Comments of the Waters Advocacy Coalition
on the U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' Supplemental Notice of Proposed Rulemaking, Updated Definition of "Waters of the United States," Docket ID No. EPA-HQ-OW-2025-0322

October 9, 2026

I. Introduction

The Waters Advocacy Coalition ("WAC") submits the following comments on the Environmental Protection Agency's ("EPA") and U.S. Army Corps of Engineers' ("Corps") (collectively, the "Agencies") Supplemental Notice of Proposed Rulemaking ("SNPRM") regarding the definition of "waters of the United States" ("WOTUS") under the Clean Water Act ("CWA" or the "Act"), *Updated Definition of "Waters of the United States*."[1] The SNPRM supplements the Agencies' November 20, 2025, Notice of Proposed Rulemaking, *Updated Definition of "Waters of the United States*,"[2] (hereinafter "NPRM") by proposing additional options for defining "continuous surface connection" and "relatively permanent."[3] WAC appreciates the Agencies' efforts to improve regulatory predictability and consistency by providing an additional option for clarifying the scope of WOTUS. As WAC noted in its comments on the NPRM, when Congress enacted the CWA, it exercised its commerce power over navigation and specifically granted the Agencies the power to regulate "*navigable* waters," which the CWA defines as "waters of the United States."

For decades, the Agencies' regulations and guidance—coupled with the Agencies' implementation and enforcement activity—steadily expanded the definition of WOTUS well beyond constitutional and statutory boundaries. The Agencies need to ensure that the regulatory definition of WOTUS aligns with Congress's intended scope of federal regulatory authority under the CWA and Supreme Court precedent. They must give meaning to Congress's use of the term "navigable" throughout the Act and respect the CWA's express policy to preserve the states' traditional and primary authority over land and water use. By codifying definitions of key terms that are central to determining the scope of the CWA's reach, the Agencies can reduce the serious due process concerns associated with WOTUS regulations.

WAC represents a diverse cross-section of the nation's business community, including construction, transportation, real estate, mining, manufacturing, forestry, agriculture, energy, recreational, wildlife conservation, and public health and safety sectors—all of which are vital to a thriving national economy and provide much-needed American jobs.[4] WAC members are committed to both building modern, resilient infrastructure and protecting and restoring America's wetlands and waters.

WAC members have substantial interests in ensuring that federal CWA jurisdiction is exercised in accordance with the law and in promoting predictability and consistency in the definition and implementation of WOTUS. WAC members regularly conduct activities on, over,

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

[2] 90 Fed. Reg. 52,498 (Nov. 20, 2025).

[3] 91 Fed. Reg. at 57,301.

[4] A complete list of WAC members is attached to these comments as Appendix A.

or near waterbodies. Consequently, their projects and operations are often subject to regulation under various provisions of the CWA, including Sections 402, 404, 401, and 311. The Agencies' regulatory authority under these provisions extends only to WOTUS. Thus, the question of whether a water feature is WOTUS—and the ease and certainty with which that can be determined—will have significant impacts on WAC members' operations. A clear line between federal and state waters is essential to a workable permitting framework that supports needed infrastructure, while protecting the environment and preserving the states' vital role in managing non-federal waters.

Through their experience, planning, and operations, WAC members possess a wealth of practical expertise directly relevant to the Agencies' proposed revision of the WOTUS definition. WAC and many of its individual members have a long history of involvement in the critical issues concerning the scope of federal jurisdiction under the CWA. We have submitted comments on the Agencies' prior rulemakings and guidance documents on this issue. In all prior comments, WAC and its members have consistently advocated for regulatory approaches that offer predictability and certainty to regulated entities and property owners while rejecting overly broad interpretations of federal authority that: (i) undermine state primacy in managing land and water resources and inappropriately redefine the federal-state balance based on ecological justifications; (ii) lack grounding in controlling Supreme Court jurisprudence; and (iii) render the statutory term "navigable" meaningless or otherwise diminish its import.

