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

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I. Introduction

The Waters Advocacy Coalition ("WAC") offers the following comments on the Environmental Protection Agency's ("EPA") and U.S. Army Corps of Engineers' ("Corps") (collectively, the "Agencies") proposed revised definition of "waters of the United States" ("WOTUS") under the Federal Water Pollution Control Act, as amended, also known as the Clean Water Act ("CWA" or "Act"),[1] *Updated Definition of "Waters of the United States,*" 90 Fed. Reg. 52,498 (Nov. 20, 2025) (hereinafter, "Proposed Rule"). WAC appreciates the Agencies' efforts to improve regulatory predictability and consistency by further clarifying the scope of WOTUS. 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 beyond constitutional and statutory boundaries. The Proposed Rule represents an important move toward realigning the regulatory definition of WOTUS with Congress's intended scope of federal regulatory authority under the CWA. It gives meaning to Congress's use of the term "navigable" throughout the statute and respects the CWA's express policy to preserve the states' traditional and primary authority over land and water use. Moreover, by codifying definitions of key terms that are central to determining the scope of the CWA's reach, the Proposed Rule reduces 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.[2] 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 or near waterbodies and thus their projects and operations are often subject to regulation under various provisions of the CWA, including Sections 402, 404, 401, 311. The Agencies' regulatory authority under these provisions extend 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. WAC believes that a regulation that draws clear lines between federal and state waters is foundational to delivering a practical federal permitting framework that enables needed new infrastructure while protecting the environment.

Through their experience, planning, and operations, WAC members possess a wealth of 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 on the critical issues

[1] *See generally* 33 U.S.C. § 1251 et seq.

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

concerning the scope of federal jurisdiction under the CWA. We have submitted comments on the Agencies' prior rulemakings and guidance documents on this issue.[3] In all prior comments, WAC and its members have consistently advocated for regulatory approaches that offer predictability 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; (ii) lack grounding in controlling Supreme Court jurisprudence; (iii) render the statutory term "navigable" meaningless or otherwise diminish its import; and (iv) inappropriately redefine the federal-state balance based on ecological justifications.

II. Executive Summary

WAC supports the Proposed Rule because it better aligns the regulatory definition of WOTUS with the CWA and Supreme Court precedent—in particular, by defining critical terms such as "relatively permanent" and "continuous surface connection." These new definitions provide much needed clarity and transparency, and they better preserve the states' primary role in regulating water resources and land use within their boundaries, while still maintaining important protections for aquatic resources consistent with the law. The Agencies rightly recognize that Congress did not intend for federal regulation of all the Nation's waters. Instead, only "navigable waters" are subject to federal regulation, and all other aquatic resources are subject to state and local oversight and regulation, with support from various non-regulatory grants and technical assistance programs.

The Proposed Rule will provide regulatory certainty that WAC members desperately need and hopefully break the cycle of regulatory revisions with each change in administration. For decades, shifting WOTUS definitions have created a moving target for jurisdictional determinations, forcing landowners and operators to repeatedly modify plans, conduct redundant delineations, and litigate disputed determinations. This uncertainty imposes substantial costs, delays development, and discourages infrastructure investment. Clear, stable, consistent, jurisdictional rules enable more efficient project planning and more effective environmental protection. When WAC members can reliably identify jurisdictional waters during preliminary site assessments, they can design projects and plan activities to avoid impacts, target mitigation efforts appropriately, and move forward with development without fear that jurisdictional determinations will later change. This predictability benefits both the regulated community and the environment by reducing unnecessary conflicts and enabling resources to be focused on genuine environmental protection.

As detailed below in these comments, WAC offers several recommendations to provide additional clarity, to further align the proposed definition with the CWA and Supreme Court precedent, and aid implementation of the rule:

- Traditional Navigable Waters (TNWs): The Agencies should revise the definition so that it encompasses only waters that are "[c]urrently used, or were used in the past, or may be susceptible to use **to transport** interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide." Over time, the Agencies have broadened the TNW category to encompass waters that are

[3] The most pertinent WAC comments are attached as Exhibits 1 through 8 to these comments.

merely used in commerce (*e.g.*, recreational use by travelers who cross state lines), not just waters used to *transport* commerce. The Agencies should return to the traditional concept of navigability that Congress had in mind when it enacted the CWA and exerted its commerce power over navigation.

- Relatively Permanent Waters: There is no need for separate jurisdictional categories for Tributaries and Lakes and Ponds. To streamline the regulations and better conform them to Supreme Court precedent, the Agencies should combine these categories to state "Rivers, lakes, streams, and ponds that are relatively permanent, standing, or continuously flowing bodies of water and that connect to waters identified in paragraph (a)(1), either directly or through one or more waters or features that convey relatively permanent flow."

    - WAC generally supports the proposed definition of "relatively permanent" and the Agencies' clarification that the "wet season" is when average monthly precipitation exceeds average monthly evapotranspiration. WAC recommends that the Agencies revise the definition to account for lag time by clarifying that relatively permanent flow need not be coterminous with the wet season months. For instance, the Agencies could instead clarify that "relatively permanent" means "standing or continuously flowing year-round or **at least as long as the duration** of the wet season."

    - WAC supports use of Web-based Water-Budget Interactive Modeling Program ("WebWIMP") outputs reported in the Antecedent Precipitation Tool as the primary tool for identifying the relevant wet season. WAC recognizes that it will be more challenging to determine whether a water feature has standing water or flow for the requisite amount of time, because landowners may not always have enough visual observations or data. Thus, the Agencies will need to rely on a weight of the evidence approach. WAC emphasizes the importance of proper oversight during implementation. Agency staff should not simply fall back on tools, such as the National Hydrography Dataset or National Wetlands Inventory, which the Agencies have recognized were not designed for regulatory purposes or with the definition of "relatively permanent" in mind.

- Adjacent Wetlands: WAC supports the proposed definition of "continuous surface connection" as it ensures that only portions of wetlands that are indistinguishably part of another WOTUS, such that it is difficult to discern where one ends and the other begins, are jurisdictional. WAC recommends that the Agencies revise the definition to reflect that the presence of surface water in a wetland need not be coterminous with the wet season months. So long as surface water is driven by the wet season and occurs predictably, year after year, for an amount of time equal to the length of the wet season, that should be sufficient. Regarding implementation of the continuous surface connection definition, WAC again emphasizes the need for proper oversight, and WAC's recommendations for implementing the relatively permanent definition apply equally to implementation of the continuous surface connection definition.

- Exclusions: WAC offers minor revisions to the proposed definition of waste treatment system and the proposed groundwater exclusion. WAC further recommends that the Agencies define "dry land" and add an exclusion for certain stormwater control features.

- Burden of Proof: WAC supports the Proposed Rule's clarification that the Agencies bear the burden of proof to demonstrate that an aquatic resource meets the requirements to be jurisdictional or excluded. WAC recommends that the Agencies establish guardrails to ensure timely decision-making and to ensure that landowners are not left in regulatory limbo. This can be some, for example, by memorializing decision-making time periods in a Memorandum of Understanding or through a separate rulemaking to revise 33 C.F.R. Part 325.

III. Statutory and Legal Background

The CWA established a comprehensive scheme to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through a combination of non-regulatory programs to improve the quality of all of the Nation's waters, and a more targeted federal permitting program to address certain "discharges" of pollutants into a subset of the Nation's waters identified as "navigable waters," which Congress defined as "the waters of the United States, including the territorial seas."[4] As the Agencies acknowledge, the CWA preserves a substantial and primary role for States in administering the Act's various provisions, which reflects Congress's intent to balance state authority over land and water resources within their borders against the need for nationwide water quality regulation.[5] Thus, in enacting the CWA, Congress declared as a national policy that states would manage the major construction grant program and administer the core permitting programs authorized by the statute, along with other responsibilities.[6]

For instance, the CWA provides that states must develop water quality standards, which states can implement through permitting, enforcement actions, and their Section 401 water quality certification authority, among other tools. And as the Agencies note, nearly all states administer all or portions of the National Pollutant Discharge Elimination System permitting program, and two states actively administer the Section 404 permit program for certain waters.[7] Additionally, states and tribes maintain authority over waters that fall outside the CWA's definition of navigable waters. The states and the Agencies therefore must work cooperatively to manage the nation's water resources under the CWA's statutory framework.

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[4] *See* 33 U.S.C. § 1251(a)-(b).

[5] 90 Fed. Reg. at 52,502-03; *see also* 33 U.S.C. § 1251(b) (expressing congressional policy to "preserve . . . the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use . . . of land and water resources").

[6] *Id.*

[7] *See id.* at 52,504-05.

The CWA also establishes a non-regulatory statutory framework for delivering technical and financial assistance to states, municipal entities, and other federal agencies to improve the quality of the Nation's waters. These programs extend beyond waters qualifying as "waters of the United States" and include grants to improve pollution control and/or prevention of discharges from sewers that carry stormwater (§ 1255(a)(1)); grants for waste treatment and water purification methods (§ 1255(a)(2)); grants for research on treatment and pollution control from point and nonpoint sources in river basins (§ 1255(b)); and development of waste management and waste treatment methods to identify and measure the effects of pollutants (§ 1255(d)).

