



October 9, 2026

Submitted Via Regulations.gov

Re: Updated Definition of “Waters of the United States,” Dkt. No. EPA–HQ–OW–2025–0322, 91 Fed. Reg. 57,284 (Sept. 9, 2026)

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

The Honorable Adam Telle
Acting Secretary
Department of the Army
101 Army Pentagon
Washington, DC 20310

Dear Administrator Zeldin and Acting Secretary Telle:

I 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”) supplemental proposed Updated Definition of “Waters of the United States” (“SNPRM”).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 the primary responsibility for land and water use regulation.

Properly updating the Agencies’ “waters of the United States” (“WOTUS”) definition is a key component of much-needed permitting reform, including by reducing unnecessary Section 404 permitting burdens and uncertainty. AFPF applauds the Agencies’ continued efforts to bring their interpretation of WOTUS in line with the Supreme Court’s decision in *Sackett v. EPA*² and statutory and constitutional limits on their jurisdiction. Unfortunately, the Agencies have a long and well-documented history of flouting statutory limits on their authority and attempting to evade or minimize the impact of Supreme Court decisions imposing constraints on their jurisdiction.³ This rulemaking presents an ideal opportunity to put an end to this toxic pattern of regulatory ping-

¹ 91 Fed. Reg. 57,284 (Sept. 9, 2026).

² 598 U.S. 651 (2023).

³ See *id.* at 666 (“Days after [the Supreme Court’s] decision, the agencies issued guidance that sought to minimize *SWANCC*’s impact.”); *Rapanos v. United States*, 547 U.S. 715, 756 n.15 (2006) (plurality) (observing “an unverifiable standard is not likely to constrain an agency whose disregard for the statutory language has been so long manifested”); *Texas v. EPA*, 662 F. Supp. 3d 739, 755 (S.D. Tex. 2023) (enjoining 2023 WOTUS rule, noting “[t]his is not the first time the Agencies have read navigability out of the Act”).

pong, federal overreach, and abuse of core private rights and ensure that, moving forward, landowners are not entirely left “at the mercy of noblesse oblige.”⁴

AFPF submitted a comment expressing general support for the Agencies’ initial proposal and making recommendations for potential improvements.⁵ AFPF incorporates by reference but will not repeat that analysis here except insofar as is relevant to the Agencies’ supplemental proposal. The SNPRM is a further step in the right direction. AFPF respectfully offers the following supplemental suggestions for how the Agencies may further improve the final rule:

- The regulatory text must conform to *Sackett*’s interpretation of “waters”—including the independent indistinguishability and continuous-surface-water-connection requirements for wetlands—and should also incorporate the best reading of the independent statutory terms “navigable waters” and “of the United States.” It is not sufficient to merely allude to these concepts in the preamble.⁶
- Although the supplemental definitions provide additional clarity, the regulations should emphasize that the primary question is “whether the water is within Congress’ traditional authority over the interstate channels of commerce” to limit the universe of edge cases.⁷ Justice Thomas’s approach, as elucidated in his concurrence in *Sackett*, not only draws the most workable and administrable line but also reflects the best reading of the CWA.
- As required by *Sackett*, the regulations should expressly place the burden on the party claiming jurisdiction over a feature to establish “relative permanence” for tributaries and “continuous surface connection” for wetlands.
- To minimize litigation risk and maximize regulatory certainty, the Agencies should include a severability clause in the regulatory text.⁸
- The CWA is not a model of clarity. But the Agencies’ regulatory definitions and exclusions should be as brightline, objective, and easy to understand and implement as is possible. Familiar metrics like the annual mean high-water line should be used to determine the metes and bounds of tidal wetlands sharing surface-water connections with traditional navigable waters, like the Chesapeake Bay and similar open water bodies.
- To the extent the definitions of “relatively permanent” and “continuous surface connection” refer to “temporary interruption[s] . . . lasting no more than a single period of up to 30 consecutive days in any given year,” those definitions should clarify that routine temporary interruptions due to low tides and common seasonal variations do not sever jurisdiction.
- Although experience has shown that the scope of federal jurisdiction under the CWA is something of a Rorschach test, to the extent possible the Agencies’ regulations should establish a baseline understanding of what is included, while respecting State primacy in regulating land

⁴ *United States v. Stevens*, 559 U.S. 460, 480 (2010).

⁵ See AFPF Comment, Dkt. No. EPA-HQ-OW-2025-0322 (filed Jan. 5, 2026), <https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-0891>.

⁶ See *Alpha Venture Capital Partners LP v. Pourhassan*, 30 F.4th 920, 926 (9th Cir. 2022) (“[W]hen a rule conflicts with its own preamble, the rule controls.”); *Mejia-Velasquez v. Garland*, 26 F.4th 193, 202 (4th Cir. 2022).

⁷ *Sackett*, 598 U.S. at 707–08 (Thomas, J., concurring).

⁸ See *Belmont Mun. Light Dep’t v. FERC*, 38 F.4th 173, 187–88 (D.C. Cir. 2022).

and water use. The CWA’s system of cooperative federalism contemplates that the States are best positioned to determine where to draw difficult lines to account for hard edge cases.