WAC submitted detailed comments on the Agencies' NPRM on January 5, 2026, and hereby incorporates those prior comments by reference in their entirety.[5] The SNPRM does not propose new regulatory options for removing the "interstate waters" category; does not make any further changes to the previously proposed exclusions for ditches, prior converted cropland, waste treatment systems, and groundwater; and does not change the proposed definitions for "ditch," "prior converted cropland," "tributary," or "waste treatment systems."[6] WAC's positions on those proposals in the NPRM remain unchanged, including WAC's analysis of the relevant statutory and legal background.[7] Additionally, WAC's positions remain the same regarding: the streamlining of the relatively permanent waters category (by combining (a)(3) and (a)(5))[8]; the need for an exclusion for stormwater control features[9]; the need to exercise caution in using

[5] *See* Comment submitted by Waters Advocacy Coalition (WAC), EPA-HQ-OW-2025-0322-0782 (posted on Jan. 8, 2026) ("WAC NPRM Comments").

[6] 91 Fed. Reg. at 57,286.

[7] *See* WAC NPRM Comments at 4-9 (detailing statutory and legal background); *id.* at 16-18 (discussing tributary category); *id.* at 28-34 (discussing exclusions for ditches, prior converted cropland, waste treatment systems, and groundwater).

[8] *See id.* at 16-18.

[9] *See id.* at 34-35.

databases or tools that were not designed for the purpose of determining whether a waterbody satisfies a particular definition of "relatively permanent" or "continuous surface connection"[10]; and the Agencies' retention of the burden of proof[11]; and the regulatory impact analysis.[12] To the extent these supplemental comments do not address those topics, WAC incorporates its prior positions by reference.

These supplemental comments focus exclusively on the two new regulatory options presented in the SNPRM: (1) the supplemental proposed definition of "relatively permanent," which would generally limit jurisdiction to perennial waters; and (2) the supplemental proposed definition of "continuous surface connection," which would generally require perennial surface water in a wetland that is continuously connected with the surface water in a jurisdictional water. WAC is supportive of codification of both supplemental options, which are clear, administrable, and faithful to the text of the CWA as interpreted by the Supreme Court in *Sackett v. EPA*, 598 U.S. 651 (2023), and *Rapanos v. United States*, 547 U.S. 715 (2006) (plurality opinion).

II. Executive Summary

WAC supports the supplemental proposed definitions and urges the Agencies to finalize them for the following reasons:

First, the supplemental definitions are firmly grounded in Supreme Court precedent. *Sackett* fully endorsed the *Rapanos* plurality's conclusion that 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.'"[13] In detailing what constitutes "relatively permanent," the *Rapanos* plurality repeatedly drew a distinction between perennial waters and "channels containing merely intermittent or ephemeral flow," making clear that the statutory term "waters" refers to "*continuously present*, fixed *bodies of water*, as opposed to ordinarily dry channels through which water occasionally or intermittently flows."[14] The supplemental definitions align squarely with the Supreme Court's interpretation of the CWA.

Second, the proposed new definitions are clear, understandable, and easy to administer. The supplemental definitions are focused on perennial waterbodies—water that is standing or continuously flowing every day of the year during ordinary conditions—with narrow, well-defined exceptions for anomalous events (*e.g.*, drought) and non-anomalous temporary

[10] *See id.* at 22-23, 27.

[11] *See id.* at 35-36.

[12] *See id.* at 36-37.

[13] *Sackett*, 598 U.S. at 671.

[14] *Rapanos*, 547 U.S. at 732-34.

interruptions (*e.g.*, low tide or a regularly occurring dry spell lasting no more than 30 consecutive days in any given year). This definition will enhance national consistency, promote transparency, and reduce the need for landowners to retain expert consultants to assess jurisdiction.

Third, the supplemental definitions are buttressed by the policy considerations that the Agencies and the Supreme Court have consistently emphasized. Congress did not intend to intrude on states' "primary responsibilities and rights . . . to plan the development and use . . . of land and water resources."[15] The proposed perennial-focused definitions respect that federalism mandate and addresses the serious fair notice and due process concerns that *Sackett* underscored.[16]

WAC's specific comments on each supplemental definition follow. WAC also offers suggestions to improve clarity and administrability.