The Agencies exercise federal regulatory authority over "navigable waters" (*i.e.*, WOTUS) under the CWA based on power conferred by Congress. Because Congress can only confer powers granted to it under the Constitution, the Agencies' authority to regulate WOTUS is constrained by constitutional limitations on Congress's own authority. In enacting the CWA, Congress sought to exercise its traditional "commerce power over navigation."[8] As the Supreme Court observed in *SWANCC*, Congress's Commerce Clause authority "though broad, is not unlimited."[9] *SWANCC* emphasized the importance of the term "navigable" in holding that the text of the statute does not allow the Court "to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water."[10] *SWANCC* specifically rejected an interpretation of the CWA, then held by the Agencies, that "invoke[d] the outer limits of Congress's power" under the Commerce Clause.[11]

Most recently in *Sackett*, the Supreme Court reinforced key aspects of *SWANCC* and affirmed the *Rapanos* plurality's jurisdictional test, holding that the statutory term "waters" encompasses only those "relatively permanent, standing or continuously flowing water bodies 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'"[12] While the Court recognized that certain wetlands fall within the definition of WOTUS, it strictly limited jurisdictional coverage to wetlands that are "indistinguishably part of a water body that itself constitutes" WOTUS.[13] The Court emphasized that "[w]etlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby."[14] To qualify as WOTUS, a wetland must be adjacent to a "relatively permanent water body connected to traditional interstate navigable waters" and must maintain a

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[8] *Solid Waste Agency of N. Cook Cnty v. U.S. Army Corps of Eng'rs* ("*SWANCC*"), 531 U.S. 159, 177 (2001).

[9] *Id.* at 173.

[10] *Id.* at 168.

[11] *See id.* at 172; *see also id.* at 172-73 (the Court "assum[es] that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority").

[12] *Sackett v. EPA*, 598 U.S. 651, 671 (2023) (quoting *Rapanos v. United States,* 547 U.S. 715, 739 (2006) (plurality)).

[13] *Id.* at 676.

[14] *Id.*

"continuous surface connection with that water, making it difficult to determine where 'water' ends and the 'wetland' begins."[15]

Sackett leaves no doubt that the *Rapanos* plurality's test for jurisdiction, as further clarified by the *Sackett* majority, governs the reach of federal jurisdiction under the Act. Thus, any definition of WOTUS must adhere to the following core principles, as established in *Rapanos* and reaffirmed in *Sackett*:

- The CWA reaches only "the waters of the United States." A water feature must independently qualify as WOTUS—meaning it must be indistinguishably part of a water body that itself constitutes "waters" under the Act.[16]

- The statutory term "waters" is limited to "bodies of open water," specifically those "relatively permanent, standing or continuously flowing bodies of water . . . described in ordinary parlance as 'streams, oceans, rivers, and lakes.'"[17]

- The Act's coverage extends only to "certain relatively permanent water bodies connected to traditional interstate navigable waters" and to "wetlands with such close physical connection to those waters that they [a]re as a practical matter indistinguishable from waters of the United States."[18] Mere proximity to a jurisdictional water is insufficient, as the term "adjacent" cannot encompass wetlands that are not part of covered "waters."[19]

- Wetlands satisfy the "continuous surface connection" requirement only where "there is no clear demarcation before 'waters' and wetlands," although "temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells."[20] A "surface connection" means the presence of surface water extending from the body of water over the wetland.[21] A barrier separating a wetland from a WOTUS removes the wetland from federal jurisdiction unless it is illegally constructed.[22]

- The Agencies cannot read the statutory term "navigable" out of the statute. That term demonstrates that in enacting the CWA, Congress was focused on its

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[15] *Id.* at 678-79 (quoting *Rapanos,* 547 U.S. at 742 (plurality)).

[16] *Id.* at 676.

[17] *Id.* at 671 (quoting *Rapanos,* 547 U.S. at 739 (plurality)).

[18] *Id.* at 667 (quoting *Rapanos,* 547 U.S. at 742, 755 (plurality)).

[19] *Id.* at 682.

[20] *Id.* at 678.

[21] *United States v. Sharfi,* No. 21-14205-CIV, 2024 WL 5244351, at *1 (S.D. Fla. Dec. 30, 2014).

[22] *Sackett*, 598 U.S. at 678 n.16.

"traditional jurisdiction over waters that were or had been navigable in fact or could reasonably be so made."[23]

- The term "waters" does not encompass everything characterized by the ordinary presence of water, as such an interpretation would conflict with *SWANCC*'s holding that the CWA does not cover isolated ponds.[24] Such an interpretation would also conflict with the Congressional policy in CWA section 101(b) because it "is hard to see how the States' role in regulating water resources would remain 'primary' if the [Agencies] had jurisdiction over anything defined by the presence of water."[25]

- The Agencies must correct their overbroad interpretation of WOTUS given the significant penalties that businesses and property owners face even for inadvertent violations.[26] Due process "requires Congress to define what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[27]

- 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.[28]

Sackett therefore reinforces fundamental principles consistent with WAC's longstanding positions regarding the definition of WOTUS. Specifically, any durable and defensible WOTUS definition must avoid significant impingement on state primacy over land and water use. A definition that pushes the outer boundaries of CWA authority—even more so, one that fails to give adequate weight to the CWA section 101(b) policy—would be legally vulnerable and would undermine the goal of establishing a durable rule. Equally important, the Agencies' interpretation must give effect to the term "navigable" and must avoid an overly narrow reading of *SWANCC*, a decision that did much more than merely reject the Migratory Bird Rule. Indeed, *Sackett* affirms that *SWANCC* stands more broadly for the holding that the Corps lacks jurisdiction over certain categories of waters, such as "ponds that are not adjacent to open water."[29] The Agencies must also avoid an overly broad reading of *Riverside Bayview*[30] as authorizing regulation of a wetland strictly because it abuts an open water body. *Sackett* and the *Rapanos* plurality both underscore

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[23] *Id.* at 672 (quoting *SWANCC,* 531 U.S. at 172).

[24] *Id.* at 674 (citing *SWANCC,* 531 U.S. at 171).

[25] *Id.* at 674 (citation omitted).

[26] *See id* at 660 (citing *Army Corps of Eng'rs. v. Hawkes Co.,* 578 U.S. 590, 602 (2016) (Kennedy, J., concurring)).

[27] *Id.* at 681.

[28] *See id.* at 683 (citing *Rapanos,* 598 U.S. at 756 (plurality)).

[29] *See id.* at 666 (quoting *SWANCC,* 531 U.S. at 168).

[30] *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121 (1985).

that, in addition to abutment, the wetland in question must be indistinguishably part of otherwise covered WOTUS such that it is "difficult to determine where the 'water' ends and the 'wetland' begins."[31]

WAC urges the Agencies to avoid the pattern of responding to the Supreme Court's rulings on WOTUS by narrowly interpreting adverse rulings in order to preserve or even expand their jurisdictional reach. As *Sackett* recounts, it did not matter whether the Agencies won or lost prior Supreme Court cases on the scope of WOTUS; the Agencies responded all the same "by expanding their interpretations even further."[32] For example, after the Supreme Court articulated important limits on the Agencies' authority in *SWANCC*, the Agencies "issued guidance that sought to minimize *SWANCC*'s impact" just days later, imploring field staff to "continue to exercise CWA jurisdiction to the full extent of their authority,"[33] which spawned "a system of 'vague' rules that depended on 'locally developed practices'" and "expansive interpretations of the CWA's reach."[34] That in turn led to the Court's decision to grant review in *Rapanos*, in which the Court again vacated an expansive theory of federal jurisdiction. "In the decade following *Rapanos*, the EPA and the Corps issued guidance documents that 'recognized larger grey areas and called for more fact-intensive individualized determinations in those grey areas."[35] Although the Agencies attempted to adopt a narrower view of jurisdiction in 2019-2020, that did not last, because the prior administration abandoned its defense of that rule and reverted to adopting overly broad interpretations of the CWA that cannot be squared with the *Rapanos* plurality's (and now *Sackett*'s) test for jurisdiction.

Notably, since *Sackett*, several lower courts have begun rejecting the Agencies' attempts to circumvent the limits that the Supreme Court has imposed on the scope of their CWA jurisdiction. For example, in *Lewis v. United States*, the Fifth Circuit held that "the *Sackett* 'adjacent' test" is whether a wetland is "indistinguishable from those waters" that meet the definition of WOTUS.[36] In that case, the Fifth Circuit rejected the Corps' determination that wetland is covered by the CWA where the "nearest relatively permanent body of water [was] removed miles away from the Lewis property by roadside ditches, a culvert, and a non-relatively permanent tributary," because "it is not difficult to determine whether the 'water' ends and any 'wetlands' on Lewis's property begin."[37] The Fifth Circuit's analysis in *Lewis* closely resembles the Eleventh Circuit's analysis in *Glynn Environmental Coalition v. Sea Island Acquisition*, which likewise emphasized the indistinguishability requirement from *Sackett* and the *Rapanos*

[31] *Sackett*, 598 U.S. at 678-79 (quoting *Rapanos,* 547 U.S. at 742 (plurality)).

