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Submission via www.regulations.gov

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Re: WOTUS Notice: The Final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations, Dkt. ID EPA–HQ–OW–2025–0093

Dear Senior Official Colosimo and Deputy Assistant Administrator Best-Wong:

Waterkeeper Alliance, Environmental Integrity Project, and the undersigned U.S. Waterkeepers (collectively "Commenters") submit the following comments on the U.S. Environmental Protection Agency's ("EPA") and the Department of the Army, U.S. Army Corps of Engineers' ("Corps") (collectively the "agencies") notice[1] requesting recommendations on the regulatory definition of "waters of the United States" ("WOTUS") under the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq*. ("Clean Water Act"), and the implementation of the WOTUS definition in light of the Supreme Court's 2023 decision in *Sackett v. EPA,* 598 U.S. 651 (2023) ("*Sackett*").

On behalf of our organizations and our respective individual members and supporters, we write to emphasize the importance of maintaining, and where possible, consistent with Supreme Court precedent, restoring longstanding protections for the nation's waters. As the agencies contemplate additional administrative action regarding the WOTUS definition, it is imperative that the protections in the current regulatory definition be maintained and that any amendments and reinterpretations of that regulatory definition through rulemaking, guidance, memoranda, or other means, fully restore protections consistent with the objective, structure, and text of the Clean

[1] WOTUS Notice: The Final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations, Dkt. ID EPA–HQ–OW–2025–0093, 90 Fed. Reg. 13428 (Mar. 24, 2025) ("March 24, 2025 Notice").

Water Act, the entire body of case law interpreting the Act, and sound science.[2] The agencies must reject calls to further narrow the scope of Clean Water Act jurisdiction in order to achieve bureaucratic policy goals like reducing "red-tape" that are contrary to the objective and text of the Act, including through the adoption of unfounded reinterpretations of settled law or the creation of definitional limitations and implementation measures that will exclude waters from protection.

I. Interests of the Commenting Organizations

Waterkeeper Alliance is a not-for-profit environmental organization and global movement dedicated to protecting and restoring water quality to ensure that the world's waters are drinkable, fishable, and swimmable. We are composed of more than 300 community-based Waterkeeper groups that patrol and protect nearly six million miles of rivers, lakes, and coastlines in the Americas, Europe, Australia, Asia, and Africa. In the United States, Waterkeeper Alliance represents the interests of more than 150 U.S. Waterkeeper groups, as well as the interests of our more than one million collective members and supporters that live, work, and recreate in or near waterways across the country—many of which are severely impaired by pollution. In the past three years alone, Waterkeeper Alliance, Waterkeeper groups, and our respective supporters in the U.S. have submitted more than 50,000 public comments on EPA actions, and Waterkeeper Alliance and Waterkeeper groups regularly attend public meetings and hearings with EPA, demonstrating our collective knowledge about EPA processes and our strong interest in engaging on issues that impact our communities, water, and the environment.

The Environmental Integrity Project is a nonprofit organization dedicated to protecting public health and our natural resources by holding polluters and government agencies accountable under the law, advocating for tough but fair environmental standards, and empowering communities fighting for clean air and clean water.

The Clean Water Act is the bedrock of our work to protect rivers, streams, lakes, wetlands, and coastal waters for the benefit of all of our members and supporters, as well as to protect people and communities that depend on clean water for drinking, subsistence fishing, recreation, their livelihoods, and their survival. Our work—in which we have answered Congress' call for "private attorneys general" to enforce and defend the Clean Water Act when regulators lack the willingness or resources to do so themselves—requires us to develop and maintain scientific, technical, and legal expertise on a broad range of water quality and quantity issues.

II. The Clean Water Act Requires Broad Protections for the Nation's Waters

As the Supreme Court has repeatedly recognized, Congress passed the Clean Water Act with a singular objective—to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters"[3]—and it intended to achieve that objective, primarily, by regulating pollution at

[2] *See, e.g.*, County of Maui v. Haw. Wildlife Fund, 590 U.S. 165, 185-86 (2020).

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

its source.[4] The Congressionally intended breadth of the Clean Water Act is indisputably apparent in the comprehensive and interrelated goals, policies, definitions, programs, and directives set forth in text of the Act itself, as well as in Congress' direction that the entire Act applies broadly to protect the "waters of the United States, including the territorial seas."[5]

The ultimate goal of the Clean Water Act is to eliminate all discharges of pollutants into those waters.[6] This includes waters specifically referenced in the text of the Clean Water Act, such as navigable waters, interstate waters, intrastate waters, wetlands, streams, rivers, lakes, territorial seas, coastal waters, sounds, estuaries, tributaries, and bays.[7] "To do this, the [Clean Water Act] does not stop at controlling the 'addition of pollutants,' but deals with 'pollution' generally, see § 1251(b), which Congress defined to mean 'the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water,' § 1362(19)."[8]

A long line of Supreme Court cases have confirmed the breadth of the Clean Water Act and its protections for the Nation's waters (i.e., "waters of the United States"), as well as the Act's objective of completely eliminating water pollution in those waters. For example:

- In *City of Milwaukee v. Illinois & Michigan* (1981), a unanimous Supreme Court determined that Congress' intention in amending the Water Pollution Control Act in 1972 was "clearly to establish an all-encompassing program of water pollution regulation . . . [and] 'to establish a *comprehensive* long-range policy for the elimination of water pollution.' S.Rep.No.92–414, at 95, 2 Leg.Hist. 1511 (emphasis supplied)."[9]

- In *Riverside Bayview* (1985), a unanimous Supreme Court determined that "[p]rotection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' . . . [This is precisely why] Congress chose to define the waters covered by the Act broadly."[10] The Court also confirmed the breadth of Clean Water Act jurisdiction over "waters," including "lakes, rivers, streams, and other bodies of

[4] *County of Maui*, 590 U.S. at 178-79 (citing EPA v. Cal. *ex rel.* State Water Res. Control Bd., 426 U.S. 200, 202-04 (1976) (basic purpose of the Clean Water Act is to regulate pollution at its source)).

[5] 33 U.S.C. § 1362(7).

[6] 33 U.S.C. § 1251(a).