III. Supplemental Proposed Definition of "Relatively Permanent"

A. Requiring Perennial Water is Consistent with the Statutory Text and Supreme Court Precedent.

The Agencies propose to define "relatively permanent" to mean "perennial bodies of water" and to define "perennial" to mean "having standing or continuously flowing water every day of the year during ordinary conditions."[17] The proposed rule text clarifies that:

> A body of water does not lose its relatively permanent status if it dries up as a result of anomalous events such as drought or dry spell. A body of water also does not lose its relatively permanent status if it dries up for no more than a single period of up to 30 consecutive days in any given year as a result of non-anomalous events resulting in a temporary interruption such as low tide or a regularly occurring dry spell.[18]

WAC supports the supplemental proposed definition of "relatively permanent" and its emphasis on perennial water, as it is consistent with the CWA's limitation of federal regulatory authority to "navigable waters," as well as the *Rapanos* plurality and *Sackett* opinions. As WAC explained in its comments on the NPRM, the Supreme Court contemplated that the Agencies could further interpret the term "relatively permanent" to some extent, as the Court did not define the phrase "relatively permanent" with precision. For example, the *Rapanos* plurality left open the possibility that the Agencies might assert jurisdiction over "streams, rivers, or lakes that

[15] 33 U.S.C. § 1251(b).

[16] *See* 598 U.S. at 680-81.

[17] 91 Fed. Reg. at 57,301.

[18] *Id*.

might dry up in extraordinary circumstances," and the plurality declined to decide whether "seasonal rivers," such as a river that flows continuously for at least 290 days a year, could still qualify as "relatively permanent."[19]

Sackett endorsed the *Rapanos* plurality's reading of the CWA and its relatively permanent standard, specifically that "the CWA's use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes.'" [20] As WAC previously explained, while the *Rapanos* plurality did not provide a precise definition of "relatively permanent," it envisioned that the requisite flow would be at the perennial end of the spectrum by repeatedly stating that intermittent flows are not relatively permanent:

- Terms included in the dictionary definition of "waters" all "connote *continuously present*, fixed bodies of water, *as opposed to ordinarily dry channels through which water occasionally or intermittently flows*."[21]

- "Even the least substantial of the definition's terms, namely, 'streams,' connotes a *continuous flow of water in* a permanent channel— especially when used in company with other terms such as 'rivers,' 'lakes,' and 'oceans.'"[22] "The principal definition of 'stream' likewise includes reference to such *permanent*, geographically fixed *bodies of water* . . . . The other definitions of 'stream' repeatedly emphasize the requirement of *continuous* flow. . . . On these definitions, therefore, the Corps' phrases 'intermittent streams' . . . and 'ephemeral streams' . . . are . . . useful oxymora."[23]

- "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 . . . short-lived,'…—are not."[24]

[19] *Rapanos*, 547 U.S. at 732 n.5 (plurality).

[20] *Sackett*, 598 U.S. at 671.

[21] *Rapanos*, 547 U.S. at 732-33 (emphasis added).

[22] *Id.* at 733.

[23] *Id*. at 733 n.6 (internal citations omitted).

[24] *Id*. at 732 n.5 (citation omitted).

- "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."[25]

- "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.'"[26]

- "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."[27]

- "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."[28]

- "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."[29]

Importantly, although the *Rapanos* plurality contemplated the *possibility* that a 290-day continuously flowing stream *might* be jurisdictional, it obviously did not interpret the Act to authorize the Agencies to assert jurisdiction over features that are dry for the majority of the year (*e.g.*, streams that only flow for 90 days a year).[30] The plurality's passing reference to seasonal rivers must be read in the context of an opinion that repeatedly underscores the need for continuous flow, and that repeatedly disclaims that intermittent flow can qualify as relatively permanent. Consequently, the most that can be said about seasonal rivers is that a waterbody that has continuous flow (or standing water) for 290 days a year *might* be (but is not necessarily) jurisdictional.

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[25] *Id*. at 733-34.

[26] *Id*. at 735-36 (emphasis in original; cleaned up).

[27] *Id*. at 736 n.7.

[28] *Id*. at 739.

[29] *Id.* at 737.

[30] *See id.* at 732 n. 5.