I. The CWA Does Not Confer Sweeping Federal Powers.

As creatures of statute, the Agencies possess only those powers Congress chooses to confer upon them,⁹ subject to constitutional limits,¹⁰ and “literally ha[ve] no power to act” absent congressional authorization.¹¹ As *Loper Bright v. Raimondo* makes clear, the CWA “ha[s] a single, best meaning” “fixed at the time of enactment.”¹² *Loper Bright* reaffirmed that Congress may “confer discretionary authority on agencies . . . subject to constitutional limits[.]”¹³ But the Agencies’ “power to promulgate legislative regulations is limited to the authority delegated by Congress.”¹⁴ Properly understood, *Loper Bright* requires an express delegation of discretion for agencies “to give meaning to a particular statutory term.”¹⁵ In this way, *Loper Bright* constrains agency discretion and creativity.¹⁶ As relevant here, the CWA “grants the EPA general rulemaking authority[.]”¹⁷ But it does not expressly delegate to the Agencies interpretive discretion to decide what “navigable waters” means or otherwise add to or change its statutory definition as “waters of the United States, including the territorial seas.”¹⁸ Instead, what those words mean is a pure question of law—not science or policy.¹⁹ Thus, while the Agencies may have some leeway with respect to practical implementation and drawing an administrable line, so long as it is reasonable and reasonably explained,²⁰ the Agencies’ task is to faithfully follow and respect the single best meaning of the statute, as construed by the Supreme Court and as further cabined by constitutional limits on federal power.²¹

Because overbroad readings of the CWA raise serious constitutional concerns, additional background principles are relevant to the interpretive project.²² The Court has repeatedly applied that approach to limit the scope of WOTUS, rejecting interpretations that “stretch the outer limits of Congress’s commerce power and raise difficult questions about the ultimate scope of that

⁹ See *FEC v. Cruz*, 596 U.S. 289, 301 (2022).

¹⁰ See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 395 (2024).

¹¹ *Cruz*, 596 U.S. at 301; see *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

¹² 603 U.S. at 400.

¹³ *Id.*

¹⁴ *Bowen*, 488 U.S. at 208.

¹⁵ *Loper Bright*, 603 U.S. at 394–95.

¹⁶ See *id.* at 399, 403, 411.

¹⁷ *Nat’l Ass’n of Mfrs. v. DOD*, 583 U.S. 109, 124 (2018); see 33 U.S.C. § 1361(a) (“The Administrator is authorized to prescribe such regulations as are necessary to carry out the functions under this Act[.]”).

¹⁸ See *Loper Bright*, 603 U.S. at 394–95 & n.5 (providing examples of express delegations); see also *Moctezuma-Reyes v. Garland*, 124 F.4th 416, 420 (6th Cir. 2024). See generally *DOL v. Americare Healthcare Servs.*, 171 F.4th 838, 856–58 (6th Cir. 2026) (Bush, J., concurring) (examining differences between specific and general delegations).

¹⁹ See *Seven Cty. Infrastructure Coal. v. Eagle Cty.*, 605 U.S. 168, 180–81 (2025).

²⁰ Cf. *id.* at 180–83. Any such “fact-dependent, context-specific, and policy-laden choices,” *id.* at 183, must be consistent with and respect statutory and constitutional boundaries on the Agencies’ jurisdiction.

²¹ The fundamental problem with the CWA’s jurisdictional language is that Congress punted on “the basic policy decision of what waters the Act regulates[.] . . . The regulatory volleyball happening since is a symptom of an underlying problem with the statute.” Sean G. Herman, *A Clean Water Act, If You Can Keep It*, 13 Golden Gate U. Envtl. L.J. 63, 72–84 (2021) (suggesting pre-*Sackett* that the definition of “waters of the United States” violates the nondelegation doctrine and is void for vagueness).

²² See *FCC v. Consumers’ Rsch.*, 606 U.S. 656, 691 (2025).

power”²³ or that “give rise to serious vagueness concerns in light of the CWA’s criminal penalties.”²⁴ In addition, because “[r]egulation of land and water use lies at the core of traditional state authority,”²⁵ and as the CWA itself “recognize[s]” is among “the primary responsibilities and rights of States,”²⁶ the “Court has required a clear statement from Congress when determining the scope of ‘the waters of the United States.’”²⁷

II. *Sackett* Significantly Limits Federal Jurisdiction Over “Wetlands.”

Among other limits on federal jurisdiction, as a threshold matter “the CWA authorizes federal jurisdiction only over ‘waters.’”²⁸ The Supreme Court’s landmark decision in *Sackett* elucidates the meaning and scope of the “waters”—including wetlands—that are eligible to qualify as WOTUS subject to the CWA. *Sackett* establishes a clear test for determining if a wetland is subject to federal jurisdiction under the CWA:

[W]e hold that the CWA extends to only those wetlands that are “as a practical matter indistinguishable from waters of the United States.” This requires the party asserting jurisdiction over adjacent wetlands to establish “first, that the adjacent [body of water constitutes] . . . ‘water[s] of the United States,’ (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”²⁹