[7] 33 U.S.C. § 1362(7); *see, e.g.*, City of Milwaukee v. Illinois & Michigan, 451 U.S. 304, 318-19 (1981); 33 U.S.C. § 1313 (applying water quality standard to "interstate waters," "intrastate waters," "navigable waters" and simply "waters."); 33 U.S.C. § 1252(c)(3) ("rivers and their tributaries, streams, coastal waters, sounds, estuaries, bays, lakes"); N. William Hines, *History of the 1972 Clean Water Act: The Story Behind How the 1972 Act Became the Capstone on a Decade of Extraordinary Environmental Reform*, 4 J. ENERGY & ENV'T L. 80 (2013), https://gwujeel.files.wordpress.com/2013/10/4-2-hines.pdf ("Hines History of the CWA").

[8] S.D. Warren Co. v. Me. Bd. of Env't Prot., 547 U.S. 370, 385 (2006).

[9] *City of Milwaukee*, 451 U.S. at 318 (internal footnotes omitted).

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

water," and found that the Corps had reasonably drawn that line by protecting "wetlands adjacent to lakes, rivers, streams, and other bodies of water"—i.e., wetlands adjacent to "waters of the United States."[11]

- In *Int'l Paper Co. v. Ouellette* (1987), the Supreme Court held that the Clean Water Act has long been recognized as "an all-encompassing program of water pollution regulation" that "applies to all point sources and virtually all bodies of water" and "virtually all surface water in the country."[12] The Court noted that "Congress intended to dominate the field of pollution regulation" and that the goal of the Act is the "elimination of water pollution."[13]

- In *PUD No. 1 of Jefferson Cnty. v. Wash. Dep't of Ecology* (1994), the Supreme Court described the Clean Water Act as a "complex statutory and regulatory scheme that governs our Nation's waters" and recognized its application to "all intrastate waters."[14]

Three more recent cases addressed Clean Water Act jurisdiction over two types of features where the distinctions between land and jurisdictional waters is less obvious—a non-adjacent abandoned sand and gravel pit and wetlands adjacent to non-navigable tributaries.

- In *Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs* (2001) ("*SWANCC*"), the Court held that "33 CFR § 328.3(a)(3) (1999), as clarified and applied to petitioner's balefill site pursuant to the 'Migratory Bird Rule,' 51 Fed.Reg. 41217 (1986), exceeds the authority granted to respondents under § 404(a) of the CWA."[15] Thus, the *SWANCC* decision was particularly fact-specific as to the respondents' abandoned sand and gravel pit, which was not adjacent to open water, and it addressed the Corps' asserted basis for jurisdiction under Clean Water Act Section 404, the Migratory Bird Rule. The Court expressly declined to address the jurisdictional reach of the Clean Water Act under the Commerce Clause.[16]

- In *Rapanos v. United States*, 547 U.S. 715 (2006) ("*Rapanos*"), the Court issued no majority opinion and instead issued three different opinions setting forth differing tests for determining whether wetlands adjacent to non-navigable tributaries (there, ditches and drains) of traditional navigable waters may be protected under the CWA: the Relatively Permanent Test, the Significant Nexus Test, and application of the Pre-2015 Regulatory

[11] *Riverside Bayview*, 474 U.S. at 131-35.

[12] Int'l Paper Co. v. Ouellette, 479 U.S. 481, 486, 492 (1987) (internal quotations omitted).

[13] *Id.* at 492, 494 (emphasis added).

[14] *PUD No. 1 of Jefferson Cnty.*, 511 U.S. at 704, 717.

[15] Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs, 531 U.S. 159, 174 (2001) ("SWANCC").

[16] *Id.* at 174.

Definition.[17] With regard to the Relatively Permanent Test, which was later adopted by the Court in *Sackett*, the plurality opinion determined:

- The Clean Water Act covers non-navigable waters in addition to traditional navigable waters, but the plurality declined to "decide the precise extent to which the qualifiers 'navigable' and 'of the United States' restrict the coverage of the Act." Instead, the plurality focused on the meaning of "the waters" in 33 U.S.C. § 1362(7). The 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**.'"[18]

- The plurality also noted that "[b]y describing 'waters' as 'relatively permanent,'" it did not "necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances" or "*seasonal* rivers which contain continuous flow during some months of the year," and, further, that it had "no occasion in this litigation to decide exactly when the drying-up of a streambed is continuous and frequent enough to disqualify the channel as a 'wate[r] of the United States.'"[19]

- Upon this opinion, the plurality sought remand of the cases for a determination by the lower courts "whether **the ditches or drains near each wetland are 'waters'** in the ordinary sense of containing a relatively permanent flow; and (if they are) whether the wetlands in question are 'adjacent' to these 'waters' in the sense of **possessing a continuous surface connection** that creates the boundary-drawing problem we addressed in *Riverside Bayview*."[20]

- In *Sackett v. EPA*, the Court adopted the approach of the *Rapanos* plurality to defining "waters" under the Clean Water Act and held that "the party asserting jurisdiction over adjacent wetlands [must] 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.'"[21]

[17] *See generally* Rapanos v. United States, 547 U.S. 715 (2006) ("*Rapanos*").

[18] *Id.* at 731-32 (emphasis added) (citations omitted).

[19] *Id.* at 732 n.5.

[20] *Id.* at 757 (emphasis added).

[21] Sackett v. EPA, 598 U.S. 651, 678-79 (2023) (quoting *Rapanos*, 547 U.S. at 742) ("*Sackett*").

III. A Broad and Legally Sound WOTUS Regulatory Definition is Critically Important to the Integrity of the Nation's Waters

The Clean Water Act regulatory definition of "waters of the United States" is critically important to the protection of human health, the wellbeing of communities, the success of local, state and national economies, and the functioning of our nation's vast, interconnected aquatic ecosystems, as well as the many endangered and threatened species that depend upon those resources. As a nation, we cannot have clean water unless we control pollution at its source—wherever that source may be.