The *Rapanos* plurality's discussion of what constitutes relatively permanent flow carries considerable weight given *Sackett*'s endorsement of the *Rapanos* plurality's relatively permanent standard. The Agencies' supplemental proposed definition of "relatively permanent" aligns fully with those discussions, as it would include only those features that have standing or continuously flowing water every day of the year during ordinary conditions, unless the waterbody dries up during limited periods due to anomalous events like droughts and non-anomalous events like low tides or dry spells.[31] As an initial matter, the modifier "relatively" qualifies the term "permanent," but it cannot cancel it out altogether. As the Agencies correctly observe, "'relatively' cannot stretch the meaning of 'permanent' to the point that 'permanent' would encompass flow for significantly less than the majority of the time."[32] The proposed new interpretation is faithful to both the statutory text and the Court's analysis.

Further confirming that the Court had in mind a perennial-focused standard is *Sackett*'s acknowledgment that temporary interruptions in the required continuous surface connection between a wetland and another WOTUS may occur because of phenomena like low tides or dry spells.[33] *Sackett* acknowledged such interruptions may occur immediately after underscoring that wetlands must have a continuous surface connection to bodies of water that are WOTUS in their own right, so that there is no clear demarcation between the two bodies of water, and it gave the example of wetlands that have an unimpaired connection with the open sea.[34] The Court plainly envisioned that water would be continually present in *both* the body of water and the wetland, save for interruptions that cause surface water to dry up or recede only *temporarily*. Put differently, it is the presence of surface water in both the wetland and the WOTUS that creates the line-drawing problem that *Sackett* and prior Supreme Court cases have referred to.[35] Nothing in *Sackett* suggests the Court was referencing difficulty in determining where a sometimes-dry channel ends and where a wetland that lacks surface water begins. Nor did the Court hint at the possibility that when a WOTUS and wetland regularly and predictably dry up for months at a time (or for the majority of the year), such features could be jurisdictional merely because there may be line drawing difficulties during the few months of the year when both features actually have surface water.

As detailed above, both *Sackett* and the *Rapanos* plurality instruct that *relative* permanence can include periods of dryness either as a result of droughts, which the *Rapanos* plurality described as "extraordinary circumstances," or due to low tides or dry spells that result in temporary interruptions in flow. The supplemental proposed definitions have drawn

[31] 91 Fed. Reg. at 57,301.

[32] *Id.* at 57,289.

[33] 598 U.S. at 678.

[34] *Id.* (citing *Rapanos*, 547 U.S. at 742 and 33 U.S.C. § 2802(5)).

[35] *E.g.*, *Sackett*, 598 U.S. at 678-79.

reasonable lines for determining, as the Court intended, when the drying up of a waterbody is continuous and frequent enough to disqualify that body as a WOTUS. For features that regularly dry up due to non-anomalous events, the new proposed definitions allow a waterbody to still be considered relatively permanent even if it dries up for a single continuous period of up to 30 consecutive days within each year (*e.g.*, a dry spell can cross over into another calendar month). This line drawing is appropriate given the *Rapanos* plurality's repeated statements that intermittent waters are not covered by the Act and its repeated emphasis on continuous flow, as noted above.[36] By contrast, a waterbody that regularly dries up multiple times per year would not be relatively permanent and is instead a non-jurisdictional intermittent or ephemeral feature.

Applying different limitations to anomalous events like droughts is also consistent with the *Rapanos* plurality's recognition that the drying up of a waterbody due to extraordinary events does not necessarily mean the waterbody is not relatively permanent.[37] Anomalous events by definition are not regular occurrences. Nevertheless, at some point, extraordinary events can become the "new normal." Neither the *Rapanos* plurality nor *Sackett* discussed when that tipping point might occur for extraordinary events. The Agencies' proposed 5-year limitation on anomalous events is consistent with the extraordinary nature of droughts and other anomalous events, while also respecting the need to give fair notice to regulated parties under a statute that provides for the possibility of significant civil and criminal penalties.