Importantly, *Sackett* places the burden of establishing jurisdiction on the Agencies, which helps restore constitutionally required limits on the Agencies’ jurisdiction. The SNPRM correctly acknowledges that *Sackett* emphasizes that the CWA “is not a land use statute, and Congress did not tie the outer bounds of Federal jurisdiction to ecological protection.”³⁰ As the *Rapanos* plurality recognized, “clean water is not the *only* purpose of the statute. So is the preservation of primary state responsibility for ordinary land-use decisions.”³¹ “[N]o law pursues its purpose at all costs, and . . . the textual limitations upon a law’s scope are no less a part of its ‘purpose’ than its substantive authorizations.”³² And *Sackett* could not have been clearer on this key point and constitutional division of labor: “the CWA does not define the EPA’s jurisdiction based on ecological importance” but instead “anticipates a partnership between the States and the Federal

²³ *Rapanos*, 547 U.S. at 738 (plurality) (citing *Solid Waste Agency of N. Cook County (“SWANCC”) v. United States Army Corps of Eng’rs*, 531 U.S. 159, 173 (2001)).

²⁴ *Sackett*, 598 U.S. at 680. Because violations of the CWA can carry criminal penalties, the rule of lenity also applies. See, e.g., *Texas*, 662 F. Supp. 3d at 752; *West Virginia v. EPA*, 669 F. Supp. 3d 781, 799 (D.N.D. 2023) (similar); see 33 U.S.C. § 1319(c); see also *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004).

²⁵ *Sackett*, 598 U.S. at 679. This includes “the issuance of [] development permits,” which “is a quintessential state and local power.” *Rapanos*, 547 U.S. at 738 (plurality).

²⁶ 33 U.S.C. § 1251(c).

²⁷ *Sackett*, 598 U.S. at 680 (citation omitted).

²⁸ *Rapanos*, 547 U.S. at 731 (plurality) (citing 33 U.S.C. § 1362(7)).

²⁹ *Sackett*, 598 U.S. at 678–79 (quoting *Rapanos*, 547 U.S. at 742, 755).

³⁰ 90 Fed. Reg. at 52,528.

³¹ *Rapanos*, 547 U.S. at 755–56 (plurality) (citing 33 U.S.C. § 1251(b)).

³² *Id.* at 752. For that matter, it bears noting that “when it enacted the CWA, Congress was not exercised over wetlands; it was concerned about ending the practice of using rivers and other waters as industrial waste receptacles[.]” Damien Schiff & Charles Yates, *Life After Sackett v. EPA—Assessing the Decision’s Implementation in the Lower Courts, and Predicting the Agencies’ Next Steps*, 38 Tulane Env’t L.J. 297, 306 (2025) (citation omitted).

Government” in which “States can and will continue to exercise their primary authority to combat water pollution by regulating land and water use.”³³ As Damien Schiff and Charles Yates of the Pacific Legal Foundation, which litigated *Sackett*, have explained:

If *Sackett* means anything, it is that the CWA is not a federal wetlands protection act, and that wetlands are protected only incidentally. Importantly, *Sackett*’s understanding of “wetlands” is not a scientific one; it is a legal one founded upon *Riverside Bayview*’s layman understanding of wetlands as being those intermediate features that one sometimes must traverse in moving from river to river bank.³⁴

Writing for the plurality in *Rapanos*, Justice Scalia put the point plainly: the CWA should not be equated with a “Comprehensive National Wetlands Protection Act”—regardless of the policy wisdom of such a statute—explaining that it is instead “clear” “Congress did not enact one when it granted the [Agencies] jurisdiction over only ‘the waters of the United States.’”³⁵

This does not mean that nonjurisdictional wetlands should not be or are not currently subject to protection under state and local laws.³⁶ In fact, many are. “Approximately 38 states allow regulation more stringent than the CWA, whereas 12 do not.”³⁷ For that matter, California, Colorado, and Maryland passed legislation updating state protections of wetlands in response to *Sackett*, while other States chose different policy solutions.³⁸ This division of labor makes sense. After all, “the CWA explicitly calls for” “state and local conservation efforts” to supplement and complement federal regulation.³⁹ Subject to limits on federal power, Congress may also amend the CWA to provide greater specificity, consistent with its constitutionally assigned legislative role.⁴⁰

III. The Statutory Terms “Navigable” and “of the United States” Further Constrain the CWA’s Reach and Must Be Given Meaning.

Standing alone, the *Sackett* “test significantly tightens the definition of federally regulable wetlands[.]”⁴¹ But the CWA places two key additional limits on the Agencies’ jurisdiction that, under *Loper Bright*, should be reflected in the Agencies’ regulations. “[L]ike the *Rapanos* plurality before it, the [*Sackett* majority opinion] focuse[d] only on the term ‘waters’; it does not determine the extent to which the CWA’s other jurisdictional terms—‘navigable’ and ‘of the United States’—

³³ *Sackett*, 598 U.S. at 683 (cleaned up).

³⁴ Schiff & Yates, 38 Tulane Env’t L.J. at 306. “*Riverside Bayview Homes*, unlike *SWANCC*, involved a wetland adjacent to an open body of water that was actually navigable.” *In re Needham*, 354 F.3d 340, 345 (5th Cir. 2003). It was also decided under the now-defunct *Chevron* regime. *See SWANCC*, 531 U.S. at 191 (Stevens, J., dissenting).