If a body of water is not included in the definition of "waters of the United States," untreated toxic, biological, chemical, and radiological pollution can be discharged directly into it without meeting any of the Clean Water Act's permitting and treatment requirements.[22] When waters are excluded from the definition of "waters of the United States," all of the protections of the Clean Water Act—the Section 402 National Pollutant Discharge Elimination System discharge standards and permitting requirements, the Section 404 Dredge and Fill standards and permitting, water quality standards, effluent limitation guidelines, total maximum daily loads, water quality certifications, and myriad other standards and programs—become inapplicable and cannot prevent pollution, degradation, and destruction as Congress intended.

Waterways excluded from the WOTUS definition can be dredged, filled, and polluted with impunity because the Clean Water Act's most fundamental human health and environmental safeguard—the prohibition of unauthorized discharges in 33 U.S.C. § 1311(a)—no longer applies. Unregulated pollution discharged into waterways that fall outside the agencies' regulatory definition will not only harm those receiving waters but will also travel through well-known hydrologic processes before harming other water resources, drinking water supplies, recreational waters, fisheries, industries, agriculture, endangered and threatened species, and, ultimately, human beings.

Prior to August 27, 2015, the Clean Water Act regulatory definition of "waters of the United States" had remained in place largely unchanged since the 1970s and broadly encompassed jurisdiction over the nation's waters.[23] The Pre-2015 Regulatory Definition was never vacated by any court and is, in fact, currently being applied by the agencies in 26 states.[24] The broad categories of waters included in the Pre-2015 Regulatory Definition are necessary to achieve the objectives of

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[22] For example, the Clean Water Act contains the following core water quality protections: point sources discharging pollutants into waters must have a permit, 33 U.S.C. §§ 1311(a), 1342; the absolute prohibition against discharging "any radiological, chemical, or biological warfare agent, any high-level radioactive waste, or any medical waste," § 1311(f); protections against the discharge of oil or hazardous substances, § 1321; and restrictions on the disposal of sewage sludge, § 1345.

[23] *See, e.g.*, 40 C.F.R. § 230.3 (1993) ("Pre-2015 Regulatory Definition").

[24] The Pre-2015 Regulatory Definition is currently being "implemented consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience, consistent with *Sackett*." March 24, 2025 Notice, 90 Fed. Reg. at 13429 n.4; *see also Definition of "Waters of the United States": Rule Status and Litigation Update*, EPA, https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update (Oct. 21, 2024).

the Clean Water Act and implement the Act's "comprehensive regulatory program" that established "a new system of regulation under which it is illegal for anyone to discharge pollutants into the Nation's waters except pursuant to a permit."[25] The definition includes:[26]

a. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.

b. All interstate waters, including interstate wetlands.

c. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

    1. Which are or could be used by interstate or foreign travelers for recreational or other purposes;

    2. From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

    3. Which are used or could be used for industrial purposes by industries in interstate commerce.

d. All impoundments of waters otherwise defined as waters of the United States under this definition.

e. Tributaries of waters identified in paragraphs (a) through (d) of this definition.

f. The territorial seas.

g. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.

The agencies first made major substantive changes to their longstanding regulatory interpretation of the waters that are subject to the Clean Water Act's critical safeguards in the June 29, 2015 "Clean Water Rule" ("CWR").[27] Although the CWR reaffirmed Clean Water Act jurisdiction over some waters historically protected under the Act, it also included many legally and scientifically indefensible provisions that, among other things, impermissibly excluded waters that must be categorically protected as a matter of law. The agencies' second change came in an October 22,

[25] *City of Milwaukee*, 451 U.S. at 310-11, 317.

[26] *See, e.g.*, 40 C.F.R. § 230.3 (1993).

[27] Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054 (June 29, 2015) ("CWR").

2019 rule repealing the CWR and reinstating the text of the Pre-2015 Regulatory Definition along with new, unsupportable and unexplained reinterpretations of that longstanding rule.[28]

The agencies' third redefinition, the Navigable Waters Protection Rule ("NWPR"), was proposed a few months later and became effective on June 22, 2020.[29] Contrary to more than 40 years of legal precedent and longstanding, well-settled agency interpretations of the Clean Water Act, in the NWPR, the agencies concocted unsupportable legal theories and utilized arbitrary, unscientific line drawing and undisclosed "policy choices" to attempt to justify their unprecedentedly narrow definition of "waters of the United States." Claiming their first-of-its-kind interpretation of the Clean Water Act was so clear the agencies lacked discretion to protect important rivers, streams, lakes, and other waters across the country, the agencies also refused to consider scientific information in the record demonstrating that their narrow jurisdictional definition eliminated protections for waters that are essential to the integrity of the nation's waters and endangered drinking water supplies, recreational waters, fisheries, endangered and threatened species, and myriad other beneficial uses of waters across the nation.[30] This regulatory definition was vacated by two federal district courts in 2021, resulting in restoration of the longstanding Pre-2015 Regulatory Definition.[31]

The agencies' fourth redefinition was proposed on December 4, 2021 ("2021 Proposed Definition"), and published as a final rule on January 18, 2023.[32] This regulatory definition rejected the legal approach taken under the NWPR and maintained or restored protections to many categories of the nation's waters that had long been jurisdictional under the Clean Water Act and the Pre-2015 Regulatory Definition consistent with longstanding legal interpretations and science. However, it also adopted yet another set of novel legal theories that resulted in exclusion of many longstanding definitional categories and previously jurisdictional waters. This regulatory definition was amended on August 29, 2023, to conform it to the *Sackett* decision, and this definition became effective on September 8, 2023.[33]

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[28] Definition of "Waters of the United States"—Recodification of Pre-Existing Rules, 84 Fed. Reg. 56626 (Oct. 22, 2019) ("Repeal Rule").

[29] The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22250 (Apr. 21, 2020) ("NWPR").

[30] *See, e.g.*, EPA, THE NAVIGABLE WATERS PROTECTION RULE—PUBLIC COMMENT SUMMARY DOCUMENT, RESPONSE TO COMMENTS, EPA DOCKET ID NO. EPA-HQ-OW-2018-0149-11574, TOPIC 11, at 3, 8-9, 13, 16 (2020), https://www.regulations.gov/document/EPA-HQ-OW-2018-0149-11574 ("NWPR RTC").