WAC appreciates the Agencies' proposal of a clear definition that gives fair notice to the public about whether a feature on their property is regulated under the CWA. The proposal is consistent with the Supreme Court's emphasis on clarity and due process.[38] Indeed, one of the reasons *Sackett* gave for rejecting EPA's significant nexus standard was that "[d]ue 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.'"[39] The Agencies' focus on ensuring that ordinary people can understand whether their conduct is prohibited is appropriate. Lastly, the proposed definition of "relatively permanent" aligns closely with *Sackett*'s emphasis on the need to respect the primary authority of the States in regulating waters within their borders.[40]

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[36] *See* 547 U.S. at 734 n.6 & n.7.

[37] *Id*.

[38] *E.g.*, *Sackett*, 598 U.S. at 669-70, 680-81.

[39] *Id*. at 680 (citing *McDonnell v. United States*, 579 U. S. 550, 576 (2016)) (cleaned up).

[40] *Id*. at 679-80.

Below, WAC poses some questions for the Agencies' consideration and offers some suggestions for ways to provide additional clarity should the Agencies adopt the supplemental proposed definition of "relatively permanent."

B. Suggestions for Clarification

1. "Relatively Permanent" and Anomalous Events

Justification for the proposed time limit on anomalous events. The Agencies should consider expanding the justification for the proposed time limit on anomalous events, which the SNPRM notes is consistent with the five-year expiration of an approved jurisdictional determination under existing Corps guidance.[41] WAC suggests that a 5-year limit also may be justified based on the clarity and fair notice concerns that animated the Supreme Court's interpretation of the statute.[42] A 5-year limit on anomalous events is also a reasonable attempt to capture when ordinary people would understand that the dry conditions are no longer anomalous, but the new normal. The *Rapanos* plurality did not speak to the length of droughts in particular, but both the *Rapanos* plurality and *Sackett* did generally endorse the use of commonsense, ordinary meanings and understandings.[43]

Codify the proposed time limit. The current proposed rule text does not contain the five-year timeframe referenced in the preamble for the length of anomalous events (beyond which, drought conditions would be considered the new normal).[44] Regulatory certainty, transparency, and durability would be enhanced if the time limit for anomalous events was codified in the regulatory text itself, rather than merely discussed in the preamble.

2. Relatively Permanent and Non-Anomalous Events

WAC notes that the SNPRM repeatedly refers to low tides as a type of non-anomalous event.[45] Indeed, *Sackett* specifically contemplates that "temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells." [46] But because low tides are a daily occurrence, it would be helpful if the Agencies clarified whether the single event of no more than 30 continuous day requirement applies to waters that routinely

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[41] *See* 91 Fed. Reg. at 57,290.

[42] *E.g.*, *Sackett*, 598 U.S. at 669-70, 680-81.

[43] 547 U.S. at 733-34 ("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.").

[44] 91 Fed. Reg. at 57,301.

[45] *E.g.*, 91 Fed. Reg. 57,290.

[46] 598 U.S. at 678.

dry up temporarily during low tide.[47] Elsewhere, the Agencies acknowledge that waters subject to tidal influence are likely (a)(1) waters.[48] Nonetheless, the Agencies should clarify either in the preamble of the final rule or potentially in the final rule text how waters that dry up due to tides should be analyzed.

3. Perennial Definition

WAC requests that the Agencies clarify what it means for water to have "standing or continuously flowing water every day of the year."[49] WAC believes the Agencies intend to require water to be present in the waterbody *at all times* every day, aside from the enumerated proposed regulatory exceptions. That interpretation would be consistent with the U.S. Geological Survey's Water Basics Glossary, which defines "perennial stream" as "a stream that normally has water in its channel at all times" and which is quoted in the SNPRM.[50] WAC recommends that the Agencies add to the definition of "perennial" that standing or continuously flowing water generally must be present *at all times* every day of the year, except for temporary interruptions due to anomalous and non-anomalous events.

4. Ordinary Conditions

WAC requests that the Agencies provide additional detail on what constitutes "ordinary conditions." The Agencies state that "ordinary conditions" mean "the climatic conditions that ordinarily prevail at a particular place and time of year."[51] But the preamble does not further clarify how to determine what conditions "ordinarily prevail." For example, do the Agencies intend to look at a rolling multi-year period to determine ordinary conditions? What data sources should be used in making this determination? WAC members understand that there can be wide variation in data—even within National Oceanic and Atmospheric Administration (NOAA) weather stations within the same geographic area—therefore, there is a risk that regulators' and stakeholders' determinations of "ordinary conditions" may be inconsistent and unpredictable. To ensure consistency and predictability, the Agencies should identify what data sources they will use to assess ordinary conditions.

