January 5, 2026

Submitted Via Regulations.gov

Re: Updated Definition of ‘‘Waters of the United States,’’ Dkt. ID No. EPA–HQ–OW–2025–0322, 90 Fed. Reg. 52,498 (Nov. 20, 2025)

The Honorable Lee M. Zeldin
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

The Honorable Adam Telle
Assistant Secretary of the Army (Civil Works)
Office of the Assistant Secretary of the Army
Department of the Army
108 Army Pentagon
Washington, DC 20310-0104

Dear Administrator Zeldin and Assistant Secretary Telle:

We write on behalf of Americans for Prosperity Foundation (“AFPF”), a 501(c)(3) nonpartisan organization that educates and trains citizens to be advocates for freedom, creating real change at the local, state, and federal levels. AFPF appreciates the opportunity to comment on the U.S. Environmental Protection Agency’s (“EPA”) and the U.S. Department of the Army, Corps of Engineers (“Corps”) (together, “the Agencies”) proposed Updated Definition of “Waters of the United States” (“Proposed Rule”).[1] AFPF believes that proper environmental stewardship, including appropriate measures to ensure the American people have clean water, can coexist with our system of dual sovereignty, respect for due process, and private property rights. Under the U.S. Constitution, and the system of cooperative federalism established by the Clean Water Act (“CWA”), States have primary responsibility for land and water use regulation.

AFPF applauds the Agencies’ efforts to bring their interpretation of “waters of the United States” (“WOTUS”) in line with statutory and constitutional limits on their jurisdiction, consistent with the Supreme Court’s decision *Sackett v. EPA*,[2] President Trump’s directives,[3] and the Executive Branch’s obligations under the U.S. Constitution’s Take Care Clause.[4] Properly updating the Agencies’ WOTUS definition is a key component of much-needed permitting reform—a critical component of unleashing American prosperity. AFPF believes the Agencies’ proposal dramatically improves on the Agencies’ so-called “conforming” rule.[5] AFPF believes the Proposed Rule, in its current form, is more faithful to 33 U.S.C. § 1362(7)’s single best reading, and better respects constitutional limits on federal jurisdiction.

[1] 90 Fed. Reg. 52,498 (Nov. 20, 2025).
[2] 598 U.S. 651 (2023).
[3] *See* Presidential Memorandum, Directing the Repeal of Unlawful Regulations (Apr. 9, 2025) (directing agency heads to evaluate regulations for compliance with *Sackett* and to repeal those that are unlawful).
[4] *See* U.S. Const. art. II, § 3.
[5] *See* 88 Fed. Reg. 61,964 (Sept. 8, 2023).

As written, the updated WOTUS definition and exclusions provide greater certainty and predictability for stakeholders and better protect due process and property rights than its predecessor. The Proposed Rule is a meaningful step towards simplifying compliance, reducing regulatory burdens, and providing property owners with fairer notice of whether they are subject to federal jurisdiction under the CWA. AFPF respectfully suggests that the updated WOTUS definition can be further improved and offers the following general recommendations:

- The statutory qualifiers "navigable" and "of the United States" should be read in harmony to closely tether the updated WOTUS Rule to navigable-in-fact bodies of water capable of reaching interstate waterways. Regulation of fully intrastate features lacking a surface water connection to navigable waters capable of being used for interstate transportation must be left to the States.
- The WOTUS definition and exclusions should be as bright line, objective, and easy for ordinary people to understand and implement as is possible.
- Features that in ordinary parlance are not oceans, rivers, streams, and lakes, or indistinguishable from those waters, should be clearly excluded from federal jurisdiction.
- The Agencies should be sensitive to the vagueness and fair-notice problems, and corollary danger of arbitrary and discriminatory enforcement, that have arisen with past interpretations of 33 U.S.C. § 1362(7). Experience has shown that amorphous WOTUS definitions are subject to abuse by field offices and private litigants.
- Because the CWA is backed by criminal penalties, WOTUS must be construed consistent with principles of lenity. This holds particularly true because it criminalizes a broad array of ordinary activities (*e.g.*, moving dirt) without meaningful mens rea protections and imposes crushing civil penalties on a strict-liability basis.

AFPF urges the Agencies to craft a definition of WOTUS that adopts the CWA's single best meaning, fixed at the time of enactment, restores States' primacy in regulating water and land use, and gives ordinary people clarity on the statute's reach.

I. General Principles of Statutory Interpretation.

Agencies are creatures of statute, which possess only those powers Congress chooses to confer upon them,[6] subject to constitutional limits.[7] They "literally ha[ve] no power to act" absent congressional authorization.[8] As *Loper Bright v. Raimondo* makes clear, federal statutes like the CWA "do—in fact, must—have a single, best meaning," which "is fixed at the time of enactment."[9] The Agencies must therefore seek to ascertain and respect the single best meaning of 33 U.S.C. § 1362(7).

Because possible readings of the CWA raise serious constitutional concerns, additional background principles are relevant to the interpretive project. As the Supreme Court stated just last Term, "[s]tatutes (including regulatory statutes) should be read, if possible, to comport with the

[6] *See FEC v. Cruz*, 596 U.S. 289, 301 (2022).
[7] *See Loper Bright Enters. v. Raimondo,* 603 U.S. 369, 395 (2024).
[8] *Cruz*, 596 U.S. at 301; *see Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).
[9] *See* 603 U.S. at 400. The CWA does not expressly delegate to the Agencies interpretive discretion to alter or expand the meaning of 33 U.S.C. § 1362(7). *Cf. Loper Bright*, 603 U.S. at 394–95 & nn.5–6.