[31] On August 30, 2021, the U.S. District Court for the District of Arizona in *Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949 (D. Ariz. Aug. 30, 2021), vacated the NWPR, which had the effect of restoring the Pre-2015 Regulatory Definition. Less than one month later, the U.S. District Court for the District of New Mexico also issued an order vacating and remanding the NWPR. *See generally* Navajo Nation v. Regan, 563 F. Supp. 3d 1165 (D.N.M. Sept. 27, 2021).

[32] *See, e.g.*, Revised Definition of ''Waters of the United States," 86 Fed. Reg. 69372 (proposed Dec. 7, 2021) ("2021 Proposed Definition"); Revised Definition of ''Waters of the United States," 88 Fed. Reg. 3004 (Jan. 18, 2023). ("January 2023 Definition").

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

The September 2023 Definition includes:

1) Waters which are:

    a) Currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

    b) The territorial seas; or

    c) Interstate waters;

2) Impoundments of waters otherwise defined as waters of the United States under this definition, other than impoundments of waters identified under paragraph (a)(5) of this section;

3) Tributaries of waters identified in paragraph (a)(1) or (2) of this section that are relatively permanent, standing or continuously flowing bodies of water;

4) Wetlands adjacent to the following waters:

    a) Waters identified in paragraph (a)(1) of this section; or

    b) Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3) of this section and with a continuous surface connection to those waters;

5) Intrastate lakes and ponds not identified in paragraphs (a)(1) through (4) of this section that are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3) of this section.

Adjacent is defined as having a continuous surface connection. The current definition expressly exempts certain waste treatment systems; prior converted cropland; ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water; certain artificially irrigated areas; certain artificial lakes or ponds; certain artificial reflecting or swimming pools or other small ornamental bodies of water; certain waterfilled depressions and fill, sand, and gravel pits excavated in dry land for the purpose of obtaining fill, sand, or gravel; and swales and erosional features (*e.g.*, gullies, small washes) characterized by low volume, infrequent, or short duration flow.

IV. The Impacts of Eliminating Protections in the WOTUS Regulatory Definition

We understand and have seen first-hand how important a broad definition of “waters of the United States” is to the functioning and effectiveness of the Clean Water Act to protect and restore water quality across the country. While the Clean Water Act has been very effective in controlling pollution in many respects, many of our major waterways remain severely polluted, and by some indications, pollution appears to be increasing. Given the water quality challenges our nation

continues to face almost 50 years after the passage of the Clean Water Act, it is plain that the Act's requirements and enforcement desperately need to be supported and strengthened, not diminished. Weakening the Clean Water Act by further reducing the scope of federal jurisdictional waters and assuming that state and tribal governments all have the desire, will, resources, and capacity to pick up the slack, would be an unreasonable and unsupportable course of action.

As the agencies are well-aware, the passage of the Clean Water Act and a host of other federal laws in the 1970s occurred as a direct result of public outcry regarding dangerous pollution problems that resulted from failures by states to protect people and public trust resources from pollution.[34] The agencies also know that most states and tribal governments will not be able or willing to sufficiently regulate dangerous pollution on deregulated rivers, streams, and wetlands utilizing state law alone and without the federal regulatory "floor" established by the Clean Water Act. For example, information gathered by the agencies after the adoption of the NWPR demonstrated that states and tribal governments had not replaced, and in many instances could not replace, the federal protections provided by the Clean Water Act for the nation's waters. For example, in a section of the 2021 Proposed Definition entitled "*States and Tribes Did Not Fill the Regulatory Gap Left by the NWPR*," the agencies stated that "[g]iven the limited authority of many states and tribes to regulate waters more broadly than the Federal government, the narrowing of federal jurisdiction would mean that discharges into the newly non-jurisdictional waters would in many cases no longer be subject to regulation, including permitting processes and mitigation requirements designed to protect the chemical, physical, and biological integrity of the nation's waters."[35] In fact, instead of stepping in to address lost protections, certain states actually began taking deregulatory steps to change their state regulatory practices to match the NWPR.[36]

The NWPR was particularly dangerous because it stripped protections against uncontrolled industrial, municipal, agricultural, and other pollution discharges into many—and in some parts of the country, nearly all—rivers, streams, lakes, ponds, wetlands, and other waters. It left vast swaths of the Nation's waters unprotected against dangerous pollution discharges and destructive dredging and filling that harm drinking water supplies, fisheries, and recreational waters, people, endangered and threatened species, and the nation's vast, interconnected aquatic ecosystems that have been exposed to dangerous levels of pollution and destruction in both directly impacted and downstream waters. It irresponsibly impeded the ability of states, tribes, communities, and even of other federal agencies and EPA itself, to protect waters and ecosystems and the people and wildlife that depend on them across the country.

After it had been in place for only a short time, the agencies noted that a "broad array of stakeholders—including states, Tribes, local governments, scientists, and non-governmental

[34] *See* Hines History of the CWA, *supra* note 7, at 81-82.

[35] 2021 Proposed Definition, 86 Fed. Reg. at 69415.

[36] *See* EPA & DEP'T OF THE ARMY, MEMORANDUM FOR THE RECORD: REVIEW OF U.S. ARMY CORPS OF ENGINEERS ORM2 PERMIT AND JURISDICTIONAL DETERMINATION DATABASE TO ASSESS EFFECTS OF THE NAVIGABLE WATERS PROTECTION RULE (2021), https://www.epa.gov/sites/default/files/2021-06/documents/3_final_memorandum_for_record_on_review_of_data_web_508c.pdf; EPA, ATTACHMENT A: DATA ANALYSIS (2021), https://www.epa.gov/sites/default/files/2021-06/documents/combined_4_thru_12_508.pdf.

organizations—are seeing destructive impacts to critical water bodies under the [NWPR],” and EPA Administrator Regan was quoted as saying that EPA had “determined that [the NWPR] is leading to significant environmental degradation.”[37] For example, EPA determined that the NWPR removals of jurisdiction were already causing harm to various sensitive ecosystems and that the definition removed Clean Water Act protections from nearly all waters in some arid states.[38] Waterkeeper Alliance had submitted extensive written comments to the administrative record during the public comment period for the NWPR, including a comment letter containing evidence and 12 watershed evaluations demonstrating that: (1) important water resources would lose Clean Water Act protections under NWPR without any sound legal or scientific basis, and (2) the NWPR would cause serious harm to waters, people, aquatic systems, and endangered and threatened species and their designated critical habitats.[39] For example, Waterkeeper Alliance’s NWPR Comments documented the expected loss of Clean Water Act jurisdiction from the rule to:

- Large numbers of rivers and streams protected by the Missouri Confluence Waterkeeper that briefly flow subsurface and then reemerge as surface waters, which would have significant adverse impacts on waters throughout Missouri, including large, important downstream waterways, such as the Missouri and Meramec Rivers.