[32] *Id*. at 666.

[33] *Id.*

[34] *Id.* (citations omitted).

[35] *Id.* (citation omitted).

[36] *Lewis v. United States,* 88 F.4th 1073, 1078 (5th Cir. 2023) (citing *Sackett,* 598 U.S. at 684).

[37] *Id.* at 1079.

plurality.[38] There, the Court rejected attempts to demonstrate a "continuous surface connection" via occasional flows through pipes and culverts. The Eleventh Circuit underscored that although wetland characteristics such as a high water table and soil and vegetation characteristics, and occasional surface water might suggest that the property in question "was a wetland in the colloquial or scientific sense, none supports the conclusion that the wetland had a 'continuous surface connection' to a water of the United States" within the meaning of *Sackett*.[39] Other courts have similarly rejected attempts to classify water features as WOTUS where those features fail to meet the *Rapanos* plurality's jurisdictional test, as clarified by the *Sackett* majority.[40]

The Agencies rightly began to take steps to ensure that the regulatory definition of WOTUS aligns with *Sackett* when it issued the March 2025 guidance on "continuous surface connection."[41] WAC agrees with the rationales the Agencies set forth in that guidance, as discussed below in Part IV.D.1 of these comments. While that guidance marks an important step toward fully conforming the definition of WOTUS to the CWA and the Court's decision in *Sackett,* additional clarification in the form of regulatory revisions is necessary.

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[38] *Glynn Env't Coal., Inc. v. Sea Island Acquisition, LLC*, 146 F.4th 1080, 1088-89 (11th Cir. 2025).

[39] *Id.* at 1089-90.

[40] *See e.g., United States v. Sharfi,* No. 2:21-cv-14205, 2024 WL 4483354, at *13 (S.D. Fla. Sept. 21, 2024), *report and recommendation adopted,* 2024 WL 5244351 (rejecting government's assertion of jurisdiction over wetland as "ignor[ing] th[e] indistinguishability requirement, which becomes meaningless if abutment alone establishes a 'continuous surface connection'"); *United States v. Ace Black Ranches, LLP,* No. 1:24-cv-00113, 2024 WL 4008545 at *4 (D. Idaho Aug. 29, 2024) (dismissing the government's complaint for failure to "connect any wetlands" it alleged to be WOTUS with a traditional, navigable water "via a sufficient surface-water connection"); *but see United States v. Andrews*, No. 24-1479, 2025 WL 855763 (2d Cir. Mar. 19, 2025) (affirming summary judgment in favor of the government and stating that "the CWA does not require surface water but only soil that is regularly 'saturated by surface or ground water.'"), *petition for cert. filed*, No. 25-668 (Nov. 20, 2025). The Second Circuit did not explain how that outcome is consistent with *Sackett*'s discussion on indistinguishability and how a jurisdictional wetland must have a continuous surface connection to an adjacent WOTUS but for "phenomena like low tides or dry spells." *Compare id. with Sackett*, 598 U.S. at 678.

[41] *See* U.S. EPA, 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 (Mar. 12, 2025) (hereinafter "2025 Continuous Surface Connection Guidance"), *available at* https://www.epa.gov/system/files/documents/2025-03/2025cscguidance.pdf.

IV. Proposed Rule WOTUS Categories

A. Traditional Navigable Waters and Territorial Seas

The Agencies do not propose to change the scope of the traditional navigable waters ("TNW") category under paragraph (a)(1)(i) of the regulatory definition.[42] As currently codified, the TNW category includes waters "which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide."[43] The Agencies solicit comment on whether to clarify this category, including on what it means for a water to be "susceptible to use in interstate or foreign commerce."[44]

WAC recommends that the Agencies amend the proposed regulatory text for the (a)(1) category to read: waters which are "Currently used, or were used in the past, or may be susceptible to use **to transport** interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide." This slightly modified phrasing more closely aligns with the statutory text[45] and gives meaning to the term "navigable" as understood by Congress when it exercised its "commerce power over navigation" in enacting the CWA.[46] The proper interpretation of the scope of the (a)(1) traditional navigable waters category is critically important because, as the *Rapanos* plurality and *Sackett* make clear, jurisdiction over non-navigable waters is premised on the water's relationship to a TNW. Under the *Rapanos* plurality's jurisdictional test, a non-navigable water is jurisdictional only if it is "a relatively permanent body of water connected to a [TNW]."[47] *Sackett* reinforced the *Rapanos* plurality's holding and explained that a wetland is jurisdictional only if it is adjacent to a "relatively permanent body of water connected to traditional interstate navigable waters" and has a "continuous surface connection with that water[.]"[48] Thus, any ambiguity or improper expansion

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[42] 90 Fed. Reg. at 52,515. The Agencies have codified identical regulatory definitions at 33 C.F.R. § 328.3 and 40 C.F.R. § 120.2. Any references to WOTUS categories in these comments apply to both regulatory definitions.

[43] *See* 33 C.F.R. § 328.3(a)(1)(i); 40 C.F.R. § 120.2(a)(1)(i).

[44] 90 Fed. Reg. at 52,515.

[45] *See* 33 U.S.C. § 1344(g) (specifying that the federal government must retain authority over Section 404 permitting for discharges into "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 high water mark on the west coast, including wetlands adjacent thereto") (emphasis added).

[46] *SWANCC*, 531 U.S. at 168 n.3.

[47] 547 U.S. at 742 (plurality).

[48] 598 U.S. at 678.

of the traditional navigable waters category would have cascading effects on the CWA's jurisdictional framework.

The question of whether a water qualifies as a TNW traces back to the test for "navigability" under the Rivers and Harbors Act ("RHA"), as articulated by the Supreme Court in *The Daniel Ball*[49] and subsequent precedent such as *United States v. Appalachian Electric Power Co.*[50] Indeed, in articulating the "relatively permanent" jurisdictional standard, the *Rapanos* plurality explained that the CWA adopted the "traditional phrase 'navigable waters' . . . from its predecessor statutes" and cited to *The Daniel Ball* and *Appalachian Electric Power Co.*[51] Thus, when referring to "traditional navigable waters," the *Rapanos* plurality intended to apply the historical definition of "navigable" as articulated in *The Daniel Ball* and its progeny. Those cases define TNWs as waters that (1) are navigable-in-fact (or capable of being rendered so); and (2) together with other waters, form waterborne highways used to transport commercial goods in interstate or foreign commerce.[52]

Over time, however, the Agencies have expanded the TNW category under the CWA to include waterways that are merely used in commerce rather than for the transportation of goods in interstate commerce. The current (a)(1)(i) category deviates from *The Daniel Ball* and its progeny by eliminating the second prong of the well-established TNW definition—the requirement that the water in question, together with other water bodies, form an interconnected highway to carry commercial goods in interstate or foreign commerce. Although the regulatory text defining TNWs uses terms similar to the second prong of the traditional TNW definition, it reaches waters that are, were, or could be subject to *any use* in interstate commerce, not just those waters that are, were, or are susceptible to forming part of a continued highway of waterborne commerce. In practice, this has resulted in the designation of many waters as TNWs for CWA purposes, such as inland lakes, merely because they "have an impact on interstate commerce resulting from tourism, but [that] may have little to no impact on the *transport* of interstate or foreign commerce (as do RHA waters)."[53] For example, "Bah Lake (an isolated 70-acre water, maximum depth 10 feet)" is an (a)(1) TNW for CWA purposes, merely because of

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[49] *The Daniel Ball*, 77 U.S. 557 (1870).

[50] *United States v. Appalachian Elec. Power Co*., 311 U.S. 377 (1940).

[51] 547 U.S. at 734 (plurality).

[52] *See The Daniel Ball,* 77 U.S. at 563; *Leovy v. United States,* 177 U.S. 621, 630 (1900) (relying on *The Daniel Ball's* definition of navigable waters in interpreting the RHA); *Econ. Light & Power Co. v. United States,* 256 U.S. 113, 121-22 (1921) (same); *Appalachian Elec. Power Co.,* 311 U.S. at 406-09 (same).

