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Via Regulations.gov

U.S. Environmental Protection Agency
EPA Docket Center: Office of Water Docket
Mail Code 28221T
Attn: EPA-HQ-OW-2025-0322
1200 Pennsylvania Avenue NW
Washington D.C. 20460

Re: The American Petroleum Institute's Response to the Environmental Protection Agency's and Army Corps of Engineers' Proposed Updated Definition of "Waters of the United States;" 90 Fed. Reg. 52,498 (Nov. 20, 2025)/EPA-HQ-OW-2025-0322).

Dear Environmental Protection Agency and Army Corps of Engineers:

This letter provides comments from the American Petroleum Institute ("API"), the Independent Petroleum Association of America ("IPAA"), the Petroleum Alliance of Oklahoma, the Petroleum Association of Wyoming ("PAW"), and the Western States' Petroleum Association ("WSPA") in response to the U.S. Environmental Protection Agency's ("EPA's") and the Army Corps of Engineers' ("Army Corps") (collectively "the Agencies'") proposed revisions ("Proposed Revisions") to the definition of "Waters of the United States" ("WOTUS").[1]

We appreciate the Agencies' commitment to fully incorporating the jurisdictional limits Congress imposed through the Clean Water Act ("CWA" or "the Act") and the broad interpretive guideposts provided by the United States Supreme Court ("Supreme Court" or "the Court"). We believe that our additional **clarifying** changes further goals we share with the

[1] 90 Fed. Reg. 52,498 (Nov. 20, 2025)/EPA-HQ-OW-2025-0322).

government — developing an interpretation of WOTUS that is clear, protective of the environment and human health, administrable, and legally sound.

To that end, we offer strong general comments supporting the totality of the Proposed Revisions. Specifically, we want to acknowledge the value and underlying complexity of the Agencies' efforts, in light of the following challenges:

1.) ***The herculean task of developing a clear, concise, definition of WOTUS that works in the Arid West as well as in Alaska***. Given that challenge as well as the comment period of a mere 45 days encompassing 3 national holidays, we strongly encourage the Agencies to carefully review comments by the various states as well as national and state oil and gas associations (including but not limited to the Alaska Oil and Gas Association, also known as "AOGA").

2.) ***Reducing permitting challenges, while maintaining the integrity of the CWA***. Permitting processes under the Act have become increasingly burdensome, complicated, inconsistent, and uncertain. This lack of clarity extends to, but is not limited to, questions about the proper scope of federal jurisdiction under the CWA as well as the frequently uncertain and inconsistent processes by which the Agencies assert jurisdiction over specific waterbodies and features.

3.) ***Reconciling competing past definitions of federal jurisdiction***. These include, but are not limited to the Agencies' January 2023 WOTUS rule ("2023 Rule")[2] and subsequent direct final rule[3] ("2023 Amended Rule") revising the Agencies' January 2023 WOTUS rule to conform to the Supreme Court's holding in *Sackett v. EPA* ("*Sackett*").[4]

Additionally, where necessary, our comments also provide suggestions where our members have recognized the potential for the Agencies' proposed approach to be unclear, difficult to administer, and insufficiently aligned with important Supreme Court interpretations of the CWA. For example, in some instances, proposing to introduce new jurisdictional criteria not found in relevant Supreme Court interpretations of the Act—such as the wet season concept—risks regulatory ambiguity, inconsistent application, and unnecessary litigation. We therefore urge the Agencies to ensure that the Proposed Rule Revisions' operative definitions and jurisdictional triggers are drawn directly from — or are otherwise strictly aligned with — relevant Supreme Court decisions. This nexus will promote regulatory certainty and minimize interpretive disputes.

Finally, our comments should be read in conjunction with other significant comments from our industry, and the broader coalitions in which we participate. For example, we generally, support the comments submitted by the Waters Advocacy Coalition ("WAC") and the Federal Water Quality Coalition ("FWQC"), including the overall position that the Agencies should ensure faithful implementation of *Sackett* through rulemaking. Similar to our April 23, 2025 comments, there are significant areas where we depart from these, and as such, where our specific comments

[2] 88 Fed. Reg. 3,004 (Jan. 18, 2023).
[3] 88 Fed. Reg. 61,964 (Sept. 8, 2023).
[4] *Sackett v. EPA*, 598 U.S. 651 (2023).

differ from those filed by WAC, we request that the Agencies treat our comments herein as reflective of our primary position.

Similarly, we encourage the Agencies' to carefully review region-specific comments from our industry – including, but not limited to, those submitted by AOGA, which deal specifically with unique implementation challenges in specific parts of the country.

Overall, we are grateful for the Administration's commitment to prompt action, as well as the opportunity to provide comments that will clarify the development timeline for projects. We genuinely welcome the opportunity to work with EPA and the Army Corps on the development and implementation of a WOTUS definition that complies with the CWA, adheres to binding Supreme Court interpretations, and provides the regulated community the clarity and certainty they need to utilize our nation's vast energy resources, build critically needed infrastructure, and grow our domestic manufacturing base.

Thank you for your consideration of these comments. If you have any questions, please do not hesitate to contact us.

Sincerely,

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I. EXECUTIVE SUMMARY

The Associations broadly support the Agencies' Proposed Revisions to the regulatory definition of WOTUS because we believe that many of the proposed changes will help make the Agencies' federal jurisdiction more clear, protective, durable, and legally sound. We are grateful that the Agencies' Proposed Revisions reflect meaningful consideration of our April 23, 2025 comments, the broad interpretive guideposts provided by the Supreme Court, and a genuine interest in implementing the CWA in accordance with the "single, best meaning" of the CWA that was "fixed at the time of enactment."[5] To that end, we also appreciate the Agencies' recognition that the definition of WOTUS must closely align with Congress's objective of implementation to preserve states' primary authority over land and water use.

The Associations further support the Agencies' efforts to ensure that the definition of WOTUS is sufficiently clear and precise to avoid implicating the void-for-vagueness doctrine and the due process concerns that informed the Supreme Court's decision in Sackett and in other cases. And while we appreciate statements in the preamble acknowledging that the Agencies have the burden of proving that features are jurisdictional, we urge the Agencies to expressly state this acknowledgement within the regulatory text and to provide deadlines and mechanisms for redress to better ensure that jurisdictional determinations are timely and fair.

We also broadly support the way the Agencies applied these principles and interpretative guideposts in their proposed revisions to specific categories of waters.

- We support limiting category (a)(1) waters to traditionally navigable waters and the territorial seas; however, we urge the Agencies to further determine that historic use alone is insufficient to demonstrate navigability or define a water as a traditionally navigable water.

- We also supports eliminating standalone categories of water for "impoundments" and "lakes and ponds."

- We suggest that retaining an "impoundments" category is inappropriate because merely impounding an otherwise non-jurisdictional water should not make it a WOTUS.

- On the adjacent wetlands category, we recommend a modest but important clarification that adds the concept of indistinguishable into rule language to state: "Wetlands adjacent to and indistinguishable from the following waters: . . " We believe that this additional language provides a clear, objective, and legally defensible standard for jurisdictional wetlands consistent with the Supreme Court and aids field implementation.

- We also request the "lakes and ponds" category should be incorporated into the "tributaries" category because jurisdiction over these features is assessed pursuant to the same "relatively permanent" standard.

[5] *Loper Bright Enterprises v. Raimondo,* 603 U.S. __ (2024); 144 S. Ct. 2244 (2024).

- We support key aspects of the Agencies' proposed changes to the "tributaries" and "adjacent wetlands" categories of waters as relating to the relatively permanent and continuous surface connection tests. In particular, we support the Agencies' proposed definition of "tributary;" proposed identification of features and circumstances that limit the extent of federal jurisdiction within a tributary, river system, wetland, or wetland complex; and proposed interpretation that federal jurisdiction can only extend to those adjacent wetlands that actually abut (*i.e.*, touch) WOTUS.

We are concerned, however, about potential misalignment between binding Supreme Court interpretations of WOTUS and the "wet season" approach that the Agencies propose to use to determine if tributaries are "relatively permanent" and whether adjacent wetlands share a "continuous surface connection" with the WOTUS they abut.

- ***Particularly, on the implementation side, we are supportive of the Agencies' efforts, but there is enormous scope for confusion with reconciling wet season precipitation and seasonal flows (which may not overlap).*** In addition to the practical challenges of clearly and consistently implementing this proposed approach in jurisdictional determinations, we believe that adoption of the proposed "wet season" approach may allow the Agencies to assert jurisdiction over features that are ordinarily dry throughout much of the year and wetlands that frequently lack the continuous surface water connections that would make them indistinguishable from the WOTUS they abut.

- ***Notably, asserting jurisdiction over features that only infrequently contain surface water or flows is inconsistent with Sackett and other relevant Supreme Court decisions because it contravenes the CWA and its framework for cooperative federalism and because it implicates serious due process and void-for-vagueness concerns***. As such, we recommend that the Agencies update the proposed definitions of "relatively permanent" and "continuous surface connection" to require that surface water be present or flowing for at least 90 consecutive days as per longstanding practice implementing *Rapanos*. We believe that this recommendation provides a legally defensible backstop to the Agencies' wet season concept, preventing unusually short wet seasons from being inadvertently folded into the relatively permanent and continuous surface connection frameworks, while allowing the Agencies to assess other waters on case-by-case basis, taking into account regional-specific factors such as those applicable in Alaska as discussed herein. This would provide greater regulatory certainty and increased durability.

Beyond that, we appreciate the Agencies' acknowledgement of region-specific issues in Alaska — including but not limited to Agencies' efforts to change the implementation method for permafrost wetlands delineation such that the Agencies will not consider the entire wetland as jurisdictional if only a portion of a wetland is adjacent as defined. While we are supportive of this measure, we request clarification on the methods that will be used to make these determinations. To aid the Agencies, we also provide region-specific comments and recommendations to ensure that the chosen methods are sound, reliable, and easy to utilize in delineating adjacent wetlands. Again, for region-specific compliance challenges, we strongly encourage the agencies to review comments from states like Alaska and industry associations like the AOGA's definition of WOTUS.

We also strongly encourage the Agencies to provide a comprehensive list of exclusions and associated definitions, including all those that are discussed as exclusions under the preamble, and ones based on longstanding practice and past rules. Clear codification of those regulatory requirements will be invaluable in field evaluation scenarios, where it will provide clear direction and guidance to ordinary landowners and applicants. As contemplated by the Supreme Court in *Sackett*, we do not believe that ordinary landowners should have to parse through legal language in the preamble or otherwise to discern the Agencies' intent regarding which features are likely to be excluded. Easy-to-discern non-jurisdictional features should be excluded and not require further costly and unnecessary case-by-case jurisdictional determination analysis.

We therefore offer multiple clarifying recommendations for exclusions from federal jurisdiction. In particular, we support excluding groundwater, waste treatment systems, most ditches, and prior converted cropland. We urge the Agencies to: 1) clarify groundwater to include diffuse or shallow subsurface groundwater flows; 2) clarify the waste treatment system exclusion and the array of treatment systems it includes; 3) add exclusions for stormwater control, wastewater recycling, and green infrastructure features; (4) extend the abandonment time limit for the "prior converted croplands" exclusion ten or more years; (5) adopt language excluding all ditches that are excavated or constructed entirely in dry land with clarifying definitions for dry land/upland; (6) provide clarification on the scope of various artificial lakes and ponds with an illustrative list; and (7) provide an exclusion for ephemeral waters similar to 2020 Navigable Waters Protection Rule ("2020 NWPR") and as noted in the preamble. Clarifying and expanding these exclusions is critical to the Agencies' efforts to define WOTUS in a manner that is clear, protective, durable, and legally sound.

III. THE ASSOCIATIONS' INTERESTS

API is a national trade organization of nearly 600 members involved in all aspects of the domestic and international oil and natural gas industry, including exploration, production, refining, marketing, distribution, and marine activities. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements while economically developing and supplying energy resources for consumers.

API's members have a substantial interest in the scope of federal jurisdiction under the CWA. All segments of the oil and natural gas industry are subject to extensive water permitting and regulatory requirements at both the state and federal levels for activities such as drilling and producing from oil and natural gas wells, refining crude oil, transporting crude oil or refined product, and operating filling stations. Protecting water resources is important, and API and its members remain committed to working with federal and state regulators to ensure that water resource regulations are clear, administrable, and legally sound.

This commitment is reflected in API's long engagement on this very issue. In this and each prior effort to interpret WOTUS, API and its members participated in opportunities to provide constructive insight on the elements of a clear, administrable, and legally sound reading of the

CWA. API has submitted comments on its own, as well as through multi-industry trade coalitions, including WAC and FWQC.

To that end, API's recommendations reflect API's support for the CWA and our interest in having the Act administered in a way that gives meaningful effect to Congress's explicit directive to protect the integrity of water resources through cooperation and coordination with the states. These recommendations also reflect API's consideration of the Agencies' prior interpretations, the broad guideposts provided by the Supreme Court, and our members' interest in developing an interpretation of WOTUS that is clear, **administrable, and legally sound.**

The Independent Petroleum Association of America ("IPAA") serves as an informed voice for the exploration and production segment of the industry, and advocates its members' views before the United States Congress, The White House, and federal agencies. IPAA represents the thousands of independent oil and natural gas producers and service companies across the United States

The **Petroleum Alliance of Oklahoma** is the largest oil and gas trade association in the Mid-Continent and the only trade association in Oklahoma to represent all sectors of the state's oil and natural gas industry. Representing more than 1,700 individuals and member companies, the Alliance's membership includes oil and natural gas producers, service providers to the oil and natural gas industry, midstream companies, refiners, and other associated businesses. Our members include companies of all sizes, ranging from small, family-owned companies to large, publicly traded corporations.

Our members are responsible for 83% of all operated crude oil and natural gas production in Oklahoma. When non-operated production is considered, we estimate our members produce, transport, process, and refine more than 97% of Oklahoma's crude oil and natural gas. Additionally, our members have operations, assets, or interests in most of the United States' oil and natural gas producing regions as well as internationally. Our members develop private, state, and federal minerals and operate on federal lands in Oklahoma and in other states.

The Petroleum Association of Wyoming ("PAW") represents companies involved in all aspects of responsible oil and natural gas development in Wyoming, including upstream production, oilfield services, midstream processing, pipeline transportation and essential work such as legal services, accounting, consulting and more.

The Western States' Petroleum Association ("WSPA") is a non-profit trade association that represents companies that account for the bulk of petroleum exploration, production, refining, transportation and marketing in the five western states of Arizona, California, Nevada, Oregon, and Washington. WSPA members operate in upstream, midstream, and downstream segments of the oil and natural gas industry.

IV. CRITICAL LEGAL AND STATUTORY BACKGROUND

The CWA establishes a host of programs that, together, are designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[6] One element of Congress's comprehensive strategy is the program to regulate the "discharge of any pollutant," defined as "any addition of any pollutant to navigable waters from any point source," except "in compliance with" other provisions of the Act.[7] The Act, in turn, defines "navigable waters" to mean "the waters of the United States, including the territorial seas."[8]

To "discharge" lawfully to navigable waters, a business or person must obtain a permit. EPA and authorized state and tribal governments (if delegated authority) may issue permits for "the discharge of any pollutant."[9] The Army Corps and authorized states may issue permits for "the discharge of dredged or fill material."[10]

The CWA permitting regimes are not the exclusive means of protecting waters under the Act. Founded on principles of cooperative federalism, the CWA recognizes states as the primary permitting and enforcement authorities. In fact, the primary role of states was among Congress's foremost considerations when designing the Act:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. It is the policy of Congress that the States manage the construction grant program under this Act and implement the permit programs under sections 402 and 404 of this Act. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.[11]

Thus, in acquiescence to state sovereignty and the practical recognition that states can have useful resources to regulate their waters, the CWA requires EPA to coordinate its water resource protection efforts with the states.[12] Waters and wetlands that are outside the definition of WOTUS,

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[6] 33 U.S.C. § 1251(a); The Act's provisions address water pollution control programs, funding, grants, research, training and many other measures, including programs managed by the states for water quality standards (33 U.S.C. §§ 1311-14), area-wide waste treatment management (33 U.S.C. § 1288), and nonpoint source management (33 U.S.C. §§ 1313(d), 1329); federal assistance to municipalities for sewage treatment plants (33 U.S.C. § 1281); funding to study impacts on water quality (33 U.S.C. §§ 1251–74); and programs targeting specific types of pollution (*e.g.*, 33 U.S.C. § 1321).

[7] 33 U.S.C. §§ 1311(a),1362(12).

[8] 33 U.S.C. § 1362(7).

[9] 33 U.S.C. § 1342(a).

[10] 33 U.S.C. §§ 1344(a), 1344(g) ("CWA Dredge and Fill Program"). Under these provisions, states and tribes may assume administration of this program. To date, two states have assumed administration of the CWA Dredge and Fill Program.

[11] 33 U.S.C. § 1251(b).

[12] 33 U.S.C. §§ 1251(b), 1251(g).

and therefore federal jurisdiction, are not left unprotected, but instead are regulated and protected by states, tribes, and localities. In that respect, any overly broad regulatory assertion of federal jurisdiction disturbs the federal-state balance that Congress struck in the CWA and intrudes on states' authority and responsibility to manage their own land and water resources.

In 1974, the Army Corps initially defined WOTUS as waters that "are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce."[13] The Army Corps later revised the definition in 1977 to encompass not only traditional navigable waters ("TNWs"), but also adjacent "wetlands" and "[a]ll other waters" the "degradation or destruction of which could affect interstate commerce."[14]

Although the text of the Agencies' definition of WOTUS remained essentially unchanged for the next 33 years, the Agencies' interpretation of their regulatory definition of WOTUS continued to expand in scope and effect. In seminal decisions beginning in 1985, the Supreme Court confronted those increasingly broad interpretations and the limits of federal regulatory jurisdiction under the CWA.

a. ***United States v. Riverside Bayview Homes* (1985) ("*Riverside Bayview*")**

In *Riverside Bayview Homes*, the Court considered the Army Corps' assertion of jurisdiction over "low-lying, marshy land" immediately abutting a navigable water on the ground that it was an "adjacent wetland" within the meaning of the Army Corps regulations.[15] The Court addressed the question of whether non-navigable wetlands may be regulated as WOTUS on the basis that they are "adjacent to" and "inseparably bound up" with navigable-in-fact waters because of their "significant effects on water quality and the aquatic ecosystem."[16] Observing that Congress intended the CWA "to regulate at least some waters that would not be deemed 'navigable,'" the Court held that it is "a permissible interpretation of the Act" to conclude that "a wetland that actually abuts on a navigable waterway" falls within the definition of WOTUS.[17]

b. ***Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (2001) ("*SWANCC*")**

Following *Riverside Bayview,* the Agencies "adopted increasingly broad interpretations" of their regulations, asserting jurisdiction over an ever-growing set of features bearing little or no relation to TNWs.[18] One of those interpretations—the Migratory Bird Rule—was struck down in *SWANCC*.[19]

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[13] 39 Fed. Reg. at 12,115, 12,119 (Apr. 3, 1974).
[14] 42 Fed. Reg. at 37,122, 37,144 (July 19, 1977).
[15] *United States v. Riverside Bayview Homes*, 474 U.S. 121, 124 (1985).
[16] *Riverside Bayview Homes*, 474 U.S. at 131–35, n.9. "Navigable-in-fact" waters refer to waters that are presently suitable to commercial navigation.
[17] *Riverside Bayview Homes*, 474 U.S. at 135 (emphasis added).
[18] *Rapanos v. United States*, 547 U.S. 715, 725 (2006).
[19] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*").

In *SWANCC*, the Army Corps asserted CWA jurisdiction over isolated "seasonally ponded, abandoned gravel mining depressions" because they were "used as habitat by [migratory] birds."[20] The Army Corps reasoned that this use by migratory birds brought the isolated ponds within the reach of the Commerce Clause. The Supreme Court disagreed and explained that a ruling for the Army Corps would have required the Court "to hold that the jurisdiction of the Army Corps extends to ponds that are not adjacent to open water," a conclusion that "the text of the statute will not allow."[21] The Court stressed that, while *Riverside Bayview* turned on "the significant nexus" between "wetlands and [the] 'navigable waters'" they abut, the Migratory Bird Rule asserted jurisdiction over isolated ponds bearing no connection to navigable waters.[22] According to the Court, that approach impermissibly read the term "navigable" entirely out of the statute, even though navigability was "what Congress had in mind as its authority for enacting the CWA."[23] The Court therefore invalidated the rule.