Constitution, not to contradict it."[10] The Court has applied that approach to limit the scope of WOTUS, rejecting interpretations of the CWA that "stretch the outer limits of Congress's commerce power and raise difficult questions about the ultimate scope of that power"[11] or that "give rise to serious vagueness concerns in light of the CWA's criminal penalties."[12] In addition, because "[r]egulation of land and water use lies at the core of traditional state authority,"[13] and as the CWA itself "recognize[s]" is among "the primary responsibilities and rights of States,"[14] the Supreme "Court has required a clear statement from Congress when determining the scope of 'the waters of the United States.'"[15] This accords with basic principles of cooperative federalism that permeate the CWA's permitting scheme and the key principle that Congress must "enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property."[16] Furthermore, because violations of the CWA can carry criminal penalties, the rule of lenity counsels against interpretations that would extend federal jurisdiction to features not plainly covered by the statutory text.[17]

II. The Single Best Meaning of 33 U.S.C. § 1362(7).

The CWA establishes a permitting structure that authorizes the Agencies to regulate "navigable waters,"[18] defined as "the waters of the United States, including the territorial seas."[19] This definition is a firm limit on the Agencies' authority to regulate. It cabins federal jurisdiction in three important ways: the Agencies only have authority over (1) "waters" that are (2) "navigable" and (3) "of the United States."[20] Although "navigable waters" is a defined term, the requirement of navigability is reinforced by both the statutory phrase "navigable waters" and because "waters of the United States" is necessarily limited by the Commerce Clause and thus navigability is a required element of being capable of being used to conduct commerce.[21] The Agencies thus lack jurisdiction unless all three conditions are met.

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[10] *FCC v. Consumers' Rsch*., 606 U.S. 656, 691 (2025).
[11] *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality) (citing *Solid Waste Agency of N. Cook County ("SWANCC") v. United States Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001)).
[12] *Sackett*, 598 U.S. at 680.
[13] *Id.* at 679.
[14] 33 U.S.C. § 1251(c).
[15] *Sackett*, 598 U.S. at 680 (citation omitted).
[16] *Id.* at 679 (citation omitted). The federalism canon "has played an important role in interpreting the Clean Water Act[.]" *N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC*, 76 F.4th 291, 298 (4th Cir. 2023).
[17] Because it is a hybrid statute carrying both civil and criminal penalties, *see* 33 U.S.C. § 1319(c), the rule of lenity applies, *see Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *see, e.g., Texas v. EPA,* 662 F. Supp. 3d 739, 752 (S.D. Tex. 2023); *West Virginia v. EPA*, 669 F. Supp. 3d 781, 799 (D.N.D. 2023) (similar).
[18] 33 U.S.C. § 1344(a).
[19] *Id.* § 1362(7). Although the CWA statutorily defines "territorial seas," *see id.* § 1362(8), it does not define the phrase WOTUS, *see Cty. of Maui v. Haw. Wildlife Fund,* 590 U.S. 165, 198 n.4 (2020). Regrettably, WOTUS is "decidedly not a well-known term of art[.]" *Sackett*, 598 U.S. at 671.
[20] "The CWA's jurisdictional terms have a long pedigree and are bound up with Congress' traditional authority over the channels of interstate commerce." *Sackett*, 598 U.S. at 685 (Thomas, J., concurring).
[21] *See generally The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870) (discussing the power of Congress over commerce among the states and "navigable waters" as "a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water").

A. "Waters"

As to the first textual limit, a feature must first qualify as "waters." In *Sackett*, the Supreme Court held that "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.'"[22] This understanding is consistent with § 1362(7)'s "use of the definite article ('the') and the plural number ('waters')," which forecloses reading it to "refer to water in general."[23] It also best reflects the ordinary meaning of "waters" at the time of the CWA's enactment.[24] In its plural form, "waters" is best read to "designate a body of water, such as a river a lake, or an ocean, or an aggregate of such bodies of water[.]"[25] However, delineating the boundaries of these waters is notoriously difficult, as the edge of most water features is in continuous motion due to tides, seasons, weather, drought, etc.

Consider the status of wetlands. In common parlance, "the ordinary meaning of 'waters' in § 1362(7) might seem to exclude *all* wetlands[.]"[26] However, statutory context elucidates that a limited subset of "wetlands" may qualify as WOTUS insofar as—and because—they are *indistinguishably* bound up with and thus are a part of incontrovertible "waters." Specifically, in 1977 Congress amended the CWA to "authorize[] States to establish their own permit programs over a discrete class of traditionally navigable waters of the United States,"[27] consistent with the CWA's system of cooperative federalism under which the States are primarily tasked with protecting water quality.[28] This amendment allowed the States to do so for "navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, . . . including wetlands adjacent thereto)[.]"[29] This "nonjurisdictional provision" thereby "*expand*[*ed*] state authority"—*not* federal authority—authorizing States to regulate water bodies that used to be but are no longer navigable waters of the United States.[30]