[53] Final Report of the Assumable Waters NACEPT Subcommittee, at (May 2017), *available at* https://www.epa.gov/sites/default/files/2017-06/documents/awsubcommitteefinalreprort_05-2017_tag508_05312017_508.pdf.

the possibility that some out-of-state travelers could access the lake via a county road and use small recreational watercraft.[54]

The Agencies' current formulation of TNW, as expressed in the 2022 TNW Guidance (formerly known as "Appendix D" to the Rapanos Guidance),[55] reveals the basis for this improper expansion. In that guidance, the Agencies assert that they will consider any water that "a federal court has determined . . . is navigable-in-fact under federal law *for any purpose*" to be a TNW.[56] The Agencies cite to cases such as *FPL Energy Me. Hydro LLC v. FERC*[57] and *Alaska v. Ahtna, Inc.*[58] as support for their broadened definition of TNWs, which they assert can include waters susceptible to use in recreational boating and canoeing.[59] However, these cases are inapposite because they do not arise in the context of the CWA or the RHA and therefore do not involve the traditional test for navigability that the *Rapanos* plurality relied on in articulating its jurisdictional test. As the Supreme Court has explained over the decades, "any reliance upon judicial precedent" on the issue of navigability "must be predicated upon careful appraisal of the purpose for which the concept of 'navigability' was invoked in a particular case."[60] "[T]he test for navigability is not applied in the same way in [] distinct types of cases" interpreting specific federal statutes or applying specific doctrines.[61]

In *FPL Energy Me. Hydro LLC*, the D.C. Circuit assessed whether a stream was "navigable" under the Federal Power Act ("FPA"), which defines "navigable waters" to mean waters "used or suitable for use for the transportation of persons or property in interstate commerce of foreign commerce."[62] The FPA's definition is significantly broader than the standard articulated in *The Daniel Ball,* which requires that "navigable waters" be used or are susceptible to being used "as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[63] The Ninth Circuit's decision in *Alaska v. Ahtna, Inc.* is likewise inapposite because, there, the court examined whether a river was navigable such that title to the lands beneath the water would be vested in the State of

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[54] *See* USEPA, Memorandum for JD # 2007-04488-EMN (Jan. 16, 2008), *available at* https://usace.contentdm.oclc.org/digital/api/collection/p16021coll5/id/1426/download.

[55] USEPA & USACE, Waters that Qualify as "Traditional Navigable Waters" Under Section (a)(1) of the Agencies' Regulations (2022) (hereinafter "2022 TNW Guidance"), *available at* https://www.epa.gov/system/files/documents/2022- 12/Water%20that%20Qualify%20as%20TNWs_Final_0.pdf.

[56] 2022 TNW Guidance at 3.

[57] *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151 (D.C. Cir. 2002).

[58] *Alaska v. Ahtna, Inc*. 891 F.2d 1401 (9th Cir. 1989).

[59] *See* 2022 TNW Guidance at 3 n.1.

[60] *Kaiser Aetna v. United States,* 444 U.S. 164, 171 (1979).

[61] *PPL Montana LLC v. Montana,* 565 U.S. 576, 592 (2012).

[62] 287 F.3d at 1154 (citing 16 U.S.C. § 796(8)).

[63] 77 U.S. at 563.

Alaska under the Submerged Lands Act of 1953 and the "equal footing doctrine."[64] Although the Ninth Circuit held that at the time of statehood, the river was susceptible to use as a highway for commerce and thus was "navigable" under the Submerged Lands Act based on the river's present commercial use by the fishing and sightseeing industry, the court provided no explanation to support the notion that recreational use demonstrates that a water is susceptible for use as "highway[] for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water" and thus meets *The Daniel Ball* test.[65] As such, that case provides little help in explaining how evidence of recreational boating is sufficient to meet the definition of a TNW.

In any event, in construing the RHA and applying *The Daniel Ball,* the Supreme Court has cautioned that a water does not qualify as a TNW merely because it is navigable-in-fact. For example, in *The Montello,* the Supreme Court explained that "not every small creek in which a fishing skiff or gunning canoe can be made to float at high water" qualifies as a "navigable water."[66] Similarly, in *Leovy,* the Supreme Court rejected as overbroad a jury instruction stating that "the mere capacity to pass in a boat of any size, however small, from one stream or rivulet to another . . . is sufficient to constitute a navigable water of the United States."[67]

Unsurprisingly, application of the 2022 Guidance (and formerly Appendix D) has caused confusion for both regulators and regulated communities and has resulted in the improper classification of waters not tied to the transport of interstate or foreign commerce as TNWs. The 2022 Guidance primarily consists of references to judicial precedent but provides little insight as to how the Agencies will apply those decisions, or how to identify TNWs in the field. In addition, the Agencies' reference to and reliance on cases addressing navigability outside of the CWA context, such as under the Federal Power Act and Submerged Lands Act, further complicates application of the TNW category because it tethers the Agencies' CWA regulatory authority to the outcome of all federal court decisions regarding navigability under various statutes.

For these reasons, WAC recommends amending the text of the (a)(1)(i) category to return to a traditional understanding of navigability as articulated in *The Daniel Ball*. In addition, the Agencies should withdraw the 2022 TNW Guidance. These changes would restore the critical second prong of the traditional TNW definition by clarifying that the relevant inquiry is whether waters are used (or susceptible to use) to transport interstate or foreign commerce, not merely whether they are used in commerce for any purpose. Notably, waters that do not meet the two-part definition of navigable waters, as understood in *The Daniel Ball* and other cases interpreting the RHA, may still be regulated under the CWA based on their connections to TNWs. WAC believes these changes to the Proposed Rule would align the definition of WOTUS with Supreme Court precedent, eliminate confusion that has resulted from the Agencies' expanded interpretation of TNWs in Appendix D and the 2022 Guidance, and ensure that the foundational

[64] 891 F.2d at 1404.

[65] *See id.* at 1405.

[66] *The Montello*, 87 U.S. 430, 442 (1874).

[67] 177 U.S. at 633.

TNW category is consistent with Congress's Commerce Clause authority and the traditional understanding of navigable waters that has guided federal law for over 150 years.

B. Interstate Waters

The Agencies propose to remove interstate waters as a standalone category of WOTUS such that interstate waters would be WOTUS only if they qualify under another jurisdictional category under the Proposed Rule (*e.g.,* TNWs, relatively permanent tributaries, or adjacent wetlands).[68] The Agencies correctly recognize that this change is necessary to align the definition of WOTUS with the CWA, as interpreted by the *Rapanos* plurality and *Sackett.*[69] As the Agencies explain, their authority to regulate under the CWA is limited by Congress's use of the term "navigable waters" in the CWA, and thus the Agencies lack authority to regulate waters untethered to that term.[70] Because the current interstate waters category can encompass bodies of water that are not connected to a TNW or the territorial seas (*e.g.*, a "non-navigable, non-relatively permanent lake straddling a State line"[71]), and because Congress did not treat interstate waters and navigable waters as two distinct categories, WAC supports the Agencies' proposal to eliminate "interstate waters" as a standalone WOTUS category.

WAC agrees with the Agencies' interpretation of the CWA's text, including their detailed recounting of the relevant history and how the language in federal water pollution control statutes has evolved over time.[72] In 1972, when Congress amended the Federal Water Pollution Control Act of 1948, it selected "navigable waters" as the operative term for the newly established regulatory programs under the Act and deliberately removed the definition of "interstate waters" from the statute.[73] As *Sackett* explained, though the "CWA's predecessor encompassed 'interstate or navigable waters,' . . . the CWA prohibits the discharge of pollutants *into only 'navigable waters*[.]'"[74] The Agencies correctly note that they must treat Congress's removal of "interstate waters" from the Act as intentional.[75]

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[68] 90 Fed. Reg. at 52,516.

[69] *See id.*

[70] *Id.*

[71] USEPA & USACE, Regulatory Impact Analysis for the Proposed Updated Definition of Waters of the United States Rule, at 13 (Nov. 2025) (hereinafter "RIA"), EPA-HQ-OW-2025-0322-0120, *available at* https://downloads.regulations.gov/EPA-HQ-OW-2025-0322-0120/content.pdf

[72] *See* 90 Fed. Reg. at 52,616-17.

[73] *Compare* Water Pollution Control Act, ch. 758, 62 Stat. 1155, 1156 (1948) (the pollution of "interstate waters" is a public nuisance subject to abatement), *and* Pub. L. No. 87-88, 75 Stat. 204, 208 (1961) (the pollution of "interstate or navigable waters" is subject to abatement), *with* 33 U.S.C. § 1362(7) (defining "navigable waters" as waters of the United States).

[74] *Sackett*, 598 U.S. at 661 (citations omitted).

[75] 90 Fed. Reg. at 52,516.

The Supreme Court has repeatedly interpreted navigability to be the crux of federal jurisdiction under the Act. For example, in *Rapanos,* the Court described navigability as the "central requirement" to jurisdiction,[76] and in *SWANCC,* it held that the statute's language invokes Congress's traditional authority over waters navigable in fact or susceptible of being made so.[77] The Court in *Sackett* effectively confirmed the holding in *Georgia v. Wheeler* that including interstate waters as an independent WOTUS category impermissibly reads "navigable" out of the statute.[78] While the CWA covers "more than traditional interstate navigable waters," WOTUS cannot be defined without reference to such waters.[79] A WOTUS is "a relatively permanent body of water connected to traditional interstate navigable waters."[80] Traditional interstate navigable waters are, in turn, interstate waters that are "either navigable in fact and used in commerce or readily susceptible to being used this way."[81] Prior regulatory definitions that categorically include all interstate waters that are neither navigable nor used in commerce violate the CWA.