As noted in the preamble to the Proposed Revisions, the *SWANCC* Court expressly limited the reach of the CWA and discussed the constitutional ramifications of the Army Corps' assertion of federal regulatory jurisdiction.[24] The Court "held that the use of 'isolated' nonnavigable intrastate ponds by migratory birds was not, by itself, a sufficient basis for the exercise of federal authority under the Clean Water Act."[25] The preamble also quotes the Court's admonition that "'[w]here an administrative interpretation of a statute presses against the outer limits of the Congress' constitutional authority, we expect a clear statement from Congress that it intended that result,' and that this is particularly true 'where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.'"[26]

c. ***Rapanos v. United States* (2006) ("*Rapanos*")**

In *Rapanos*, the Court addressed sites containing "sometimes-saturated soil conditions," located twenty miles from "[t]he nearest body of navigable water."[27] The Army Corps asserted that because these sites were "near ditches or man-made drains that eventually empty into traditional navigable waters," they should be considered "adjacent wetlands" covered by the Act.[28]

Justice Scalia, writing for a four-Justice plurality,[29] rejected the Army Corps' position because WOTUS includes "only relatively permanent, standing or flowing bodies of water" and not "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[30] In going beyond this "commonsense understanding" to classify features like "ephemeral streams" and "dry arroyos" as WOTUS, the Agencies stretched the text of the CWA "beyond parody" to mean "'Land is Waters.'"[31] And wetlands fall within the CWA

[20] *SWANCC*, 531 U.S. at 162–65 (citing 51 Fed. Reg. 41,217 (Nov. 13, 1986)).
[21] *SWANCC*, 531 U.S. at 171.
[22] *SWANCC*, 531 U.S. at 171–72.
[23] *SWANCC*, 531 U.S. at 171.
[24] 86 Fed. Reg. at 69,379 (citing *SWANCC*, 531 U.S. at 172–73).
[25] 86 Fed. Reg. at 69,379.
[26] 86 Fed. Reg. at 69,379 (citing *SWANCC*, 531 U.S. at 172–73).
[27] *Rapanos*, 547 U.S. at 720.
[28] *Rapanos*, 547 U.S. at 729.
[29] The plurality opinion was joined by Chief Justice Roberts as well as Justices Thomas and Alito.
[30] *Rapanos*, 547 U.S. at 732, 739.
[31] *Rapanos*, 547 U.S. at 734.

jurisdiction as adjacent wetlands "only [if they have] a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands."[32] In other words, in order to come within federal jurisdiction, adjacent wetlands must be, "as a practical matter indistinguishable from" the WOTUS they abut.[33] "[A]n intermittent, physically remote hydrologic connection" to TNWs is not enough under either *Riverside Bayview* or *SWANCC*.[34]

Justice Kennedy concurred in the judgment. As he saw it, "the Corps' jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense."[35] When "wetlands' effects on water quality [of traditional navigable waters] are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'"[36] While Justice Kennedy suggested that this test "may" allow for the assertion of jurisdiction over a wetland abutting a major tributary to a TNW, he categorically rejected the idea that "drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes toward it" would satisfy his conception of a significant nexus.[37] So he suggested that any agency regulation identifying covered tributaries would need to rest on considerations including "volume of flow" and "proximity to navigable waters" "significant enough" to provide "assurance" that they and "wetlands adjacent to them" perform "important functions for an aquatic system incorporating navigable waters."[38]

Taken together, *Rapanos* and *SWANCC* represent the Court's reluctance to conclude Congress has authorized far-reaching federal regulatory controls over private land use. Before federal regulatory measures can encroach on matters traditionally left to states (such as local land use), Congress must explicitly authorize such measures. In this way, *SWANCC* and *Rapanos* affirm the Court's federalism "clear statement" rule that disfavors federal regulatory intrusions into matters traditionally regulated by the states and is skeptical of the purported need for a comprehensive federal regulatory scheme over such matters.

d. ***Sackett v. EPA* (2023)*("Sackett")***

On May 25, 2023, the Supreme Court issued its decision in *Sackett*, which provides the Court's most recent interpretation of the term WOTUS under the CWA.[39] The Sacketts are an Idaho couple who sought to build a home and therefore "began backfilling their property with dirt and rocks" on a wetland separated by a 30-foot road from an unnamed tributary that "feeds into a non-navigable creek, which in turn feeds into Priest Lake," a navigable interstate waterbody.[40] "A few months later, the EPA sent the Sacketts a compliance order informing them that their backfilling violated the CWA because their property contained protected wetlands," demanding that they "immediately undertake activities to restore the Site," and threatening "the Sacketts with penalties

[32] *Rapanos*, 547 U.S. at 742.
[33] *Rapanos*, 547 U.S. at 755.
[34] *Rapanos*, 547 U.S. at 742.
[35] *Rapanos*, 547 U.S. at 779.
[36] *Rapanos*, 547 U.S. at 780.
[37] *Rapanos*, 547 U.S. at 778 (The Act does not reach wetlands alongside "a ditch or drain" that is "remote or insubstantial" just because it "eventually may flow into traditional navigable waters").
[38] *Rapanos*, 547 U.S. at 781.
[39] *Sackett v. EPA*, 598 U.S. 651 (2023).
[40] *Sackett*, 598 U.S. at 662.

of over $40,000 per day if they did not comply."[41] In the legal challenge that followed, the U.S. Court of Appeals for the Ninth Circuit affirmed a district court ruling for EPA, holding that the wetlands on Sacketts' property "significantly affect the integrity of Priest Lake"—thereby meeting the jurisdictional standard put forth by former Justice Anthony Kennedy in *Rapanos*, and triggering federal CWA jurisdiction.[42]

On appeal to the Supreme Court, a majority of the Court rejected the "significant nexus" standard Justice Kennedy articulated in his *Rapanos* concurrence, and clarified the definition of certain terms used to define WOTUS.[43] To begin, the Court "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 geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'"[44] The *Sackett* majority also explained that "[w]hile [the CWA's] predecessor encompassed 'interstate or navigable waters,' 33 U.S.C. § 1160(a) (1970 ed.), the CWA prohibits the discharge of pollutants into only 'navigable waters.'"[45]

Of particular note, the Supreme Court in *Sackett* also agreed with the *Rapanos* plurality's determination that federal jurisdiction can extend to some wetlands, but only those that are "indistinguishably part of a body of water that itself" constitutes WOTUS.[46] "Wetlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby."[47] For a wetland to be a WOTUS and therefore subject to federal jurisdiction, it must have "a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands."[48]

Those wetlands that are not "indistinguishable" from adjacent WOTUS, and therefore outside of federal jurisdiction, are not unregulated. Rather, as the Court makes clear, "[s]tates can and will continue to exercise their primary authority to combat water pollution by regulating land and water use."[49]

II. WE STRONGLY RECOMMEND THAT THE PROPOSED RULE ADHERE CLOSELY TO THE CWA AS ARTICULATED BY SUPREME COURT CASE LAW INCLUDING *SACKETT* WHICH PROVIDES CLEAR AND BINDING GUIDEPOSTS FOR FEDERAL JURISDICTION; AND WITHIN THESE BOUNDS, WE SUPPORT THE PROPOSED REVISIONS WITH RECOMMENDATIONS TO CERTAIN CATEGORIES OF WATERS.

Although confusion and inconsistency about the proper scope of federal jurisdiction under the definition of WOTUS has plagued the Agencies' implementation the CWA for many years, certain

[41] *Sackett*, 598 U.S. at 662 (internal citations and quotations omitted).
[42] *Sackett v. EPA*, 8 F.4th 1075, 1092 (9th Cir. 2021) (citing 547 U.S. 715, 780 (2006)).
[43] *Sackett v. EPA*, 598 U.S. at 651.
[44] *Sackett*, 598 U.S. at 671 (citations omitted) (alterations in original).
[45] *Sackett*, 598 U.S. at 661.
[46] *Sackett*, 598 U.S. at 676.
[47] *Sackett*, 598 U.S. at 676.
[48] *Sackett*, 598 U.S. at 678.
[49] *Sackett*, 598 U.S. at 683.

actions taken in the 2023 Rule undermined the predictability and consistency of jurisdictional determinations by disrupting Congress's intended balance between federal and state jurisdiction, creating significant ambiguity and confusion, and exceeding the Agencies' jurisdiction under the CWA as interpreted by the Supreme Court. Whereas the 2020 "Navigable Waters Protection Rule" ("2020 NWPR"),[50] reasonably clarified and refined the definition of WOTUS in accordance with the *Rapanos* plurality's decision, on January 18, 2023, the 2023 Rule[51] allowed for the expansive assertion of federal jurisdiction using Justice Kennedy's "significant nexus" test, an overly expansive definition of "adjacent, and other misapplications of the Act and Court interpretations thereof.

After a Supreme Court majority subsequently endorsed and expanded on the *Rapanos* plurality's interpretation, the Agencies issued the 2023 Amended Rule, which "remove[d] the significant nexus standard" from the previous WOTUS rule, eliminated "interstate wetlands" from the category of "interstate waters," "amend[ed] its definition of 'adjacent,'" and made multiple other revisions that better aligned the Agencies' WOTUS interpretation with the Supreme Court's decision in *Sackett*.[52] The 2023 Amended Rule failed, however, to address multiple other significant aspects of the Agencies' WOTUS interpretation that remained at odds with the Court's holding in *Sackett*.

Key aspects of the *Sackett* decision that were not addressed or improperly addressed in the 2023 Amended Rule include: (1) the scope of "relatively permanent" waters and the features to which the phrase "relatively permanent" applies; (2) the meaning of the phrase "continuous surface connection" and the key language that wetlands be "indistinguishable" from abutting WOTUS in order to be jurisdictional; and (3) the scope of federal jurisdiction over ditches.[53] For example, the preamble to the 2023 Amended Rule seemingly allowed the Agencies to identify a tributary based on "trace evidence of a flowpath downstream"[54] that does not need to be a WOTUS[55] and determine whether it is "relatively permanent" based on runoff from "a concentrated period of back-to-back precipitation events."[56] These interpretations directly conflict with the *Sackett* decision by allowing the Agencies to extend federal jurisdiction over ephemeral features, non-jurisdictional man-made drainage ditches, and grass swales.

Moreover, notwithstanding ongoing litigation over the legality of the 2023 Rule and 2023 Amended Rule, on September 27, 2023, the Agencies aggressively asserted federal jurisdiction in accordance with their 2023 rules through a September 27, 2023 joint coordination memorandum, which established an "elevation" process for certain jurisdictional determinations ("AJDs") involving landscape features being evaluated by the agencies under either the categories of "adjacent wetlands" or "other waters."[57] The Agencies also released at least nine additional

[50] 85 Fed. Reg. 22,250 (Apr. 21, 2020).
[51] 88 Fed. Reg. 3,004 (Jan. 18, 2023).
[52] 88 Fed. Reg. at 61,966.
[53] 90 Fed. Reg. 13,340–41.
[54] 88 Fed. Reg. at 3,079.
[55] 88 Fed. Reg. at 3,079–84.
[56] 88 Fed. Reg. at 3,086–87.
[57] Memorandum for Director of Civil Works and US EPA Regional Administrators, Subject: U.S. Department of the Army, U.S. Army Corps of Engineers (Corps) and U.S. Environmental Protection Agency (EPA) Coordination of draft approved jurisdictional determinations under the "Revised Definition of 'Waters of the United States,'" as

memoranda focusing on specific jurisdictional matters, including when an isolated wetland feature has a potential "continuous surface connection" to another jurisdictional feature, thus making the isolated wetland into a CWA-jurisdictional adjacent wetland.[58]

Given widespread confusion over the 2023 Amended Rule as well as its inconsistency with the statute as interpreted by the Supreme Court, it is clear that the Agencies must take action to promulgate a WOTUS definition that is lawful, durable, predictable, administrable, and clear. Thus, API supported the Administration's March 12, 2025 "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," and provided detailed recommendations in response to the Agencies' March 24, 2025 solicitation of stakeholder feedback on defining WOTUS. [59]

We are pleased to see that the Agencies' Proposed Revisions reflect meaningful consideration of our April 23, 2025, comments, the CWA's jurisdictional limits, the broad interpretive guideposts provided by the Supreme Court, and a genuine interest in developing an interpretation of WOTUS that is clear, administrable, and legally sound. To that end, in Subsection V.a., we provide general recommendations to help ensure that the Agencies' final WOTUS definition effectively promotes durability, consistency, clarity, and certainty. And later we apply these guidelines in discussing our support for, and recommended revisions to, the Proposed Revisions' categories of waters. Section VI offers specific recommendations for rule revisions to the relatively permanent definition, as well as a proposed "wet season" definition for your consideration.

a. We support a WOTUS rule that provides consistency, clarity, durability, and regulatory certainty, and follows legal guideposts.

As reflected by the previous Section's discussion of the decades of evolving WOTUS interpretations and extensive litigation, it is time for the Agencies to finally begin implementing the CWA in a manner that provides consistency, clarity, and certainty. A clear, consistent, and durable WOTUS definition is not only necessary for the growth and competitiveness of America's domestic energy industry and manufacturing base, but also critical for environmental protection and administrative accountability.

1. Under *Loper Bright Enterprises v. Raimondo*, a recent Supreme Court case that overturned the principle of special deference afforded to administrative agencies in interpreting applicable laws; the Proposed Revisions must now adhere to the "single, best meaning" of the CWA that was "fixed at the time of enactment."

amended by the final rule "Revised Definition of 'Waters of the United States'; Conforming" (the 2023 rule, as amended, 33 CFR § 328.3; 40 CFR §120.2) (Sept. 27, 2023).

[58] See Feb. 16, 2024, MVS-2023-00288, St. Louis Dist.; Feb. 16, 2024, LRB-2021-01386, Buffalo Dist.; Feb. 16, 2024, LRL-2023-00466, Louisville Dist.; Feb. 16, 2024, NWO-2003-60436, Omaha Dist.; Feb 16, 2024, SAS-2001-13740, Savannah Dist.; Mar. 19, 2024, NWP-2023-602, Portland Dist.; Jun. 25, 2024, NAP-2023-01223, Philadelphia Dist.; Jun. 25, 2024, NWK-2022-00809, Kansas City Dist.; and Jun. 25, 2024, SWG-2023- 00284, Galveston Dist.

[59] 90 Fed. Reg. 13,428 (Mar. 24, 2025).

In its June 28, 2024, *Loper Bright Enterprises v. Raimondo* ("*Loper Bright Enterprises*"),[60] the Supreme Court overturned its long-standing "*Chevron* Doctrine," which required courts to afford special deference to a federal administrative agency's interpretation of applicable law within its enforcement purview on the theory that an agency specializing in, say, environmental regulation, has a special expertise in the environmental laws it enforces. While the *Loper Bright Enterprises* allows courts to afford "respect" to agencies' factual and technical determinations, it requires courts to consider questions of law *de novo* and exercise independent judgement to determine the "single, best meaning" of a statutory provision that was "'fixed at the time of enactment.'"[61]

This doctrinal change means that courts will no longer defer to agency interpretations simply because they are permissible constructions of a statute. When courts have cases challenging agencies' interpretations of their governing statutes, they must now set aside any agency rule, policy or other directive that is based on an interpretation that does not reflect the "single, best meaning" of a statute.

As applied here, the *Loper Bright* decision means that the breadth of federal jurisdiction the Agencies claimed through the 2023 Rule and 2023 Amended Rule is not entitled to deference as the Agencies previously suggested. It also means that the Proposed Revisions must adhere to the "single, best meaning" of the CWA that was "'fixed at the time of enactment.'"[62]

Fortunately, given the number of times the Supreme Court has opined on the definition of WOTUS and the scope of federal jurisdiction under the CWA, the Court has already ascertained a "single, best meaning" of nearly every salient aspect of the term "waters of the United States." The Agencies' task in defining WOTUS is therefore largely limited to strictly adhering to the interpretive guidelines set forth by the Court. The Proposed Revisions generally reflect this critical reliance on the Supreme Court's determinations of the "single, best meaning" of the term WOTUS, and if finalized consistent with the modest recommendations provided herein, is likely to provide the lawful and durable regulatory definition of WOTUS that has proven to be elusive since the CWA was enacted.

2. The Proposed Revisions provide for a WOTUS rule that clearly recognizes CWA's objectives to preserve states' primary authority over land and water use.

As discussed in Section IV, waters outside of federal jurisdiction are not unregulated. On the contrary, the CWA expressly states that by relegating jurisdiction over certain waterbodies to states or tribes, the Agencies are entrusting those waters to the entities with the "primary responsibilit[y] and right[]... to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources."[63] This is important for two reasons that are particularly relevant here.

First, the Supreme Court "require[s] Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government

[60] 603 U.S. __ (2024); 144 S. Ct. 2244 (2024).
[61] "*Loper Bright,"* 144 S. Ct. at 2266 (citing *Wisconsin Central Ltd. v. U.S.*, 585 U. S. 274, 284 (2018)).
[62] *Loper Bright*, 144 S. Ct.at 2266 (2024).
[63] 33 U.S.C. § 1251(b).

over private property."[64] "Regulation of land and water use lies at the core of traditional state authority."[65] "An overly broad interpretation of the CWA's reach would impinge on this authority."[66] Therefore, "given the CWA's express policy to 'preserve' the States' 'primary' authority over land and water use," the Supreme Court will require any WOTUS definition that asserts federal jurisdiction over land and water uses traditionally within the purview of states to be based on "a clear statement from Congress."[67]

Second, defining WOTUS to clarify the lines between state and federal jurisdiction will facilitate state regulatory decisions with respect to waters readily identifiable as outside federal jurisdiction and will preserve agency resources for actual environmental protection. When jurisdiction over a waterbody is clear, the entities tasked with protecting that waterbody are similarly clear about their mandate. When jurisdiction over a waterbody is unclear, it can fall into a jurisdictional purgatory rife with bureaucratic maneuvering, poor accountability, and few opportunities for federal-state cooperation. Similarly, when industries, landowners, and others in the regulated community can readily discern the entity with jurisdiction over a waterbody, they can readily take appropriate actions to obtain the necessary permits. Faced with jurisdictional uncertainty, important projects—including projects that promote and protect water quality—may be substantially delayed or altogether abandoned. In these respects, and many others, the CWA's water quality objectives are best accomplished through clear jurisdictional boundaries that promote administrative accountability and which can be administered in a way that preserves resources for actual environmental protection.

3. <u>We support a final WOTUS rule that is sufficiently clear and precise to avoid implicating the void-for-vagueness doctrine. We support the burden of proving jurisdiction shifting to Agencies; and we ask the Agencies to establish processes and review times of no more than 60 days to ensure that there will not be significant delays in receiving jurisdictional determination or confirmation on excluded features.</u>

We urge the Agencies to ensure that its final WOTUS definition is sufficiently clear and precise to avoid implicating the void-for-vagueness doctrine, which "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[68] Put more succinctly, the doctrine holds that a law carrying criminal sanctions must be readily understandable by the average person without legal advice. A statute that is unduly vague, and so indefinite that the average person can only guess as its meaning, "is no law at all."[69]

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[64] *Sackett*, 598 U.S. at 679 (quoting *United States Forest Service v. Cowpasture River Preservation Assn.*, 590 U. S. ——, —— – —— (2020)).
[65] *Sackett*, 598 U.S. at 679.
[66] *Sackett*, 598 U.S. at 680.
[67] *Sackett*, 598 U.S. at 680 (quoting *SWANCC*, 531 U. S. at 174).
[68] *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).
[69] *United States v. Davis*, 139 US 2319, 2324 (2019); *see generally*, *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (discussing how "vague laws offend several important values," including providing a person of ordinary intelligence a reasonable opportunity to know what is prohibited and act, accordingly, preventing arbitrary and discriminatory application and enforcement, and inhibiting the exercise of basic constitutional freedoms).

The void-for-vagueness doctrine also guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of government officials, prosecutors, juries, and judges.[70] In that sense, the doctrine is a corollary of the separation of powers, which requires that Congress, rather than the executive or the executive or judicial branch, define what conduct is sanctionable, and what is not.[71]

Vague laws contravene the "first essential of due process of law" that statutes must give people "of common intelligence" fair notice of what the law demands of them.[72] As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.[73]

Here, the penal statute is the CWA. A determination that a body of water qualifies as WOTUS not only triggers the CWA's permitting requirements and exposes a party to substantial administrative and civil liability, but also potential criminal prosecution for the unpermitted discharge of a pollutant. With respect to criminal prosecution, negligent violations of the CWA are punishable under the statute by a fine of up to $25,000 *per day* of violation, by imprisonment for not more than one year, or by both, with doubled penalties available for a repeat offender.[74] Knowing violations of the Act are punished even more harshly.[75] Criminal sanctions are not merely theoretically possible under the Act; they are aggressively pursued. The Department of Justice has not hesitated to bring criminal prosecutions for CWA violations, even under the ordinary negligence standard.[76]

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[70] *See Kolender*, 461 U.S. at 357–58. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

[71] *Kolender*, 461 U.S. at 358, n.7 ("[I]f the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, [it would] substitute the judicial for the legislative department" (internal quotation marks omitted)).