To be sure, this "relatively obscure provision concerning state permitting programs"[31] cannot reasonably be read to have brought "about an enormous and transformative expansion in EPA's regulatory authority,"[32] as "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide

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[22] 598 U.S. at 671 (citations omitted).
[23] *Rapanos*, 547 U.S. at 732 (plurality).
[24] Because "waters"—like WOTUS—is undefined, it should be given its ordinary meaning, as it was understood when the statue was enacted. *See Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 277 (2018); *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006).
[25] Black's Law Dictionary 1426 (5th ed. 1979). The ordinary meaning of "waters" is difficult to square "with classifying 'lands,' wet or otherwise, as 'waters.'" *Sackett*, 598 U.S. at 672 (citations omitted).
[26] *Sackett*, 598 U.S. at 674.
[27] *Id.* at 704 n.9 (Thomas, J., concurring).
[28] *See* 33 U.S.C. § 1251(c).
[29] 33 U.S.C. § 1344(g)(1). "Ordinary" connotes "[r]egular; usual; normal; common; often recurring" as in "not characterized by peculiar or unusual circumstances[.]" Black's Law Dictionary 1249 (4th ed. 1951); *accord* Webster's Seventh New Collegiate Dictionary 594 (1972) (defining "ordinary" as "to be expected").
[30] *Sackett*, 598 U.S. at 704 n.9 (Thomas, J., concurring).
[31] *Id.* at 677 (majority op.).
[32] *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014).

elephants in mouseholes."[33] Indeed, *Sackett* squarely foreclosed attempts to construe expansion of *state* power over wetlands as a grant of power to the Agencies to regulate "wetlands" as WOTUS.[34] But while § 1344(g)(1) did not expand or alter the scope § 1362(7)'s definition of "navigable waters" as "waters of the United States,"[35] it shows that "at least some wetlands may qualify as" WOTUS,[36] "consistent with the commonsense recognition that some wetlands are *indistinguishable from* navigable waters with which they have continuous surface connections."[37] In other words, although features like wetlands are not as a general matter "waters," wetlands may be federally regulated if they "qualify as 'waters of the United States' in their own right."[38]

Sackett holds that for a "wetland" to qualify as "waters" potentially subject to the CWA's jurisdiction, two conditions must be met: "'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.'"[39] Under *Sackett*, "[w]etlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby."[40]

But consistent with the nature of water features, *Sackett* also "acknowledge[s] that temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells."[41] In other words, simply because the lowest water level during the driest day of the year breaks the surface connection, it does not follow that all the contiguous water on the landward side of that broken connection is no longer part of the larger body of water. That would belie both common sense and common law. Where and how to draw the line is a hard question and there may be more than one appropriate test. But there is a long-running, existing test in Anglo-American law that can be used to determine the boundaries of water features: the mean annual high-water mark.[42] *Borax Consolidated, Ltd., v. Los Angeles* is instructive.[43] In *Borax*, the

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[33] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).
[34] *See Sackett*, 598 U.S. at 677–78.
[35] *See id.* at 682. "Section 1344(g)(1) . . . is not the operative provision that defines the Act's reach." *Id.* at 676. Section 1344(a) limits federal jurisdiction to "navigable waters," as defined by § 1362(7).
[36] *Sackett*, 598 U.S. at 675.
[37] *Id.* at 704 n.9 (Thomas, J., concurring).
[38] *Id.* at 676 (majority op.).
[39] *Id.* at 678–79 (quoting *Rapanos*, 547 U.S. at 742 (plurality)); *see Rapanos*, 547 U.S. at 747–48 (plurality) (equating "adjacent" with "physically abutting"); *see also id.* at 776 (Kennedy, J., concurring) ("[W]hen a surface-water connection is lacking, the [*Rapanos*] plurality forecloses jurisdiction over wetlands that abut navigable-in-fact waters[.]"); *United States v. Cundiff*, 555 F.3d 200, 212 (6th Cir. 2009) ("the [*Rapanos*] plurality's test requires a topical flow of water").
[40] *Sackett*, 598 U.S. at 676. That said, "a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA." *Id.* at 678 n.16.
[41] *Id.* at 678.
[42] This concept is distinct from the absolute high-water mark that may occur due to an isolated instance such as a flood or precipitation event. An annual mean high-water mark test takes the average daily fluctuations of water into account to ascertain the extent to which a surface-water connection exists. *Cf.* West's ALR Digest Water Law § 2665 ("The term 'ordinary high-water mark' is not the line reached by unusual floods, but is the line to which high water ordinarily reaches. (citing *Peck v. Alfred Olsen Const. Co*., 238 N.W. 416 (Iowa 1931)); *5F, LLC v. Dresing*, 142 So. 3d 936, 939 (Fla. Dist. Ct. App. 2014) ("The mean high water line or ordinary high water mark is described as 'the point up to which the presence and action of the water is so continuous as to destroy the value of the land for agricultural purposes by preventing the growth of vegetation.'" (citation omitted)).
[43] 296 U.S. 10 (1935).

