and eliminating “adjacent” from the regulatory definition.

Similarly, the Supreme Court and the agencies have consistently recognized that wetlands abutting jurisdictional waters are also “waters of the United States.” The unanimous *Riverside Bayview* decision upheld Clean Water Act jurisdiction over a wetland that actually abutted on a navigable waterway.¹⁴⁶ The *Rapanos* plurality characterized the Court’s holding in *Riverside Bayview* as resting “upon the inherent ambiguity in defining where water ends and abutting (“adjacent”) wetlands begin, permitting the Corps’ reliance on ecological considerations *only to resolve that ambiguity* in favor of treating all abutting wetlands as waters.”¹⁴⁷ The Court in *Sackett* also discussed *Riverside Bayview*’s holding in which the Court “deferred to the Corps’ decision to regulate wetlands actually abutting a navigable waterway.”¹⁴⁸

Lastly, while it is apparent that this definition was designed for application to wetlands, it is important to note that “continuous surface connection” also applies to (a)(5) lakes and ponds in both the September 2023 Definition and the current proposed rulemaking. However, the proposed definition of “continuous surface connection” in the 2026 Supplemental Notice is nonsensical when applied to (a)(5) lakes and ponds given the definition’s internal reference to determining “where the jurisdictional water ends and the wetland begins.”

¹⁴³ *Riverside Bayview*, 474 U.S. at 138.

¹⁴⁴ *Sackett*, 598 U.S. at 678-79.

¹⁴⁵ *Sackett*, 598 U.S. at 724 (Kavanaugh, J., concurring).

¹⁴⁶ *Riverside Bayview*, 474 U.S. at 135.

¹⁴⁷ *Rapanos*, 547 U.S. at 742.

¹⁴⁸ *Sackett*, 598 U.S. at 677-78.

Conclusion

For all of the reasons stated above, Commenters urge the agencies to withdraw the proposed rule, Docket ID No. EPA–HQ–OW–2025–0322, and to undertake an evaluation of how the agencies can support cooperative federal, state, and tribal government implementation of the Clean Water Act, including assessing how the September 2023 Definition and Pre-2015 regime are impacting the nation’s waters, and what actions the agencies can take to address ongoing water quality impairments and restore protections to waters that are not currently encompassed within those definitions.

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Sean Bothwell
California Coastkeeper Alliance
Sacramento, California