The Agencies correctly recognize that, in light of the CWA's history, Section 303(a)'s reference to "interstate waters" does not support retaining "interstate waters" as a standalone WOTUS category.[82] Rather, Section 303(a)'s reference to interstate waters merely reflects Congress's intent that certain state water quality standards adopted prior to the 1972 amendments would remain in effect, regardless of whether those waters were subject to federal jurisdiction. In practice, under the pre-1972 regime, states had interpreted "interstate" waters to apply only to interstate *navigable* waters.[83] Indeed, as the Agencies note, the Supreme Court reinforced this interpretation of the pre-1972 regulatory regime in *EPA v. California.*[84] There, the Court noted that prior to the 1972 amendments, the Act "employed ambient water quality standard specifying the acceptable levels of pollution in a State's *interstate navigable waters* as the primary mechanism in its program for the control of water pollution."[85]

WAC also agrees with the Agencies' recognition that neither of the Supreme Court decisions in *Illinois v. City of Milwaukee* ("*City of Milwaukee I*")[86] or *City of Milwaukee v.*

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[76] *Rapanos,* 547 U.S. at 778 (Kennedy, J., concurring).

[77] 531 U.S. at 172.

[78] *See* 598 U.S. at 672; *see also Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1359 (S.D. Ga. 2019).

[79] *Sackett*, 598 U.S. at 672.

[80] *Id.* at 678.

[81] *Id.* at 659.

[82] 90 Fed. Reg. at 52,517; *see also* 33 U.S.C. § 1313(a)(1).

[83] *See, e.g.*, 118 Cong. Rec. 10240 (1972) (the amendment "expands the coverage of the law to intrastate, as well as interstate navigable waterways").

[84] *EPA v. California*, 426 U.S. 200, 202 (1976).

[85] *Id.* (emphasis added).

[86] *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

Illinois ("*City of Milwaukee II*")[87] support treating interstate waters as a standalone jurisdictional category.[88] Those cases addressed interstate water pollution generally and did not opine on whether "interstate waters" and "navigable waters" are distinct categories of jurisdictional waters under the CWA. Indeed, the water body at issue in both of those cases, Lake Michigan, is both an interstate *and* a navigable water. Thus, those decisions provide no support for treating all interstate features, regardless of navigability or permanence, as categorically jurisdictional under the Act.

Finally, the *Rapanos* plurality and *Sackett* foreclose treating interstate waters as "foundational waters" on the same footing as TNWs and the territorial seas. As discussed in Section IV.C, the *Rapanos* plurality tethered its relatively permanent standard to navigable waters. The *Rapanos* plurality emphasized that for a non-navigable water to be jurisdictional, it must be relatively permanent and connected to a "traditional interstate navigable water." *Sackett* reinforced that formulation, noting that Congress's use of the term 'navigable' means that WOTUS "principally refers to bodies of navigable water like rivers, lakes, and oceans."[89] *Sackett* thus makes clear that CWA coverage extends only to: (i) traditional interstate navigable waters; (ii) relatively permanent waters connected to TNWs; and (iii) wetlands with a continuous surface connection to TNWs—leaving no room for a separate, non-navigability-based "interstate waters" category.

Consistent with *Sackett's* interpretation of "waters" under the Act to mean "navigable waters" in the traditional sense, the Agencies have already removed "interstate wetlands" from the (a)(1) category.[90] The proposed elimination of the interstate waters category is the logical corollary: just as interstate wetlands are not jurisdictional solely because they cross state boundaries, non-navigable, non-relatively permanent lakes or ponds are not jurisdictional solely because they cross state boundaries. WAC thus supports the Agencies' proposal to eliminate "interstate waters" as an independent jurisdictional category, which would align the definition of WOTUS with the CWA's text and relevant history, adhere to the *Rapanos* plurality and *Sackett* decisions, and properly cabin federal jurisdiction to navigable-rooted waters, while preserving State and Tribal primacy over other waters.

C. Tributaries

The Agencies propose to define "tributary" to mean "a body of water with relatively permanent flow, and a bed and bank, that connects to a downstream [TNW] or the territorial seas either directly through one or more waters or features that convey relatively permanent flow."[91] The Agencies clarify that under the Proposed Rule, a tributary can connect through certain features, including natural (*e.g.,* debris piles, boulder fields, beaver dams) and artificial (*e.g.,*

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[87] *City of Milwaukee v. Illinois*, 451 U.S. 304 (1982).

[88] *See* 90 Fed. Reg. at 52,517.

[89] 598 U.S. at 672 (citing *Rapanos,* 547 U.S. at 734 (plurality)).

[90] 85 Fed. Reg. 61,964, 61,966 (Oct. 1, 2020).

[91] 90 Fed. Reg. at 52,521.

culverts, ditches, pipes, tunnels, pumps, tide gates, dams) even if such features are non-jurisdictional under the Proposed Rule, "so long as those features convey relatively permanent flow."[92] By contrast, "[f]eatures with non-relatively permanent flow" would "sever jurisdiction upstream under the [P]roposed [R]ule, including flow through non-relatively permanent reaches or streams or wetlands[.]"[93] The Agencies further explain that "lakes and ponds may be considered a tributary" if they meet the relatively permanent standard.[94]

WAC recommends that the Agencies simplify the regulations by combining the (a)(3) tributary category with the (a)(5) category for lakes and ponds. The combined (a)(3) category could state: "**Rivers, lakes, streams, and ponds that are relatively permanent, standing, or continuously flowing bodies of water and that connect to waters identified in paragraph (a)(1), either directly or through one or more waters or features that convey relatively permanent flow.**"

This revision would better reflect the *Rapanos* plurality's and *Sackett*'s interpretations of CWA, which emphasize that the term "waters" refers to "rivers, streams, and other hydrographic features more conventionally identifiable as waters."[95] *Sackett* explained 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 geographic features "described in ordinary parlance as 'oceans, rivers, and lakes.'"[96] *Sackett* 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."[97] Indeed, over the past several decades, the Court has repeatedly emphasized that Congress's use of the term "waters" in the CWA refers to "bodies of open water."[98] WAC recommends that the Agencies revise the regulatory text for this category to specifically refer to the sorts of water bodies Congress had in mind when it enacted the CWA.

Moreover, WAC agrees with the Agencies' proposal to require that water features have relatively permanent flow *and* connect to a downstream TNW either directly or through a feature that itself has relatively permanent flow. Requiring relatively permanent flow throughout the features that link to a TNW is the best reading of the statute, as interpreted by the *Rapanos*

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[92] *Id.* at 52,522.

[93] *Id.*

[94] *Id.*

[95] *Rapanos,* 547 U.S. at 734 (plurality) (citing *Riverside Bayview Homes, Inc.,* 474 U.S. at 13).

[96] 598 U.S. at 671 (quoting *Rapanos,* 547 U.S. at 739 (plurality)).

[97] *Id.* at 672-73.

[98] *Id.* at 672-73 (analyzing specific provisions of CWA's use of "waters" to refer to rivers, lakes, and oceans); *SWANCC,* 531 U.S. at 167 (describing statutory term "navigable waters" as "open water"); *Riverside Bayview Homes, Inc.,* 474 U.S. at 132 & n.8, 134 (referring to Corps' CWA jurisdiction over "open waters").

plurality and *Sackett* opinions.[99] Without such connection, upstream features, including those with permanent standing or flowing water are more appropriately characterized as isolated water bodies and thus, non-jurisdictional under *SWANCC.*[100] A non-navigable, relatively permanent water feature that is connected to a TNW only through a non-relatively permanent feature has no relationship to the federal government's commerce power over navigation and thus must be excluded from the definition of WOTUS. Consistent with the Congressional policy articulated in CWA section 101(b), such water features must be left to the states' primary responsibilities over land and water resources.[101]

Under WAC's recommended revision to the (a)(3) category, there is no longer a need for a definition of "tributary." Nonetheless, WAC recommends including language from the proposed definition of "tributary" in the preamble to the final rule, which provides helpful clarification on whether and when features that do not convey relatively permanent sever jurisdiction. The Agencies could also state that they expect most rivers and streams will have a bed and bank, but there is no need to codify that as a requirement in regulatory text. Under the *Rapanos* plurality and *Sackett* opinions, the key for determining jurisdiction is the presence of relatively permanent flow, not any particular physical characteristic.

1. Definition of Relatively Permanent

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."[102] The Agencies explain that "at least during the wet season" is intended to include "periods of predictable continuous surface hydrology[103] 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."[104] The Agencies also clarify that to satisfy the relatively permanent standard, standing or flowing surface water must be "continuous throughout the entirety of the wet season."[105]

WAC generally supports the Agencies' proposed definition of relatively permanent, as it conforms to the *Rapanos* plurality and *Sackett* opinions. As an initial matter, the Supreme Court clearly contemplated that the Agencies could further interpret the term "relatively permanent" by

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[99] *See Rapanos,* 547 U.S. 742 (plurality).

[100] *See* 531 U.S. at 171.

[101] *See* 33 U.S.C. § 1251(b); *see also Sackett,* 598 U.S. at 674 ("It is hard to see how the States' role in regulating water resources would remain 'primary' if the EPA had jurisdiction over anything defined by the presence of water.").

[102] 90 Fed. Reg. at 52,517.

[103] For consistency and simplicity, WAC recommends that the Agencies use "surface water," "surface water flow" or "standing or flowing surface water" instead of the phrase "surface hydrology" in the preamble.

[104] *Id.* at 52,517-18.