Supreme Court determined the boundary delineating upland from tidal land by using the "mean high water" line, determined by reference to "the average height of all the high waters at that place over a considerable period of time[.]"[44] Under this methodology, if a wetland, or other water feature, ebbs and flows throughout the year and the mean annual high-water mark would create a connection with a navigable body of water included in WOTUS then the adjacent body is part of the larger body and within the reach of Congress's regulatory authority. Such an approach derives largely from the common law pertaining to the line between private fast lands and commonly-held waterways;[45] and thus, the use of mean water levels presents an approach that is consistent with tradition and easy to understand.[46] Moreover, existing law provides a variety of methods for how and when to perform the calculation of mean high water levels for tidal zones, such as by using a nineteen-year lunar cycle.[47]

In sum, wetlands subject to federal regulation under the CWA are likely to constitute a small subset of all wetlands—the vast majority of which are subject to State and local regulation.[48] *Sackett*'s two-part test sets forth necessary but not sufficient preconditions that must be met and establishes the outer boundaries of the CWA.[49] To qualify as "waters" it is not enough that a wetland be located near WOTUS; rather, the wetland must be a part of, *i.e*., indistinguishable from, those jurisdictional waters. And indistinguishability should be measured using the annual mean high-water mark. The CWA does not reach ground water, puddles, irrigation ditches, culverts, and the like, which lack the requisite connection to traditional navigable waters.[50] Nor, for that matter, does it reach isolated ponds or purely intrastate waters.[51] The ordinary presence of water does not

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[44] *See id.* at 26–27. In *Borax*, the Court found that mean high-water mark should be ascertained by reference to the 18.6-year lunar cycle. *See id.*

[45] *See Kaiser Aetna v. U. S*., 444 U.S. 164, 167–70 (1979) (discussing how dredging a pond and connecting it by channel to a bay on the Pacific Ocean converted it from unencumbered "fast" land to navigable waters subject to navigational servitude).

[46] *Id*. at 167 (using "mean sea level" as reference for height of proposed bridge).

[47] *See, e.g.*, 35 Fla. Jur 2d Maps, Plats, and Surveys § 32 ("The mean high-water line is thus determined by averaging the high tides over a 19-year period (a full lunar cycle).").

[48] As *Sackett* observed, "[t]he area covered by wetlands alone is vast—greater than the combined surface area of California and Texas." 598 U.S. at 680. And under the CWA only "some wetlands must qualify as 'waters of the United States.'" *Id.* at 675. But it does not follow that nonjurisdictional wetlands are not subject to appropriate regulation. To the contrary, "States can and will continue . . . to combat water pollution by regulating land and water use." *Id.* at 683. And at least as a general matter the federal government has authority—separate and distinct from its Commerce Clause power to regulate interstate navigation—to protect wetlands on federal land (*e.g*., national parks) as it sees fit. *See* U.S. Const. art. IV, § 3, cl. 2 (granting Congress power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States").

[49] In other words, qualifying "waters" might be but are not necessarily WOTUS.

[50] *See United States v. Sharfi,* No. 21-CIV-14205, 2024 U.S. Dist. LEXIS 233982, at *3 (S.D. Fla. Dec. 30, 2024) ("'continuous surface connection' means a surface water connection"); *see, e.g., Lewis v. United States*, 88 F.4th 1073, 1078 (5th Cir. 2023) ("roadside ditches, a culvert, and a non-relatively permanent tributary" insufficient to establish requisite surface connection under *Sackett*); *United States v. Ace Black Ranches, LLP*, No. 1:24-cv-00113-DCN, 2024 U.S. Dist. LEXIS 156797, at *8 (D. Idaho Aug. 29, 2024) (dismissing complaint due to government's failure to "specify that these [alleged] wetlands have a continuous surface connection with the River to be considered indistinguishable from the River, satisfying the adjacency test" under *Sackett*); *United States v. Chameleon, LLC*, Civil Action No. 3:23-cv-763-HEH, 2024 U.S. Dist. LEXIS 145921, at *17 (E.D. Va. Aug. 15, 2024) (dismissing government's complaint because it "alleges no facts to substantiate the conclusions that a 'continuous surface connection' exists or that the tributaries are 'relatively permanent'").

[51] *See Sackett*, 598 U.S. at 674 (noting *SWANCC* "held that the Act does not cover isolated ponds" (citation omitted)).

confer jurisdiction.[52] Federal jurisdiction does not extend to "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[53]

B. Navigability and "Waters of the United States"

The scope of federal power under the CWA is further bounded by the jurisdictional requirement that qualifying "waters" must be "of the United States" to be regulated.[54] While the majority in *Sackett* did not interpret "other jurisdictional terms—[including] . . . 'of the United States,'" Justice Thomas's scholarly concurrence persuasively takes up that task.[55] The Agencies should use this rulemaking to give the best reading to this second jurisdictional term. The statutory term "of the United States" should be read in harmony to closely tether the updated WOTUS Rule's scope to navigable-in-fact bodies of water capable of reaching interstate waterways, consistent with the ordinary meaning of those words and constitutional limits on federal power. Because "navigable waters" is a defined term, the requirement of navigability is reinforced by both the statutory phrase "navigable waters" and because "waters of the United States" is necessarily limited by the Commerce Clause and thus navigability is a required element of being capable of being used to conduct interstate commerce.[56]