- Texas coastal prairie wetlands crucial to the health of Lower Galveston Bay, which is protected on behalf of its members by Bayou City Waterkeeper.

- Streams, reservoirs, ditches, and canals that receive pollution discharges and flow into Boulder Creek—the primary drinking water supply for the Colorado cities of Boulder, Louisville, Lafayette, Erie, Superior, and Nederland—which were protected on behalf of its members by Boulder Waterkeeper.

- Between an estimated 500 and 1,000 miles of ephemeral and ditched streams that flow into the Niagara River—the channel that connects two Great Lakes, Erie and Ontario—which is protected on behalf of its members by Buffalo Niagara Waterkeeper.

- Pocosins, Carolina Bays, and ditched and ephemeral streams that receive animal waste and other pollution discharges in the Cape Fear Basin of North Carolina, which is protected on behalf of its members by Cape Fear Riverkeeper.

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[37] *EPA, Army Announce Intent to Revise Definition of WOTUS*, EPA (June 9, 2021), https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus; *see also Request for Remand and Supporting Documentation*, EPA, https://www.epa.gov/wotus/request-remand-and-supporting-documentation (Feb. 21, 2025).

[38] *See, e.g.*, Declaration of Radhika Fox ¶¶ 15, 17, Conservation L. Found. v. EPA (D. Mass. June 9, 2021) (No. 20-cv-10820-DPW), https://www.epa.gov/sites/default/files/2021-06/documents/conservation_law_found._d._mass._-_radhika_fox_declaration_signed.pdf; Declaration of Jaime A. Pinkham ¶ 15, Conservation L. Found. v. EPA (D. Mass. June 9, 2021) (No. 20-cv-10820-DPW), https://www.epa.gov/sites/default/files/2021-06/documents/2_conservation_law_found._d._mass._-_jaime_pinkham_declaration_final_signed_508c.pdf.

[39] *See* WATERKEEPER ALLIANCE, COMMENTS ON REVISED DEFINITION OF WATERS OF THE UNITED STATES: DOCKET ID NO. EPA-HQ-OW-2018-0149 (2019), https://www.regulations.gov/comment/EPA-HQ-OW-2018-0149-11318 (“Waterkeeper NWPR Comments”).

- Streams that provide habitat and water supply for federally threatened Chinook salmon, coho salmon, chum salmon and steelhead trout, and ditched streams that receive animal waste and industrial and municipal pollution discharges in the Puget Sound Basin of Washington, which is protected on behalf of its members by Puget Soundkeeper.

- An estimated 9,165 miles of ephemeral streams in the Rogue River Basin in Oregon that provide drinking water for the region, as well as habitat and spawning grounds for federally threatened Southern Oregon/Northern California Coast coho salmon and steelhead; numerous canals and ditches that receive pollution discharges that are hydrologically connected to and influence the quality of the Rogue River; and the Agate Desert vernal pools that are the only vernal pools in Oregon and support unique species, such as the vernal pool fairy shrimp listed as threatened under the federal Endangered Species Act ("ESA").[40] These waters are protected on behalf of its members by Rogue Riverkeeper.

- All of the waters, including premiere trout streams and critical habitat for federally threatened bull trout, located within the 5,185-square-mile "closed basin" area in the upper Snake River Basin of Idaho, that are connected to the Snake River by subsurface flows and springs, and 14,866 miles of ditches, ditched streams and canals that receive pollution discharges and flow into the Snake River. These waters are protected on behalf of its members by Snake River Waterkeeper.

- An estimated 30,297 miles (85 percent) of the streams in the Upper Missouri River Basin of Montana that feed into and impact water quality in the Big Hole River (world-class trout fishery), Beaverhead River (premiere brown trout fishery), Jefferson River (Westslope cutthroat habitat and drinking water supply), Madison River (Yellowstone cutthroat and Westslope cutthroat trout habitat), and the Gallatin River (Yellowstone Park and downstream recreation). These waters are protected on behalf of its members by Upper Missouri Waterkeeper.

After the 2020 NWPR became effective, the massive scope and geographic extent of the loss of Clean Water Act protections for the Nation's waters began to be documented, to some extent, in a database maintained on an EPA webpage showing approved Clean Water Act jurisdictional determinations by the EPA and the Corps.[41] A review of the database and associated maps shows massive numbers of waters that were not protected under the NWPR. For example, as of June 29, 2021, maps from that database show that out of the 14,435 approved Clean Water Act jurisdictional determinations made under the 2020 NWPR across the country, 13,290 waters were found to be non-jurisdictional and only 1,145 were found to be jurisdictional.[42]

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[40] Endangered Species Act, 16 U.S.C. §§ 1531-1544.

[41] *See Clean Water Act Approved Jurisdictional Determinations*, EPA, https://watersgeo.epa.gov/cwa/CWA-JDs/ (last visited April 21, 2025).

[42] *See id*; WATERKEEPER ALLIANCE, *supra* note 40, at Attach. 34.