Garry Brown
Inland Empire Waterkeeper
Costa Mesa, California

Garry Brown
Coachella Valley Waterkeeper
Costa Mesa, California

Jaime Neary
Russian Riverkeeper
Healdsburg, California

Charles Scribner
Black Warrior Riverkeeper
Birmingham, Alabama

Michael Mullen
Choctawhatchee Riverkeeper
Troy, Alabama

Satchel Pondolfin
Cook Inletkeeper
Homer, Alaska

Jennifer Kalt
Humboldt Waterkeeper
Arcata, California

Erina Kwon
Los Angeles Waterkeeper
Los Angeles, California

Garry Brown
Orange County Coastkeeper
Costa Mesa, California

Phillip Musegaas
San Diego Coastkeeper
San Diego, California

Ted Morton
Santa Barbara Channelkeeper
Santa Barbara, California

Traci Sheehan
Yuba River Waterkeeper
Nevada City, California

Dara Illowsky
Long Island Soundkeeper
New Haven, Connecticut

Dean Naujoks
Potomac Riverkeeper
Washington, District of Columbia

Brent Walls
Upper Potomac Riverkeeper
Washington, District of Columbia

Jen Lomberg
Matanzas Riverkeeper
St. Augustine, Florida

Abbey Tyrna
Suncoast Waterkeeper
Sarasota, Florida

Maggie Van Cantfort
Altamaha Coastkeeper
Brunswick, Georgia

Damon Mullis
Ogeechee Riverkeeper
Savannah, Georgia

Tonya Bonitatibus
Savannah Riverkeeper
Augusta, Georgia

Konrad Fisher
Shasta Waterkeeper
Somes Bar, California

Cindy Medina
Alamosa Riverkeeper
La Jara, Colorado

Trey Sherard
Anacostia Riverkeeper
Washington, District of Columbia

Mark Frondorf
Shenandoah Riverkeeper
Washington, District of Columbia

Jason Pim
Calusa Waterkeeper
Fort Myers, Florida

Lisa Rinaman
St. Johns Riverkeeper
Jacksonville, Florida

Justin Tramble
Tampa Bay Waterkeeper
St. Petersburg, Florida

Fletcher Sams
Altamaha Riverkeeper
Brunswick, Georgia

Shannon Gregory
Satilla Riverkeeper
Waycross, Georgia

Emily Floore
St. Marys Riverkeeper
Kingsland, Georgia

John S. Quarterman
Suwannee Riverkeeper
Hahira, Georgia

Dawn Buehler
Kansas Riverkeeper
Lawrence, Kansas

Pete Nichols
Penobscot Bay Waterkeeper
Belfast, Maine

Maegan White
Chester Riverkeeper
Chestertown, Maryland

Theaux Le Gardeur
Gunpowder Riverkeeper
Sparks, Maryland

Frederick Tutman
Patuxent Riverkeeper
Upper Marlboro, Maryland

Matt Henjum
Waterkeepers Chesapeake
Annapolis, Maryland

Robert Burns
Detroit Riverkeeper
Taylor, Michigan

Jessica Gauley
Pearl Riverkeeper
Jackson, Mississippi

Guy Alsentzer
Upper Missouri Waterkeeper
Bozeman, Montana

Buck Ryan
Snake River Waterkeeper
Boise, Idaho

Ivy Frignoca
Casco Baykeeper
Portland, Maine

Alice Volpitta
Baltimore Harbor Waterkeeper
Baltimore, Maryland

Matt Pluta
Choptank Riverkeeper
Easton, Maryland

Ben Ford
Miles-Wye Riverkeeper
Easton, Maryland

Zack Kelleher
Sassafras Riverkeeper
Easton, Maryland

Julie Silverman
Lake Champlain Lakekeeper
Boston, Massachusetts

Christine Crissman
Grand Traverse Bay Waterkeeper
Traverse City, Michigan

Michael Howell
Bitterroot River Protection Association, a
Waterkeeper Alliance Affiliate
Hamilton, Montana

Melissa Paly
Great Bay-Piscataqua Waterkeeper
Portsmouth, New Hampshire

Sandra LaVigne
Great Swamp Watershed Association –
Passaic River Waterkeeper Affiliate
Morristown, New Jersey

Bill Schultz
Raritan Riverkeeper
Keasbey, New Jersey

Jane Conroe
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Chris Navitsky
Lake George Waterkeeper
Lake George, New York

Pete Topping
Peconic Baykeeper
Hampton Bays, New York

Bridget Wright
Upper St. Lawrence Riverkeeper
Clayton, New York

Erin Sherrill
Deep River Riverkeeper
Jamestown, North Carolina

Erica Shanks
Green Riverkeeper
Asheville, North Carolina

Katey Zimmerman
Pamlico Tar Riverkeeper
Washington, North Carolina

Gregory Remaud
NY/NJ Baykeeper
Hazlet, New Jersey

Jill Jedlicka
Buffalo Niagara Waterkeeper
Buffalo, New York

Drew Gamils
Hudson Riverkeeper
Ossining, New York

Andrew Mirchel
Long Island South Shore Waterkeeper
Babylon, New York

Joseph Campbell
Seneca Lake Guardian, a Waterkeeper
Alliance Affiliate
Watkins Glen, New York

David Caldwell
Broad Riverkeeper
Shelby, North Carolina

Anna Alsobrook
French Broad Riverkeeper
Asheville, North Carolina

Samantha Krop
Neuse Riverkeeper
Raleigh, North Carolina

Hartwell Carson
Upper New Riverkeeper
Asheville, North Carolina

Andy Hill
Watauga Riverkeeper
Boone, North Carolina

Nicole Eastman
Yadkin Riverkeeper
Winston-Salem, North Carolina

Rebecca Jim
Tar Creekkeeper
Miami, Oklahoma

Glenn Fee
Tualatin Riverkeepers
Tualatin, Oregon

Ted Evgeniadis
Lower Susquehanna Riverkeeper
Wrightsville, Pennsylvania

Kate McPherson
Narragansett Bay Riverkeeper
Providence, Rhode Island

Erin Donmoyer
Black-Sampit Riverkeeper
Georgetown, South Carolina

Debra Buffkin
Lumber Riverkeeper
Conway, South Carolina

Preston Kelly
Waccamaw Riverkeeper
Conway, South Carolina

Zachary Frankel
Great Salt Lake Waterkeeper
Millcreek, Utah

Christina Boxberger
White Oak Waterkeeper
Beaufort, North Carolina

Martin Lively
Grand Riverkeeper
Miami, Oklahoma

Miles Johnson
Columbia Riverkeeper
Hood River, Oregon

Lindsey Hutchison
Willamette Riverkeeper
Eugene, Oregon

Heather Hulton VanTassel
Three Rivers Waterkeeper
Pittsburgh, Pennsylvania

Kate McPherson
South County Coastkeeper
Providence, Rhode Island

Bill Stangler
Congaree Riverkeeper
Columbia, South Carolina

Dylan Coleman
Pee Dee-Lynches Riverkeeper
Conway, South Carolina

Kristen Schlemmer
Bayou City Waterkeeper
Houston, Texas

Kirsten McDade
North Sound Waterkeeper
Bellingham, Washington

Kathryn Rizzo
Puget Soundkeeper Alliance
Seattle, Washington

Maya Rommwatt
Twin Harbors Waterkeeper
Elma, Washington

Cheryl Nenn
Milwaukee Riverkeeper
Milwaukee, Wisconsin

Katelyn Scott
Spokane Riverkeeper
Spokane, Washington

Autumn Crowe
West Virginia Headwaters Waterkeeper
Charleston, West Virginia