[72] *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926); *See Collins v. Kentucky*, 234 U.S. 634, 638 (1914).

[73] *Kolende*r, 461 U.S. at 357, 103 S.Ct. 1855; *see also United States v. Lovern*, 590 F.3d 1095, 1103 (10th Cir. 2009) (*quoting Colautti v. Franklin*, 439 U.S. 379, 390 (1979)) ("Elemental to our concept of due process is the assurance that criminal laws must `give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' and those that fail this test are treated as no laws at all: they are `void for vagueness.'").

[74] 33 U.S.C. § 1319(c)(1). The maximum permissible penalties are doubled for a repeat offender. 33 U.S.C. § 1319(c)(1). The CWA initially authorized a per-day civil penalty up to $25,000, but Congress subsequently mandated the EPA to adjust the maximum penalty for inflation. 28 U.S.C. § 2461. The current maximum per-day penalty is $68,445. 90 Fed. Reg. 1,374m 1,377 (Jan. 8, 2025).

[75] 33 U.S.C. § 1319(c)(2). Again, the maximum possible penalties are doubled for a repeat offender. 33 U.S.C. § 1319(c)(2).

[76] *See* 33 U.S.C. § 1319(c)(1); *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999). In the *Hanousek* case, the government, consistent with other decisions of the Ninth Circuit, argued that the discharge of pollutants, prohibited by the CWA, was a "public welfare offense." Because Hanousek was, according to the government, working in a heavily regulated business that was a threat to community safety, he was *presumed* to know all of the obligations impose upon him by the CWA, and thus precluded from challenging his conviction on the ground that he did not know of his obligation not to act negligently.

What is more, the CWA "imposes criminal liability for persons using standard equipment to engage in a broad range of ordinary industrial and commercial activities"[77] (*e.g.*, building homes) that are unlike the ones that gave rise to the CWA (*e.g.* dumping pollutants into a stream) and in places that the average person would find it implausible to believe are WOTUS (*e.g.*, areas miles away from water). Most people find it confusing—or downright bizarre—that they must obtain a CWA permit to construct a home when the area to be developed is miles away from what is ordinarily understood to be a body of water. On top of that, the exorbitant cost and delays associated with obtaining an individual permit—more than $271,000 and 788 days by the Supreme Court's reckoning—make obtaining a CWA permit hardly straightforward for the average person.[78] An interpretation of WOTUS that creates such an obligation is utterly insufficient to provide the fair notice that due process demands.[79]

The vast majority of companies want to comply with the law and have intense interest in understanding what the law requires so that they can do what is necessary to comply. Under the 2023 Amended Rule; however, companies were compelled to dutifully implement CWA compliance programs without any real insight into what any given EPA or Army Corps enforcement officer would view as reasonable or sufficient. They design and implement measures to reduce the risk of discharging dredge or fill material into WOTUS, but as Justice Alito observed in his concurrence the first time the Supreme Court heard a challenge brought by the Sacketts, "if property owners begin to construct a home on a lot the Agency thinks possesses the requisite wetness, the property owners are at the Agency's mercy."[80] In the five decades that the CWA has been law, Congress has done nothing to resolve the critical ambiguity in the phrase "WOTUS," and the Agencies, relying largely on informal guidance, have not provided the requisite clarity and predictability that due process demands. As a result, "the meaning of 'waters of the United States' under the EPA's interpretation remains 'hopelessly indeterminate.'"[81]

The opacity of the framework perpetuated by the 2023 Amended Rule continues to subject countless companies and landowners to "crushing" criminal consequences for engaging in otherwise innocent activities.[82] The Agencies' Proposed Revisions; however, with some recommended changes as discussed below, would reasonably resolve much of the jurisdictional ambiguity associated with the 2023 Amended Rule's lack of definitions, vague jurisdictional tests, and inconsistency with the CWA and Supreme Court interpretations.

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[77] Justice Thomas and Sandra Day O'Connor thought that the expansive use of criminal sanctions in what was, essentially, a simple negligence tort, merited review. As Justice Thomas wrote, rejecting the application of the public welfare doctrine to Hanousek's activity: "[T]o determine as a threshold matter whether a particular statute defines a public welfare offense, a court must have in view some category of dangerous and deleterious devices that will be assumed to alert an individual that he stands in 'responsible relation to a public danger.'" *United States v. Hanousek*, 528 U.S. 1102 (2000) (Thomas, J., dissenting from denial of *certiorari*) (quoting *Staples v. United States*, 511 U.S. 600, 613 n.6 (1994)).

[78] *U.S. Army Corps of Engineers v. Hawkes*, 136 S. Ct. 1807, 1812 (2016) *("Hawkes").*

[79] Because violations of the CWA carry criminal penalties, the rule of lenity, which interprets ambiguous statutory provisions in favor of the criminal defendant, casts even more doubt on the legality of the Agencies' interpretation.

[80] *See Sackett v. EPA ("Sackett 2012")*, 566 U.S. 120, 132 (2012) (Alito, J., concurring).

[81] *Sackett*, 598 U.S. at 681 (quoting *Sackett 2012*, 566 U. S. at 133 (Alito, J., concurring).

[82] It is telling ten years after *Rapanos*, Justice Kennedy, whose interpretation of WOTUS is so integral to the Proposed Revisions, observed that "the reach and systemic consequences of the [CWA] remain a cause for concern." *Hawkes Co.*, 136 S. Ct. 1807, 1816 (Kennedy, J., concurring).

Of course, no single framework for identifying WOTUS can remove all sources of subjectivity or ambiguity from jurisdictional determinations. Similarly, even though the Proposed Revisions largely delineate categories of waters and the availability of exclusions based on readily identifiable or observable criteria, determining the jurisdictional status of some waters and features will likely still present significant evidentiary challenges. As such, we agree with the Agencies' statement in the preamble to the Proposed Revisions that "[w]hen preparing an approved jurisdictional determination, . . . the agencies bear the burden of proof in demonstrating that an aquatic resource meets the requirements under the Proposed Revisions to be jurisdictional or excluded."[83]

We agree that shifting the burden to the Agencies to prove their jurisdictional claims would help mitigate some of the due process concerns inherent in any WOTUS definition, we are concerned that the Proposed Revisions do not include a burden-shifting provision in the proposed regulatory text despite multiple references to the Agencies' evidentiary burden in the preamble.[84] As such, in addition to supporting the Proposed Revisions and offering recommendations to best assure that jurisdictional determinations under their final WOTUS definition are based on criteria that are as clear, objective, and observable as possible, we herein request that the Agencies amend the Proposed Revisions to include regulatory text expressly stating that the Agencies bear the burden of proving that a waterbody is subject to federal jurisdiction.

Also, while we support amending the Proposed Revisions to expressly state that the Agencies have the burden of proving that features are jurisdictional, we are concerned that this burden shifting will cause the Agencies to significantly delay issuing jurisdictional determinations or confirmation on excluded features. Consequently, we also request that the Agencies establish a 60-day deadline for issuing jurisdictional determinations. Finally, we also ask that the Agencies provide a process for applicants to escalate adverse jurisdictional determinations and decisions that have been unreasonably delayed.

4. <u>We appreciate the Agencies' consistently maintaining that AJDs and permits issued under prior WOTUS definitions will remain valid and not be reopened due to a subsequent rule change, unless requested by the landowner/applicant.</u>

The Proposed Revisions state that "[t]he agencies have consistently maintained that [approved jurisdictional determinations ("AJDs")] and permits issued under a previous regulatory definition of [WOTUS] would still be considered valid and would not necessarily be reopened due to a subsequent rule change, unless requested by the landowner or applicant."[85] This was certainly true until the Agencies promulgated the 2023 Rule, which took the position that, because two district courts vacated the 2020 NWPR,[86]AJDs issued pursuant to the 2020 NWPR "may not reliably state the presence, absence, or limits of 'waters of the United States' on a parcel and will not be relied upon by the Corps in making new permit decisions following the Arizona district court's August

[83] 90 Fed. Reg. at 52,515. See also 90 Fed. Reg. 52,538, 53,541.
[84] 90 Fed. Reg. at 52,515, 52,538, 53,541.

[85] 90 Fed. Reg. at 52,505 (citing 84 Fed. Reg. 56,626, 56,664 (Oct.22, 2019) and 85 Fed. Reg. 22,250, 22,331–22,332 (Apr. 21, 2020)).
[86]85 Fed. Reg. 22,250 (Apr. 21, 2020).

30, 2021 order vacating the 2020 NWPR."[87] Although the Agencies further stated that "stand-alone" NWPR AJDs generally will remain valid until their expiration date, they nevertheless cast doubt on the validity of those AJDs by warning recipients of such AJDs about "the unreliability of those jurisdictional findings" and cautioning those property owners to discuss their options with the Army Corps prior to any discharges into waters identified in the AJDs as non-jurisdictional.[88]

We therefore appreciate that "the agencies stand ready to assist the applicant or landowner" who "may believe the permit includes conditions that are no longer required if this proposed rulemaking were to be finalized."[89] And while we also support and appreciate the Agencies' reference to their pre-2023 position on the continued validity of AJDs and permits, given the confusion caused by the Agencies' 2023 statements about the potential retroactive application of their regulatory changes, we urge the Agencies to expressly clarify that AJDs remain valid for their full five-year terms unless a change is requested by the landowner or applicant.

b. <u>Paragraph (a)(1) waters should be limited to traditionally navigable waters ("TNW") and the territorial seas.</u>

We support the Agencies' proposal to "remove the category of interstate waters from the definition of 'waters of the United States.'"[90] Waterbodies that straddle or cross state lines but otherwise satisfy no other jurisdictional element are not properly within the scope of WOTUS and therefore not subject to federal jurisdiction. In other words, interstate waters are not automatically subject to federal jurisdiction simply because they cross a state line.

Removing "interstate waters" from the definition of WOTUS is therefore reasonable and necessary because:

> [T]his category can encompass bodies of water that are not relatively permanent, standing, or continuously flowing or that are not themselves connected to a downstream traditional navigable water or the territorial seas, either directly or through one or more waters or features that convey relatively permanent flow . . .[91]

Defining WOTUS to include such waters simply because they cross a state line is plainly inconsistent with the Supreme Court's holding in *Sackett* that a WOTUS must be "a relatively permanent body of water connected to traditional interstate navigable waters" or "wetland [with] a continuous surface connection with that water."[92]

Federal jurisdiction under the CWA springs from Congress' enumerated power to regulate the channels of interstate commerce. Isolated waters and wetlands that bridge state borders are not channels of commerce, and automatically including interstate waters in the definition of WOTUS is inconsistent with the concept of navigability that "Congress had in mind as its authority for

[87] 88 Fed. Reg. at 3,136.
[88] 88 Fed. Reg. at 3,136.
[89] 90 Fed. Reg. at 52,506 n.19.
[90] 90 Fed. Reg. at 52,516. As discussed in Subsection V.f, we also supports the Agencies' related proposed deletion of the term "interstate" from the "lakes and ponds" category in Paragraph (a)(5).
[91] 90 Fed. Reg. at 52,516.
[92] *Sackett* at 678 (*citing Rapanos*, 547 U.S. at 742, 755).

enacting the CWA."[93] Therefore, we believe that interstate, but otherwise isolated and unconnected, waters and wetlands are properly regulated by states and tribes.[94]

The Commerce Clause authorizes Congress to regulate the "channels of interstate commerce," the "instrumentalities of interstate commerce or persons and things in interstate commerce" and "those activities having a *substantial relation* to interstate commerce."[95] Waters do not acquire this commercial effect simply because they may straddle a state border. For example, many isolated waters (*i.e.*, wetlands, ponds, or swales) that cross state lines "ha[ve] nothing to do with 'commerce' or any sort any sort of economic enterprise, however broadly one might define those terms."[96] Nor is the assertion of jurisdiction over such waters "an *essential* part of a larger regulation of *economic* activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[97]

Although the statutory predecessor to the CWA—the 1948 FWPCA—applied to "interstate or navigable waters,"[98] this does not support the continued inclusion of interstate waters as an independent category of WOTUS irrespective of navigability. In fact, it proves the impermissibility of including these waters. While the 1948 FWPCA indeed references "interstate waters" without reference to navigability, one cannot ignore that Congress amended the FWPCA in 1961 to encompass "interstate or navigable waters,"[99] and amended the Act again in 1972 to bring forth the current definition of "navigable waters" as WOTUS.[100]

Thus, while a decades-old version of the CWA's predecessor statute referenced "interstate waters," "the version at issue here . . . is the current one—from which Congress removed any mention of [the disputed term]."[101] "When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."[102] The "real and substantial effect" of Congress's purposeful replacement of the Act's references to "interstate waters" with "navigable waters," was to define federal jurisdiction under the CWA consistent with "its commerce power over navigation.''[103]

The Agencies' proposed removal of "interstate waters" from this category of WOTUS appropriately addresses this inconsistency with the CWA and binding Supreme Court case law interpreting that Act. We, therefore, support this proposed revision.

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[93] *SWANCC*, 531 U.S. at 167.
[94] *See SWANCC*, 531 U.S. at 159, 172, 174 (declining to interpret § 404(a)'s scope to include non-navigable, isolated, intrastate waters because such an assertion of jurisdiction would significantly impinge upon the state's traditional and primary power over water and land use).
[95] *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).
[96] *Lopez*, 514 U.S. at 561.
[97] *Lopez*, 514 U.S. at 561 (emphasis added).
[98] *Sackett*, 598 U.S. at 673.
[99] Pub. L. No. 87-88, 75 Stat. 204, 208 (1961).
[100] 33 U.S.C. § 1362(7).
[101] *Intel Corp. Inv. Policy Committee v. Sulyma*, 140 S. Ct. 768, 779 (2020).
[102] *United States v. Quality Stores, Inc.,* 572 U.S. 134 S.Ct. 1395, 1401, 188 L.Ed.2d 413 (2014).
[103] *SWANCC*, 531 U.S. at 168 n.3.

1. Historic Use Alone is Insufficient to Demonstrate Navigability or Define a Water as a TNW

While we appreciate and supports the proposed removal of interstate waters from Paragraph (a)(1), we urge the Agencies to consider additional revisions to ensure that this category of WOTUS fully conforms with the CWA and interpretations thereof. In particular, we urge the Agencies to remove from paragraph (a)(1) waters that were "used in the past" for "interstate or foreign commerce."

Asserting jurisdiction based solely on historic use in commerce obscures the intended meaning of TNWs and perpetuates an overly inclusive definition of TNWs that is inconsistent with the CWA and applicable case law. A more reasonable reading of the CWA and case law affirms that a waterbody's past use to transport goods in interstate or foreign commerce does not alone cause a waterbody to be forever classified as a TNW subject to federal jurisdiction.

This interpretation is based on consideration of a number of different elements. To begin, the CWA authorizes the states to administer their own Dredge and Fill Program, and references as "navigable waters:"

> . . other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher water mark on the west coast, including wetlands adjacent thereto. . .[104]

The Supreme Court justices agreed in *Riverside Bayview*, *SWANCC*, *Rapanos*, and *Sackett* that this phrase in Section 404(g)(1)[105] of the Act indicated that Congress intended "navigable waters," and therefore the Section 502(7)[106] definition of "navigable waters" as WOTUS, to extend federal jurisdiction to some waters that are not navigable in the traditional sense.[107] The majority and minority in *SWANCC* also agreed that the CWA Section 404 Dredge and Fill Program remains ambiguous "because it does not indicate precisely how far Congress considered federal jurisdiction to extend."[108] However, the conspicuous omission of "past use" from Section 404(g)(1) indicates that Congress did not intend the Act to assert federal jurisdiction over waters based solely on historic use in commerce. While we acknowledge that the Act's use of the phrase "navigable waters" reflects congressional intent to extend federal jurisdiction over some waters that are not navigable in the traditional sense, the Agencies' discretion to interpret WOTUS to include certain non-navigable waters does not extend so far as to allow the Agencies to overlook the jurisdictional limits that Congress actually drafted into the CWA.

The Agencies similarly lack sufficient discretion to interpret those "waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means

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[104] 33 U.S.C. § 1344(g)(1).
[105] 33 U.S.C § 1344(g)(1).
[106] 33 U.S.C § 1362(7).
[107] *See Riverside Bayview*, 474 U.S. at 132; *SWANCC*, 531 U.S. at 167, 171, 188-189; *Rapanos*, 547 U.S. at 731, 767–68; *Sackett*, 598 U.S. at 672.
[108] *SWANCC*, 531 U.S. at 189.

to transport interstate or foreign commerce" as including purely historic uses when applied to Section 502(7). While we are not suggesting that the Agencies are unconditionally compelled to interpret "navigable waters" in Section 502(7) precisely as Congress defined that same term in Section 404(g)(1), we believe that any interpretation must accord with the "Presumption of Consistent Usage," which states that "[a] word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning."[109]

The Agencies' obligation to harmonize their interpretation of the same term in the same statute is particularly apparent here because, not only do Section 502(7) and Section 404(g)(1) use the same term (navigable waters), but they also use the term for precisely the same purpose—to define the scope of federal jurisdiction. In Section 404(g)(1), Congress identified the "navigable waters" that could be administered through *state* "dredge-and-fill" permit programs and those "navigable waters" that must be administered through *federal* programs. Again, while Congress did not clearly delineate the "other" navigable waters that are within the jurisdictional purview of the states, it explicitly circumscribed federal jurisdiction under the CWA to those "waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce."[110]

Although the CWA does not allow the Agencies to assert jurisdiction based solely on historic use in interstate or foreign commerce, this does not categorically preclude the Agencies from asserting jurisdiction over these waters. Such waters would still need to be examined to determine whether they are used or "susceptible to use" in interstate or foreign commerce.

c. Impoundments should not be a separate category of WOTUS; merely impounding an otherwise non-jurisdictional water should not make it a WOTUS.

In their 2023 Rule, the Agencies created a standalone category of waters in paragraph (a)(2) for "impoundments of waters otherwise defined as waters of the United States under this definition, other than impoundments of waters identified under paragraph (a)(5) [lakes and ponds]." In the current Proposed Revisions, the Agencies have not proposed any changes to this category of waters.

We respectfully disagree with the Agencies' proposed retention of impoundments as a separate and standalone category of waters. Retaining impoundments as an independent category of WOTUS is inconsistent with the Supreme Court's decisions in *Sackett* and *Rapanos*.

For instance, paragraph (a)(3) identifies as WOTUS "[t]ributaries of waters identified in paragraph (a)(1) or (2) of this Section that are relatively permanent, standing or continuously flowing bodies of water." Extending federal jurisdiction to a tributary with relatively permanent, standing, or continuous flow to a paragraph (a)(1) TNW or territorial sea is reasonable, but it is wholly inconsistent with *Sackett* and *Rapanos* to confer federal jurisdiction over a tributary based on its connection to an impoundment.

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[109] Scalia and Garner, *Reading Law: The Interpretation of Legal Texts* at 170 (2012). *See also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, (2000) (it is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.")

[110] 33 U.S.C. § 1344(g)(1).

If the Agencies' Proposed Revisions do not eliminate or substantially revise paragraph (a)(2), a relatively permanent tributary that would not otherwise be subject to federal jurisdiction because it does not connect to TNW or the territorial seas could be construed as being subject to federal jurisdiction simply because it is impounded. And because the Proposed Revisions would continue to allow the Agencies to assert jurisdiction over wetlands adjacent to tributaries and impoundments that do not connect to TNWs,[111] the Proposed Revisions would seemingly continue to allow the Agencies to assert federal jurisdiction over unconnected wetlands as well.

Neither of these presumed jurisdictional assertions is based on any connection with, or relationship to TNWs or the territorial seas. As such, unless the Proposed Revisions are updated to eliminate or substantially revise paragraph (a)(2), the final WOTUS definition would seemingly allow the Agencies to assert jurisdiction based solely on the presence of an impoundment. No credible reading of the CWA or the applicable Supreme Court case law supports an assertion of jurisdiction in this context.