As the Agencies recognize, "[n]avigability remained the lodestar of Federal authority over water regulation for most of our Nation's history prior to the Clean Water Act."[57] Indeed, "[f]or a century prior to the CWA, [the Supreme Court] had interpreted the phrase 'navigable waters of the United States' in the Act's predecessor statutes to refer to interstate waters that are 'navigable in fact' or readily susceptible of being rendered so."[58] The CWA was enacted against this backdrop and should be presumed to incorporate a similar understanding.[59] Contemporary dictionary definitions bolster this conclusion. At that time, Black's Law Dictionary defined "navigable waters of the United States" as those that "form in their ordinary condition by themselves, or by united with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by

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[52] *See Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1360 (S.D. Ga. 2019) ("[T]he Agencies' inclusion of all interstate waters within the definition" for WOTUS "extends beyond their authority under the CWA.").
[53] *Rapanos*, 547 U.S. at 739 (plurality)
[54] *See* 33 U.S.C. § 1362(7).
[55] *See Sackett*, 598 U.S. at 685 (Thomas, J., concurring). "In practice, Justice Thomas's understanding of 'waters of the United States' would mean that only those waters that are navigable in fact could be regulated under the Clean Water Act." Damien M. Schiff, *Sackett v. EPA II: Ascertaining the Scope of Wetlands Jurisdiction Under the Clean Water Act*, Cato Sup. Ct. Rev. 243, 260 (2023).
[56] *Cf. Sackett*, 598 U.S. at 672 (The Supreme Court has "refused to read 'navigable' out of the statute, holding that it at least shows that Congress was focused on 'its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.'" (quoting *SWANCC*, 531 U.S. at 172)).
[57] 90 Fed. Reg. at 52,501.
[58] *Rapanos*, 547 U.S. at 723 (plurality) (citing *The Daniel Ball*, 77 U.S. (10 Wall.) at 563); *United States v. Appalachian Elec. Power Co*., 311 U.S. 377, 406 (1940)); *see SWANCC*, 531 U.S. at 168 ("Respondents put forward no persuasive evidence that the Corps mistook Congress' intent in 1974" when its 1974 regulations narrowly defined "navigable waters" consistent with traditional definition). For those who find legislative history useful, *see Milner v. Dep't of the Navy*, 562 U.S. 562, 573–74 (2011), nothing in it "signifies that Congress intended to exert anything more than its commerce power over navigation," *SWANCC*, 531 U.S. at 168 n.3, in the CWA.
[59] *See Shapiro v. United States*, 335 U.S. 1, 16 (1948) ("In adopting the language used in the earlier act, 'Congress must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment.'" (quoting *Hecht v. Malley*, 265 U.S. 144, 153 (1924)).

water."[60] Mere navigability without a nexus to interstate commerce was insufficient to establish federal jurisdiction.

In a similar vein, "the CWA's use of the phrase 'the waters of the United States' reinforces . . . the need for a water to be at least part of 'a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.'"[61] When the CWA was enacted, "[t]he terms 'navigable waters' and 'waters of the United States' shared a core requirement that the water be a 'highway over which commerce is or may be carried,' with the term 'of the United States' doing the independent work of requiring that such commerce 'be carried on with other States or foreign countries.'"[62] "As traditionally understood," the "of the United States" "qualifier excludes intrastate waters, whether navigable or not."[63] By contrast, even if navigable, it was historically understood that if a water body "is not of itself a highway for commerce with other States or foreign countries, or does not form such highway by its connection with other waters, and is only navigable between different places within the State, then it is not a navigable water of the United States, but only a navigable water of the State[.]"[64] Properly understood, then, "waters of the United States" are those "waters" that are in fact, or may "reasonably be made[,] a highway of interstate or foreign commerce."[65]

AFPF respectfully submits that the Agencies should update the Proposed Rule to reflect this understanding in line with the CWA's focus on traditional navigable waters.[66]

III. The CWA's Scope is Constrained By Constitutional Limits on Federal Power.

Before Congress can confer power on an administrative agency, it must first have that power itself. Congress's power is derived only from grants in the Constitution and subject to constraints therein. The federal government "is acknowledged by all to be one of enumerated powers."[67] And it "can claim no powers which are not granted to it by the [C]onstitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication."[68] Without a constitutional grant of authority to Congress, it simply cannot act.[69] Instead, "the Constitution provides that all powers not specifically granted to the Federal Government are reserved to the States or" the People.[70]

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[60] Black's Law Dictionary 1179 (4th ed. 1951); *accord* Black's Law Dictionary 926 (5th ed. 1979).
[61] *Sackett*, 598 U.S. at 702 (Thomas, J., concurring) (quoting *The Daniel Ball*, 77 U.S. (10 Wall.) at 563).
[62] *Id.* at 699 (Thomas, J., concurring) (quoting *The Daniel Ball*, 77 U.S. (10 Wall.) at 563).
[63] *Rapanos*, 547 U.S. at 731 n.3 (plurality); *see The Daniel Ball*, 77 U.S. (10 Wall.) at 563 (using "of the United States" to distinguish navigable-in-fact waters used for interstate and foreign commerce from those used only for intrastate commerce).
[64] *The Montello*, 78 U.S. (11 Wall.) 411, 415 (1870).
[65] *Sackett*, 598 U.S. at 707 (Thomas, J., concurring). That was the Corps understanding in 1974, shortly after the CWA was enacted. *See id.* at 699–700 (Thomas, J., concurring).
[66] "'[T]raditional navigable waters'" are "interstate waters that . . . [are] either navigable in fact and used in commerce or readily susceptible of being used in this way[.]" *Sackett*, 598 U.S. at 659.
[67] *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819).
[68] *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816).
[69] *See Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018) ("The Constitution confers on Congress not plenary legislative power but only certain enumerated powers."); *NFIB v. Sebelius*, 567 U.S. 519, 647 (2012) (Scalia, J., dissenting).
[70] *Shelby Cty. v. Holder*, 570 U.S. 529, 543 (2013) (citing U.S. Const. amend. X).

