

## A. Tributaries

The notice seeks comment on, among other things, which waters can be considered tributaries under (a)(3) of the current regulatory definition or under the agencies' application of the Pre-2015 Regulatory Definition in light of "the agencies' objectives" and the *Sackett* decision.<sup>54</sup> It is important to recognize that tributaries were categorically protected under the Clean Water Act at its inception. In fact, tributaries to "navigable waters" have been protected since 1899, and tributaries to interstate waters have been protected since 1948.<sup>55</sup> Under the agencies' Pre-2015 Regulatory Definition, all tributaries to traditionally navigable waters, interstate waters, impoundments, and "other waters" are categorically defined as "waters of the United States."<sup>56</sup> As the EPA stated in 2015, "[t]he scientific literature documents that tributary streams, including perennial, intermittent, and ephemeral streams, and certain categories of ditches are integral parts of river networks."<sup>57</sup> This is also consistent with the findings of the 2015 EPA Office of Research and Development Connectivity Report and the 2014 EPA Scientific Advisory Board Review of the Connectivity Report.<sup>58</sup>

The question posed by the agencies in the March 24, 2025 Notice regarding which waters are protected as tributaries has already been resolved by the Court. The Court in *Sackett* found the plurality in *Rapanos* to be "correct,"<sup>59</sup> and the *Rapanos* plurality defined waters as "relatively permanent, standing or flowing bodies of water . . . as found in 'streams,' 'oceans,' 'rivers,' 'lakes,' and 'bodies' of water 'forming geographical features.'"<sup>60</sup> In response to that decision, the agencies amended the 2023 Regulatory Definition so that it includes: "[t]ributaries of waters identified in

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<sup>54</sup> March 24, 2025 Notice, 90 Fed. Reg. at 13430.

<sup>55</sup> The 1899 Refuse Act, the predecessor to the Clean Water Act Section 402 permitting program, governed discharges to traditionally navigable waters and "into any tributary of any navigable water from which the same shall float or be washed into such navigable water." 33 U.S.C. § 407. The 1948 Water Pollution Control Act declared that the "pollution of interstate waters" and their tributaries is "a public nuisance and subject to abatement." 33 U.S.C. § 466a(d)(1) (1948) (codifying Pub. L. 80–845 section 2(d)(1), 62 Stat. 1156 (1948)).

<sup>56</sup> 40 C.F.R. § 230.3(e) (1993).

<sup>57</sup> EPA & DEPT. OF THE ARMY, TECHNICAL SUPPORT DOCUMENT FOR THE CLEAN WATER RULE: DEFINITION OF WATERS OF THE UNITED STATES 243 (2015) ("CWR TSD").

<sup>58</sup> EPA, CONNECTIVITY OF STREAMS & WETLANDS TO DOWNSTREAM WATERS: A REVIEW & SYNTHESIS OF THE SCIENTIFIC EVIDENCE (2015), <https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-0074> ("Connectivity Report"); EPA, SAB REVIEW OF THE DRAFT EPA REPORT *CONNECTIVITY OF STREAMS AND WETLANDS TO DOWNSTREAM WATERS: A REVIEW AND SYNTHESIS OF THE SCIENTIFIC EVIDENCE* (2014), <https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-0101> ("SAB Review").

<sup>59</sup> *Sackett*, 598 U.S. at 671 ("And for the reasons explained below, we conclude that the *Rapanos* plurality was correct: the CWA's use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water "forming geographic[al] features" that are described in ordinary parlance as "streams, oceans, rivers, and lakes."'). (internal citations omitted).

<sup>60</sup> *Rapanos*, 547 U.S. at 732-33. Specifically, the *Rapanos* plurality concluded that "[o]n this definition, 'the waters of the United States' include only relatively permanent, standing or flowing bodies of water. The definition refers to water as found in 'streams,' 'oceans,' 'rivers,' 'lakes,' and 'bodies' of water 'forming geographical features.' All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows." *Id.* (internal citations omitted).