Moreover, in addition to being generally inconsistent with the CWA and the entire body of Supreme Court jurisprudence on WOTUS, this interpretation is specifically and expressly controverted by the holding in *Sackett* and the plurality opinion in *Rapanos*, which supply the "relatively permanent standard" that is otherwise at the heart of these Proposed Revisions. Neither the *Sackett* majority nor the *Rapanos* plurality suggested that the CWA provided the federal government jurisdiction over all "relatively permanent, standing, or continuously flowing" waters. Rather, the justices stated that an otherwise non-jurisdictional water could become jurisdictional only if its connection to a TNW was "relatively permanent, standing, or continuously flowing."[112] Indeed, "an intermittent, physically remote hydrologic connection" to TNWs is not even sufficient under either *Riverside Bayview* or *SWANCC*.[113]

In the 2023 Rule, the Agencies seemingly recognized the essentiality of asserting jurisdiction based on some connection to TNWs, as least with respect to the paragraph (a)(2) "lakes and ponds" category, which they excluded from the categories of waters that are subject to federal jurisdiction when impounded. The same reasoning applies to the tributaries and wetlands described above. Absent a sufficient connection to TNWs or the territorial seas; tributaries, adjacent wetlands, and "other waters" are not subject to federal jurisdiction and do not become so when impounded.

To the extent impoundments are subject to federal jurisdiction because they are relatively permanent, standing, or continuously flowing bodies of water *connected to* a TNW or because they are themselves TNWs, they should be classified under those other categories of waters. Retaining "impoundments" as a separate standalone category of WOTUS is therefore not just unnecessary, it is inconsistent with the CWA and binding Supreme Court interpretations thereof. This was true when the Agencies promulgated the 2023 Rule, and the illegality of this aspect of the WOTUS definition is even more conspicuous in light of the *Sackett* majority's holding that federal jurisdiction does not extend to wetlands separated from other WOTUS by a barrier. If federal

[111] *See* proposed text of 40 C.F.R. § 120.2(a)(4) and (a)(7)(ii) at 90 Fed. Reg. at 52,546.
[112] *Rapanos,* 547 U.S. at 742.
[113] *Rapanos,* 547 U.S. at 742.

jurisdiction does not extend to wetlands that are separated from other WOTUS, federal jurisdiction cannot extend to impoundments that are not connected to other WOTUS.

As such, we respectfully urge the Agencies to eliminate impoundments as a separate and standalone category of WOTUS under paragraph (a)(2). If an impoundment is a TNW or is connected to a TNW in the same manner as a jurisdictional tributary, the impoundment would be categorized as either a paragraph (a)(1) or (a)(2) waterbody and would remain a WOTUS. But as required by binding Supreme Court case law, if the impoundment is not a TNW or sufficiently connected to a TNW, it would not fall under federal jurisdiction.

d. <u>Tributaries must be clearly defined for clarity in the field and to avoid vagueness challenges, especially in the arid West. We agree with the Agencies' definition of tributaries, support the selection of limiting features, and offer additional context on the scope of "relatively permanent" flows. Because the same features that limit federal jurisdiction over tributaries also apply to lakes and ponds, we also recommend eliminating "lakes and ponds" as a standalone category of WOTUS to avoid redundancy and promote clarity in field evaluations.</u>

To more clearly describe and delineate the types of tributaries encompassed within category (a)(2) waters, the Agencies propose to define "tributary" as:

> a body of water with relatively permanent flow, and a bed and banks, that connects to a downstream traditional navigable water or the territorial seas, either directly or through one or more waters or features that convey relatively permanent flow. A tributary does not include a body of water that contributes surface water flow to a downstream jurisdictional water through a feature such as a channelized non-jurisdictional surface water feature, subterranean river, culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, wetland, or similar natural feature, if such feature does not convey relatively permanent flow. When the tributary is part of a water transfer (as that term is applied under 40 CFR 122.3) currently in operation, the tributary would retain jurisdictional status.[114]

The very existence of this proposed definition represents a substantial improvement over the 2023 Rule and 2023 Amended Rule, which did not define "tributary" even though these waters were fundamental to the Agencies' expansive jurisdictional claims at the time. As we noted in comments on the proposal that preceded the 2023 Rule, refusing to define the tributaries over which the Agencies were asserting federal jurisdiction is precisely the type of claim of standardless discretion that offends the void-for-vagueness doctrine.[115]

As such, we support and appreciates the Agencies' decision to include a definition of "tributaries" in the Proposed Revisions and concurs with the structure and much of the substance of the proposed definition. Multiple aspects of proposed definition help ensure that the scope of federal

[114] 90 Fed. Reg. at 52,546.

[115] *Sackett*, 598 U.S. at 680–81 (quoting *McDonnell v. United States*, 579 U.S. 550, 576 (2016) ("Due process requires Congress to define penal statutes 'with sufficient definiteness that ordinary people can understand what conduct is prohibited' and 'in a manner that does not encourage arbitrary and discriminatory enforcement.'")).

jurisdiction under the CWA is reasonably clear and fully consistent with the Act and binding Supreme Court interpretations of the Act.

For example, proposing to define tributaries as waterbodies "with relatively permanent flow" faithfully implements the Supreme Court's admonition that federal jurisdiction over "waters" does not extend beyond "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.'"[116] While we discuss and provide recommendations regarding the Agencies' proposed definition of "relatively permanent" in Section VI of these comments, our comments on the precise contours of the phrase "relatively permanent" do not detract from our support for proposing to limit the definition of tributaries to those water bodies "with relatively permanent flow."[117] Irrespective of the precise definition of "relatively permanent," including this criterion in the definition of "tributary" helps ensure that the definition does not "stretch the term 'waters of the United States' beyond parody" to mean "Land is Waters."[118]

Sackett reinforced that Congress's deliberate use of the plural term "waters" in the phrase "waters of the United States" means that the Act's reach extends only to bodies of water like streams, oceans, rivers, and lakes.[119] In *Sackett*, the Court also held that Congress's use of the term "waters" elsewhere in the CWA "confirm[s] the term refers to bodies of *open* water" and that Congress's "use of 'waters' elsewhere in the U.S. Code likewise correlates to rivers, lakes, and oceans."[120]

In addition to promoting consistency with the CWA and the Supreme Court's interpretations of the Act, by defining "tributary" as a waterbody with "a bed and banks," the Agencies are describing the "geographic features"[121] through which the regulated public can "clearly identify those waters that are considered tributaries,"[122] The proposed inclusion of this physical indicator is important because it is often easier for a landowner to observe a feature's "bed and banks" than whether its flow is "relatively permanent" as that term is defined in the Proposed Revisions.

Had the Agencies proposed to define "tributaries" solely based on physical indicators such as the presence of a bed and banks, the definition would have been unduly vague and impermissible. While inclusion of the "bed and banks" criterion appropriately excludes from the definition of "tributary" features such as "grassed waterways [that] do not have bed and banks but may have relatively permanent flow and may still connect to a traditional navigable water or the territorial seas,"[123] in many more instances, defining "tributaries" exclusively based on the "bed and bank" criterion would have impermissibly expanded the scope of waters subject to federal jurisdiction because many waterbodies with "beds and banks" are not "permanent, standing or continuously flowing bodies of water."[124]

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[116] *Sackett*, 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739).
[117] 90 Fed. Reg. at 52,546.
[118] *Rapanos*, 547 U.S. at 734.
[119] *Sackett*, 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739).
[120] *Sackett*, 598 U.S. at 672 (emphasis added).
[121] *Sackett*, 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739).
[122] 90 Fed. Reg. at 52,522.
[123] 90 Fed. Reg. at 52,522.
[124] *Sackett*, 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739).

Nowhere is that more apparent than in the arid West, where erosional features with beds, banks, and ordinary high-water marks ("OHWMs") often reflect one-time extreme water events and are not reliable indicators of regular flow. In the desert, rainfall occurs infrequently, and sandy, lightly-vegetated soils are highly erodible. Thus, washes, arroyos, and other erosional features often reflect physical indicators of a bed, banks, and OHWM, even if they were formed by a long-past and short-lived flood event, and the topography has persisted for years or even decades without again experiencing flow. Because arid systems lack regular flow, the channels do not "heal" or return to an equilibrium state, as they do in wet, humid climates.

But the Agencies reasonably ensured that the inclusion of this physical indicator in the proposed definition of "tributary" would not unduly expand federal jurisdiction by defining "tributary" as a waterbody with relatively permanent flow and a bed and banks. These two criteria work together to help make tributaries easier to identify on the landscape while attempting to restrain federal jurisdiction to only those "permanent, standing or continuously flowing bodies of water"[125] described by the Supreme Court.

It is not enough; however, to restrain the "tributary" definition to 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.'"[126] In order to fall under federal jurisdiction, those "relatively permanent bodies of water" must be "connected to traditional interstate navigable waters."[127] Although the Supreme Court has interpreted the CWA to confer federal jurisdiction over certain waters that are not navigable in a traditional sense, Congress's use of the term "navigable" "shows that Congress was focused on 'its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.'"[128]

Thus, the third major criterion for defining tributaries—"connect[ion] to a downstream traditional navigable water or the territorial seas, either directly or through one or more waters or features that convey relatively permanent flow"[129] — reasonably ensures that the Proposed Revisions will not read the term "navigable" out of the statute.[130] As the Proposed Revisions appropriately recognize, not only must tributaries themselves be "permanent, standing or continuously flowing"[131] but so too must their connections to TNW and the territorial seas.

Collectively, these three criteria for defining tributaries (*i.e.*, waterbody (1) relatively permanent flow; (2) a bed and banks; and (3) a relatively permanent connection to TNW or the territorial seas) help "ensure that the agencies would not exercise jurisdiction beyond the scope of clearly definable tributaries."[132] As such, we support the Agencies' proposed definition of what constitutes a "tributary" subject to federal jurisdiction.

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[125] *Sackett*, 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739).
[126] *Sackett*, 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739).
[127] *Sackett*, 598 U.S. at 666-667 (quoting *Rapanos*, 547 U.S. at 742).
[128] *Sackett*, 598 U.S. at 672 (quoting *SWANCC*, 531 U.S. 159, 172 (2001)).
[129] 90 Fed. Reg. at 52,546.
[130] *Sackett*, 598 U.S. at 672 (quoting *SWANCC*, 531 U.S. 159, 172 (2001)).
[131] *Sackett*, 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739).
[132] 90 Fed. Reg. at 52,522.

Additionally, as further discussed in Subsection IV.d, the same attributes that define the scope of federal jurisdiction over tributaries also describe the limits of federal jurisdiction over lakes and ponds. Because these waterbodies are similarly defined and share the same jurisdictional test, we recommend that the Agencies eliminate the standalone "lakes and ponds" category in paragraph (a)(5) from the WOTUS definition.

1. The Agencies' decision to clearly articulate features that limit the scope of federal jurisdiction over tributaries is consistent with Supreme Court guideposts and will provide critical clarity in the field.

In addition to listing the attributes that define a "tributary," the Agencies also describe the types of waterbodies and segments of otherwise-jurisdictional "tributaries" that are not encompassed within their proposed definition of "tributary," and therefore outside of federal jurisdiction:

> A tributary does not include a body of water that contributes surface water flow to a downstream jurisdictional water through a feature such as a channelized non-jurisdictional surface water feature, subterranean river, culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, wetland, or similar natural feature, if such feature does not convey relatively permanent flow. When the tributary is part of a water transfer (as that term is applied under 40 CFR 122.3) currently in operation, the tributary would retain jurisdictional status.[133]

This aspect of the "tributary" definition provides much needed clarity regarding the waterbodies that are not tributaries as well as features that limit the scope of federal jurisdiction to only those segments of tributaries that contribute relatively permanent flow to TNW or the territorial seas. This portion of the "tributary" definition is important because it punctuates the critical statutory requirement that federal jurisdiction does not extend to waterbodies other than TNW or territorial seas unless those waterbodies have a relatively permanent connection to TNW or the territorial seas.

It is also highly important because it reasonably restrains the Agencies' ability to assert federal jurisdiction over entire river systems and stream networks based on the jurisdictional status of only a small segment that meets the proposed definition of "tributary." For example, the 2023 Rule and 2023 Amended Rule's provision that applies the "relatively permanent" standard to the "entire reach" of tributaries and streams of the same Strahler stream order (*i.e.*, from the point of confluence, where two lower order streams meet to form the tributary, downstream to the point such tributary enters a higher order stream) even if only a very small and distant portion of the waterbody has sufficiently continuous flow.

By allowing federal jurisdiction to extend well into the vanishingly small headwaters of every water system without any consideration of the permanence or flow characteristics of those upper reaches, the Agencies' 2023 approach read the term "navigable" out of the statute, even though navigability was "what Congress had in mind as its authority for enacting the CWA."[134] The expansive jurisdictional reach allowed for under the 2023 rules is directly controverted by *Sackett*

[133] 90 Fed. Reg. at 52,546.
[134] *Sackett*, 598 U.S. at 678 (internal quotations omitted).

and the *Rapanos* plurality, and at odds with the text and structure of the Act. Indeed, the "intermittent, physically remote connection" to navigable waters allowed for under the 2023 Amended Rule's "reach" approach would not be sufficient even under either *Riverside Bayview* or *SWANCC*.[135]

The expansive "reach" that the 2023 Rule and 2023 Amended Rule allowed was unworkable as well as unlawful. Asserting jurisdiction over the entirety of a stream or tributary based solely on flow characteristics in a discrete and potentially remote segment of that stream or tributary implicates the due process concerns articulated by the Supreme Court because the regulated public cannot reasonably observe flow characteristics in stream or tributary segments that are potentially hundreds of miles away. Indeed, the jurisdictional analysis necessitated by this approach ignores that project proponents may own or have access to only a small segment of a stream or stream network, but would be required to obtain and document detailed information about the entire reach of an attenuated stream network that may stretch for many miles downstream and upstream from the project, as well as all adjacent wetlands—which may not be owned by or accessible to the proponent.

In order for a waterbody other than a TNW or territorial sea to fall under federal jurisdiction, it must have a "permanent, standing or continuously flowing"[136] "connect[ion] to traditional interstate navigable waters."[137] If upstream features sever a "permanent, standing or continuously flowing"[138] "connect[ion] to traditional interstate navigable waters,"[139] only the downstream portions of the waterbody are subject to federal jurisdiction. Consistent with Congress's express intent in enacting the CWA, the state has jurisdiction over the portion of the waterbody upstream of the features that sever the requisite connection. As such, we support the Agencies' proposal to expressly define those waterbodies that are not tributaries as well as features that limit the scope of federal jurisdiction within the tributary.

2. <u>While aspects of the Agencies' definition of "relatively permanent" broadly align with statutory and jurisprudential guideposts, we believe additional modifications are necessary to lawfully conform to relevant Supreme Court case law and could offer significant clarity in the field.</u>

While the Agencies' 2023 rules incorporated the phrase "relatively permanent, standing or continuously flowing bodies of water" from the *Sackett* and *Rapanos* plurality opinion, it provided no regulatory text from which to understand the meaning of this important phrase. To the extent that the 2023 rules provided any guidance, it was through a discussion in the preamble to the 2023 Amended Rule that reflected an expansive interpretation that is squarely at odds with binding Supreme Court interpretation.

Indeed, in the 2023 rules, the Agencies declined to include any flow duration benchmarks or minimum flow duration. Instead, they included a vague and confusing explanation that

[135] *Rapanos,* 547 U.S. at 742.
[136] *Sackett*, 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739).
[137] *Sackett*, 598 U.S. at 666–67 (quoting *Rapanos*, 547 U.S. at 742).
[138] *Sackett*, 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739).
[139] *Sackett*, 598 U.S. at 666–67 (quoting *Rapanos*, 547 U.S. at 742).

"[r]elatively permanent waters do not include surface waters with flowing or standing water for only a short duration in direct response to precipitation."[140] Accordingly, the 2023 Amended Rule opined that "tributaries in the arid West" that are "dominated by coarse, alluvial sediments and exhibit high transmission losses, resulting in streams that often dry rapidly following a storm event" are not relatively permanent,[141] whereas "relatively permanent flow may occur as a result of multiple back-to-back storm events throughout a watershed" or even a single "larger storm event[]."[142] Suffice it to say, this parsimonious guidance resulted in significant confusion and inconsistency. It also contravenes the Supreme Court's holdings in *Sackett* and *Rapanos*.

These Proposed Revisions reflect that the Agencies now recognize that the 2023 Amended Rule's application of the "relatively permanent" standard was inconsistent. The Agencies also plainly recognize the importance of relative permanence to the definition of "tributary" and to the legality of the Proposed Revisions more broadly. As such, the Agencies propose to define "relatively permanent" to mean "standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season."[143]

While we discuss the precise contours of, and potential challenges associated with, this proposed definition as well as our recommendation in Section VI below, we herein summarizes the binding Supreme Court case law that must guide the Agencies' decision with respect to the proposed definition of "relatively permanent" and the various alternatives described in the Proposed Revisions.

To begin, *Sackett* majority and *Rapanos* plurality both clearly hold that federal jurisdiction does not extend to any intermittently or ephemerally flowing waters. Referring to the dictionary's definition of the term" waters," the plurality in *Rapanos* noted that all of the terms in the definition "connote continuously present, fixed bodies of water, *as opposed to ordinarily dry channels through which water occasionally or intermittently flows*."[144] This distinction between the "continuously present, fixed bodies of water" that may be considered WOTUS and the "ordinarily dry channels through which water occasionally or intermittently flows" that cannot be considered WOTUS is repeatedly bolstered throughout the *Rapanos* plurality decision:

- "It suffices for present purposes that channels containing permanent flow are plainly within the definition, and that the dissent's 'intermittent' and 'ephemeral' streams…—that is, streams whose flow is '[c]oming and going at intervals . . . [b]roken, fitful,'…, or 'existing only, or no longer than, a day; diurnal . . . shortlived,'…—are not."[145]

- "The restriction of 'the waters of the United States' to exclude channels containing merely intermittent or ephemeral flow also accords with the commonsense understanding of the term."[146]

[140] 88 Fed. Reg. at 3,039.
[141] 88 Fed. Reg. at 3,086.
[142] 88 Fed. Reg. at 3,086–87.
[143] 90 Fed. Reg. at 52,546.
[144] *Rapanos*, 547 U.S. at 732 n. 5 (emphasis added).
[145] *Rapanos*, 547 U.S. at 732 n. 5 (citation omitted).
[146] *Rapanos*, 547 U.S. at 733–34.

- "Most significant of all, the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from 'navigable waters,' by including them in the definition of 'point source'. . . . The separate classification of 'ditches, channels, and conduits—which are terms ordinarily used to describe the watercourses through which *intermittent* waters typically flow—shows that these are, by and large, *not* 'waters of the United States.'"[147]

- "On its only natural reading, such a statute that treats 'waters' separately from 'ditch[es], channel[s], tunnel[s], and conduit[s],' thereby distinguishes between continuously flowing 'waters' and channels containing only an occasional or intermittent flow."[148]

- "The phrase ["waters of the United States"] does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[149]

- "Even if the phrase 'the waters of the United States' were ambiguous as applied to intermittent flows, our own canons of construction would establish that the Corps' interpretation of the statute is impermissible."[150]

Indeed, "the ordinary presence of water" represents the "*bare minimum*"[151] necessary for a waterbody to be subject to federal jurisdiction, but even the "ordinary presence of water" may not always provide a sufficient basis for asserting federal jurisdiction.[152]

While "the ordinary presence of water" represents the "*bare minimum*"[153] necessary for a waterbody to be subject to federal jurisdiction, the *Rapanos* plurality also explained that the relatively permanent standard "do[es] not necessarily exclude streams, rivers, or lakes that might dry up in *extraordinary* circumstances, such as drought," nor does it necessarily exclude "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months—such as [a] 290-day, continuously flowing stream."[154] In other words, an open waterbody that dries up during drought or a stream that flows continuously for 290 days is not categorically a WOTUS under the relatively permanent standard construed by the *Rapanos* plurality and ratified by a majority of the Court in *Sackett*.