³⁵ *Rapanos*, 547 U.S. at 745–46 (plurality).

³⁶ *See* Virginia S. Albrecht & Stephen M. Nickelsburg, *Could SWANCC Be Right? A New Look at the Legislative History of the Clean Water Act*, 32 Env. L. Rev. 11042, 11058 (2002).

³⁷ Megan E. Jenkins, Tobias Russell, and Charles Yates, *State vs. Federal Water Regulation In A Post-Sackett World*, Pacific Legal Foundation Research In Brief 2 (July 15, 2026), <https://pacificlegal.org/research/state-vs-federal-water-regulation-in-a-post-sackett-world/>.

³⁸ *See* Therese Wilkerson, *As the Silt Settles: State Wetlands Programs After Sackett*, 38 Tul. Envtl. L.J. 315 (2025).

³⁹ *Rapanos*, 547 U.S. at 745–46 (plurality) (citing 33 U.S.C. § 1251(b)).

⁴⁰ *See* James Valvo and Cynthia Crawford, *Congress Has the Floor: Legislative Opportunities After Supreme Court Statutory Interpretations*, Americans for Prosperity (July 2026), <https://americansforprosperity.org/wp-content/uploads/2026/07/2026.07.22-Congress-Has-The-Floor.pdf>.

⁴¹ *Lewis v. United States*, 88 F.4th 1073, 1078 (5th Cir. 2023).

limit the reach of the statute.”⁴² However, as Justice Thomas’s concurrence elucidates, those jurisdictional terms do real work, consistent with the statute’s focus on protecting traditional navigable waters.⁴³ Indeed, in enacting the CWA Congress did not even exercise the full extent of its authority to regulate commerce.⁴⁴

Importantly, as Justice Thomas explained, when the CWA was enacted, “the statutory terms ‘navigable waters,’ ‘navigable waters of the United States,’ and ‘waters of the United States’ were still understood as invoking only Congress’ authority over waters that are, were, or could be used as highways of interstate or foreign commerce.”⁴⁵ The CWA “must be understood, against that key backdrop.”⁴⁶ Specifically, the CWA “defines federal jurisdiction using the same terms used in the River and Harbor Acts: ‘navigable waters’ and ‘the waters of the United States’” and “thus reflects the traditional balance between federal and state authority over navigable waters, as set out by *The Daniel Ball*.”⁴⁷ “*The Daniel Ball* made clear that ‘[t]he phrase ‘waters of the United States, in contradistinction from the navigable waters of the States,’ . . . distinguishes interstate from intrastate waters.”⁴⁸ As the Supreme Court explained in *SWANCC*, the CWA reflects an exercise of Congress’s traditional “commerce power over navigation,”⁴⁹ consistent with Congress’s “traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.”⁵⁰ *SWANCC* “repudiated” the “fallacy” “that the text of the CWA expands federal jurisdiction beyond Congress’ traditional ‘commerce power over navigation.’”⁵¹ Indeed, *SWANCC* repeatedly emphasized that “Congress’ use of the term ‘navigable waters’ signifies that Congress intended to exercise its traditional authority over navigable waters, and not its broader power over all things that substantially affect commerce.”⁵² *SWANCC* held that “Congress’ separate definitional use of the phrase ‘waters of the United States’” does not “constitute[] a basis for reading the term ‘navigable waters’ out of the statute.”⁵³

In sum, the CWA’s sweep is *not* coterminous with Congress’s authority to regulate matters that substantially affect interstate commerce under current jurisprudence.⁵⁴ To the contrary, its text confines federal jurisdiction to “navigable waters,”⁵⁵ meaning “waters of the United States, including the territorial seas,”⁵⁶ and thus more modestly “reflects the traditional balance between

⁴² *Sackett*, 598 U.S. at 685 (Thomas, J., concurring).

⁴³ *See id.* at 685–708. *Cf. Rapanos*, 547 U.S. at 731 n.3 (plurality).

⁴⁴ *See SWANCC*, 531 U.S. at 168 n.3. For that matter, EPA itself has acknowledged that Congress “hasn’t used its full Commerce Clause authority” in the CWA. Tr. of Oral Arg. 119–20, *Sackett v. EPA*, No. 21-454.

⁴⁵ *Sackett*, 598 U.S. at 685 (Thomas, J., concurring).

⁴⁶ *Id.*

⁴⁷ *Id.* at 698–99 (citations omitted).

⁴⁸ *Id.* at 701–02; *see also Montello*, 78 U.S. (11 Wall.) 411, 415 (1870).

⁴⁹ *SWANCC*, 531 U.S. at 168 n.3.

⁵⁰ *Id.* at 172.

⁵¹ *Sackett*, 598 U.S. at 706 (Thomas, J., concurring) (quoting *SWANCC*, 531 U.S. at 168 n.3).