The Constitution grants Congress authority "to regulate Commerce" "among the several States,"[71] and the power to "make all Laws which shall be necessary and proper for carrying into Execution" its enumerated powers.[72] Properly understood, neither provision authorizes the federal government to regulate wholly intrastate land and water use decisions untethered to Congress's power to regulate interstate trade and transportation. As the Agencies recognize, "Congress' authority to regulate navigable waters derives from its Commerce Clause power over the channels of interstate commerce."[73] "From the beginning, it was understood that '[t]he power to regulate commerce, includes the power to regulate navigation,' but only 'as connected with the commerce with foreign nations, and among the states.'"[74] In other words, under the original understanding, "[t]he power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie."[75] Importantly, "activities that merely 'affect' water-based commerce, such as those regulated by '[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State,' are not within Congress' channels-of-commerce authority."[76]

The CWA invokes Congress's power under the Commerce Clause to regulate navigation.[77] And thus the CWA "must be interpreted in light of Congress' traditional authority over navigable waters."[78] But even if it were otherwise, any federal authority to regulate beyond Congress's "commerce power over navigation"[79] must follow from the Necessary and Proper Clause,[80] which

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[71] U.S. Const. art. I, § 8, cl. 3.

[72] U.S. Const. art. I, § 8, cl. 18.

[73] 90 Fed. Reg. at 52,501 (citing *SWANCC*, 531 U.S. at 168 & n.3, 172, 173–74); *see* U.S. Const., Art. I § 8, cl. 3. When the "Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes." *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring). This understanding of commerce "stood in contrast to productive activities like manufacturing and agriculture." *Gonzales v. Raich*, 545 U.S. 1, 58 (2005) (Thomas, J., dissenting); *see Kidd v. Pearson*, 128 U.S. 1, 20 (1888) (contrasting commerce with manufacturing). "[T]he founding generation would not have seen production activities . . . as being part of commerce." William J. Seidleck, *Originalism and the General Concurrence: How Originalists Can Accommodate Entrenched Precedents While Reining in Commerce Clause Doctrine*, 3 U. Pa. J. L. & Pub. Affs. 263, 269 (2018).

[74] *Sackett,* 598 U.S. at 686–87 (Thomas, J., concurring) (quoting *United States v. Coombs*, 37 U.S. (Pet.) 72, 78 (1838) (Story, J.)). "Congress's power under the Interstate Commerce Clause operates only on commerce that involves 'more States than one.'" *Haaland v. Brackeen*, 599 U.S. 255, 323 (2023) (Gorsuch, J., concurring) (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 194). As a matter of first principles, "the Constitution does not give Congress power to regulate intrastate commerce." *Am. Trucking Ass'ns v. City of L.A.*, 569 U.S. 641, 655 (2013) (Thomas, J., concurring) (citation omitted); *see License Tax Cases*, 72 U.S. (5 Wall.) 462, 470–71 (1867) ("Congress has no power of regulation nor any direct control" over "internal commerce or domestic trade of the States").

[75] *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 724–25 (1866).

[76] *Sackett*, 598 U.S. at 688 (Thomas, J., concurring) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824)).

[77] The CWA does not implicate Congress's power to regulate matters that substantially affect interstate commerce under current jurisprudence. *See SWANCC*, 531 U.S. at 168 n.3. "*SWANCC* . . . interpreted the text of the CWA as implementing Congress' 'traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made'—i.e., the expanded *Daniel Ball* test." *Sackett*, 598 U.S. at 703–04 (Thomas, J., concurring) (citing 531 U.S. (10 Wall.) at 172). *But see SWANCC,* 531 U.S. at 181 (Stevens, J., dissenting) ("The activities regulated by the CWA have nothing to do with Congress' 'commerce power over navigation.' Indeed, the goals of the 1972 statute have nothing to do with navigation at all.").

[78] *Sackett*, 598 U.S. at 705 (Thomas, J., concurring).

[79] *SWANCC*, 531 U.S. at 168 n.3.

[80] *See Coombs*, 37 U.S. at 78. "[A]ctivities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone." *Raich*, 545

"is not itself a grant of power, but a caveat that the Congress possesses all the means necessary to carry out the specifically granted 'foregoing' powers of § 8[.]"[81] That Clause requires that a law must be both "necessary and proper[.]"[82] These are "distinct requirements,"[83] both of which must be met. To be "necessary," a law must be "'appropriate' and 'plainly adapted' to the exercise of an enumerated power[.]"[84] "Plainly adapted" connotes "some obvious, simple, and direct relation between the statute and the enumerated power."[85]