The *Rapanos* plurality's reference to "extraordinary circumstances, such as drought" and example of a seasonal river flowing for 290 days out of the year reflects the Court's caution that its limited exception to the relatively permanent standard cannot be interpreted to subsume the overarching

[147] *Rapanos*, 547 U.S. at 735–36 (emphasis in original).
[148] *Rapanos*, 547 U.S. at 736, n.7.
[149] *Rapanos*, 547 U.S. at 739.
[150] *Rapanos*, 547 U.S. at 737.
[151] *Rapanos*, 547 U.S. at 734 (plurality opinion) (emphasis added).
[152] *See Sackett*, 598 U.S. at 674 ("Consider puddles, which are also defined by the ordinary presence of water even though few would describe them as 'waters.'").
[153] *Rapanos*, 547 U.S. at 734 (plurality opinion) (emphasis added).
[154] *Rapanos*, 547 U.S. at 732, n.5 (emphasis added).

rule the Court set forth. That is, that "channels containing permanent flow are plainly within the [WOTUS] definition," and "'intermittent' and 'ephemeral' streams . . . are not."[155]

While we concur with the Agencies' view that the "relatively permanent" standard in the *Sackett* decision and the *Rapanos* plurality opinion refers to "standing or continuously flowing bodies of water that are standing or continuously flowing year-round," as well as some features like "seasonal rivers" that occasionally lack standing water or flow, we do not agree that the "relatively permanent" standard is satisfied when a feature has standing or continuously flowing water "at least during the wet season." [156] On the contrary, we believe that this aspect of the Agencies' proposed definition of "relatively permanent" would allow the Agencies to assert federal jurisdiction over features that lack the "the ordinary presence of water," which according to *Sackett*, is the "*bare minimum*"[157] necessary for a waterbody to be subject to federal jurisdiction.

The Agencies' Proposed Revisions correctly note that "[t]he time period that encompasses flow during the wet season can vary across the country based upon climate, hydrology, topography, soils, and other conditions,"[158] but seemingly fail to recognize that this regional variability means that, in areas like the arid West and in other dryer regions, the "wet season," to the extent it exists at all, may be measured in days or weeks. Thus, under the Agencies' proposed interpretation of the "relatively permanent" standard, the Agencies would be able to assert jurisdiction over many features in the West and in other arid regions that are "ordinarily dry" throughout the majority of the year.

While the Agencies' proposed determination that features are "relatively permanent" if they standing or continuously flowing water "at least during the wet season," [159] may lawfully "connote continuously present, fixed bodies of water"[160] in those geographic areas with long and/or multiple wet seasons, in many parts of the United States, this proposed determination would impermissibly extend federal jurisdiction to "ordinarily dry channels through which water occasionally or intermittently flows."[161] Therefore, absent inclusion of some minimal duration of flow, in more arid regions of the U.S., the proposed "wet season" approach would be inconsistent with and impermissible under the *Sackett* decision and the *Rapanos* plurality opinion.

For similar reasons, if the Agencies do not prescribe a minimum flow duration, in certain arid regions, the proposed "wet season" approach would also implicate the due process concerns articulated by the Supreme Court because the regulated public cannot reasonably discern the jurisdictional status of a feature that lacks "the ordinary presence of water" throughout most of the year.[162] Applying the "wet season" approach without establishing a minimum flow duration would also undermine the CWA's framework for cooperative federalism because asserting federal jurisdiction over ordinarily dry areas that may only contain water during fleeting "wet seasons," amounts to the "[r]egulation of land and water use [that] lies at the core of traditional state

[155] *Rapanos*, 547 U.S. at 732, n.5 (citation omitted).
[156] 90 Fed. Reg. at 52,546.
[157] *Rapanos*, 547 U.S. at 734 (plurality opinion) (emphasis added).
[158] 90 Fed. Reg. at 52,520.
[159] 90 Fed. Reg. at 52,546.
[160] *Rapanos*, 547 U.S. at 732 n. 5.
[161] *Rapanos*, 547 U.S. at 732 n. 5.
[162] *Rapanos*, 547 U.S. at 734 (plurality opinion) (emphasis added).

authority."[163] Given the "CWA's express policy to 'preserve' the States' 'primary' authority over land and water use," the Supreme Court will require any WOTUS definition that asserts federal jurisdiction over land and water uses traditionally within the purview of states has to be based on "a clear statement from Congress."[164]

Congress has provided no such statement. Therefore, in addition to addressing the practical implementation challenges associated with defining "relatively permanent" to include standing or continuously flowing water "at least during the wet season," [165] which we discuss in Section VI), we respectfully urge the Agencies to revise the proposed "wet season" approach so that it appropriately encompasses only "continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows."[166] Based on our interpretation of the *Sackett* decision and the *Rapanos* plurality opinion, we believe that the Agencies should specify that a continuous flow or presence of water for at least 90 consecutive days the "*bare minimum*"[167] necessary for a feature to be deemed "relatively permanent." The 90-day minimum flow duration provides an appropriate "floor" to the "wet season" approach because it approximates the seasonality implied by the *Rapanos* plurality's reference to "seasonal rivers."[168]

Although incorporating "a minimum duration of flow" into the "wet season" approach may not follow the Agencies' intended "regionalized implementation of relatively permanent tributaries in the proposed rule,"[169] we urge the Agencies to recognize that neither the CWA nor the relevant Supreme Court interpretations of the Act require the Agencies to adopt a strictly regionalized approach to assessing federal jurisdiction over tributaries and other features.

For the purpose of determining the scope of federal jurisdiction under the CWA, it does not matter whether jurisdictional waters will be more prevalent in some regions and less common in others. What matters is "the ordinary presence of water."[170] "[C]ontinuously present, fixed bodies of water" may be considered WOTUS, and "ordinarily dry channels through which water occasionally or intermittently flows" cannot.[171]

e. We support the adjacent wetlands approach as outlined in Sackett, the definition tied to the word "abut," and offers recommendations relating to adjacent wetlands as relating to concepts of indistinguishability, as well as relating to the definition of continuous surface connection

We broadly support the Proposed Revisions' overall approach for aligning the Agencies' assessments of the jurisdictional status of adjacent wetlands with Supreme Court case law. Under this proposed approach, the Agencies would incorporate relevant Supreme Court interpretations,

[163] *Sackett*, 598 U.S. at 679.
[164] *Sackett*, 598 U.S. at 680 (quoting *SWANCC*, 531 U. S. at 174).
[165] 90 Fed. Reg. at 52,546.
[166] *Rapanos*, 547 U.S. at 732 n. 5.
[167] *Rapanos*, 547 U.S. at 734.
[168] *Rapanos*, 547 U.S. at 734 n. 5.
[169] 90 Fed. Reg. at 52,520.
[170] *Rapanos*, 547 U.S. at 734.
[171] *Rapanos*, 547 U.S. at 732 n. 5.

not through revisions to the text of paragraph (a)(4),[172] which would remain unchanged, but by defining the key phrase "continuous surface connection."[173]

In light of the *SWANCC*, *Rapanos* plurality, and *Sackett* holdings, the Agencies are proposing to "define 'continuous surface connection' for the first time to mean 'having surface water at least during the wet season and abutting (*i.e.*, touching) a jurisdictional water.'"[174] The phrase "continuous surface connection" is highly relevant to the jurisdictional status of adjacent wetlands because the Agencies' existing regulations (which would remain unchanged): (1) define "adjacent" to mean "having a continuous surface connection;"[175] and (2) only extend federal jurisdiction to wetlands adjacent to tributaries and impoundments when those waterbodies are "relatively permanent" and share a "continuous surface connection" with the adjacent wetland.[176]

Applying the proposed new definition of "continuous surface connection" to the Agencies' current "adjacent wetland" category of WOTUS and existing definitions of "adjacent" and "wetland" therefore reveals the Agencies' proposed new framework for assessing whether a wetland is subject to federal jurisdiction.

First, "the agencies must determine if the wetland in question meets the regulatory definition of 'wetlands,'"[177] which the Agencies' regulations have long defined to mean:

> those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.[178]

We support the Agencies' proposed retention of this longstanding definition. We further agree with the Agencies that, to qualify as a wetland, the feature must exhibit each of the three criteria set forth in the "wetlands" definition: "hydrology, hydric soils, and hydrophytic vegetation under normal circumstances."[179] We believe that reasonable adherence to these criteria restrains this category to those swamps, marshes, bogs, and similar areas that are well within the common notion of a wetland. This is important because the due process concerns articulated by the Supreme Court

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[172] See 40 C.F. R. § 328.3(a)(4), which includes within the definition of WOTUS "Wetlands adjacent to the following waters: (i) Waters identified in paragraph (a)(1) of this section; or (ii) 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."

[173] 90 Fed. Reg. at 52,527. As previously noted, the Agencies also proposed to define "relatively permanent" as "standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season." (90 Fed. Reg. at 52,546). In the context of adjacent wetlands category, the phrase "relatively permanent" is relevant to describing one type of waterbody that an adjacent wetland must abut and be connected to in order for the wetland to be jurisdictional, as well as shared language relating to the proposed "wet season" approach. As such, API's comments on the Agencies' proposed definition of "relatively permanent" are also relevant to paragraph (a)(4) adjacent wetlands but need not be repeated here.

[174] 90 Fed. Reg. at 52,527.

[175] 40 C.F.R. § 328.3(c)(2).

[176] 40 C.F.R. § 328.3(a)(4)(ii).

[177] 90 Fed. Reg. at 52,530.

[178] 40 C.F.R. § 328.3(c)(1).

[179] 90 Fed. Reg. at 52,530.

in *Sackett (2012)*; *Hawkes*, *Rapanos*, and *Sackett* necessitate providing the regulated public a reasonable means from which to discern the scope of federal jurisdiction over a feature.

"Once a feature is identified as a wetland, if the wetland itself is not a traditional navigable water (*e.g.*, it is not a tidal wetland), the agencies assess whether it is adjacent to" a TNW, the territorial seas, a jurisdictional impoundment, or a jurisdictional tributary.[180] As previously noted, the Agencies propose to continue to define "adjacent" to mean "having a continuous surface connection,"[181] but propose to "define 'continuous surface connection' for the first time to mean 'having surface water at least during the wet season and abutting (*i.e.*, touching) a jurisdictional water."[182] This "provides a two-prong test that requires both (1) abutment of a jurisdictional water; and (2) having surface water at least during the wet season."[183] Although we agree that both of these prongs are essential prerequisites to asserting federal jurisdiction over wetlands, as discussed in Subsection V.e.1 below, we believe that, in many arid regions with very short wet seasons, a connection via "surface water at least during the wet season" is not sufficiently continuous to meet the Supreme Court's test for extending federal jurisdiction from a WOTUS to an adjacent wetland.

1. <u>The Agencies appropriately considered the "abutment" criterion."</u>

The Agencies' proposed inclusion of the "abutment" criterion appropriately recognizes that, although Supreme Court case law allows the Agencies to assert jurisdiction over wetlands "adjacent" to WOTUS, that jurisdictional reach is based on the ordinary meaning of "adjacent" that the Court used in *Riverside Bayview*, *SWANCC*, and *Rapanos*. The Court in *Riverside Bayview,* for example, described "wetlands adjacent to [jurisdictional] bodies of water" as wetlands "adjoining" and "actually abut[ting] on" a traditional "navigable waterway."[184] Jurisdictional adjacent wetlands thus are those "inseparably bound up with the 'waters' of the United States" and not meaningfully distinguishable from them.[185]

For the same reason, the Court in *SWANCC* rejected the Agencies' assertion of jurisdiction over isolated non-navigable waters "that [we]re not adjacent to open water" and thus not "inseparably bound up" with "navigable waters."[186] The *Rapanos* plurality continued this plain-language approach to adjacency by clarifying that the Court's prior holding in *Riverside Bayview* "rested upon the inherent ambiguity in defining where waters end and abutting ('adjacent') wetlands begin[.]"[187] As the United States Court of Appeals for the Sixth Circuit explained, *Rapanos* stands for the proposition that, regardless of whether the word adjacent may be "ambiguous... in the abstract," it clearly includes "'physically abutting'" and not "merely 'near-by.'"[188]

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[180] As discussed in Subsection V.c of these comments, API recommends that the Agencies eliminate impoundments as a standalone category of waters. Although the jurisdictional status of impoundments is relevant to understanding the scope of "adjacent wetlands" subject to federal jurisdiction, for the sake of efficiency, we refer the Agencies to our discussion in Subsection V.e rather than repeat those points here.
[181] 40 C.F.R. § 328.3(c)(2).
[182] 90 Fed. Reg. at 52,527.
[183] 90 Fed. Reg. at 52,527.
[184] *Riverside Bayview,* 474 U.S. at 135 & n.9.
[185] *Riverside Bayview,* 474 U.S. at 134–35 & n.9.
[186] *SWANCC*, 531 U.S. at 167–68, 171.
[187] *Rapanos*, 547 U.S. at 741–42.
[188] *Summit Petroleum Corp. v. EPA*, 690 F.3d 733, 744 (6th Cir. 2012) (*quoting Rapanos*, 547 U.S. at 748).

Likewise, in *Sackett*, the Supreme Court endorsed the *Rapanos* plurality's view that asserting federal jurisdiction over wetlands is allowed only when there is "no clear demarcation between 'waters' and wetlands."[189] Applying the *Sackett* decision, United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") held that the Agencies could not assert jurisdiction over a wetland where the "nearest relatively permanent body of water [was] removed miles away... by roadside ditches, a culvert, and a non-relatively permanent tributary."[190] Federal jurisdiction over the wetland could not lie because "it is not difficult to determine where the 'water' ends and any 'wetlands' on Lewis's property begin."[191]

In sum, federal jurisdiction does not extend to wetlands that are merely neighboring, or proximate to, WOTUS. Neighboring wetlands do not implicate the same problematic question of where open water ends and dry land begins that the Court contended with in *Riverside Bayview*.[61] As such, consistent with the Supreme Court's holdings in at least four decisions, a wetland can only be considered "adjacent" for the purpose of determining federal jurisdiction if that wetland directly abuts a WOTUS.

2. <u>"Having surface water at least during the wet season" is concerning under the "continuous surface connection definition" that is tied to adjacent wetlands, and we provide recommendations.</u>

Of course, abutment alone is insufficient to extend federal jurisdiction from a WOTUS to a wetland. To fall under federal jurisdiction, a wetland adjacent to a jurisdictional water must also share a surface water connection with the jurisdictional water. Thus, the second prong of the two-part test in the Agencies' proposed "continuous surface connection" definition (*e.g.*, "having surface water at least during the wet season")[192] is as important as the "abutment" prong because collectively these two criteria help answer the critical jurisdictional question of "where waters end and abutting ('adjacent') wetlands begin[.]"[193]

Similar to our discussion of the term "relatively permanent," we discuss in Section VI the precise contours of and potential implementation challenges associated with defining "continuous surface connection" to mean "surface water at least during the wet season."[194] Here, we discuss the ways in which defining "continuous surface connection" to mean "surface water at least during the wet season" aligns with but also departs from relevant Supreme Court's interpretations.

To begin, by defining "continuous surface connection" based on the presence of surface water, the Agencies correctly clarify that the *Sackett* decision and the *Rapanos* plurality opinion both reflect that wetlands must share a surface *water* connection with WOTUS in order to be jurisdictional. Although *Sackett* and the *Rapanos* plurality would allow federal jurisdiction to extend to wetlands abutting WOTUS even if there are "temporary interruptions" to the "continuous surface

[189] *Sackett*, 598 U.S. at 678 (quoting *Rapanos*, 547 U.S. at 742).
[190] *Lewis v. United States ("Lewis")*, 88 F.4th 1073, 1079 (5th Cir. 2023).
[191] *Lewis*, 88 F.4th at 1079.
[192] 90 Fed. Reg. at 52,527.
[193] *Rapanos*, 547 U.S. at 741–42.
[194] 90 Fed. Reg. at 52,527.

connection" such as from "low tides or dry spells,"[195] that language makes it clear that the requisite connection is a *water* connection.

Moreover, it is the presence of surface water that underlies the *Rapanos* plurality's holding that wetlands are WOTUS when they are "as a practical matter indistinguishable from waters of the United States."[196] In fact, each of the other justices who wrote opinions in *Rapanos* recognized that the plurality's reference to "continuous surface connection" meant "continuous surface *water* connection"[197] Multiple lower courts have also understood that the *Rapanos* plurality would only extend federal jurisdiction over those wetlands that share a continuous surface *water* connection with a WOTUS.[198]

At least two courts have also reached the same conclusion by relying on *Sackett*. In *United States v. Sharfi ("Sharfi")*, the U.S. District Court for the Southern District of Florida ruled against the federal government in an enforcement action alleging that the property owners illegally discharged dredged material into a jurisdictional wetland complex in Florida.[199] The wetlands at issue in *Sharfi* abutted manmade drainage ditches that connected to traditional navigable waters. Although the court ultimately ruled that the abutting ditches were not themselves WOTUS, the court additionally rejected the government's argument that the ditches, which did not continuously hold water, were "continuous surface connections" because, according to the court, "'continuous surface connection' means a surface *water* connection."[200]

Similarly, in *United States v. Ace Black Ranches, LLP ("Ace Black Ranches")*, the United States for the District of Idaho dismissed a CWA enforcement action alleging illegal discharges into wetlands.[201] Like *Sharfi*, the District of Idaho did so because "[t]he Government [failed] to connect any wetlands it believes Ace Black Ranches' has polluted with the River via a sufficient surface-water connection."[202]

While we concur with the Agencies' view that the jurisdictional test in the *Sackett* decision and the *Rapanos* plurality opinion requires a wetland to be connected to WOTUS via a surface *water* connection, we are concerned about whether a wetland that is ordinarily dry except during a

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[195] *Sackett*, 598 U.S. at 678 n.16.
[196] *Rapanos*, 547 U.S. at 755.
[197] *See Rapanos*, 547 U.S. at 776 (Kennedy, J., concurring in the judgment) ("when a surface-water connection is lacking, the plurality forecloses jurisdiction over wetlands that abut navigable-in-fact waters"). *See also Rapanos*, 547 U.S. at 805 (Stevens, J., dissenting) ("Under this view, wetlands that border traditionally navigable waters or their tributaries and perform the essential function of soaking up overflow waters during hurricane season—thus reducing flooding downstream—can be filled in by developers with impunity, as long as the wetlands lack a surface connection with the adjacent waterway the rest of the year.").
[198] *See United States v. Cundiff*, 555 F.3d 200, 211–13 (6th Cir. 2009) ("the [*Rapanos*] plurality's test requires a topical flow of water"); *Tri-Realty Co. v. Ursinus Coll.*, 124 F. Supp. 3d 418, 467 (E.D. Pa. 2015) ("the *Rapanos* plurality derived the requirement for a surface water connection from the phrase 'adjacent to'"); *Simsbury-Avon Pres. Soc'y, LLC v. Metacon Gun Club, Inc.*, 472 F. Supp. 2d 219, 224 (D. Conn. 2007), aff'd on other grounds, 575 F.3d 199 (2d Cir. 2009) ("Plaintiffs do not dispute defendant's reading that Rapanos requires a continuous surface water connection between the wetland and an adjacent, relatively permanent water of the United States[.]").
[199] *United States v. Sharfi*, 2024 WL 4483354, *1–2, *12 (S.D. Fla. Sept. 21, 2024)
[200] *Sharfi,* 2024 WL 4483354 at *11
[201] *See Ace Black Ranches,* 2024 WL 4008545, at *1.
[202] *Ace Black Ranches*, 2024 WL 4008545, at *4 n.2

potentially short wet season would represent the type of "*continuous* surface connection" described in *Rapanos* and *Sackett*.[203] In fact, in addition to the importance of addressing the practical implementation challenges associated with defining "continuous surface connection" to mean "surface water at least during the wet season" (which we discuss in Section VI), we respectfully urge the Agencies to revise the proposed "continuous water connection" definition so that it is limited to only those connections that are sufficiently continuous to render adjacent wetlands indistinguishable from the WOTUS they abut (See Section VI for specific recommendations). Based on our interpretation of the *Sackett* decision and the *Rapanos* plurality opinion, we believe that a continuous surface water connection must be continuously present or flowing for at least 90 days, even if the wet season in a particular region typically lasts for less than 90 days. This is because a surface connection of less than 90 days does not make a wetland indistinguishable from WOTUS and therefore does not provide a basis for extending federal jurisdiction from a WOTUS to an adjacent wetland.

To begin, although we acknowledge that *Sackett* would consider surface water connections to be "continuous" even if "temporary interruptions . . . may sometimes occur because of phenomena like low tides or dry spells,"[204] that limited exception to the jurisdictional test does not subsume the jurisdictional test itself. On the contrary, *Sackett* and the *Rapanos* plurality both make it clear that the hydraulic connection between a wetland and an abutting WOTUS must be so consistently and ordinarily present that there is "no clear demarcation between 'waters' and wetlands."[205] In other words, the surface connection must be so continuous that the wetland is "'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.'"[206]

Indeed, "indistinguishability" is at the very heart of the *Sackett* decision. So central is this concept to the holding in *Sackett* that the opinion uses the term "indistinguishable" even more than it uses "continuous surface connection." And for good reason – the only way a wetland can be a WOTUS is if it is indistinguishable from a WOTUS.

