

paragraph (a)(1) or (2) of this section that are **relatively permanent, standing or continuously flowing bodies of water**.”⁶¹ This includes relatively permanent streams, rivers, lakes, ponds, impoundments, ditches, canals, and other bodies of water forming geographical features. Because the Clean Water Act is designed to achieve its objective by ensuring broad protections for the Nation’s waters so that pollution is controlled at its source, it is imperative that the regulatory definition broadly encompass all of those connected waters—both to protect their physical, chemical, and biological integrity and to protect the integrity of any downstream surface waters to which they are connected.

Contrary to the agencies’ statement in the March 24, 2025 Notice, the Pre-2015 Regulatory Definition does not limit Clean Water Act jurisdiction over “relatively permanent” tributaries to only those “that typically flow year-round or that have continuous flow at least seasonally (e.g., typically three months).”⁶² However, the Notice refers to the “pre-2015 regulatory regime,” which appears to mean some unwritten, undisclosed interpretation of the Pre-2015 Regulatory Definition based on what the agencies have deemed “relevant case law and longstanding practice, as informed by applicable guidance, training, and experience, consistent with *Sackett*.”⁶³ Where the Pre-2015 Regulatory Definition is currently in effect, it is the law, and it is not permissible to narrow it in an undisclosed manner to exclude waters from Clean Water Act protections. To the extent that the agencies are relying, in part, on the 2003 *SWANCC* and/or 2008 *Rapanos* Guidance Documents,⁶⁴ the agencies have already determined that those guidance documents limited jurisdiction in a manner that was not justified by law or science.⁶⁵ Additionally, the guidance documents do not impose legally binding requirements on the agencies or the regulated community,⁶⁶ and the agencies cannot lawfully rely on them and their erroneous interpretations and applications of *SWANCC* and *Rapanos* to narrow jurisdiction over tributaries.

The agencies should not attempt to readopt the NWPR rule approach to tributaries or any other WOTUS. The agencies have already determined that the NWPR is plagued with procedural and substantive legal errors and caused significant, actual environmental harm to the nation’s

⁶¹ See, e.g., 40 C.F.R. § 120.2(a)(3) (2023) (emphasis added).

⁶² March 24, 2025 Notice, 90 Fed. Reg. at 13430.

⁶³ *Id.* at 13429 n.4.

⁶⁴ EPA & ARMY CORPS OF ENG’RS, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT’S DECISION IN *RAPANOS V. UNITED STATES & CARABELL V. UNITED STATES* (2008), https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf (“2008 Rapanos Guidance”).

⁶⁵ See CLAUDIA COPELAND, CONG. RSCH. SERV., R43555, EPA AND THE ARMY CORPS’ RULE TO DEFINE “WATERS OF THE UNITED STATES” 10 (2017), <https://www.congress.gov/crs-product/R43455>.

⁶⁶ 2021 Proposed Definition, 86 Fed. Reg. at 69380 n.12 (“The agencies note that the guidance ‘does not impose legally binding requirements on EPA, the Corps, or the regulated community, and may not apply to a particular situation depending on the circumstances.’ *Rapanos* Guidance at 4 n.17.”); 2008 Rapanos Guidance, *supra* note 65, at 4 n.17 (“The CWA provisions and regulations described in this document contain legally binding requirements. This guidance does not substitute for those provisions or regulations, nor is it a regulation itself.”).