"No law that flattens the principle of state sovereignty, whether or not 'necessary,' can be said to be 'proper.'"[86] Under our system of federalism, the "general power of governing" belongs to the States, not the federal government, which has no general police powers.[87] Within their borders, and "subject always to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states," states have primary authority to regulate the water and the land beneath the water.[88] Similarly, "[r]egulation of land use, as through the issuance of the development permits . . . , is a quintessential state and local power."[89]

Application of these principles to the CWA counsels toward limiting WOTUS to "the aquatic channels of interstate commerce over which Congress traditionally exercised authority."[90]

IV. The CWA Should Be Construed Consistent with Federalism Principles.

The Act's "waters of the United States" language should be interpreted against the backdrop of federalism, the traditional authority of the States to regulate water and land use, and limits on Congress's enumerated powers. As *Sackett* reaffirmed, Congress must "enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property."[91] That principle applies with full force to the CWA because "[r]egulation of land and water use lies at the core of traditional state authority."[92] Indeed, it has been described as "the quintessential state activity."[93] And the "power

U.S. at 34 (Scalia, J., concurring). Under current precedent, this power "derives from the Necessary and Proper Clause." *Id.* (Scalia, J., concurring). *But see Lopez*, 514 U.S. at 588–89 (Thomas, J., concurring).

[81] *Kinsella v. United States*, 361 U.S. 234, 247 (1960).

[82] U.S. Const. art. I, § 8, cl. 18.

[83] Gary Lawson & Patricia Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L. J. 267, 276 (1993).

[84] *United States v. Comstock*, 560 U.S. 126, 160–61 (2010) (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 421).

[85] *Sabri v. United States*, 541 U.S. 600, 613 (2004) (Thomas, J., concurring). *Cf. United States v. Dewitt,* 76 U.S. (9 Wall.) 41, 44 (1869) (intrastate "prohibition of the sale of the illuminating oil" not "appropriate and plainly adapted for carrying into execution" Congress's taxing power).

[86] *Bond v. United States*, 572 U.S. 844, 879 (2014) (Scalia, J., concurring in judgment).

[87] *See NFIB v. Sebelius*, 567 U.S. at 535–36; *see New York v. United States*, 505 U.S. 144, 181 (1992).

[88] *Ill. C. R. Co. v. Illinois*, 146 U.S. 387, 435 (1892); *see also SWANCC*, 531 U.S. at 174 (noting "States' traditional and primary power over land and water use").

[89] *Rapanos*, 547 U.S. at 738 (plurality) (citation omitted).

[90] *Sackett*, 598 U.S. at 697 (Thomas, J., concurring).

[91] *Id.* at 679 (majority op.).

[92] *Id.*

[93] *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982).

to control navigation, fishing, and other public uses of water is 'an essential attribute of'" States' traditional police powers.[94]

As the Supreme Court has recognized, "[t]he phrase 'the waters of the United States' hardly qualifies" as the requisite clear statement to upend cooperative federalism and the balance between federal and state power the Constitution requires.[95] Underscoring this, the CWA expressly recognizes that it is "the primary responsibilities and rights of States" to manage and protect their "land and water resources[.]"[96] It plainly "'anticipates a partnership between the States and the Federal Government'" in which States "exercise their primary authority to combat water pollution by regulating land and water use."[97] In short, "[t]he baseline under the Constitution, the CWA, and the Court's precedents is state control of waters."[98]

Consistent with these principles, the Supreme Court has rejected interpretations of the CWA "stretch[ing] the outer limits of Congress's commerce power and rais[ing] difficult questions about the ultimate scope of that power."[99] The Agencies should follow that approach here. The term WOTUS may be interpreted "in a manner that remains faithful to its Commerce Clause origins and is readily applicable by the average person," so as to "allow[] the federal government to protect navigation and the water quality of much of the nation's creeks, rivers, streams, and lakes without putting the average member of the public at risk of violating the criminal law."[100] Congress's authority to regulate WOTUS should be subject to a commonsense limit that ordinary people of the Framers' generation would have immediately recognized: waters that can be used to transport goods and people. The test for federal jurisdiction under the CWA could be quite simple. For example, does a water body "support the use of an ark, raft, or dugout canoe" at least during some times of the year "to reach one of the traditional forms of United States waters such as the Ohio, Mississippi, or Missouri Rivers or one of the Great Lakes."[101] And the boundaries of those waters should be determined by examining their annual mean high-water mark. This approach "would satisfy the requirements of both the Commerce Clause and the Due Process Clause and allow the federal government to protect from pollution the waters that the Framers would have understood as falling within federal regulatory authority."[102]

V. Due Process Requires Clear Definitions and Exclusions.

Finally, as the Supreme Court emphasized in *Sackett*, "[d]ue process requires Congress to define penal statutes with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory

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[94] *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 631 (2013) (quoting *U.S. v. Alaska*, 521 U.S. 1, 5 (1997)).
[95] 547 U.S. at 738 (plurality) (citation omitted); *accord Sackett*, 598 U.S. at 680 ("An overly broad interpretation of the CWA's reach would impinge on . . . [traditional state] authority.").
[96] 33 U.S.C. § 1251(b).
[97] *Sackett*, 598 U.S. at 683 (quoting *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992)).
[98] *Id.* at 706 (Thomas, J., concurring).
[99] *Rapanos*, 547 U.S. at 738 (plurality) (citing *SWANCC*, 531 U.S. at 173).
[100] Paul J. Larkin, Jr., *The "Waters of the United States" Rule and the Void-for-Vagueness Doctrine*, The Heritage Foundation, No. 207, at 12 (June 22, 2017), *available at* https://ssrn.com/abstract=3046861.
[101] *Id.*
[102] *Id.*

enforcement."[103] As applied here, that basic principle requires that the WOTUS definition and exemptions must be written in a way that landowners can understand and generally apply.