[105] *Id.* at 52,518.

explaining what "relatively" means, as the Court did not define that term with more precision and instead left open the possibility that the Agencies could assert jurisdiction over "streams, rivers, or lakes that might dry up in extraordinary circumstances" as well as "seasonal rivers" such as a "290-day, continuously flowing stream."[106] At the same time, the *Rapanos* plurality seemed to suggest that the requisite flow is closer to the perennial end of the flow spectrum, given that it repeatedly suggested that intermittent flows—in the colloquial, not the scientific sense—do not meet the relatively permanent standard:

- 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*."[107]

- "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."[108]

- "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."[109]

- "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.'"[110]

- "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."[111]

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

[107] *Id.* at 732-33 (emphasis added).

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

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

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

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

- "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."[112]

- "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."[113]

Because *Sackett* endorsed the *Rapanos* plurality's reading of the statute and the relatively permanent standard, the foregoing statements must be given considerable weight. The Agencies' proposed definition does that by including as WOTUS features only those features that flow throughout the wet season and by excluding features that have less predictable flow.

The Agencies' proposed wet season concept is also appropriately flexible because it establishes a clear test—when average monthly precipitation exceeds average monthly evapotranspiration—while also accounting for regional variation and precipitation normalcy, which in turn accounts for climactic variation over time. Moreover, the fact that it may be difficult for water features in certain regions such as the arid West to satisfy the relatively permanent definition does not call into question the defensibility of the Agencies' approach. In articulating the relatively permanent test, the *Rapanos* plurality explained that seasonal rivers with flow "during some months of the year," including a stream that flows continuously for 290-days, can qualify as WOTUS, but that a feature with merely intermittent and ephemeral flows, such as "ordinarily dry channels through which water occasionally or intermittently flows" would be excluded.[114] Thus, the *Rapanos* plurality's test, endorsed by *Sackett,* clearly excluded dry washes with only sporadic precipitation-driven flow such as those that exist in the arid West.

As the Agencies correctly recognize, certain water features may experience a delay or lag in exhibiting surface water in response to wet season precipitation such that flowing or standing surface water does not overlap exactly with the start and finish of the wet season.[115] For example, a water feature that has predictable, continuous flow year after year from melting snowpack may not exhibit surface water flow until several months after repeated snowfall creates a snowpack (*i.e.,* the wet season) because snowpack melt necessarily lags behind the accumulation of snow. In addition, certain streams experience delays in surface water flow during the transition from the dry season to the wet season where the water table does not rise to the ground surface until sometime after the beginning of the wet season. To accommodate for this lag time, WAC recommends that the Agencies clarify that the relatively permanent definition's temporal requirement, "at least during the wet season," is satisfied where a water feature has standing or flowing surface water for the same amount of time as the duration of the identified wet season and that flow need not occur throughout the exact months of the wet season. Such a standard would still be implementable, while recognizing that a water feature with predictable, annual

[112] *Id.* at 739.

[113] *Id.* at 737.

[114] 547 U.S. at 733 (plurality).

[115] 90 Fed. Reg. at 52,518.

season flow may not exhibit such flow until sometime after the start of the wet season. For example, the Agencies could revise the definition of "relatively permanent" to say something like "standing or continuously flowing year-round or **at least as long as the duration** of the wet season."

2. Implementation of Relatively Permanent Requirement

The Agencies solicit comment on possible approaches for implementing the "relatively permanent" definition. To determine whether a particular feature is relatively permanent, a landowner must (1) identify the wet season months; and (2) determine whether surface water is standing or continuously flowing for a period of time that is at least as long as the duration of the wet season.

With respect to the first step, landowners and regulators can use the Corps' Antecedent Precipitation Tool ("APT"), which in turn relies on metrics from the Web-based Water-Budget Interactive Modeling Program ("WebWIMP") to identify the relevant wet season. Indeed, the Agencies propose to rely on WebWIMP outputs reported in the APT "as a primary tool to help identify the wet season."[116] WAC agrees with the Agencies' proposal to focus on when average monthly precipitation exceeds average monthly evapotranspiration as the primary characteristic for identifying the wet season and to rely on the WebWIMP outputs reported in APT as the "primary tool" to identify the wet season.[117] Corps regulators have used APT/WebWIMP for years, and many consultants assisting the regulated community likewise have experience with this tool.[118] WAC further recommends that the Agencies clarify that the "wet season" concept in the Proposed Rule is not the same as the months when rainfall totals are the highest. Indeed, even in months with increased precipitation, evapotranspiration may be higher. For example, during the growing season and when temperatures are the highest, those months could be classified as dry season months according to WebWIMP metrics reported in the APT.

With respect to the second step in implementing the relatively permanent definition—determining the duration of the presence of surface water or flows—the Agencies correctly recognize that many landowners will be able to determine whether features on their property contain flow for the requisite amount of time (*i.e.,* equal to the length of the wet season) to satisfy the relatively permanent standard.[119] WAC agrees that direct observations of hydrology, including visual observations or through the use of tools (*e.g.*, stream gages, game cameras, or

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[116] 90 Fed. Reg. at 52,520.

[117] *Id*.

[118] *See* USACE, Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region (Version 2.0), at 103 (Sept. 2008), *available at* https://www.nwp.usace.army.mil/Portals/24/docs/regulatory/jurisdiction/Wetland_Delineation_Sup_Arid_West.pdf; *see also* USEPA & USACE, Implementing the Navigable Waters Protection Rule, at 5 (Jan. 23, 2020), *available at* https://19january2021snapshot.epa.gov/sites/static/files/2020-01/documents/nwpr_fact_sheet_-_implementation_tools.pdf.

[119] *Id.* at 52,525.

other equipment capable of providing real-time flow measurements or photographs), are the most reliable way to verify if a feature has relatively permanent flow.[120] However, when such observations and data are unavailable, WAC agrees that the Agencies should implement the relatively permanent standard consistent with the Agencies' proposed "weight of the evidence" approach by considering multiple indicators, data points, and sources of information.[121] To avoid potential conflicts over the sources of information, the Agencies should consider establishing a hierarchy of implementation tools, recognizing that certain sources of information are more up-to-date and reliable than others. To that end, the Agencies might consider providing detailed examples that illustrate the step-by-step analysis the Agencies will undertake and what data sources the Agencies will rely on under a weight of the evidence approach to determine whether a feature meets the relatively permanent definition.

The Agencies should exercise caution in using various databases or tools that were not designed for the purpose of determining whether a water feature satisfies the Agencies' proposed new definition of relatively permanent. To use one example, the Agencies suggest that regional streamflow duration assessment methods ("SDAMs") are available tools for determining flow duration.[122] SDAMs are regionalized, field-based methods that use hydrological and other biological indicators to classify streamflow as ephemeral, intermittent, or perennial.[123] However, as the Agencies themselves recognize, SDAM flow classifications are not synonymous with the term "relatively permanent" as used in the Proposed Rule and interpreted by the *Rapanos* plurality and *Sackett* decisions.[124] For that reason alone, SDAM classifications are a poor fit for implementing the proposed definition of relatively permanent. Moreover, even if such classifications *might* be useful in implementing the relatively permanent definition—*e.g.*, relying on an SDAM classification as ephemeral to conclude that a feature does not meet the relatively permanent definition—SDAM classifications may not be reliable. A recent analysis of several features in Texas illustrates the potential hazard of relying on SDAMs.[125] All five water features in that analysis were classified as ephemeral by *both* a professional environmental consultant and the local Corps District; yet, the Great Plains (for 1 feature) and Southeast SDAMs (for the remaining 4 features) classified each feature as either "Intermittent" or "Less than Perennial."[126]

Similarly, the Proposed Rule preamble refers to various other tools and datasets, including the USGS National Hydrography Dataset ("NHD") and the National Wetlands Inventory data in discussing implementation of the relatively permanent standard as to tributaries. But as the "Regulatory Impact Analysis for the Proposed *Updated Definition of Waters of the United States* Rule" (the "RIA") explains in detail, the Agencies have consistently

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[120] *See id.*

[121] *See id.* at 52,526.

[122] 90 Fed. Reg. at 52,521.

[123] *Id.* at 52,525-26 & n.73.

[124] *See id.*

[125] *See* Memorandum from Integrated Environmental Solutions to Waters Advocacy Coalition (Jan. 4, 2026) (attached as Exhibit 9).

[126] *See id.* at 2-3.

maintained that neither of these datasets was designed to be used to determine the scope of CWA jurisdiction, and neither is consistent with the new definition of "relatively permanent."[127] Moreover, both datasets suffer from errors of omission and commission, as the Agencies previously documented in a detailed memorandum accompanying the 2020 Navigable Waters Protection Rule ("NWPR").[128] WAC agrees that it would be inappropriate for the Agencies to rely on those datasets to differentiate between features that have relatively permanent flow and features that lack relatively permanent flow, though they may be relevant and useful to determining flow paths and whether features connect downstream traditional navigable waters.