In *Sackett*, the Court "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 geographic[al] features' that are described in ordinary parlance as 'streams' oceans, rivers, and lakes.'"[207] "This reading follows from the CWA's deliberate use of the plural term 'waters.' That term typically refers to bodies of water like those listed above."[208]

"Although the ordinary meaning of 'waters'" in the phrase "waters of the United States" would "exclude all wetlands," the Court in *Sackett* was compelled to "harmonize" this meaning "with the reference to adjacent wetlands in section 404(g)(1);" a provision Congress added in 1977 to allow states to assume permitting authority for the discharge of dredged or fill material into WOTUS "including wetlands adjacent thereto."[209] The Court then concluded that "because the adjacent

[203] *Sackett*, 598 U.S. at 678 (quoting *Rapanos*, 547 U.S. at 742) (emphasis added).
[204] *Sackett*, 598 U.S. at 678 n.16.
[205] *Sackett*, 598 U.S. at 678 (quoting *Rapanos*, 547 U.S. at 742).
[206] *Sackett*, 598 U.S. at 678–79 (citation and internal quotation marks omitted).
[207] *Sackett*, 598 U.S. at 671(quoting *Rapanos*, 547 U.S. at 739).
[208] *Sackett*, 598 U.S. at 671 (internal citations omitted).
[209] *Sackett*, 598 U.S. at 675–676.

wetlands in [section404(g)(1)] are 'includ[ed]' within 'the waters of the United States,' these wetlands must qualify as 'waters of the United States'" by being "indistinguishably part of a body of water that itself constitutes 'waters' under the CWA."[210] In other words, regulation of "indistinguishable" adjacent wetlands is permissible—but only incidentally to the CWA's regulation of "waters."

The Agencies recognize "the 'indistinguishable' concept articulated in the *Rapanos* plurality and *Sackett* opinions," and acknowledge that "[a] wetland that lacks surface water during the wet season may often look like dry land and can be easily distinguishable from the surface waters to which it abuts," but somewhat paradoxically "view indistinguishability during the wet season as sufficient to satisfy the *Sackett* test."[211]

Given that wet seasons can be a month-long or less, a "clear demarcation between 'waters'"[212] and dry land would exist for eleven months or more per year in many parts of the United States. In these areas, it would not be 'difficult to determine where the water ends and the wetland begins.'"[213] In other words, the ordinarily dry areas that these Proposed Revisions would treat as jurisdictional wetlands would in no way be "'as a practical matter indistinguishable from waters of the United States.'" [214]

Given this heightened "indistinguishability" standard, the exceptions to the "continuous" nature of connection are necessarily limited. In *Sackett*, the Court allowed "temporary interruptions [that] may sometimes occur because of phenomena like low tides or dry spells."[215] As such, we believe that the Agencies should establish that a "continuous surface water connection" requires that water be continuously present or for at least 90 days, even if the wet season in a particular region is typically shorter. We also believe that the Agencies should consider adding an independent criterion expressly stating that federal jurisdiction only extends to those adjacent wetlands or portions of wetlands are indistinguishable from the WOTUS they abut.[216]

We also recommend that the Agencies amend the Proposed Revisions to expressly state that no "continuous surface connection" exists when a wetland is separated from WOTUS by any natural or man-made dykes, river berms, flood or tide gates, beach dunes, barriers, or any other type of natural or man-made structure or landform providing vertical separation between the surface of the wetland and WOTUS.[217] A wetland that may appear adjacent to a WOTUS on a map may not share a "continuous surface connection" with the WOTUS due to differences in elevation or altitude. Banks and other features that separate the wetland from the OHWM or high tide line of

[210] *Sackett*, 598 U.S. at 676.
[211] 90 Fed. Reg. at 52,528.
[212] *Sackett*, 598 U.S. at 678 (quoting *Rapanos*, 547 U.S. at 742).
[213] *Sackett*, 598 U.S. at 678–79 (citation and internal quotation marks omitted).
[214] *Sackett*, 598 U.S. at 678–79 (citation and internal quotation marks omitted).
[215] *Sackett*, 598 U.S. at 678 n.16.
[216] See additional discussion relating to adjacent wetlands and "wet season" approach in Section VI.
[217] While physical barriers generally preclude the extension of federal jurisdiction over wetlands irrespective of whether the barriers are natural or artificial, API acknowledges that man-made barriers will not sever federal jurisdiction over wetlands if they are unlawfully constructed for the specific purpose of removing jurisdiction. (*Sackett*, 598 U.S. at 678, n.16).

WOTUS provide a clear demarcation that prevents federal jurisdiction from extending to the wetland.[218]

For similar reasons, we disagree with the Agencies' proposed determination "that culverts do not inherently sever the continuous surface connection when the culvert serves to extend the relatively permanent water such that the water directly abuts a wetland."[219] According to the Agencies, "[t]his proposed approach would not include the culvert itself as a jurisdictional feature; however, the relatively permanent tributary flowing within the culvert would be jurisdictional, with the wetland abutting the tributary also jurisdictional."[220] The Agencies also solicit comment on an alternate approach "where culverts which serve to connect wetland portions on either side of a road do not inherently sever jurisdiction, but only when the culvert carries relatively permanent water."[221]

We do not believe that either of these approaches are consistent with *Sackett* or the *Rapanos* plurality because wetlands that are connected to WOTUS via culverts, pipes, ditches, narrow channels, and similar conveyances are not in "inseparably bound up with the 'waters' of the United States," and in fact are readily distinguishable from them.[222] Each of these types of conveyances provide a "clear demarcation between 'waters' and wetlands,"[223] and therefore none can serve to extend jurisdiction from a WOTUS to a wetland. This is particularly true for pipes, road culverts, and other subsurface or enclosed features because these conveyances do not provide the continuous *surface water connection* that the Supreme Court determined to be necessary to make an adjacent wetland jurisdictional.

Finally, while we disagree with certain aspects of the manner in which the Agencies propose to assess federal jurisdiction over wetlands, we fully agrees with the Agencies' proposed approach to delineating and tailoring federal jurisdiction *within* a wetland and in wetland mosaics more broadly. According to the Proposed Revisions, "mosaic wetlands would not be considered 'one wetland,' but rather the agencies would delineate wetlands in the mosaic individually."[224] "In addition, only the portion of a delineated wetland in a wetland mosaic that meets the definition of continuous surface connection ('having surface water at least during the wet season and abutting (*i.e.*, touching) a jurisdictional water') would be adjacent" under the Agencies' proposed approach.[225]

While we acknowledge that delineating the scope of federal jurisdiction within a wetland or wetland complex presents certain implementation challenges, this tailored approach is necessary to align the Agencies' Proposed Revisions with the *Sackett* decision and the *Rapanos* plurality opinion (See Section VI for further discussion). Given the precise and narrow circumstances under which the Supreme Court believed that federal jurisdiction could extend to adjacent wetlands,

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[218] Even the presence of a relatively permanent waterfall or spillway would not necessarily extend federal jurisdiction to the wetland if other parts of the barrier maintain vertical separation between the wetland and the WOTUS.
[219] 90 Fed. Reg. at 52,529.
[220] 90 Fed. Reg. at 52,529.
[221] 90 Fed. Reg. at 52,529.
[222] *Riverside Bayview,* 474 U.S. at 134-35 & n.9.
[223] *Sackett*, 598 U.S. at 678 (quoting *Rapanos*, 547 U.S. at 742).
[224] 90 Fed. Reg. at 52,529.
[225] 90 Fed. Reg. at 52,529.

meaningfully the Agencies' regulations with the *Sackett* decision and the *Rapanos* plurality opinion requires the Proposed Revisions to only allow the Agencies to assert federal jurisdiction over those portions of adjacent wetlands that have "continuous surface connections" with the WOTUS they abut such that they are "as a practical matter indistinguishable from waters of the United States."[226]

If federal jurisdiction is asserted over an adjacent wetland, that jurisdictional reach does not automatically extend throughout the wetland or wetland complex. Rather, it terminates at whatever point within a wetland or wetland complex that surface hydrology or features begin to show a clear demarcation between 'waters' and wetlands,"[227] because if wetlands – or portions of wetlands – are distinguishable from WOTUS, they are not subject to federal jurisdiction.[228]

In light of the discussion above, where *Sackett* makes it clear that federal jurisdiction over wetlands extends only to those that are "as practicable matter indistinguishable from waters of the United States," and to codify into the rule, a clear, objective and legally defensible standard for determining jurisdictional wetlands, we recommend a modest change to (a)(4):

> (4) Wetlands adjacent to and indistinguishable from the following waters: . . .

f. <u>Retaining "lakes and ponds" as a separate category is unnecessary because these features can be included in the "tributaries" category.</u>

Consistent with our support for the proposed removal of "interstate waters" from paragraph (a)(1), we support the Agencies' proposed deletion of the term "interstate" from the "lakes and ponds" category of waters in paragraph (a)(5).[229] As with any other type of waterbody, lakes and ponds are not automatically subject to federal jurisdiction simply because they cross a state line.

While we support the Agencies' proposed revision to paragraph (a)(5), we believe that classifying lakes and ponds as a standalone category of WOTUS is unnecessary and confusing. To the extent lakes and ponds are relatively permanent and connected to a TNW in a manner consistent with the *Sackett* and *Rapanos* decisions, the lakes or ponds would be subject to federal jurisdiction under paragraph (a)(3). But if a relatively permanent lake or pond is *not* connected to a TNW—if, for example, the lake or pond only connects to a non-navigable water or to an impoundment of a non-navigable water—binding Supreme Court case law forecloses defining it as a WOTUS.

Because federal jurisdiction extends to relatively permanent lakes and ponds only if those lakes and ponds are sufficiently connected to TNW, for the purpose of defining WOTUS, they are no different than the tributaries categorized under paragraph (a)(3). If there is no material distinction between the jurisdictional tests for lakes/ponds and tributaries, there is no reason to retain lakes and ponds as a separate and standalone category of waters. As such, we urge the Agencies to adopt

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[226] *Rapanos*, 547 U.S. at 755.
[227] *Sackett*, 598 U.S. at 678 (quoting *Rapanos*, 547 U.S. at 742).
[228] API agrees that this "approach would also influence how the agencies identify permafrost wetlands as many permafrost wetlands are mosaic wetlands." 90 Fed. Reg. at 52,529. We discuss permafrost wetlands in Section VI.
[229] 90 Fed. Reg. at 52,533.

the alternative approach described in the Proposed Revisions[230] and eliminate paragraph (a)(5) from the WOTUS definition.

VI. TECHNICAL COMMENTS ON IMPLEMENTATION OF PROPOSED REVISIONS

a. We support the Agencies' efforts to define "relatively permanent," however, for regulatory certainty, in keeping with longstanding agency practice, and grounding this determination on clear, understandable, and readily observable surface connections, we provide the following comments.

1. While we are supportive of the Agencies' efforts, we request further refinement and guidance from the Agencies on the tools and methods that are proposed for the implementation of the "wet season" approach, and overall, we encourage the Agencies' development and use of reliable tools that promote consistency and efficiency and do not unreasonably burden landowners.

We appreciate the Agencies' efforts to use the existing tools, including the Antecedent Precipitation Tool ("APT") as a basis for "at least during the wet season" approach to address "relatively permanent" waters and "continuous surface connection." Certainly, as discussed above, the legal parameters envision giving meaning to the words "relatively permanent" beyond perennial waters. However, we believe that the scope and reach of the Agencies' proposed "wet season" approach with the proposed wide-ranging tools requires further refinement and a commitment from the Agencies that the implementation process will not unreasonably expand jurisdictional reviews and not add additional costly burdens on landowners.

The preamble and supporting documentation should be also reviewed for consistency and cohesiveness, as well as resolve challenges associated with the "wet season." Overall, if the Agencies proceed with this approach, we are supportive of the Agencies' development and using agency-endorsed tools that promote consistency and efficiency and adheres to *Sackett*. But first, we would urge the Agencies to clarify the scope of "wet season" determination, and to rely on tools with demonstrated reliability.

The Agencies "acknowledge that landowners often know when surface hydrology is occurring in waterbodies on their land, and such visual observations and other local knowledge and records would be helpful when identifying the occurrence and duration of surface hydrology."[231] But the Agencies also state that they "intend to use the metrics from the Web-based Water-Budget Interactive Modeling Program ("WebWIMP"), which are reported in the APT, as a **primary source** for identifying the wet season."[232] Using WebWIMP as a primary tool may add consulting costs for many landowners (versus primary consideration given to direct observational and

[230] 90 Fed. Reg. at 52,533.
[231] 90 Fed. Reg. at 52,521.
[232] 90 Fed. Reg. at 52,519 (emphasis added).

available visual data) and we ask the Agencies to further review this approach and look for ways to minimize potential burdensome impacts.

Overall, we understand that Agencies will use the "weight-of-evidence" (WoE) method in considering whether a feature is a jurisdictional WOTUS.[233] While we appreciate this approach, we ask the Agencies to be mindful of issues that may arise with the use of this WoE method, including the potential for introducing subjectivity and potential biases. We recommend appropriate staff training and guidance on how these various tools should be weighed. Certainly, preference should be given to real-time observable data, with steps outlined on use of other agency-developed reliable tools as secondary options based on a clear hierarchical system.

We also request additional information on WebWIMP, a 2003 database developed by the University of Delaware, last upgraded in 2009.[234] The APT simply "reports an interpretation of the average monthly water-balance metrics from WebWIMP . . . ."[235] The underlying climate and precipitation data that WebWIMP accesses is owned by the federal agencies that own it (e.g. NOAA). As found in footnote 48:

> The APT reports an interpretation of the average monthly water-balance metrics from WebWIMP [website deleted] as an estimation of the approximate dates of the wet and dry seasons for the observation location, including whether the date of observation falls within the wet season or the dry season. The interpretation of wet season using the results from WebWIMP is that the wet season corresponds to all periods of the year where precipitation is estimated to, on average, exceed evapotranspiration.[236]

Yet, the Agencies "recognize that the WebWIMP outputs reported in APT may not have complete functionality in certain territories," and that they are "exploring ways to improve functionality."[237] With this statement, no further information is provided on securing functionality, and we request clarification. The Agencies also note their experience with applying the concept of "wet season" in the use of the APT, which they state "is routinely used to inform wetland delineations and jurisdictional determinations."[238] We understand that WebWIMP is listed in a 2008 Corps Guidance relating to the Arid West Region as "one source for approximate dates of wet and dry seasons for any terrestrial location based on average monthly precipitation and estimated evapotranspiration).[239] The guidance also notes that "[a]ctual dates for the dry season vary by

[233] 90 Fed. Reg. at 52,515.
[234] http://cyclops.deos.udel.edu/wimp/public_html/index.html.
[235] 90 Fed. Reg. at 52,519, n. 48.
[236] 90 Fed. Reg. at 52,519, n. 48.
[237] 90 Fed. Reg. at 52,520-21.
[238] 90 Fed. Reg. at 52,518.
[239] Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region (Version 2.0) at 103, Sept. 2008 (emphasis added).

locale and year."[240] The APT was first introduced in May 2020 in response to the implementation of 2020 NWPR's "typical year,"[241] which many supported despite implementation concerns.

In 2025, we understand that the Agencies view APT as a primary tool and this year "expands the analysis domain to include Alaska, Hawaii, Puerto Rico, and the US Virgin Islands."[242] We simply ask the Agencies to clarify in the preamble as well as in guidance ways that the Agencies will reconcile and balance the use of landowner's visual observations with the use of APT, WebWIMP and other tools given *Sackett*'s language that directs the Agencies to avoid vague and overly strenuous applications of relatively permanent and continuous surface connection tests such that an ordinary landowner is not unreasonably burdened, and without proper notice exposed to CWA's strict liability. We raise this issue because our members with experience in Alaska and Northern states find that tools such as WebWIMP demonstrate that the "wet season" coincides with periods when the ground is frozen and covered in snow, rendering jurisdictional determinations impractical and disconnected from observable hydrology. If seasonality is considered, it should be tied to the "growing season" as defined by the Army Corps' Wetlands Delineation Manual (for Alaska), and not to precipitation/evapotranspiration metrics that do not necessarily reflect field conditions.[243] This approach would ensure that jurisdictional determinations are both scientifically defensible and administrable in all regions.

The Agencies also make the argument that the "incorporation of wet season into the proposed definition of 'relatively permanent' can be viewed as a bright line test, as it would provide a required duration threshold for which a water must have standing or flowing water in order to be considered jurisdictional."[244] Yet, the Agencies suggest the use of several tools to determine wet season which makes it unclear how this will be a bright line test with required duration thresholds. The preamble notes "other sources of information on identification of wet season could include NOAA, NRCS, and USGS sources, among others such as the Frequent Rainfall Observations on GridS (FROGs)."[245] The Agencies also discuss streamflow duration assessment methods (SDAMs) which some stakeholders have found to have implementation challenges as they mention in the preamble,[246] or the USGS Enhanced Runoff Method.[247] None of these tools were developed with the proposed regulatory definitions in mind, and will need to be fully assessed for functionality and reliability, and whether these tools are reasonably fit for purpose in providing the required duration thresholds within the proposed definitions. Of course, there are many ways to determine surface flows, and we ask for a technically and legally sound approach that reflects the law, is scientifically defensible, durable, and administrable in all regions without requiring multitudes of consultants using various tools.

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[240] Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region (Version 2.0) at 103, Sept. 2008 (emphasis added).

[241] "The term '*typical year'* means when precipitation and other climatic variables are within the normal periodic range (e.g., seasonally, annually) for the geographic area of the applicable aquatic resource based on a rolling thirty-year period." 85 Fed. Reg. at 22,341.

[242] APT Version 3.0: Technical and User Guide at 1, July 18, 2025.

[243] Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region (Version 2.0) at 108. Sept. 2007. See https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/reg_supp/

[244] 90 Fed. Reg. at 52,519. This same language is used for adjacent wetlands. 90 Fed. Reg. at 52,528.

[245] 90 Fed. Reg. at 52,524 (footnotes removed).

[246] 90 Fed. Reg. at 52,521.

[247] 90 Fed. Reg. at 52,521.

On the continuous surface connection side relating to wetland habitats, the Agencies state that "the hydrologic regime of wetlands may be described with a modifier related to flooding status (e.g., NWI water regime flooding modifiers) and help inform duration and timing of surface inundation."[248] The Agencies are using "a modified version of the 'semipermanently flooded' definition used by NWI to inform the implementation of the surface water requirement for continuous surface connection in the Proposed Revisions, where surface water must persist throughout the wet season without interruption."[249] Yet, it is confusing because the Agencies also state that, "wet season would be implemented the same way as for the proposed definition of 'relatively permanent,' creating consistency in implementation."[250] We would be supportive of a consistent approach with the two tests but given different parameters that inform the Agencies' decisions, it is unclear how the Agencies plan to implement the "wet season" approach consistently and we request further clarification.

The types of tools that would be used to implement the Agencies' intention in the phrase ''having surface water at least during the wet season'' also need to be further refined. The Agencies note that, "it intends to include wetlands that have at least semipermanent surface hydrology that is persistent surface water hydrology uninterrupted throughout the wet season except in times of extreme drought and would not include wetlands without semipermanent surface hydrology, including wetlands with only saturated soil conditions supported by groundwater."[251] These types of assessments involving conditions below ground cannot be easily performed by visual inspections or desktop reviews, and we ask the Agencies to provide further guidance and clarification.

We also understand that the Agencies seek to "allow for regional variation given the range of hydrology and precipitation throughout the country," and we ask the Agencies to consider this task with goals of administrative efficiency and in alignment with *Sackett.*[252] As discussed above, for certain regions such as Alaska, we recognize the usefulness of regional wetland delineation manuals and their definition of "growing season" in conjunction with the 1987 USACE Wetland Delineation Manual.[253] We also encourage the Agencies to seek the counsel of states in seeking consistency and clarity when defining wet season parameters by state or regionally, because the states may have useful local expertise and depth of knowledge about their surface hydrology and regional conditions with relatively permanent flows and precipitation data.