The CWA "'impose[s] criminal liability,' as well as steep civil fines, 'on a broad range of ordinary industrial and commercial activities.'"[104] It "imposes a regime of strict liability,"[105] and "'the consequences to landowners even for inadvertent violations can be crushing.'"[106] Moreover, "because the CWA can sweep broadly enough to criminalize mundane activities like moving dirt," an unconstrained WOTUS definition "means a staggering array of landowners are at risk of criminal prosecution or onerous civil penalties."[107] This problem is not theoretical.[108] The scope of the CWA's reach has long "raised[ed] troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation."[109]

This state of affairs must end. After all, "[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."[110] "Only the people's elected representatives in Congress have the power to write new federal criminal laws. And when Congress exercises that power, it has to write statutes that give ordinary people fair warning about what the law demands of them."[111] Basic due process requires that "fair warning should be given to the world *in language that the common world will understand*, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible *the line should be clear*."[112] And "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."[113]

That resonates here. "Due to the CWA's capacious definition of 'pollutant,' its low mens rea [standard], and its severe penalties," its "geographic scope" matters a great deal.[114] Given these stakes, it is critical that insofar as possible the Agencies provide the public with clear bright-line rules that ordinary people can understand.[115]

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[103] *Sackett*, 598 U.S. at 680.
[104] *Rapanos*, 547 U.S. at 721 (plurality) (quoting *Hanousek v. United States*, 528 U.S. 1102, 1103 (2000) (Thomas, J., dissenting from denial of certiorari)).
[105] *Cty. of Maui*, 590 U.S. at 206 (Alito, J., dissenting) (citing 33 U.S.C. §§ 1311, 1342, 1344).
[106] *Id.* (Alito, J., dissenting) (quoting *Army Corps of Engineers v. Hawkes Co*., 578 U.S. 590, 602 (2016) (Kennedy, J., concurring)).
[107] *Sackett*, 598 U.S. at 669–70
[108] *See, e.g., United States v. Lucero*, 989 F.3d 1088, 1091 (9th Cir. 2021) (criminal prosecution under CWA for "companies . . . dump[ing] dirt and debris on lands near the San Francisco Bay"); *United States v. Mills*, 817 F. Supp. 1546, 1548 (N.D. Fla. 1993) ("In a reversal of terms that is worthy of Alice in Wonderland, the regulatory hydra which emerged from the [CWA] mandates in this case that a landowner who places clean fill dirt on a plot of subdivided dry land may be imprisoned[.]"); *see also United States v. Deaton,* 332 F. 3d 698, 702 (4th Cir. 2003).
[109] *Hawkes Co*., 578 U.S. at 603 (Kennedy, J., concurring).
[110] *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).
[111] *United States v. Davis*, 588 U.S. 445, 447–48 (2019).
[112] *McBoyle v. United States*, 283 U.S. 25, 27 (1931).
[113] *Connally v. Gen. Constr. Co*., 269 U.S. 385, 391 (1926).
[114] *Sackett*, 598 U.S. at 661. Counterintuitively, the CWA defines "pollutant" to not only include toxic materials (e.g., "radioactive materials") and the like that ordinary people acting reasonably and in good faith would understand to be regulated but also harmless materials like "rock, sand, [and] cellar dirt[.]" 33 U.S.C. § 1362.
[115] *See Sackett*, 598 U.S. at 680–81.

An unconstrained understanding of WOTUS poses another related constitutional problem. Laws that "authorize and even encourage arbitrary and discriminatory enforcement" raise serious due process concerns.[116] Amorphous jurisdictional language open to subjective interpretations creates fertile grounds for this kind of abuse.[117] Exhibit A: the Sacketts' decade-plus odyssey challenging EPA's ultra vires claim that allegedly soggy *land* on a residential lot was WOTUS.[118] The CWA should no longer be read as an exception to basic due process principles. The Proposed Rule certainly takes a step in the right direction.

If you have questions about this comment, please contact us at mpepson@afphq.org or FBurns@afphq.org. Thank you for your attention to this matter.

Sincerely,

Michael Pepson
Americans for Prosperity Foundation
4201 Wilson Blvd., Ste. 1000
Arlington, VA 22203
(571) 329-4529
mpepson@afphq.org

Faith Burns
Americans for Prosperity
4201 Wilson Blvd., Suite 1000
Arlington, VA 22203
(571) 581-8588
FBurns@afphq.org

[116] *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999); *see Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."); *FCC v. Fox TV Stations, Inc*., 567 U.S. 239, 253 (2012); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402–03 (1966) (finding due process violated if "judges and jurors [are] free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case").

[117] *See* GAO, Waters and Wetlands: Corps of Engineers Needs To Evaluate Its District Office Practices in Determining Jurisdiction, GAO-04-297, at 26 (2004) (finding different field offices use different standards to make jurisdictional determinations under standards that are deliberately left vague).

[118] *See Sackett*, 598 U.S. at 661–63.