Finally, as the Agencies continue to explore available methods or tools to assist with implementation or refinement and revisions to existing methods or tools, WAC urges that the Agencies do so in a transparent manner with public participation and input. Where assertions of jurisdiction are heavily informed by tools that do not remain static, there is a risk that tools can be changed or even manipulated to produce desired outcomes. Moreover, where there is a wide variety of data sources—*e.g.*, different agencies relying on different concepts of what constitutes the wet season—there is a risk that regulators' and stakeholders' analyses and conclusions will be inconsistent and unpredictable, depending on the data sources and methods of calculation. How the Agencies will implement the new definitions in the Proposed Rule is every bit as important as the definitions themselves. Consistency, predictability, and transparency are all critical and thus, robust stakeholder participation is critical to ensuring both scientific soundness and alignment with the legal underpinnings of the new definitions.

D. Adjacent Wetlands

1. Definition of Continuous Surface Connection

The Agencies do not propose to revise the definition of "adjacent," which means "continuous surface connection."[129] The Agencies propose, however, 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."[130] The Agencies further explain that they are not changing their longstanding regulatory definition of wetland, but *are* newly clarifying that only the portions of a wetland that meet the new definition of continuous surface connection would be jurisdictional, regardless of the full delineated scope of the wetland. *Id.* WAC generally supports the Agencies' proposed definition of "continuous surface connection," as it is consistent with *Sackett* and the *Rapanos* plurality opinions.

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[127] RIA at 23 & n.14.

[128] *See* Limitations of the National Hydrography Dataset at High Resolution and the National Wetlands Inventory and their use for Determining the Scope of Waters Subject to Clean Water Act Jurisdiction, at 2, EPA-HQ-OW-2018-0149, *available at* https://www.regulations.gov/document/EPA-HQ-OW-2018-0149-11585.

[129] 90 Fed. Reg. at 52,527 (citing 33 C.F.R. § 328.3(c)(2); 40 C.F.R. § 120.2(c)(2)).

[130] *Id.*

Sackett clarified that WOTUS extends only to those wetlands that are "indistinguishably part of a body of water that itself constitutes" WOTUS.[131] The Court "agree[d] with [the *Rapanos* plurality's] formulation of when wetlands are part of the waters of the United States":[132] those wetlands that 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."[133] Thus, *Sackett* established a two-prong test for asserting jurisdiction over a wetland and required that the wetland (1) be adjacent to a body of water that constitutes "waters of the United States"; and (2) have a continuous surface connection with that water, making it "difficult to determine where the 'water' ends and the 'wetland' begins."[134] The Court recognized that temporary interruptions in surface connection may occur, such as during periods of drought or low tide, thus signaling that the connection must be a surface water connection.[135] Importantly, the *Rapanos* plurality held that "adjacent" means "physically abutting," and used "abutting" and "adjacent" interchangeably.[136]

Sackett acknowledged that this indistinguishability requirement "is the thrust of observations in decisions going all the way back to *Riverside Bayview.*"[137] In that case, the Court deferred to the Corps' regulation of wetlands "actually abut[ting] on a navigable waterway," while recognizing the inherent difficulty of defining precise bounds to regulable waters.[138] The *Rapanos* plurality subsequently clarified that the Court's holding in *Riverside Bayview* "rested upon the inherent ambiguity in defining where waters end and abutting ('adjacent') wetlands begin[.]"[139] Finally, *Sackett* adopted the *Rapanos* plurality's formulation by holding that "the CWA extends to only those wetlands that are as a practical matter indistinguishable from waters of the United States."[140]

WAC agrees with the Agencies' determination that abutment alone does not satisfy *Sackett's* requirement that a wetland is "indistinguishable" from the adjacent WOTUS such that it is difficult to discern where one ends and the other begins.[141] Rather, the wetland must have a *surface water* connection with the abutting WOTUS either year round or at least as long as the duration of the wet season. WAC agrees that *surface water*, as opposed to merely saturated soils or an elevated groundwater table, is what makes wetlands as a practical matter indistinguishable

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[131] 598 U.S. at 676.

[132] *Sackett,* 598 U.S. at 678 (citing *Rapanos,* 547 U.S. at 742, 755 (plurality)).

[133] *Rapanos,* 547 U.S. at 742 (plurality).

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

[135] *Id.* at 678.

[136] *Rapanos,* 547 U.S. at 748 (plurality).

[137] 598 U.S. at 677.

[138] 474 U.S. at 135.

[139] *Rapanos,* 547 U.S. at 741-42 (plurality).

[140] 598 U.S. at 678.

[141] *See* 90 Fed. Reg. at 52,529.

from the adjacent WOTUS.[142] A wetland must have water on its surface for there be no clear demarcation between waters and wetlands. Indeed, the *Sackett* majority's recognition that "temporary interruptions" in surface connection may occur due to "low tides or dry spells" without rendering a wetland non-jurisdictional only makes sense if the requisite surface connection is a water connection.[143]

Consistent with WAC's comments above on the relatively permanent definition, the Agencies should consider revising the definition of "continuous surface connection" to reflect that the presence of surface water need not neatly align with the start and end of the wet season, because surface water may lag the start of the wet season for a period of time. So long as the surface water is driven by the wet season and would occur predictably, year after year, for an amount of time equal to the duration of the wet season, that would satisfy the requirement for a continuous surface connection.

Lower courts have adhered to and enforced *Sackett's* indistinguishability requirement. For example, the Eleventh Circuit has recognized that under *Sackett,* a wetland is jurisdictional only if it has a "continuous surface connection to bodies that are waters of the United States" such that the wetland is "indistinguishable from those waters."[144] That court affirmed a dismissal of a citizen suit alleging CWA violations because environmental petitioners failed to allege sufficient facts to demonstrate that the at-issue wetland "had a continuous surface connection to a water of the United States under *Sackett*."[145] In so holding, the Eleventh Circuit noted that the wetland "was separated from [a] salt marsh and creek by sections of upland and [a] road" such that "[t]he only possible surface connection . . . would flow through pipes and culverts."[146] In another case, a district court confirmed that "'continuous surface connection' means a surface water connection" and explained that any interpretation to the contrary would render the Court's assertions in *Sackett* and the *Rapanos* plurality as "hav[ing] no practical meaning."[147]

WAC supports the Agencies' interpretation in the March 2025 Continuous Surface Connection Guidance that a wetland only has a "continuous surface connection" to a WOTUS, and thus is jurisdictional, if that wetland "directly abuts" the WOTUS and is "not separated" from the WOTUS "by uplands, a berm, dike, or similar feature."[148] Indeed, as the Agencies explained, that is the interpretation that the Agencies adopted when they first interpreted

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[142] *See id.* at 52,531 ("Wetlands characterized as having less than surface water at least during the wet season, including wetlands with only saturated soil conditions supported by groundwater, would not be considered adjacent under this proposal.").

[143] *See* 598 U.S. at 678-79.

[144] *Glynn Env't Coal., Inc. v. Sea Island Acquisition, LLC,* 146 F.4th 1080, 1090-91 (11th Cir. 2025) (citing *Sackett,* 598 U.S. at 684).

[145] *Id.* at 1091.

[146] *Id.* at 1090.

[147] *Sharfi,* 2024 WL 5244351, at *1.

[148] 2025 Continuous Surface Connection Guidance, at 5.

Rapanos in their 2008 Guidance.[149] That interpretation aligns with *Sackett's* assertion that "a barrier separating a wetland from a [WOTUS] would ordinarily remove that wetland from jurisdiction," unless such barrier was unlawfully constructed specifically to remove CWA jurisdiction.[150] It also aligns with the *Rapanos* plurality's interpretation of "adjacent" as meaning "physically abutting."[151]

Relatedly, WAC agrees with the Agencies' assertion in the 2025 Continuous Surface Connection Guidance that discrete features such as pipes and ditches cannot satisfy the continuous surface connection requirement.[152] Like man-made dikes or barriers and natural barriers, discrete features make it easy to determine as a practical matter where a WOTUS ends and the wetland begins. This is true even if such discrete features carry relatively permanent flow. Such barriers and features constitute "clear demarcation[s] between 'waters' and wetlands" such that the wetland is not indistinguishably part of a jurisdictional water and thus is not a "water of the United States in its own right."[153]

WAC urges the Agencies to further clarify that relying on discrete features to classify two distinct wetlands separated by a barrier as one wetland is also contrary to *Sackett.* Under *Sackett,* a road that separates a relatively permanent water and a wetland plainly severs jurisdiction,[154] regardless of whether there is a culvert carrying relatively permanent flow[155] that links the wetland to the adjacent WOTUS. That application of the continuous surface connection requirement does not change even where a second, distinct wetland sits on the other side of the road between the road and the WOTUS. The road constitutes a clear demarcation between the wetland and the WOTUS and eliminates any boundary drawing problem between the wetland and the WOTUS. Thus, the Agencies' treatment of two wetlands as one improperly rewrites the *Sackett* test to allow for jurisdiction over not just wetlands that have a continuous surface connection such that they are practically indistinguishable from the adjacent WOTUS, but also any *additional* wetlands that the Agencies can establish have a hydrologic connection—including through a discrete feature such as a culvert—to the jurisdictional wetland. It is

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[149] 2008 *Rapanos* Guidance, at 7 n.29 (Dec. 2, 2008) *available at* https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf; *see also* USACE JD Form Instruction Guidebook, at 6 (May 30, 2007), *available at* https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll11/id/2310; 88 Fed. Reg. 3090 (Jan. 18, 2023) ("[W]etlands meet the continuous surface connection requirement if they physically abut, or touch, a [requisite jurisdictional water].").