Beyond the tools referenced in the preamble, in the long term, we also suggest that the Agencies create a fit-for-purpose geospatial mapping tool of jurisdictional waters based on the post-*Sackett* legal guideposts, utilizing visual observations and modeling that any member of the public could

[248] 90 Fed. Reg. at 52,531 (footnote removed).
[249] 90 Fed. Reg. at 52,531 (footnote removed).
[250] 90 Fed. Reg. at 52,531.
[251] 90 Fed. Reg. at 52,527 (emphasis added).
[252] 90 Fed. Red. at 52,519.
[253] For example, Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Alaska Region (Version 2.0). Sept. 2007. See https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/reg_supp/ Note: The preamble solicits comments on growing season, noting the definition found in Army Corps' Wetland Delineation Manual. 90 Fed. Reg. at 52,532.

use and rely on.[254] Consistent with comments submitted by the Wyoming Department of Environmental Quality in April 2025, we support "the development of integrating publicly available, national mapping tools through federal-state partnerships," which identifies waters with "relatively permanent" flows.[255] Such a map can include a phased approach that first focuses on (a)(1) waters and excluded features, followed by more complex (a)(3) to (a)(4) waters, and ultimately (a)(5) waters.[256]

Overall, we appreciate the Agencies' efforts to achieve a durable goal that reflects a "balancing of the law, common sense, science, and stakeholder input received pre-proposal" but this cannot be achieved without further clarification and significant refinement of the relatively permanent test and continuous surface connection tests associated with the underlying "wet season" approach and associated tools that are contemplated for implementation.[257]

2. <u>If the Agencies proceed with the "wet season" approach, we recommend providing a clear definition of "at least during the wet season" that is legally defensible and one that defines a wet season as comprising at least 90 consecutive days of continuous flow.</u>

We appreciate that the Agencies acknowledge that there is no definition of "at least during the wet season" in the Proposed Revision, and if the Agencies proceed with this concept, we recommend that there should be a clear definition that is easy to administer and is scientifically and technically sound.

While the Proposed Revisions do not include a clear definition, the preamble states that "'at least during the wet season' is intended to include extended periods of predictable, continuous surface hydrology occurring in the same geographic feature year after year in response to the wet season, such as when average monthly precipitation exceeds average monthly evapotranspiration."[258] We also appreciate the Agencies stating that "ephemeral waters" (*i.e.*, those with surface water flowing or standing only in direct response to precipitation) are not considered relatively permanent waters; however, these concepts are not in the rule language itself. In addition, without clear quantitative definitions of surface flow (as we propose below), this definition is likely to be applied inconsistently even accounting for regional variations.

Our technical experts also find the preamble definition of "at least during the wet season" to be confusing, and given differing language in the preamble, we are unclear on implementation methods that will be used consistently to make jurisdictional determination on when average monthly precipitation exceeds average monthly evotranspiration.[259]

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[254] *See* Wyoming Department of Environmental Quality Comments in response to Docket No. EPA-HQ-OW-2025-0093. April 23, 2025 (advocating quantitative criteria of at least 90 consecutive days of continuous flows that uses observed or stream flows rather than field indicators as the basis for determining "relatively permanent."

[255] Wyoming Department of Environmental Quality Comments in response to Docket No. EPA-HQ-OW-2025-0093.

[256] Wyoming Department of Environmental Quality Comments in response to Docket No. EPA-HQ-OW-2025-0093.

[257] 90 Fed. Reg. at 52,519.

[258] 90 Fed. Reg. at 52,518.

[259] See discussion above.

Overall, we are supportive of the Agencies' efforts, but there is enormous scope for confusion with reconciling wet season with seasonal flow (which may not overlap). The Agencies mention that "surface hydrology would be required to be continuous throughout the entirety of the wet season" and that the "temporal component of the wet season is intended to be an extended period where there is continuous surface hydrology resulting from predictable seasonal precipitation patterns year after year."[260] The Agencies also "acknowledge that surface hydrology may not always exactly overlap with the wet season, for example in regions exhibiting a time lag or delay in demonstration of surface hydrology due to various factors," and no further guidance is provided to resolve this concern.[261]

Our members' experiences also indicate that, in Eastern Wyoming, the wet season could be from April to June, which could align with typical season flow (*i.e*. spring run-off). But in Yellowstone (NW corner of Wyoming), peak precipitation would be in the form of snow during the winter months but seasonal stream flows would have a significant lag due to cold temperatures and snowmelt, and stream and tributary flows would occur much later in the spring and summer. Hence, using "at least during the wet season" in the definition as intended by the Agencies in the Proposed Revisions would be problematic and conflict with seasonal flows and the Agencies are not clear how these concepts would be reconciled.[262]

We ask the Agencies to provide a clear, durable definition that is tied to the legal parameters of *Sackett* and *Rapanos* and encompasses all elements in the rule language itself.

If the Agencies elect to retain the "wet season" approach, we believe that "at least during the wet season" should give weight to the "at least during the" language and require at least one wet season and there must be a continuously standing or flowing surface flow throughout the entire wet season as defined by a quantitative limit that is predictable and legally and technically sound. As discussed below, we recommend at least 90 consecutive days which, as the Agencies point out, may be a more conservative approach, but it conforms to the Court's statements in *Sackett* that jurisdiction must be based on defensible objective standard that any landowner can understand without relying on consultants and various tools that the Agencies might utilize to ascertain a wet season.

Notwithstanding legal rationale as provide in Section V, the 90 days is also recommended based on the Agencies' own longstanding practice outlined in the *Rapanos* guidance issued in 2007, of determining relatively permanent waters by including "waters that have a continuous flow at least seasonally (e.g. typically three months).[263] It also reflects our consistent position over several rulemakings based on its own members' experience with WOTUS implementation.

There are reliable methods to establish 90 days of continuing flow, including visual observation and real-time data as well as [r]outine monitoring or modeling, as suggested by the Wyoming

[260] 90 Fed. Reg. at 52,518.
[261] 90 Fed. Reg. at 52,518.
[262] The Agencies also suggest the alternative approach of limiting seasonal flows to "perennial waters" only, and while it would be easier approach to implement, there are legal issues with that approach as discussed above.
[263] EPA and Army Corps, "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States* ("*Rapanos* Guidance"), June 5, 2007.

Department of Environmental Quality that "can help verify that a water maintains at least 90 consecutive days of continuous flow, while also reducing inconsistencies… ."[264]

Our recommended language:

> "Wet season" means as at least one contiguous period during which there is continuously standing or continuously flowing surface water for a minimum of 90 consecutive days.

3. Recognizing concerns above and given the Agencies' solicitation of alternative approaches to defining a "at least during the wet season," we recommend replacing the "at least during the wet season" term with an objective quantifiable evidence-based standard that establishes a straightforward, balanced, and implementable continuous seasonal flow tethered to 90-days (with room for case-by-case consideration of regional delineations manuals in certain locations, *e.g.* Alaska).

With additional guidance and clarification, the Agencies' "wet season" concept as currently envisioned introduces a system for assessing jurisdictional determinations on a case-by-case basis with the-often conflicting opinions of experts using a variety of technical methods and tools with limitations and issues on their usage and reliability. Thus, in response to the Agencies' solicitation of comments regarding quantifiable limits, we recommend an alternative approach of replacing "at least during the wet season" entirely and defining "relatively permanent" to mean a continuous flow of surface water for least 90 consecutive days during years of typical precipitation. The years of typical precipitation can include the 30-year precipitation normals developed by the NOAA that are robust products that can used at different geographic scales and are updated every ten years.[265] This standard is based on longstanding Agency guidance, and the preamble acknowledges that practitioners have experience applying this approach.[266]

We believe that the word "consecutive" is necessary so as not to cause any ambiguity with other multi-day precipitation events potentially being used to stack up time to add up to 90 days. And in this approach, intermittent, insubstantial, or episodic flows that render jurisdictional determinations less predictable, harder to demonstrate or disprove, and more inclined to be inconsistently applied are easily excluded.

Within this construct and recognizing the need for regional variability in certain geographic locations, we support allowing limited case-by-case consideration with region-specific "wet season" (tethered to seasonal flow) analyses when requested by landowners or others seeking a jurisdictional determination. Regional variability can be appropriate to account for differing hydrology, provided the approach is narrowly tailored, transparent, and grounded in objective relevant data and methods. Certainly, we recognize that the Army Corps developed regional supplements to the US Corps' 1987 Wetland Delineation Manual for many unique geographic area

[264] Wyoming Department of Environmental Quality Comments in response to Docket No. EPA-HQ-OW-2025-0093.
[265] Wyoming Department of Environmental Quality Comments in response to Docket No. EPA-HQ-OW-2025-0093.
[266] 90 Fed. Reg. at 52,521.

including Alaska. These manuals provide useful, region-based guidance on wetland delineations, and where these are published and available, should be used to determine continuous surface connection of a jurisdictional adjacent wetland under the legal guideposts provided in *Sackett.*

Our recommended language:

> Relatively permanent means standing or continuously flowing bodies of surface water that are standing or continuously flowing year-around or ~~at least during the wet season.~~ are standing or continuously flowing at least 90 consecutive days during years of typical precipitation.

4. We support the Agencies' proposal to change the implementation of wetland mosaics to delineating wetlands in a mosaic that meet the definition of "continuous surface connection."

We submitted detailed comments relating to the Agencies' overly broad method of considering all wetlands collectively under the "one wetland" memorandum. We are pleased to note that the Agencies are proposing to change the implementation method and will not consider the entire wetland as adjacent if any portion of the wetland is adjacent.[267] Under the proposed revised method, the wetland has to be touching and with continuous surface connection as discussed above, and only the portions of wetland mosaics that meet the definition of "continuous surface connection" under the Proposed Revisions would be jurisdictional as adjacent wetlands.

We had also requested and recommended that permafrost wetlands be excluded, and while the Agencies declined to undertake that approach, the Agencies noted that many Alaskan wetlands are mosaic wetlands, and this change in implementation methods will address the concerns we had raised. The Agencies received pre-proposal recommendations that they exclude permafrost wetlands. While the Agencies would not exclude permafrost wetlands in the Proposed Revisions, they have considered approaches to permafrost wetlands and believe that the proposed changes to how mosaic wetlands are considered would address some concerns raised in pre-proposal feedback, as many permafrost wetlands are mosaic wetlands.

We appreciate the Agencies' efforts in clarifying approaches to permafrost wetlands; however, we retain concerns relating to the methods that will be used to delineate permafrost wetlands. Notwithstanding our discussion on the term, "at least during the wet season," we recommend further clarification on the approach to permafrost wetlands and based on our technical expertise of the unique region, we provide additional comments for your consideration. First, we submit that delineation should only occur in the absence of surface snow and ice, and when adjacent waters are thawed. Second, we also recommend that the information issued for jurisdictional determinations in Alaska, should be collected only during the growing season as defined by the Army Corps' Alaska Regional Supplement for Wetland Delineation. Third, in mosaic permafrost complexes, only those polygons that actively share a continuous surface water connection with a jurisdictional water during the growing season should be treated as an adjacent wetland. And those

[267] 90 Fed. Reg. at 52,529.

portions without such a connection would remain non-jurisdictional. Fourth, we also request that features that interrupt surface continuity—*e.g.*, berms, raised roadbeds, tussock tundra ridges, dunes, or other vertical/topographic breaks—should be expressly acknowledged as an area where it is no longer "indistinguishable" and clearly denotes where the water ends, and the wetland begins, thus terminating jurisdictional adjacency. In sum, we recommend that Agencies provide a sound method that is reliable and is easy to utilize in delineating permafrost wetlands.

5. As discussed above, we support the definition of "tributary" with the addition of the "bed and banks" language, and we prefer this language over any reference to OHWM.

We appreciate the Agencies' being supportive of our prior comments relating to issues with the implementation of OHWM in the field and consistent applications of its physical indicators in making jurisdictional determinations, and offering bed and bank instead of OHWM in the definition of tributary.

From an implementation standpoint, the "bed and bank" formulation is clearer, observable, more objective, and more practicable for field implementation. As we had submitted in prior comments, OHWM determinations are often subjective, seasonally variable, and dependent on professional judgment, which can increase cost and delay.

In keeping with our overall comment to include all definitions as rule language, we also ask the definition of bed and banks, as provided in the preamble, be codified as a rule. Codifying the language would not necessarily have to make it a mandatory requirement but it would simply provide consistency in the meaning of the term when used by the regulatory agencies.

Preamble language to be codified as a final rule definition is as follows:

> *Bed and banks* means the substrate and sides of a channel, lake, or pond between which standing water or continuous flow is ordinarily confined.[268]

We also appreciate and support the preamble language that the Agencies declined to include physical indicators of flow because they "would be inadequate to define relatively permanent because streams that flow only in direct response to precipitation, such as ephemeral streams, sometimes have an ordinary high water mark as well as bed and banks."[269] We also appreciate the Agencies recognizing that "[t]he agencies and members of the public thus could struggle to consistently and effectively use physical indicators to distinguish between a non-relatively permanent stream flowing for a short duration only in response to precipitation and a jurisdictional relatively permanent tributary.[270]

We continue to encourage the Agencies to review the National OHWM Field Delineation Manual for Rivers and Streams as issued in January 2025 and assess it for consistency and clarity in field application, per our comments we submitted in our April 2025 comments.

[268] 90 Fed. Reg. at 52,520.
[269] 90 Fed. Reg. at 52,520.
[270] 90 Fed. Reg. at 52,520.

VII. SUPPORT AND RECOMMENDATIONS FOR PROPOSED EXCLUSIONS

a. **We appreciate and support the Proposed Exclusions with additional recommendations for your consideration.**

In support of longstanding practice and case law, we appreciate and support the Agencies' modifications to three of the eight exclusions, as well as the additional exclusion of groundwater. We also support the Agencies' continuing to apply the longstanding policy and the current regulatory language that paragraph (b) exclusions apply to (a)(2)-(a)(5) waters even in circumstances where features may be jurisdictional.[271] That is, as a first step, if a water or feature is excluded, then it is automatically considered non-jurisdictional and no further assessment is needed. We also submit the following comments.

1. For ease of application and to provide clarity for landowners, we recommend that a complete list of exclusions with supporting definitions, be provided in the rule language reflecting longstanding practice and past rules such as the 2020 NWPR, as well as in keeping with *Sackett*'s emphasis on rules with sufficient definiteness that ordinary persons can understand.

We appreciate the Agencies proposing to keep the eight exclusions, modifying three exclusions, and adding an exclusion for groundwater. However, we understand that the Agencies declined to add a number of 2020 NWPR exclusions, stating that most of those exclusions would not be jurisdictional under the Proposed Revisions because they would not meet the definition of WOTUS under the current proposal.[272] We would request that the Agencies reconsider this position, especially since the Agencies also state that their objective is to "draw lines" and "articulate that certain waters and features would not be subject to the jurisdiction of the Clean Water Act."[273] Providing a comprehensive codified list of excluded waters and features would be in direct alignment with the Agencies' goals for a clear, durable rule that landowners and the regulated community can rely on with confidence.

Our review of the Proposed Revisions indicates that the relatively permanent standard and the continuous surface connection test, with the addition of "at least during the wet season" analysis on a case-by-case basis, depart from the clear line drawing tests suggested by *Sackett* as discussed above, and add a level of regulatory uncertainty and challenges for permittees. Should the Agencies proceed with this new approach, exclusions that recognize and exclude easy-to-identify non-jurisdictional features without further unnecessary case-by-case analysis, will help to offset burdens on staff, allowing agency resources to be used on key areas requiring jurisdictional determinations under the post-*Sackett* regime. For example, the Proposed Revisions already provide language in the preamble stating their intention to exclude certain features including ephemeral waters and grassed waterways. As discussed above, we do not believe that ordinary

[271] 90 Fed. Reg. at 52,533-34.
[272] 90 Fed. Reg. at 52,534.
[273] 90 Fed. Reg. at 52,534.

landowners, as contemplated by *Sackett,* should have to parse legal language in the preamble of a rule to discern the Agencies' intent regarding which features are likely to be excluded. These types of easy-to-discriminate non-jurisdictional features should be excluded and not require further costly and unnecessary case-by-case analysis.

To that extent, we also recommend that exclusions should include "non-jurisdictional" features as provided in the 2020 NWPR for certain exclusions. The preamble notes that the Agencies are choosing not to include the 2020 NWPR non-jurisdictional exclusions for storm water control features and wastewater recycling structures, but that many of these aquatic features "will continue to be non-jurisdictional because they do not satisfy the proposed rule's definition of 'waters of the United States.'''[274] Since, by the Agencies' own admission, it is clear that certain aquatic features will not satisfy WOTUS tests under *Sackett* and the provision revisions, then given the objective for a clear, transparent rule, these types of exclusions should be automatically excluded in the rule. We also provide similar recommendation for the ditch exclusion as discussed below.

We also agree with the Agencies as noted in the waste treatment system discussion, that incorporating a definition with the text of a rule, rather than having "to rely on guidance in the preamble is preferable for clarity, consistency, and transparency."[275] We recommend that this core principle be implemented throughout all the exclusions and ask that, a clear list of exclusions that permittees and landowners can rely on in the language of the rule itself rather than having to look to the preamble or other materials for guidance.

As such, we provide the following list for your consideration, including those currently proposed as well as additional exclusions for stormwater control features, wastewater recycling structures, and green infrastructure as well as clarifying language on the scope of the artificial lakes and ponds and ephemeral waters.

2. <u>We believe that the exclusion for waste treatment systems is pivotal and we support the Agencies' clarifying definition of waste treatment system that encompasses all components, active and passive features, and cooling ponds. We also offer specific clarifying recommendations.</u>

We support the continued exclusion of these features consistent with the Agencies' longstanding practice and prior rules, and we agree with the Agencies that the additional definition provides further clarity for the regulated community. We also support the Agencies' goals to incorporate a definition within the text of the rule rather than relying on guidance in the preamble. Overall, we support the exclusion because we believe this longstanding exclusion is supported by the text of the CWA and the applicable case law.

We also agree with the additional helpful preamble language that includes waste treatment systems that were constructed prior to the 1972 Federal Water Pollution Control Act amendments. We also ask for clarification relating to preamble language that, "a waste treatment system that is <u>abandoned</u> and otherwise ceases to serve the treatment function for which it was designed would

[274] 90 Fed. Reg. at 52,534, n. 98.
[275] 90 Fed. Reg. at 52,535.

not continue to qualify for the exclusion . . . ."[276] "Abandoned" in this context should be defined to provide consistency in the interpretation of this term. It should not simply mean when flow ceases because decommissioning a waste treatment system can take time involving several regulatory steps (*e.g*. removal of equipment, cleaning, draining, inspection, approving request from agencies). The exclusion should extend to the time of completion of the regulatory-required decommissioning process and once approval has been attained by the applicable agencies.

The Agencies also seek comment on retaining the current text without a definition and we would recommend including the proposed definition as is, or with some clarifying modifications as suggested below. We appreciate that no substantive change from longstanding practice is intended by the proposed definition. The Agencies seek comments on ways to make the definition clearer, and we support the language that all components of the system are covered, and we include further clarifying language for your consideration.

Our changes do not anticipate a change in longstanding practice but would clarify the variety of systems that are covered under this exclusion. As the Agencies themselves note, "[t]he waste treatment system exclusion applies to a variety of systems that are functioning as waste treatment systems and are designed to meet the requirements of the CWA."[277] Thus, the words "wastewater" may be inadvertently limiting and inconsistently applied in the field at times, even though the intent is to apply to a broader variety of systems that "function" as a waste treatment system. As such, we recommend that the Agencies remove references to the word "wastewater" so that this exclusion would more clearly apply to **any** waters including wastewater, stormwater, and any other water undergoing treatment prior to the discharge which would be subject to regulation under CWA. As the regulated industry continues to innovate water and wastewater recycling, it is imperative that such efforts are not discouraged due to uncertainty over the definition of WOTUS.

We appreciate the Agencies responding to our comments relating to stormwater suggesting that it would depend on the "specific attributes of the control and the water feature and thus need to be made on a case by case basis."[278] However, we ask that the Memorandum on NWS-2023-923 as referenced in the preamble be withdrawn as guidance because it is ambiguous and we find that it overstates that storm water features are not excluded under the wastewater treatment exemption.[279] We ask that the associated preamble be clarified as relating to stormwater.

As a permitting matter, stormwater regulated under the CWA, such as stormwater associated with industrial activities, mining activities, and oil and gas activities, is different from other untreated stormwater runoff, and should be considered as a wastewater that is part of a waste treatment system. Stormwater from these types of activities is regulated under the CWA and similar to other waste treatment systems, facilities install treatment units such as stormwater basins and ponds to treat stormwater to meet CWA requirements prior to discharge. These treatment units may only receive stormwater runoff (*i.e.*, without being comingled with other types of wastewaters) but require treatment units designed to meet CWA requirements. Stormwater treatment can include settling, pH adjustment, oil/water separation, flow attenuation, *etc*. All of these treatment methods

[276] 90 Fed. Reg. at 52,535 (emphasis added).