⁵² *Albrecht & Nickelsburg*, 32 Env. L. Rev. at 11055. Under *SWANCC*, “the regulation of areas outside the traditional navigable waters . . . must be justified with a clear showing of congressional intent. No longer can federal CWA jurisdiction be justified by showing that an activity ‘substantially affects commerce.’” *Id.*

⁵³ *SWANCC*, 531 U.S. at 172.

⁵⁴ *Id.* 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) (citation omitted).

⁵⁵ 33 U.S.C. § 1344(a)

⁵⁶ *Id.* § 1362(7).

federal and state authority over navigable waters, as set out by *The Daniel Ball*.⁵⁷ The final rule should incorporate those key limitations on the Agencies’ jurisdiction to keep the scope of federal jurisdiction under the CWA within textual and constitutional bounds.⁵⁸ Properly codifying these jurisdictional limits in the final rule would substantially ameliorate the federalism and due process concerns animating *Sackett*, *Rapanos*, and *SWANCC*.⁵⁹ And it would render line-drawing disputes about the meaning of “relatively permanent,” as applied to tributaries, and “continuous surface connection,” as applied to wetlands, of far less import, reducing the universe of edge cases. As always, the text of the statute controls and the Agencies play some role in helping the courts explore that meaning. The Agencies should do so here.

IV. In General, the SNPRM’s Proposed Definitions Are Consistent With *Sackett* and Respect Statutory and Constitutional Limits on Federal Jurisdiction.

As with the Agencies’ erstwhile “wet season” concept, the phrases “relatively permanent” and “continuous surface connection” are not used in the CWA itself. But unlike the “wet season” concept, the qualifying phrases “relatively permanent” and “continuous surface connection” are both incorporated into *Sackett*’s core holding. The SNPRM’s proposed definitions of “relatively permanent” for tributaries and “continuous surface connection” for wetlands are generally directionally consistent with the Supreme Court’s discussion of those concepts in those cases.

Of course, neither *Sackett* nor *Rapanos* purported to draw the exact lines or delineate the boundaries for “relatively permanent” and “continuous surface connection.” And these are certainly difficult questions. But those concepts appear to be amenable to brightline rules, so long as they are reasonable and reasonably explained. Both Supreme Court decisions appear to contemplate, at a minimum, surface water flow for the preponderance of the year. Specifically, although the Court was clear in both *Sackett* and *Rapanos* that continuous surface-water flow is a required component of both the “relatively permanent” and “continuous surface connection” inquiries, neither decision directly addresses the precise duration and nature of the required flow. AFPF offers one concrete drafting suggestion applicable to both proposed definitions: To the extent the definitions of “relatively permanent” and “continuous surface connection” refer to “temporary interruption[s],” those definitions should clarify that routine temporary interruptions due to low tides or common seasonal variations do not sever jurisdiction. In all events, the Agencies must ensure that the cutoff date is as brightline as possible, reasonable, reasonably explained, and does not produce arbitrary outcomes or encourage gamesmanship.

⁵⁷ *Sackett*, 598 U.S. at 699 (Thomas, J., concurring). Cf. *Leovy v. United States*, 177 U.S. 621, 625 (1900) (“Subject, then, to the paramount jurisdiction of Congress over the navigable waters of the United States, the State of Louisiana has full power to authorize the construction and maintenance of levees, drains and other structures necessary and suitable to reclaim swamp and overflowed lands within her limits.”).

⁵⁸ “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).

⁵⁹ “[A] commerce-based test offers a person of ‘common intelligence’ a ready go-by for interpreting the CWA. . . . It would provide a useful go-by for an average person to identify a navigable water, while also respecting what the Framers understood to fall within federal regulatory authority.” Paul J. Larkin, *The Clean Water Act and the Void-for-Vagueness Doctrine*, 20 *Geo. J.L. & Pub. Pol’y* 639, 667 (2022).

A. Proposed Definition of “Relatively Permanent”

“[C]onstruing statutory language is not merely an exercise in ascertaining the outer limits of a word’s definitional possibilities.”⁶⁰ That holds particularly true given the federalism and due process background principles that apply to the CWA.⁶¹ *Sackett* “conclude[d] that the *Rapanos* plurality was correct: the CWA’s use of ‘waters’ encompasses *only* those relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in *ordinary parlance* as streams, oceans, rivers, and lakes.”⁶² That is all. This is a closed list that clearly excludes features that are not described in *ordinary* language in these terms. Broader statutory context further confirms as much.⁶³ As *Sackett* observed, “[t]he CWA repeatedly uses ‘waters’ in contexts that confirm the term refers to bodies of open water. The use of ‘waters’ elsewhere in the U.S. Code likewise correlates to rivers, lakes, and oceans.”⁶⁴ In short, the CWA was never meant to confer federal jurisdiction over features like ditches or dry washes; its principal focus is instead on “bodies of navigable water like rivers, lakes, and oceans.”⁶⁵