[47] *Id*.

[48] 91 Fed. Reg. at 57,290.

[49] *Id*.

[50] *See* 91 Fed. Reg. 57,288 n.2.

[51] *Id.* at 57,288.

5. Simplify the Relatively Permanent Category and Clarify the Requirement to Convey Relatively Permanent Flow

As WAC previously recommended, the Agencies should simplify the regulations by creating a single category for "relatively permanent rivers, lakes, streams, and ponds," rather than retain the existing (a)(3) and (a)(5) categories for tributaries and lakes/ponds. That combined category would further conform the regulatory definition of WOTUS to the holding in *Sackett* that "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."[52] Should the Agencies adopt this recommendation, there would no longer be a need to define "tributary" in the regulatory text. The NPRM's proposed definition of "tributary," however, contained helpful language about the requirement to convey relatively permanent flow.[53] The Agencies should consider adding the following sentence at the end of the proposed new definition of "relatively permanent": "A perennial 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, loses its relatively permanent status if such feature does not convey relatively permanent flow."

IV. Supplemental Proposed Definition of "Continuous Surface Connection"

A. Requiring Perennial Surface Water Connecting a Wetland to Another WOTUS is Consistent with Statutory Text and Supreme Court Precedent.

The SNPRM proposes to define the term "continuous surface connection" to mean "perennial surface water in a wetland that is continuously connected with the surface water in the jurisdictional water such that it is difficult to determine where the jurisdictional water ends and the wetland begins."[54] Like the supplemental proposed definition of "relatively permanent," the supplemental definition of "continuous surface connection" clarifies that:

> Temporary interruptions in the surface water connection may occur as the result of anomalous events such as drought or dry spell. A temporary interruption in the surface water connection lasting no more than a single period of up to 30 consecutive days in any given year may also occur as a result of non-anomalous events such as low tide or a regularly occurring dry spell.[55]

[52] 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739) (cleaned up).

[53] *See* 90 Fed. Reg. at 52,545.

[54] 91 Fed. Reg. at 57,301.

[55] *Id*.

WAC supports adoption of the supplemental proposed definition of continuous surface connection because it is consistent with *Sackett*'s holding that the CWA extends only to "those wetlands that are 'as a practical matter indistinguishable from waters of the United States.'"[56] The supplemental definition also helps clarify that a surface *water* connection is required under *Sackett* and the *Rapanos* plurality opinion.

The legal foundation for requiring a continuous surface *water* connection—as opposed to mere physical abutment or adjacency—follows directly from the text of the statute. The operative provision is CWA section 502(7), which defines "navigable waters" to mean "*waters* of the United States, including the territorial seas."[57] As *Sackett* held, a wetland is jurisdictional only if it has "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."[58] The *Rapanos* plurality set forth similar reasoning, explaining that it was insufficient for wetlands to be neighboring or reasonably proximate to other covered waters, relying on the *Riverside Bayview*'s repeated reference to "the difficulty of determining where waters end and wetlands begin."[59] It is the presence of perennial surface *water* that creates the line-drawing problem that *Sackett* and prior Supreme Court decisions described. Any other reading would effectively amend and substantially broaden the definition in section 502(7), which *Sackett* rejected.[60]

As *Sackett* explained, section 404(g) "is not the operative provision that defines the Act's reach"—the operative provision is section 502(7).[61] Section 404(g) merely confirms that some wetlands (namely, those "adjacent" to waters that 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) are considered part of that "commerce waters" category. As *Sackett* explained, the only way to reconcile the reference to "adjacent wetlands" in section 404(g) with the definition of "navigable waters" in section 502(7) is that adjacent wetlands "must qualify as waters of the United States in their own right" because they "are included within the waters of the United States. In other words, they must be *indistinguishably part of a body of water* that itself constitutes 'waters' under the CWA."[62]

The supplemental proposal appropriately incorporates *Sackett's* critically important indistinguishability requirement into the regulatory text. Again, *Sackett* requires that wetlands be

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[56] 598 U.S. at 678.