[277] Memorandum on NWS-2023-923; 90 Fed. Reg. at 52,535, n. 99.
[278] 90 Fed. Reg. at 52,535.
[279] 90 Fed. Reg. at 52.535, n.99.

are currently described in the proposed definition of waste treatment system and, by definition, encompass what is considered a wastewater system. As such, instead of considering case-by-case analyses for aspects related to stormwater, we recommend that the Agencies clarify in the preamble, that stormwater features designed to meet CWA requirements as described here, are covered under water treatment systems. This will help minimize the inconsistency and complexity of applicability determinations inherent in varying exemptions on the basis of the precise type of water that may be captured, treated, stored, retained, detained, conveyed, or otherwise managed by features broadly used by industrial facilities to comply with the CWA requirements.

We also appreciate the Agencies soliciting comments on components that make up a waste treatment system, such as the inclusion of active and passive treatment component because our experience finds that this area needs further clarification for consistent implementation.[280] We believe it is important that this definition avoids inconsistencies in future interpretations that inappropriately narrow this exclusion based on the Agencies' presumptions about the function of particular features. For instance, in the field, there can be differing views of whether storage constitutes active or passive treatment. In one case, agency staff did not recognize the critical components of settlement, flow regulation, and off-specification impoundment for additional treatment as necessary active treatment. Therefore, it is important that the exclusion is drafted to clearly use key terms such as detain, store, recycle, reuse, or evaporate so that this exclusion covers all components of systems for managing waters, the discharge of which is subject under the CWA. It would also avoid inconsistent application over systems in which stormwater is comingled with wastewater as well as situations where operators use a feature for wastewater storage and treatment during normal operating conditions but also rely on that feature's capacity during heavy precipitation events.

We support the definition as proposed because it provides regulatory certainty and is consistent with longstanding practice. Based on the Agencies' request for comments on any additional clarification to the proposed rule, we also provide the following suggestions for your consideration in redline-strikeout.

> Waste treatment system means a system for managing waters designed to meet the requirements of the Clean Water Act ~~subject to regulation under the CWA~~ and includes the entire system and all components thereof, ~~of a waste treatment system designed to meet the requirements of Clean Water Act,~~ including but not limited to lagoons and treatment ponds (such as settling or cooling ponds), designed to convey, or retain, detain, store, recycle, reuse, evaporate, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

3. <u>We support the Proposed Revisions' continued exclusion and proposed definition of prior converted croplands from the scope of federal jurisdiction, but we urge the Agencies to increase the abandonment time-period to ten years.</u>

[280] 90 Fed. Reg. at 52.535.

We support the proposed revision's continued exclusion of prior converted cropland from the definition of WOTUS and therefore federal jurisdiction. We also support the Agencies' clarification of the framework by which the Agencies can render a determination that an agricultural use has been abandoned, thereby allowing the Agencies to assert federal jurisdiction over any wetlands that had thereafter developed. However, we disagree that five years is a sufficient duration for determining that a prior converted cropland has been abandoned or is otherwise no longer used for agricultural purposes. We believe that a more appropriate duration for determining abandonment is ten years. A parcel of land can lie unused for a significant period without ever being abandoned from an operational perspective. Land use decisions are made on time horizons that far exceed five years and frequently fluctuate based on markets, investment strategies, resource availability, and capital requirements.

We believe ten years is a sufficient timeframe to account for these variables so that land is not inaccurately classified as abandoned. Allowing land to remain unused for significant durations is also an environmentally responsible and sustainable method of allowing land to recover from previous uses and generate the nutrients needed for future uses. Conversely, the shorter five-year timeframe incentivizes farmers and others to continually maintain drainage and periodically maintain croplands that otherwise would not be disturbed but for the five-year lookback. Responsible management practices should not be discouraged by imposing an unnecessarily short duration for classifying land as abandoned. We propose the following language change:

> Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding ~~five~~ ten years.

We also note that, while this exemption seemingly applies only to agricultural land, many industrial and commercial facilities have within their boundaries former wetlands that were lawfully filled and converted to upland. There is no ecological or hydrological rationale for treating wetlands converted to cropland differently than wetlands converted to serve industrial purposes. As such, we believe that the Agencies should at least explain their basis for limiting the availability of this exclusion to croplands.

4. <u>We support the inclusion of groundwater as an exclusion and provide additional clarifying language relating to diffuse or shallow subsurface flow.</u>

We appreciate the Agencies providing an exclusion for groundwater, which we have advocated for inclusion because in past rulemakings, the Agencies have clearly stated that they "have never interpreted groundwater to be a 'water of the United States.'"[281] The Agencies' proposed language makes no change to that longstanding interpretation, and we recommend the inclusion of the exclusion with slight changes to clarify that shallow subsurface flow or diffuse flow is itself not a jurisdictional water.

We recommend the following additional language:

[281] 90 Fed. Reg. at 52,541.

(11) Groundwater, including diffuse or shallow subsurface flow and groundwater drained through subsurface drainage systems.

5. We support the Agencies' revising the exclusion to exclude all ditches that are excavated or constructed entirely in dry land, with a specific 2020 NWPR definition of ditches. We recommend some additional clarifications relating to reach and non-jurisdictional features; and we support the Agencies' position that they have the burden of demonstrating the historic status of the ditch's construction, and we ask for reasonable limits provided for the consideration of field and remote-based resources in making a jurisdictionality decision.

We support the Agencies' Proposed Revisions to exclude ditches (including roadside ditches) that are excavated or constructed entirely in dry land, and the added definition that ditches mean a constructed or excavated channel used to convey water. This is helpful to clarify that the Agencies' intent is to only include man-made ditches excavated or constructed in dry land.

We also agree with the Agencies' proposed removal of the requirement that ditches need to carry a relatively permanent flow of water as well and we do not endorse any alternative approach. This is all consistent with *Sackett* which excludes ditches that "are not a part of the naturally occurring tributary system and "do not fall under the ordinary meaning of the term 'waters' within the scope of the Clean Water Act."[282] The Agencies provide one example of roadside ditches but within the intent of the ditches, we also ask that clarification be provided that this is not a limiting list, but that other types of ditches, such as flood control, agricultural, and railroad right-of-way, are included.

We support the Agencies' effort to mirror 2020 NWPR in the consideration of ditches including the definition of ditches, and to that extent, we also ask the Agencies to provide clear language in the exclusion similar to 2020 NWPR, that all ditches are excluded unless they are a TNW, meet the tributary requirement, or are constructed in an adjacent wetland as defined under the Proposed Revisions. This language would provide regulatory certainty to the applicants and remove the unnecessary need for case-by-case determinations on manmade ditches that are clearly non-jurisdictional (*i.e.*, not relatively permanent).

There is also no definition provided for dry land, and we recommend the addition of a definition that includes the term "upland," which will provide further regulatory certainty. A definition of upland or dry land is important, given that the Agencies will determine the exclusion solely based on where the ditch was constructed or excavated in dry land and not if the ditch has a relatively permanent flow or connects to a jurisdictional water (unless channelized or rerouted).[283] The Agencies solicit comments on alternative approaches on whether ditches should be excluded based on lack of relatively permanent flow or whether agencies should exclude all non-navigable irrigation and drainage ditches, regardless of flow duration or where the ditch was constructed. We

[282] 90 Fed. Reg. at 52,539.
[283] See definition discussion below.

recommend the proposed language without consideration of flow duration, except that we recommend that the Agencies provide clarification provided as related to dry land and non-jurisdictional features similar to the 2020 NWPR.

We also request additional clarification on ways the Agencies will consistently apply the reach analysis to exclude ditches. As proposed, the Agencies' concept sounds reasonable that the ditch that is constructed and excavated in dry land will be excluded even if it drains into a relatively permanent tributary, so long as the reach conditions of the ditch (*i.e*., depth, area, and slope) remain unchanged; however, more clarity and guidance is needed to understand this requirement.

We agree with the reach-based approach that the Agencies propose, and we offer the following comment. Practically speaking, certain ditches can be considered within the same reach without any unnecessary analysis. One such example is the category of man-made ditches within industrial facilities. Based on our members' experience, unlike natural tributaries, the reach conditions of a man-made ditch within an industrial facility are typically engineered for drainage purposes and thus will have similar slope and other conditions. As such, we recommend that the Agencies clarify that industrial ditches within an industrial footprint should all be considered within the same reach. In other words, all industrial ditches constructed and excavated within the boundaries of a facility should be presumed to have the same reach and excluded, even if ultimately, the excluded industrial ditch drains into a relatively permanent tributary.

We also support the Agencies' position that they have the burden of demonstrating the historic status of the ditch's construction. We recognize that no single framework for identifying WOTUS can remove all sources of subjectivity or ambiguity from jurisdictional determinations. As such, we support the Agencies' implementation approach that meaningfully mitigates against jurisdictional uncertainty and evidentiary challenges with the burden of proof shifting to Agencies in the determination of exclusions; however, we have some concerns that this burden shifting will cause significant delays in receiving jurisdictional determinations or confirmation of excluded features.

To support their decision regarding whether a ditch is an excluded ditch under the Proposed Revisions, we appreciate that the preamble notes that the Agencies "will use the most accurate and reliable research in making its determination."[284] However, we are concerned with the open-ended query involving multiple sources of information. The preamble states: "Information sources may include historic and current topographic maps, historic and recent aerial photographs, Tribal, State, and local records and surface water management plans (such as county ditch or drainage maps and datasets), NHD or NWI data, agricultural records, street maintenance data, precipitation records, historic permitting and jurisdictional determination records, certain hydrogeomorphological or soil indicators, wetlands and conservation programs and plans, and functional assessments and monitoring efforts."[285]

For clarity and consistency, we ask for guidance provided on the scope of the use of this wide range of field and remote-based resources, and a reasonable time limit within which the review will be achieved. Given the variabilities in these historic tools and the inconsistent availability of

[284] 90 Fed. Reg. at 52,540.
[285] 90 Fed. Reg. at 52,540.

records, we do not believe that the Agencies should necessarily limit the universe of remote-based sources that should or could be requested from applicants for consideration by the Agencies. Instead, we believe that the Proposed Revisions should provide reasonable temporal limits to the historic data the Agencies could request from applicants. Applicants could, of course, choose to undertake a more extensive effort to collect data from further back in history, but would not be required to do so by the Agencies in order to show that the record review was sufficient. The Agencies should not be able to unreasonably withhold jurisdictional determinations. We recommend that the Proposed Revisions be amended so that the Agencies are required to review an applicant's data and render a determination within 60 days. In addition, the Agencies should explicitly provide a process for instances in which this time is exceeded, including providing that the application is automatically approved on the 61st day if no timely determination is provided by the Agencies.

Note, while we herein discuss burden of proof in the context of ditch exclusion, we also ask for similar considerations for all exclusions so that the rules and guidance are clear in requiring that the Agencies review an applicant's data and render a jurisdictional determination within 60 days and provide similar reasonable timelines for other permitting requirements related to WOTUS determinations.

We also propose deleting "entirely" because a similar word, "wholly" was removed in the 2020 NWPR. The Agencies explained: "[t]o avoid any confusion in implementation, this is why the agencies have not included the term ''wholly'' in the final regulatory text.[286] We ask the same consideration here because even though the preamble explains some of the issues that may arise in interpretation and during implementation, it is best to be clear in the rule itself.

In sum, we recommend the following clarifications (as well as a definition of upland/dry land, see below) and provide two options for your consideration:

> Ditches (including roadside ditches, flood control, agricultural, railroad right of way) constructed or excavated ~~entirely~~ in dry land. [**We recommend adding the 2020 NWPR language relating to excluded ditches that are not TNWs, tributaries, or constructed in adjacent wetlands (and revised to conform to the Proposed Revisions' numbering protocol:]** Ditches that are not waters identified in paragraph ~~(1)(i) or (ii)~~a(1) or a(3) of this definition, and those portions of ditches constructed in waters identified in paragraph ~~(1)(iv)~~ (a)(4) of this definition that do not satisfy the conditions of paragraph ~~(3)(i)~~ (c)(1) of this definition.
>
> OR
>
> Ditches (including roadside ditches, flood control, agricultural, railroad right of way) constructed or excavated entirely in dry land or in non-jurisdictional features.

6. We recommend providing granularity with the proposed term "dry land" as it related to exclusions, and we recommend a definition that covers either upland or dry land as used interchangeably.

[286] 85 Fed. Reg. at 22,322.

In the past rules, the Agencies have used the terms, "upland" and "dry land" in language relating to exclusions, and we have consistently requested one term to be used throughout the rule and other regulatory language to avoid ambiguity. It is also a critical term for determining jurisdictional exclusions, and as such, a clear definition that is understood by staff and the regulated community is essential for implementation.

In 2023, the Agencies noted that they "consistently use the phrase 'dry land' in the regulatory text to provide clarity to the public, . . .[yet] this preamble and documents supporting this rule use the phrases ''dry land'' and ''upland'' interchangeably."[287] This incongruence in the rule and the supporting documents is unnecessary and can be easily fixed with a rule definition that covers both terms in one definition. Without a clear definition, there can also be varying interpretations of the meaning of dry land, and the scope, especially with the addition of proposed concepts related to "wet season," which can potentially expand this term beyond the permissible legal parameters.

We appreciate the discussion the Agencies provide in the preamble; however, as a fundamental comment, we request that definitions be provided clearly in the rule itself. The Agencies generally discuss the meaning of the term "dry land," stating, "[t]hese excluded ditches are not part of the naturally occurring tributary system and do not fall under the ordinary meaning of the term 'waters' within the scope of the Clean Water Act."[288] This does not provide enough clarification in the definition as found in prior rules, such as the 2020 NWPR.

As such, we propose that the term "dry land" be clearly defined with the definition of "upland" from the 2020 NWPR. The definition provides much-needed clarity. We also support additional preamble language clarification from the 2020 NWPR preamble that "a proposed excluded feature that develops wetland characteristics within the confines of the water/feature would remain excluded from the definition of 'waters of the United States'" unless it is within an adjacent wetland.[289] This is important because it provides certainty in agency decisions that can be relied on for vital long-term energy infrastructure projects. That is, once a determination has been made to exclude a water or feature as non-jurisdictional WOTUS, such as an excluded ditch, lake or pond, an impoundment, or an excluded CWA system, and that water/feature then develops wetland characteristics, would remain excluded from being considered a WOTUS.

We provide suggested definitions that include concepts from the Proposed Revisions as well as the 2020 NWPR for the Agencies' consideration.

> Suggested language.
>
> The term dry land means either dry land or upland, and these terms are interchangeable. The term upland means any land area that under normal circumstances does not satisfy all three wetland factors (i.e., hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (3)(c)(1) of this

[287] 88 Fed. Reg. at 3,111.
[288] 90 Fed. Reg. at 52,535, 52,541.
[289] 85 Fed. Reg. at 22,322.

definition and does not lie below the ordinary high water mark or the high tide line of a jurisdictional water.

Suggested language from the 2020 NWPR (cross-references updated).[290]

The term upland means any land area that under normal circumstances does not satisfy all three wetland factors (i.e., hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (3)(c)(1) of this definition and does not lie below the ordinary high water mark or the high tide line of a jurisdictional water.

7. We recommend additional exclusions for stormwater control, wastewater recycling, and green infrastructure features as found in past rules, including the 2020 NWPR, and to encourage water reuse and conservation.

First, we recommend maintaining longstanding exclusions related to stormwater control features and wastewater recycling features. The NWPR notes that these two features were not explicitly discussed in the 1986 and 1988 preamble language; however, these exclusions clarify the Agencies' longstanding practice is to view stormwater control features that are not constructed within WOTUS as non-jurisdictional;[291] and water reuse and recycling features as not jurisdictional when constructed in uplands or within non-jurisdictional waters.[292] We also request the inclusion of an exclusion for green infrastructure.

Incorporating such language will add regulatory certainty and support EPA's goals to develop advanced water reuse and wastewater recycling facilities. It would also be in keeping with the goal of the Administration to propose a durable, transparent rule that codifies all key concepts into the rule. The preamble, for example, includes rationale for excluding features such as grassed waterways and rather than having to review that regulatory language for guidance, it will be helpful to have these types of clear exclusions clearly provided as exclusions.[293]

We recommend the following exclusion language for stormwater control features, wastewater recycling structures, and green infrastructure, and where applicable, we also provide the 2020 NWPR language as an alternative for your consideration:[294]

2020 NWPR language for stormwater control features: Stormwater control features constructed or excavated in dry land or in non- jurisdictional waters to convey, treat, infiltrate, or store stormwater run-off.

Suggested language for wastewater recycling structures: Wastewater recycling structures built in dry land or in non-jurisdictional waters, including detention and retention basins, groundwater recharge basins,; percolation ponds built and water distributary.

[290] 85 Fed. Reg. at 22,341.
[291] 85 Fed. Reg. at 22,323.
[292] 85 Fed. Reg. at 22,317.
[293] 90 Fed. Reg. at 52,522.
[294] 85 Fed. Reg. at 22,340.

2020 NWPR language for wastewater recycling structures: Groundwater recharge, water reuse, and wastewater recycling structures, including detention, retention, and infiltration basins and ponds, constructed or excavated in upland or in non-jurisdictional waters;]

Additional suggested language for green infrastructure: Green Infrastructure that uses natural or engineered systems designed to mimic natural processes and directs storm water to where it can be infiltrated, evapotranspirated, or re-used."

8. <u>While no changes are proposed for this exclusion relating to the artificial lakes and ponds, we urge the Agencies to provide additional clarifications to provide regulatory certainty on the scope of this exclusion.</u>

This is an important exclusion for our members, and we request added clarity in the language to provide regulatory certainty. We support the exclusion relating to artificial lakes and ponds, and we recommend that Agencies clarify that these features remain excluded regardless of their precise use or use for more than one purpose.

For enhanced implementation clarity, we also recommend including in the final rule a list of features that fall within the exclusion. We believe these features should encompass, but not be limited to, industrial features necessary for the operation of a facility, such as water storage ponds, impoundments, conveyances, and other structures used for fire water, utility water, cooling water, process water, and raw water. We believe that listing these features within the rule (as opposed to the preamble) will help avoid future misinterpretations and provide certainty for the regulated community and staff within the rule itself for implementation purposes.

These features should encompass, but not be limited to, industrial features necessary for the operation of a facility, such as water storage ponds, impoundments, conveyances and other structures used for fire water, utility water, cooling water, process water, and raw water.

9. <u>For a clear, transparent rule, we recommend expressly identifying ephemeral waters as a non-jurisdictional exclusion that incorporates the language referenced in the preamble.</u>

Under *Sackett* and as noted by the Agencies, certain features are now clearly non-jurisdictional, and all those non-jurisdictional features, such as ephemeral waters, should be excluded as categorical exclusions.[295] As such, we recommend the 2020 NWPR's ephemeral water exclusion be added to these Proposed Revisions.[296]

[295] 88 Fed. Reg. at 3,112.
[296] 85 Fed. Reg. at 22,340.

We understand that the Agencies state that it "is not necessary because ephemeral features would not satisfy the relatively permanent standard in *Sackett* as proposed in this rule so would already be non-jurisdictional."[297] Yet, the relatively permanent standard introduces a case-by-case assessment for "at least during the wet season" that introduces a high level of uncertainty in this implementation phase of the rule and is far removed from providing bright lines. Therefore, a clear rule that explicitly excludes any feature that in ordinary parlance would be considered ephemeral as defined in a rule should be excluded without any further scrutiny. Additional illustrative list can include channels, playa lakes, prairie potholes), and other waters or features that do not meet the definition of tributary.

We recommend an exclusion for ephemeral features as well as a definition of ephemeral per 2020 NWPR language:

> Ephemeral features, including ephemeral streams, swales, gullies, rills, and pools.
>
> Ephemeral means surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall).

VIII. CONCLUSION

The Associations appreciate the opportunity to provide these comments on the Agencies' Proposed Revisions to the regulatory definition of WOTUS. We believe that the Proposed Revisions reflect consideration of the jurisdictional limits Congress imposed through the CWA and the broad interpretive guideposts provided by the Supreme Court. Although these comments respectfully recommend that the Agencies revise specific aspects of their proposed approach to defining WOTUS, these differences do not diminish our recognition that the Proposed Revisions reflect the Agencies' commitment to developing an interpretation of WOTUS that is clear, protective of the environment and human health, administrable, and legally sound.

Thank you again for the opportunity to provide these comments. We looks forward to continuing to engage with the Agencies to ensure that the definition of WOTUS is clear, protective, durable, and legally sound. To that end, if you have any questions about these comments, please do not hesitate to reach out to Amy Emmert using the contact provided in the cover letter.

[297] 90 Fed. Reg. at 52,534.