None of those open water bodies contain water only intermittently or only during a “wet season.” As the Agencies suggest, *Sackett*’s description of “waters” therefore “does not appear to encompass waters that would flow significantly less than the majority of the time.”⁶⁶ To be sure, *Sackett* did not directly address what qualifies as a “relatively permanent” water body. Nor did *Sackett* resolve the tension between the two words: “permanent” connotes “[e]nduring indefinitely; not subject to change, replacement, fluctuation, or transience,”⁶⁷ yet the qualifier “relative” means “not absolute.”⁶⁸ But the *Rapanos* plurality provides some general guidance as to where the line might fall. On the one hand, the plurality repeatedly made clear that intermittent flow is insufficient to meet the relatively permanent standard,⁶⁹ “stat[ing] more than once that channels with

⁶⁰ *FCC v. AT&T Inc.*, 562 U.S. 397, 407 (2011); *see, e.g., N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC*, 76 F.4th 291, 301 (4th Cir. 2023) (*SWANCC* “acknowledged that certain isolated wetlands arguably fell within the literal meaning of” WOTUS . . . [b]ut that literalism, the Court instructed, was not a clear authorization for the agency to regulate those wetlands.”).

⁶¹ To respect the primary role of the States in regulating land and water use under our system of federalism, the Supreme “Court has required a clear statement from Congress when determining the scope of ‘the waters of the United States.’” *Sackett*, 598 U.S. at 680. And given the danger that the CWA’s “sweep” could be construed “so broadly as to render criminal a host of what might otherwise be considered ordinary activities,” the Supreme Court has “been wary about going beyond what Congress certainly intended the statute to cover.” *Id.* at 681 (cleaned up).

⁶² *Id.* at 671 (emphasis added) (cleaned up). As Justice Scalia observed in *Rapanos*, “[a]ll of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows. Even the least substantial of the definition’s terms, namely, ‘streams,’ connotes a continuous flow of water in a permanent channel[.]” 547 U.S. at 733 (plurality).

⁶³ *See generally City & Cty. of S.F. v. EPA*, 604 U.S. 334, 350 (2025) (“[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” (cleaned up)).

⁶⁴ *Sackett*, 598 U.S. at 672–73.

⁶⁵ *Id.* at 672.

⁶⁶ 91 Fed. Reg. at 57,289.

⁶⁷ Permanent, Black’s Law Dictionary (12th ed. 2024).

⁶⁸ Webster’s Seventh New Collegiate Dictionary 723 (1972); *see Murphy v. Commissioner*, 2023 Tax Ct. Memo LEXIS 75, at *72 (T.C. June 15, 2023) (“The added word—‘relatively’—means ‘not absolutely.’” (quoting *Relatively*, Webster’s Third New International Dictionary of the English Language, Unabridged (2002))).

⁶⁹ *See Rapanos*, 547 U.S. at 733 (plurality) (“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.* at 733–34 (WOTUS “exclude[s] channels containing merely intermittent or ephemeral flow”); *id.* at 739 (WOTUS “does not include channels through which water flows intermittently or ephemeral”).

intermittent flow are not WOTUS.”⁷⁰ And thus under “the legal standard set forth by *Sackett*, guided by the *Rapanos* plurality” an “intermittent or ephemeral” tributary cannot qualify as WOTUS.⁷¹ In a footnote, the *Rapanos* plurality left open the possibility that “streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought” and “seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months” may qualify as “relatively permanent.”⁷² By way of example, the plurality suggested that “[a] 290-day, continuously flowing stream” could qualify as “relatively permanent.”⁷³ But this footnote in a plurality opinion is neither a holding nor a statute and should not be read as such to definitively set the cutoff at 290 days or necessarily foreclose the Agencies from setting a brightline cutoff, so long as the Agencies have a reasonable, nonarbitrary basis for doing so.

So where might the line fall? Taken together, this suggests that open bodies of water that temporarily dry up during drought or other extraordinary conditions and streams that ordinarily continuously flow at least for the majority of the year may be “waters” under the relatively permanent standard. To be sure, the *Rapanos* plurality had “no occasion” to draw the exact line, writing that “[i]t suffices for present purposes that channels containing permanent flow are plainly within the definition, and that . . . intermittent and ephemeral streams . . . are not.”⁷⁴ But consistent with its emphasis on ordinary language, the plurality offered that “[c]ommon sense and common usage distinguish between a wash and seasonal river,” for whatever that is worth.⁷⁵

Thus far, “the lower courts have rejected the agencies’ attempts to regulate tributary features that do not contain continuous flow” and “applied *Sackett*’s relative permanence test—including its ordinary parlance component—strictly” to agency power claims over tributaries.⁷⁶ The Agencies should follow the same general approach. It is also worth considering whether the “relatively permanent” inquiry is limited to traditional waters like rivers and lakes, whereas the “continuous surface connection” aspect of the *Sackett* test applies more specifically to wetlands. The *Rapanos* plurality’s “footnote regarding seasonality, by its own terms, applies to rivers and not ditches” and it “describes the extraordinary circumstances of a drought as perhaps causing a stream, river, or lake to ‘dry up.’”⁷⁷ And *Sackett* only references the *Rapanos* plurality’s discussion of “relative permanence” in that context.⁷⁸ At no point does *Sackett* qualify the phrase “continuous surface connection” with the word “relatively.” That is not a distinction without a difference. This

⁷⁰ *United States v. Sharfi*, No. 21-cv-14205, 2024 U.S. Dist. LEXIS 171175, at *35–36 (S.D. Fla. Sep. 21, 2024), *report and recommendation adopted*, 2024 U.S. Dist. LEXIS 233982 (S.D. Fla. Dec. 30, 2024). “The *Rapanos* plurality, whose conclusions the *Sackett* Court adopted, ‘emphasize[d] the requirement of continuous flow’ in stating that ‘relatively continuous flow is a necessary condition for qualification as a ‘water,’ not an adequate condition.’” *Lewis v. United States*, 764 F. Supp. 3d 362, 371 (M.D. La. 2025) (quoting *Rapanos*, 547 U.S. at 733 n.6, 736 n.7).