[57] 33 U.S.C. § 1362(7) (emphasis added).

[58] 598 U.S. at 678 (quoting *Rapanos*, 547 U.S. at 742).

[59] *Rapanos*, 547 U.S. at 741 n.10.

[60] *See* 598 U.S. at 677.

[61] *Id.* at 676.

[62] *Id*. (cleaned up).

"indistinguishably part of a body of water" that is jurisdictional such that it is difficult to determine where one ends and the other begins.[63] Nothing in *Sackett* suggests the indistinguishability requirement can be satisfied by features that are dry. Rather, the indistinguishability problem arises only "when wetlands have a continuous surface connection to *bodies* that are 'waters of the United States' in their own right."[64] The Court was not talking about the difficulty of determining where a dry channel ends and where a wetland that lacks surface water begins. It is the presence of surface water in both the *body of water* and the wetland that makes them indistinguishable, save for interruptions that cause water to dry up or recede only temporarily.

Sackett's acknowledgment that temporary interruptions in surface connection may occur, because of phenomena like low tides or dry spells, must mean that the Court had in mind that surface water generally would be present in both features. If "continuous surface connection" meant mere abutment, the temporary interruption language would serve no purpose because during low tide, for example, an abutting wetland is still physically connected. The only interpretation that gives meaning to the Court's words is that the requisite connection is a surface *water* connection, which can be temporarily interrupted by low tides and dry spells.

WAC reiterates that whether particular wetlands serve important ecological functions, which may warrant protection under other applicable law, it does not justify expanding CWA jurisdiction beyond the text that Congress wrote. As *Sackett* warned, the CWA does not define jurisdiction "based on ecological importance," and neither courts nor the Agencies can "redraw the Act's allocation of authority" between federal and state governments based on ecological justifications.[65] The CWA's objective of restoring and maintaining the integrity of the Nation's waters[66] likewise cannot override the statutory text defining the Act's coverage.

The supplemental proposed definition, with its direct incorporation of *Sackett's* holding that wetlands must be indistinguishable from the WOTUS to which they are connected, will also promote greater transparency for the regulated public as well as clarity for landowners to evaluate whether they need a federal permit for activities that occur in wetlands. We suggest that the clarifications requested above regarding the proposed definitions of relatively permanent and perennial apply equally to the proposed continuous surface connection definition. WAC further recommends that the Agencies adopt our prior recommendations to clarify that: (i) discrete features cannot satisfy the continuous surface connection requirement; (ii) relying on discrete features to classify two distinct wetlands separated by a barrier as one wetland is contrary to

[63] 598 U.S. at 676.

[64] *Id.* at 678.

[65] *See id.* at 683.

[66] 33 U.S.C. § 1251(a).

Sackett; and (iii) the Agencies will delineate wetlands within a mosaic individually to assess whether each meets the "continuous surface connection' definition, rather than treating those wetlands as "one wetland" for jurisdictional purposes.[67]

B. The Agencies Should Remove the Concept of "Adjacent" Wetlands from the Regulations

WAC supports the SNPRM's additional suggestion that the regulatory text need not include the terms "adjacent" and "abutting."[68] As detailed above, *Sackett* held that, to be jurisdictional, wetlands must qualify as WOTUS in their own right, meaning "they must be indistinguishably part of a body of water that itself constitutes 'waters' under the CWA."[69] That "understanding is consistent with § 1344(g)(1)'s use of 'adjacent,'" and if the term "adjacent" were interpreted "to mean that the CWA applies to wetlands that are not indistinguishably part of otherwise covered 'waters of the United States,' . . . it would effectively amend and substantially broaden § 1362(7) to define 'navigable waters' as 'waters of the United States *and adjacent wetlands*'"—that is an interpretation the Court emphatically rejected.[70] Put simply, after *Sackett*, only one meaning of the term "adjacent" produces a substantive effect that is compatible with the rest of the CWA, and that is that wetlands must be indistinguishably part of otherwise jurisdictional bodies of water. Removing the terms "adjacent" and "abutting" and focusing instead on *Sackett's* indistinguishability requirement would promote clarity and ensure faithful implementation of the Court's holding.