V. Comments on Topics Identified in the March 24, 2025 Notice

The March 24, 2025 Notice states that the agencies are seeking "to gather recommendations on the meaning of key terms in light of *Sackett* to inform any potential future administrative actions to clarify the definition of 'waters of the United States' and to ensure transparent, efficient, and predictable implementation."[43] Despite this outreach and the upcoming Listening Sessions soliciting feedback on the definition, it appears that the outcome is predetermined. EPA Administrator Zeldin's March 12, 2025 press release indicates that the agencies have already decided to revise the current regulatory WOTUS definition, which was just revised in response to the *Sackett* decision in September 2023. Specifically, EPA Administrator Zeldin announced that, in adopting the current definition, "EPA has failed to follow the law and implement the Supreme Court's clear holding in *Sackett*," and that this definition "placed unfair burdens on the American people and drove up the cost of doing business."[44]

However, Congress did not charge the agencies with defining WOTUS in order to "reduce[] red-tape, cut[] overall permitting costs, and lower[] the cost of doing business," which are the policy goals that EPA Administrator Zeldin stated are motivating the agencies' actions to quickly revise the definition.[45] The agencies are charged with defining WOTUS in a manner that is consistent with the text of the Clean Water Act and that ensures the protection of the chemical, physical, and integrity of the nation's waters.[46] Additionally, the previous administration did not adopt a regulatory WOTUS definition that expanded protections to additional waters or increased regulatory burdens. To the contrary, the September 2023 WOTUS definition dramatically reduced protections for rivers, streams, lakes, wetlands, and waters across the country. For example, after finalizing the September 2023 definition in response to *Sackett*, EPA estimated that 63 percent of wetlands and roughly 1.2 to 4.9 million miles of streams would no longer be protected by the Clean Water Act.[47]

The March 24, 2025 Notice specifically seeks perspectives from stakeholders on jurisdictional scope and technical questions regarding three discrete regulatory categories from the September 2023 Definition, as well as previous regulatory definitions. However, the agencies' questions regarding the scope of jurisdiction over relatively permanent waters and adjacent wetlands has already been resolved by the Supreme Court. Similarly, the agencies previously engaged in extensive evaluations of the technical issues identified in the notice, including multiple outreach

[43] March 24, 2025 Notice, 90 Fed. Reg. at 13429.

[44] *Administrator Zeldin Announces EPA Will Revise Waters of the United States Rule*, EPA (Mar. 12, 2025), https://www.epa.gov/newsreleases/administrator-zeldin-announces-epa-will-revise-waters-united-states-rule ("March 12, 2025 Press Release").

[45] *Id.*

[46] *See, e.g.*, 33 U.S.C. § 1251(a); *County of Maui*, 590 U.S. at 185-86.

[47] *See* EPA, *Policy Webinar: Updates on the Definition of "Waters of the United States",* YOUTUBE, 24:01-24:18 (Sept. 12, 2023), https://www.youtube.com/watch?v=lcCVelsAy2c.

efforts to stakeholders, and the results of those evaluations are already reflected in the September 2023 Definition and its extensive supporting administrative record.[48]

If the agencies proceed with a reevaluation of the WOTUS definition, it will require evaluation and assessment of, among many other things:[49]

- The previous administrative records for WOTUS decisions.[50]
- EPA and Corps jurisdictional determinations under all of the regulatory definitions and implementation approaches.
- Maps and records of projects that have historically affected or currently affect flow regimes and continuous surface connections.[51]
- Current and historical federal and state flow data.
- Current and historical land use information, waterbody inventories, maps, aerial imagery, GIS layers, and satellite imagery.
- Data from watershed models, monitoring, studies, and scientific literature.
- Impacts of proposed changes on the chemical, physical, and biological integrity of the nation's waters in a wide variety of different climates, geological settings, and terrains in diverse watersheds.[52]
- Assessments and consultation regarding impacts to endangered and threatened species under the ESA, and an Environmental Assessment and Environmental Impact Statement under the National Environmental Policy Act ("NEPA").[53]

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

[49] For example, the evaluation of WOTUS impacts must also include the economic, health, and environmental impacts of any definitional changes on receiving and downstream waters, including impacts on drinking water supplies and treatment, fisheries and other aquatic life and commercial fishing, recreational waters and tourism, agricultural production, and interstate water compacts consistent with 33 U.S.C. § 1251(g).

[50] *See, e.g.*, *Docket Documents for Revised Definition of "Waters of the United States,"* Docket ID: EPA-HQ-OW-2021-0602, REGULATIONS.GOV, https://www.regulations.gov/docket/EPA-HQ-OW-2021-0602/document (April 21, 2025).

[51] These projects include, but are not limited to, federal and state water projects, road construction projects, and agricultural projects built since the passage of the Federal Water Pollution Control Act in 1948.

[52] This includes, for example, pollutant-by-pollutant changes to receiving water and downstream water quality, and evaluating the impacts of all facilities with Clean Water Act Section 402, 33 U.S.C. § 1342, NPDES permits and Section 404, 33 U.S.C. § 1344, Dredge and Fill permits, discharging to waters that may no longer be considered WOTUS, including facilities covered under general permits.

[53] National Environmental Policy Act, 42 U.S.C. §§ 4321-4347.

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.[54] 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.[55] 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."[56] 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."[57] 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.[58]

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,"[59] 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.'"[60] 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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[54] March 24, 2025 Notice, 90 Fed. Reg. at 13430.

[55] 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)).

[56] 40 C.F.R. § 230.3(e) (1993).

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

[58] 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").

[59] *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).

[60] *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).

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

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[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.").

waters.[67] The NWPR improperly narrowed the scope of the Clean Water Act and limited state and federal authority to control pollution in violation of the Administrative Procedure Act ("APA"), Clean Water Act, ESA, NEPA, and Supreme Court precedent. Additionally, the "typical year" requirement[68] was not applied in a consistent manner between Corps districts; the agencies found it to be inconsistent with science, "challenging and sometimes impossible to implement"; and the agencies found that data to evaluate the "typical year" requirement is frequently unavailable or unobtainable.[69] It also permitted jurisdiction to come into existence and disappear at unpredictable intervals in response to development, water withdrawals, water inputs, and other factors.[70] Similarly, the agencies should not attempt to create new, unscientific jurisdictional limitations for flow regime, flow duration, or seasonality that are unrelated to the chemical, physical, or biological integrity of waters, inconsistent with the Act or binding legal precedent, or for which data is unavailable or unobtainable.