⁷¹ *Lewis*, 764 F. Supp. 3d at 375 (cleaned up).

⁷² 547 U.S. at 732 n.5 (plurality).

⁷³ *Rapanos*, 547 U.S. at 732 n.5 (plurality). The footnote’s example does not bind the Agencies and was derived from a hypothetical raised by the dissent. *See id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Schiff & Yates*, 38 Tulane Env’t L.J. at 305; *see, e.g., Sharfi*, 2024 U.S. Dist. LEXIS 171175, at *33–36 (stream with five-month seasonal flow is not relatively permanent and thus not WOTUS).

⁷⁷ *Sharfi*, 2024 U.S. Dist. LEXIS 171175, at *35–36.

⁷⁸ *See Sackett*, 598 U.S. at 671, 678.

suggests that the concept of relative permanence might be the relevant benchmark for open bodies of water but not for wetlands, which might be subject to a stricter standard.

B. Proposed Definition of “Continuous Surface Connection”

Sackett “h[e]ld[] that for a wetland to” qualify as WOTUS, “it must share a continuous surface connection to bodies that are waters of the United States in their own right such that ‘there is no clear demarcation between waters’ and wetlands.”⁷⁹ Not a “relatively permanent” or “relatively continuous” surface connection but a “continuous” one. And as the *Sackett* majority explained, “[i]n *Rapanos*, the plurality spelled out clearly when adjacent wetlands are part of covered waters”: “‘waters’ may fairly be read to include only those wetlands that are ‘as a practical matter indistinguishable from waters of the United States,’ such that it is ‘difficult to determine where the ‘water’ ends and the ‘wetland’ begins.’”⁸⁰ As Justice Kennedy observed in his concurring opinion, “when a surface-water connection is lacking, the plurality forecloses jurisdiction over wetlands that abut navigable-in-fact waters.”⁸¹ The *Rapanos* plurality is now law.

Lower courts have likewise interpreted *Sackett* to require a continuous surface-water connection.⁸² For good reason. *Sackett* provided two examples of exceptions to a “continuous surface connection,” both of which are “temporary” and, in context, contemplate a continuous surface *water* connection: “low tides or dry spells.”⁸³ How do we know this? *Sackett*’s “acknowledgement of temporary interruptions only makes sense if the surface connection is through water because low tides and dry spells occur when a tide of water goes out temporarily or there is a temporary dry spell causing the waters to recede from the surface of the wetland.”⁸⁴ Both the temporary interruptions *Sackett* describes “plainly and necessarily require[] a surface connection involving water” during other normal times.⁸⁵ Notably, too, *Sackett*’s reference to low tides only makes sense in the context of tidal wetlands, which are typically present near traditional navigable waters capable of use in interstate commerce. Indeed, “[t]he agencies acknowledge that waters that may experience low tides likely also fall under paragraph (a)(1) waters where they are subject to the ebb and flow of the tide.”⁸⁶ And it seems likely that the subset of wetlands that are jurisdictional under the CWA will largely be comprised of tidal wetlands sharing a surface-water connection with those types of waters.

⁷⁹ *Id.* at 685 (Thomas, J., concurring); *see also id.* at 716 (Kavanaugh, J., concurring in judgment) (“The Court concludes that wetlands are covered by the Act only when the wetlands have a ‘continuous surface connection’ to waters of the United States[.]”).

⁸⁰ *Id.* at 678.

⁸¹ *Rapanos*, 547 U.S. at 776 (Kennedy, J., concurring in judgment).

⁸² *See, e.g., United States v. Ace Black Ranches, LLP*, No. 1:24-cv-00113, 2024 U.S. Dist. LEXIS 156797, at *10 n.2 (D. Idaho Aug. 29, 2024) (“The Government still needs to connect any wetlands . . . with the River via a sufficient surface-water connection.”); *Sharfi*, 2024 U.S. Dist. LEXIS 171175, at *39 (rejecting government’s “argument that that the ‘continuous surface connection’ required by *Sackett* does not require a continuous water surface connection and instead requires only that the adjacent regulated body of water ‘abut’ the wetlands”).

⁸³ *Sackett*, 598 U.S. at 678.

⁸⁴ *Sharfi*, 2024 U.S. Dist. LEXIS 171175, at *40–41.

⁸⁵ *Id.* at *41.

⁸⁶ 91 Fed. Reg. at 57,290.