WAC recommends that the Agencies codify the supplemental proposed change to paragraph (a)(4) of the regulatory text, which would remove the phrase "adjacent wetlands" from the regulatory definition of "waters of the United States" and would instead define jurisdictional wetlands as:

> Wetlands that are indistinguishably part of a body of water that itself is jurisdictional under (a)(1) through (3) of this section. This occurs when surface water in a wetland is continuously connected with the surface water in the jurisdictional water such that it is difficult to determine where the jurisdictional water ends and the wetland begins. Only the portion of the wetland that is indistinguishably part of the jurisdictional water, due to the presence of surface water, is itself jurisdictional. The requisite surface water connection is not broken

[67] *See* WAC NPRM Comments at 24-27.

[68] 91 Fed. Reg. at 57,294-95.

[69] 598 U.S. at 676-78.

[70] *Id.*

by a temporary interruption in surface connection that may sometimes occur because of phenomena like low tide or a regularly occurring dry spell.[71]

This revised (a)(4) category best conforms the definition of WOTUS to *Sackett*. But if the Agencies do not codify the proposed alternative (a)(4) language, they should at least modify the definition of "continuous surface connection" as follows:

> (3) Continuous surface connection means perennial surface water in a wetland that is continuously connected with the surface water in the jurisdictional water such that the wetland is indistinguishably part of a body of water that is itself jurisdictional under (a)(1) through (a)(3) of this section. This occurs when the continuously connected surface water makes it difficult to determine where the jurisdictional water ends and the wetland begins. Temporary interruptions in the surface water connection may occur as the result of anomalous events such as drought or dry spell. A temporary interruption in the surface water connection lasting no more than a single period of up to 30 consecutive days in any given year may also occur as a result of non-anomalous events such as low tide or a regularly-occurring dry spell. Only the portion of the wetland that is indistinguishably part of the jurisdictional water, due to the presence of surface water, is itself jurisdictional.

Codifying either of the aforementioned proposed revisions would more closely align the regulations with the indistinguishability requirement from *Sackett*. Those changes would also clarify the role of surface water in establishing the requisite connection and limit jurisdiction to only the portions of wetlands that are truly indistinguishable from the other WOTUS.

V. Conclusion

For the reasons detailed above, WAC supports the supplemental proposed definitions of "relatively permanent" and "continuous surface connection" in the SNPRM. These definitions are clear, administrable, and faithful to the CWA's text and Supreme Court precedent. WAC believes the recommendations provided in these comments will further improve the definitions and their implementation, promote regulatory certainty, and help break the cycle of shifting WOTUS definitions that have imposed significant costs on WAC members for decades. WAC appreciates the Agencies' efforts to provide regulatory stability and clarity and looks forward to working with the Agencies as this rulemaking progresses and is implemented.

[71] 91 Fed. Reg. at 57,295.

Sincerely,

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APPENDIX A

American Cement Association
American Exploration & Mining Association
American Exploration & Production Council
American Farm Bureau Federation
American Forest & Paper Association
American Fuel & Petrochemical Manufacturers
American Gas Association
American Petroleum Institute
American Public Gas Association
American Public Power Association
American Road & Transportation Builders Association
American Society of Golf Course Architects
Associated Builders and Contractors
Associated General Contractors of America
Association of American Railroads
Club Management Association of America
Florida and Texas Sugar Cane Growers
Golf Course Builders Association of America
Golf Course Superintendents Association of America
Independent Petroleum Association of America
Interstate Natural Gas Association of America
International Council of Shopping Centers
Leading Builders of America
Liquid Energy Pipeline Association
National Asphalt Pavement Association
National Association of Home Builders
National Association of Realtors
National Association of State Departments of Agriculture
National Cotton Council
National Club Association
National Corn Growers Association
National Mining Association
National Multifamily Housing Council
National Pork Producers Council
National Rural Electric Cooperative Association
National Stone Sand & Gravel Association
Responsible Industry for Sound Environment
Southeastern Lumber Manufacturers Association
The Fertilizer Institute
Treated Wood Council
United Egg Producers
USA Rice
US Chamber of Commerce