B. Adjacent Wetlands and Relatively Permanent Lakes, Ponds, and Other Intrastate, Non-navigable Waters

The notice seeks comment on the scope of "continuous surface connection," including whether it should be applied to determine the jurisdictional status of (a)(5) relatively permanent lakes and ponds, as well as other intrastate, non-navigable waters, and whether adjacent wetlands must physically abut another WOTUS in order to be jurisdictional. Relatively permanent lakes, ponds, and other intrastate, non-navigable bodies of water forming geographic features are waters under *Sackett* and *Rapanos* and are WOTUS when they are (a)(1) waters or are connected to (a)(1) waters directly or through other jurisdictional waters.[71] *Sackett* and *Rapanos* do not require the connection to (a)(1) to be limited to a "continuous surface connection" in order for those waters to be jurisdictional. Additionally, temporary interruptions in surface connections that occur because of phenomena like low tides or dry spells, e.g., periods of drought or changes in water volume, do not render adjacent wetlands or other waters non-jurisdictional.[72]

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[67] *See, e.g.*, 2021 Proposed Definition, 86 Fed. Reg. at 69407-16; *EPA, Army Announce Intent to Revise Definition of WOTUS*, EPA (June 9, 2021), https://www.epa.gov/newsreleases/epa-army-announce-intent-revise-definition-wotus; *Request for Remand and Supporting Documentation*, EPA, https://www.epa.gov/wotus/request-remand-and-supporting-documentation (Feb. 21, 2025); EPA & DEP'T OF THE ARMY, TECHNICAL SUPPORT DOCUMENT FOR THE PROPOSED "REVISED DEFINITION OF 'WATERS OF THE UNITED STATES'" RULE (2021), https://www.regulations.gov/document/EPA-HQ-OW-2021-0602-0081.

[68] *See, e.g.*, NWPR, 85 Fed. Reg. at 22340-41.

[69] *See, e.g.*, January 2023 Definition, 88 Fed. Reg. at 3058-61, 3081.

[70] *See, e.g.*, NWPR RTC, *supra* note 30, TOPIC 5, at 14; NWPR, 85 Fed. Reg. at 22291.

[71] *See, e.g.*, 40 C.F.R. § 120.2(a)(1) (2023); *Rapanos*, 547 U.S. at 731-32, 742; *Sackett*, 598 U.S. at 678-79 (citing *Rapanos*, 547 U.S. at 742).

[72] *See Sackett*, 598 U.S. at 678.

Contrary to the agencies' March 12, 2025 Memorandum announcing their intention to further limit jurisdiction over adjacent wetlands,[73] neither *Sackett* nor *Rapanos* stand for the proposition that only adjacent wetlands that abut or physically touch another WOTUS can be determined to have a continuous surface connection. In *Sackett*, the Court expressly announced the following test for asserting jurisdiction: "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."[74] It is settled that this is a physical-connection requirement,[75] as opposed to a constant-hydrologic one, and that non-jurisdictional streams, ditches, culverts, and similar features can "serve as a physical connection that maintains a continuous surface connection between an adjacent wetland and a relatively permanent water."[76] Natural berms or similar natural landforms that provide evidence of a continuous surface connection do not sever jurisdiction for similar reasons.[77] If the Court had wanted to impose the alternative or additional requirement that the adjacent wetland physically touch the jurisdictional "water of the United States," the Court would have expressly stated that requirement. It did not.

Moreover, both *Rapanos* and *Sackett* build upon the Court's decision in *Riverside Bayview*, which expressly stated that Clean Water Act jurisdiction over adjacent wetlands was not limited solely to wetlands that border "other waters of the United States." The Court found the Corps' basis for asserting jurisdiction over adjacent wetlands, which was stated as follows, to be reasonable and "an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act":[78]

> The regulation of activities that cause water pollution cannot rely on . . . artificial lines . . . but must focus on **all waters that together form the entire aquatic system**. Water moves in hydrologic cycles, and the pollution of this part of the aquatic system, **regardless of whether it is above or below an ordinary high**

[73] EPA & DEP'T OF THE ARMY, 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 (2025), https://www.epa.gov/system/files/documents/2025-03/2025cscguidance.pdf.

[74] *Sackett*, 598 U.S. at 678-79.

[75] *Rapanos*, 547 U.S. at 751 n.13.

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

[77] *Id*. at 3095.

[78] *Riverside Bayview*, 474 U.S. at 134.

> **water mark, or mean high tide line**, will affect the water quality of the other waters within that aquatic system. For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of **or are in reasonable proximity to other waters of the United States**, as these wetlands are part of this aquatic system.[79]

The agencies' March 24, 2025 Memorandum that "rescinded any components of agency interpretation, guidance, or training materials that assumed a discrete feature established a continuous surface connection"[80] and requires adjacent wetlands to physically touch or abut a jurisdictional water is contrary to the Court's holdings in *Sackett*, *Rapanos*, and *Riverside Bayview.* It is also contrary to the agencies' interpretation of *Rapanos*, *Riverside Baview* and other precedent set forth in the Preamble to the September 2023 Definition.[81]

C. Ditches

The agencies seek comment on several issues related to ditches, including whether various characteristics could provide clear and implementable distinctions between jurisdictional and non-jurisdictional ditches and whether the agencies should adopt the definition of ditch from the 2020 NWPR.[82] The agencies should not create unique jurisdictional criteria for ditches and should not adopt the definition of ditch from the 2020 NWPR, as that definition is a piece of a larger, seriously flawed legal approach to defining "waters of the United States" that was ultimately vacated.[83] The agencies specifically found the NWPR requirements for identifying jurisdictional ditches to be unworkable, "impractical," and inconsistent with the objective of the Clean Water Act.[84] The NWPR definition is also overbroad and could incorrectly encompass a broad array of "channels" that are not, in fact, ditches, including altered or relocated rivers and streams and man-made canals.

Consistent with *Rapanos* and numerous other precedents, ditches, canals, and similar bodies of water should be categorically included in the definition of "waters of the United States" when they otherwise meet the definition of a "water of the United States." The approach to determining the jurisdictional status of non-navigable ditches and drains was at issue in *Rapanos* and the plurality set forth the standard as follows: "the lower courts should determine, in the first instance, whether the ditches or drains near each wetland are **'waters' in the ordinary sense of containing a relatively permanent flow**; and (if they are) whether the wetlands in question are 'adjacent' to

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[79] *Id.* at 133-34 (emphasis added) (citing 42 Fed. Reg. 37128 (1977)).

[80] March 24, 2025 Notice, 90 Fed. Reg. at 13430.