Sackett repeatedly emphasized that wetlands “must be indistinguishably part of a body of water that itself constitutes ‘waters’ under the CWA” to be eligible for federal regulation.⁸⁷ *Sackett*’s “indistinguishability requirement . . . becomes meaningless if abutment alone establishes a ‘continuous surface connection,’” underscoring the importance of requiring both continuous surface-water connection and indistinguishability.⁸⁸ As one magistrate judge put it, “*Sackett* created a bright line test that requires a party asserting federal jurisdiction over wetlands to show an adjacent body of water constituting WOTUS *and* a continuous surface connection between the waters and the wetlands such that the two are indistinguishable.”⁸⁹ This counsels toward adoption of an approach where “[o]nly the portion of the wetland that is indistinguishably part of the jurisdictional water would be itself jurisdictional.”⁹⁰ For this reason, the regulations should make clear that “a wetland can be indistinguishably part of a jurisdictional water only when the wetland and the jurisdictional water share a surface water connection” and thus “where that continuous surface water connection runs out, the wetland and the water become distinguishable and Federal jurisdiction ends.”⁹¹

“Requiring a continuous surface connection that renders the wetlands and federally regulated waters indistinguishable enables landowners . . . to know and understand when and if wetlands on their land are subject to federal CWA regulation.”⁹² And the “continuous surface connection” requirement that *Sackett* appears to contemplate can be implemented in a manner that is readily understood. As the Agencies recognize, for example, “a temporary interruption like a regularly occurring dry spell and low tide are readily observable phenomena[.]”⁹³ But this is not to say that once a landowner is on notice of a continuous surface connection to an open body of water, further steps such as consulting maps and assessing mean annual high water marks and the like may be required to ascertain the precise metes and bounds of the connection.

As the Agencies have observed, “[t]he *Sackett* Court recognized that there may be some instances where that line drawing problem is difficult, such as during periods of drought or low tide or in those instances where there may be temporary interruptions in surface connection.”⁹⁴ But at the same time, landowners should generally be able to discern whether a feature requires further evaluation and due diligence based on observable surface water connected, at minimum, to a river, stream, or lake—or at least evidence or reason to know there is usually said surface water connection under ordinary conditions.⁹⁵ Toward that end, *Sackett*’s indistinguishability and continuous-surface-water-connection requirements should be clearly incorporated into the regulatory text of the final rule.

⁸⁷ *Sackett*, 598 U.S. at 676.

⁸⁸ *Sharfi*, 2024 U.S. Dist. LEXIS 171175, at *40.

⁸⁹ *Id.* at *42.

⁹⁰ 91 Fed. Reg. at 57,294.

⁹¹ *Id.* at 57,295.

⁹² *Sharfi*, 2024 U.S. Dist. LEXIS 171175, at *41 n.12.

⁹³ 91 Fed. Reg. at 57,296.

⁹⁴ Memorandum to the Field Between the U.S. Department of the Army, U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency Concerning the Proper Implementation of “Continuous Surface Connection” Under the Definition of “Waters of the United States” Under the Clean Water Act, 5–6 (Mar. 12, 2025), <https://www.epa.gov/system/files/documents/2025-03/2025cscguidance.pdf>.

⁹⁵ See *Sackett*, 598 U.S. at 681.

Finally, the SNPRM’s proposed definition of “continuous surface connection,” particularly as it operates in conjunction with the proposed “relatively permanent” definition, would establish a fairly brightline, relatively easy to understand rule that will provide notice to property owners of whether features on their property are or might be subject to federal jurisdiction under the CWA. As the Supreme Court has said, “[w]hen a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft[.]”⁹⁶ That observation resonates here. As Paul Larkin has suggested, “[t]he average person would read the term ‘waters of the United States’ to cover a readily identifiable interstate river or lake, as well as an immediately adjacent, *continually flooded, wetland that can be used for transportation*.”⁹⁷ That is not an unreasonable assumption.

As the Agencies finalize this rule they should continue to be sensitive to how a layperson would understand the Act. After all, the CWA “‘impose[s] criminal liability,’ as well as steep civil fines, ‘on a broad range of ordinary industrial and commercial activities’”⁹⁸ under a “strict liability”⁹⁹ where “‘the consequences to landowners even for inadvertent violations can be crushing.’”¹⁰⁰ “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.¹⁰¹ It is critical the Agencies craft a brightline rule to provide fair notice, incentivize compliance, and enable landowners to determine whether their property might fall into a gray area requiring additional due diligence.

If you have questions about this comment, please contact me at mpepson@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

⁹⁶ *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

⁹⁷ Larkin, 20 Geo. J.L. & Pub. Pol’y at 656 (emphasis added).

⁹⁸ *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)).

⁹⁹ *Cty. of Maui v. Haw. Wildlife Fund*, 590 U.S. 165, 206 (2020) (Alito, J., dissenting) (citations omitted).

¹⁰⁰ *Id.* (Alito, J., dissenting) (quoting *Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 602 (2016) (Kennedy, J., concurring)).

¹⁰¹ *Sackett*, 598 U.S. at 661. Counterintuitively, the CWA defines “pollutant” to not only include toxic materials but also harmless materials like “rock, sand, [and] cellar dirt[.]” 33 U.S.C. § 1362.