[81] *See, e.g.*, January 2023 Definition, 88 Fed. Reg. at 3095-96.

[82] March 24, 2025 Notice, 90 Fed. Reg. at 13431; NWPR, 85 Fed. Reg. at 22338.

[83] *See e.g.*, Pascua Yaqui Tribe v. EPA, 557 F. Supp. 3d 949, 957 (D. Ariz. 2021).

[84] *See, e.g.*, January 2023 Definition, 88 Fed. Reg. at 3061.

these 'waters' in the sense of possessing a continuous surface connection that creates the boundary-drawing problem we addressed in *Riverside Bayview*."[85]

For example, there are compelling legal and scientific reasons for ensuring that man-altered and man-made waters are covered as tributaries, and those reasons apply equally to ditches, canals, and similar features. As the 11th Circuit stated in *U.S. v. Eidson*, "[t]here is no reason to suspect that Congress intended to regulate only the natural tributaries of navigable waters. Pollutants are equally harmful to this country's water quality whether they travel along man-made or natural routes."[86]

Conclusion

If the agencies go through with their predetermined plan to revise the WOTUS definition in pursuit of their current deregulatory policy objective, it will be the fifth time since 2014 that the agencies will improperly attempt to create a novel regulatory interpretation of the Clean Water Act that would eliminate water quality protections for the nation's waters contrary to the intent of Congress. As a unanimous Supreme Court determined in *United States v. Riverside Bayview Homes*, "[p]rotection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' . . . [This is precisely why] Congress chose to define the waters covered by the Act broadly."[87] The agencies do not possess the authority to exclude waters that Congress intended to cover from the definition of "waters of the United States" to achieve their own independent (and ever-shifting) bureaucratic policy goals.[88]

Instead of pursuing this course of action, we urge the agencies to provide clarity and certainty, as well as consistency with the law, by maintaining the protections provided in the current regulatory definition. Any revisions to the regulatory definition, guidance, memoranda, or other administrative actions must fully encompass waters necessary to adequately protect the chemical, physical, and biological integrity of the nation's waters as intended by Congress and must follow the public participation requirements of the Clean Water Act and APA, including full notice and comment rulemaking.[89] A clear WOTUS definition that protects the integrity of the nation's waters greatly

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[85] *Rapanos*, 547 U.S. at 757.

[86] United States. v. Eidson, 108 F.3d 1336, 1342 (11th Cir. 1997) *cert. denied*, 522 U.S. 899 (1997).

[87] *Riverside Bayview*, 474 U.S. at 132-33 (citation omitted).

[88] *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 325, 328 (2014) ("An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. . . . We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.")

[89] *See* 33 U.S.C. § 1251(e) ("Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States."); 5 U.S.C. § 553. The agencies must follow the APA's public notice and comment requirements when they enact, amend, or repeal a rule. *See* Nat'l Parks Conservation Ass'n v. Salazar, 660 F. Supp. 2d 3, 5 (D.D.C. 2009). The agencies cannot satisfy the APA "good cause" exception given the nature and scope of this regulation, and notice and comment rulemaking regarding this regulatory definition is not "impracticable, unnecessary, or contrary to the public interest." *See* 5 U.S.C. §

benefits the public, farmers, businesses, landowners, and state and tribal governments in myriad ways, including reduced compliance and production costs. Constantly reinterpreting this more than 50-year-old law to suit the most recent bureaucratic objectives and justify the adoption of yet another new, narrower WOTUS definition creates uncertainty, benefits no one, and endangers everyone.

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553(b)(4)(B); *see also* Mack Trucks, Inc. v. EPA, 682 F.3d 87, 93-95 (D.C. Cir. 2012) (quoting Util. Solid Waste Activities Grp. v. EPA, 236 F.3d 749, 755 (D.C. Cir. 2001)).

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Waterkeepers Chesapeake
Silver Spring, Maryland

Chauncey J. Moran
Yellow Dog Riverkeeper
Big Bay, Michigan

Robert Burns
Detroit Riverkeeper
Taylor, Michigan

Abby Braman
Pearl Riverkeeper
Jackson, Mississippi

Kyle Roerink
Great Basin Waterkeeper
Baker, Nevada

Michele Langa
Hackensack Riverkeeper
Hackensack, New Jersey

Greg Remaud
NY/NJ Baykeeper
Hazlet, New Jersey

Peter Topping
Peconic Baykeeper
Hampton Bays, New York

Tracy Brown
Hudson Riverkeeper
Ossining, New York

Brandon Jones
Catawba Riverkeeper
McAdenville, North Carolina

Kemp Burdette
Cape Fear Riverkeeper
Wilmington, North Carolina

Sandy Bihn
Lake Erie Waterkeeper
Toledo, Ohio

Rebecca Jim
Tar Creekkeeper
Miami, Oklahoma

Miles Johnson
Columbia Riverkeeper
Hood River, Oregon

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Youghiogheny Riverkeeper
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Buffalo, New York

Chris Navitsky
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Lake George, New York

Yvonne Taylor
Seneca Lake Guardian,
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Watkins Glen, New York

Riley Lewis
White-Oak Riverkeeper
Morehead City, North Carolina

Edgar Miller
Yadkin Riverkeeper
Winston-Salem, North Carolina

Martin Lively
Grand Riverkeeper
Miami, Oklahoma

Michelle Emmons and Heather King
Willamette Riverkeeper
Eugene, Oregon

Kelsey Shaw Nakama
Tualatin Riverkeepers
Tualatin, Oregon

Heather Hulton VanTassel
Three Rivers Waterkeeper
Pittsburgh, Pennsylvania

Erin Donmoyer
Black-Sampit Riverkeeper
Conway, South Carolina

Jefferson Currie II
Lumber Riverkeeper
Conway, South Carolina

Preston Kelly
Waccamaw Riverkeeper
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Colorado Riverkeeper
Moab, Utah

Amy Wicks
Great Salt Lake Waterkeeper
Salt Lake City, Utah

Kirsten McDade
North Sound Waterkeeper - RE Sources
Bellingham, Washington

Kelsey Furman
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Seattle, Washington

Katelyn Scott
Spokane Riverkeeper
Spokane, Washington

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Cheryl Nenn
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Milwaukee, Wisconsin