[150] 598 U.S. at 678 n.16.

[151] *Rapanos,* 547 U.S. at 742, 747-48 (plurality).

[152] *See* 2025 Continuous Surface Connection Guidance, at 5 n.8.

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

[154] *See id.* at 678 n.16.

[155] *See* 90 Fed. Reg. at 52,529 (soliciting comment on approach where culvert carrying relatively permanent water and connecting wetland portions on either side of a road do not inherently sever jurisdiction).

irrelevant whether the culvert carries relatively permanent flow. Given *Sackett's* emphasis on due process, predictability, clear demarcations, and its finding that barriers sever jurisdiction, the Agencies cannot exercise jurisdiction via a chain of wetlands that are separated by clear barriers such as a road.

Finally, WAC agrees with the Agencies' proposal to modify their current approach to mosaic wetlands such that the Agencies will delineate wetlands within a mosaic individually rather than treating those wetlands as "one wetland" for jurisdictional purposes. 90 Fed. Reg. at 52529. The Proposed Rule correctly states that "only the portion of a delineated wetland in a wetland mosaic that meets the definition of continuous surface connection" would be jurisdictional. *Id.*

2. Implementation of Continuous Surface Connection Requirement

The Agencies solicit comment on all aspects of implementation of the proposed definition of "continuous surface connection" as it relates to wetlands, including the availability and efficacy of tools and resources to determine whether an adjacent wetland meets the definition. The determination of wet season length should be the same for wetlands as it is for streams, rivers, lakes, and ponds, and WAC supports use of the APT/WebWIMP as the primary tool for determining wet season length for all of the reasons set forth above in Section IV.C.2. Similarly, as discussed above, WAC recommends that the Agencies consider establishing a hierarchy of tools and provide detailed insights as to how the Agencies might implement a weight-of-the-evidence approach to continuous surface connection, including what specific tools they might use.

The Agencies describe in detail how they are using a modified version of National Wetlands Inventory ("NWI") water regime modifiers—specifically, semipermanently flooded, intermittently exposed, and permanently flooded—to inform implementation of the continuous surface water connection requirement for wetlands. But as the Agencies recognize, NWI water regime modifiers are based on the "growing season," which is *not* the same as the "wet season" concept in the Proposed Rule. The former is "dependent on temperature and budding of vegetation, while wet season, as implemented in the [P]roposed [R]ule, would be driven by precipitation and evapotranspiration."[156] Equally problematic are the limitations in the NWI dataset, as detailed in the RIA and the Agencies' own critique of NWI in 2020. For these reasons, WAC urges the Agencies to clarify that NWI water regime modifiers cannot reliably be used to determine whether a wetland meets the continuous surface connection definition.

E. Lakes/Ponds

The Agencies propose to delete the term "intrastate" from the text of the (a)(5) category to ensure that this category includes both interstate and intrastate lakes and ponds not identified in paragraphs (a)(1) through (4) that are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to a TNW, the territorial seas, or a category

[156] 90 Fed. Reg. at 52,531.

(a)(3) tributary.[157] As discussed above in Section IV.C, WAC recommends that the Agencies eliminate the existing (a)(5) standalone category and revise the (a)(3) category to include lakes and ponds. The (a)(5) category is unnecessary, and it would be fully consistent with *Rapanos* and *Sackett* to instead assess lakes and ponds for jurisdiction in the same way as streams and rivers—namely, streams, rivers, lakes, and ponds would be jurisdictional only if they are relatively permanent standing or continuously flowing bodies of water that connect to an (a)(1) water either directly or through a feature that conveys relatively permanent flow. Moreover, because non-wetland waters such as lakes and ponds "do not implicate the boundary-drawing problem" discussed in *Riverside Bayview*, there is no need to evaluate whether they meet the continuous surface connection requirement applicable to wetlands.[158]

V. <u>Exclusions</u>

A. Waste Treatment Systems

The Agencies propose to retain the exclusion for waste treatment systems and to codify a definition of "waste treatment system" to provide more clarity on which waters and features are part of an excluded waste treatment system and because codifying a definition in the regulatory text is preferable to relying on preamble guidance.[159] Importantly, the Agencies do not intend for their proposed definition "to change the longstanding approach to implementing the waste treatment exclusion but rather seek to include additional clarity in the regulation text" and thus, the Agencies would continue to recognize that "systems that are treating water to meet the requirements of the Clean Water Act" fall within the exclusion.[160] The proposed definition would thus continue to encompass both waste treatment systems constructed in accordance with the requirements of the Act and waste treatment systems constructed prior to the CWA's enactment in 1972. *Id.*

WAC appreciates the Agencies' attempts to provide more certainty and clarity. WAC agrees that a definition in the regulatory text is clearer than relying solely on preamble guidance, and the definition is important to underscore, for instance, that all components that make up a treatment system are excluded and that treatment can be active or passive. WAC generally supports the proposed definition of waste treatment system, though the Coalition recommends two revisions to the definition:

> *Waste treatment system* means all components of a waste treatment system ~~designed to meet the requirements of the Clean Water Act~~, including lagoons and treatment ponds (such as settling or cooling ponds), designed **<u>or used</u>** to either convey or retain, concentrate, settle, reduce, or remove pollutants, either actively

[157] *Id*. at 52,533.

[158] *Rapanos,* 547 U.S. at 742 (plurality).

[159] *See* 90 Fed. Reg. at 52,534-35.

[160] *See id.* at 52,535.

> or passively, from wastewater prior to discharge (or eliminating any such discharge).

Id.

WAC recommends that the Agencies delete the phrase "designed to meet the requirements of the Clean Water Act," as it causes needless confusion over whether features that were constructed prior to 1972 could ever meet the requirement that they be "designed" with CWA compliance in mind. Given that the preamble states that the Agencies would continue recognizing that waste treatment systems that are treating water to meet the requirements of the CWA are excluded regardless of the date of construction, WAC does not believe the Agencies intend to change the scope of the exclusion. To avoid any confusion over the excluded status of pre-1972 systems, WAC recommends deletion of that phrase. WAC also recommends that the Agencies clarify that waste treatment systems can be excluded if they were either designed *or used* to serve waste treatment functions. This minor but important change is necessary to account for the practical reality that individual waste treatment system components can be repurposed or otherwise change over the life of a facility or operation. The applicability of the exclusion to any given waste treatment system component should not depend on the original purpose for which the component was designed, which may not be static. Rather, the exclusion should also encompass instances where the components of a waste treatment system change over time.

B. Prior Converted Cropland

The Agencies propose to continue excluding prior converted cropland ("PCC") from the definition of WOTUS and to codify a definition of PCC in proposed paragraph (c)(7) that is identical to the definition of PCC in the NWPR.[161] Among other things, that definition clarifies that an area is no longer considered PCC for CWA purposes when the "cropland is abandoned (*i.e.,* the cropland has not been used for or in support of agricultural purposes for a period of greater than five years) *and* the land has reverted to wetlands."[162] The Proposed Rule also makes clear that the Agencies will recognize United States Department of Agriculture ("USDA") designations, but where such designations are not available, a landowner may seek a PCC determination for CWA purposes from either the USDA or the Agencies.[163] The Agencies importantly clarify that a cropland that loses PCC status because it has been abandoned and has reverted to wetlands is not automatically jurisdictional.[164] Rather, the wetland must have a continuous surface connection to a jurisdictional water to itself be jurisdictional.[165]

WAC supports the Agencies' continued exclusion of PCC and the proposed definition of PCC, because it ensures consistency with the original 1993 rulemaking that first codified the

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[161] 90 Fed. Reg. at 52,535.

[162] *Id.* at 52,536.

[163] *Id.* at 52,537.

[164] *Id.*

[165] *Id.*

PCC exclusion ("1993 Rule").[166] Although prior to the NWPR, the term "prior converted cropland" was not defined in the regulatory text, the preamble to the 1993 Rule explained that PCC are "areas that, prior to December 23, 1985, were drained or otherwise manipulated for the purpose, or having the effect, of making production of a commodity crop possible [and that are] inundated for no more than 14 consecutive days during the growing season[.]"[167] This exclusion reflects the recognition that PCC generally have been subject to such extensive modification and degradation as a result of human activity that the resulting "cropped conditions" constitute the normal conditions for such lands.[168] The 1993 Rule preamble clarified that PCC do not lose their status merely because the owner changes use.[169] Thus, the Agencies intended that even if the PCC are used for a non-agricultural use, they remain excluded from the definition of WOTUS. That interpretation was upheld in *United States v. Hallmark Construction Co.*[170] and in *New Hope Power Co. v. U.S. Army Corps of Engineers.*[171] The 1993 Rule preamble instead made clear that the critical inquiry for determining whether a PCC loses its status is whether wetland conditions (as determined using the Corps' 1987 Wetlands Delineation Manual) have returned to the area.[172]

Notably, when the 1993 Rule was published, the abandonment principle was consistent with USDA's implementation of the Food Security Act of 1985. However, three years later, Congress enacted the 1996 Farm Bill and modified the abandonment principle to incorporate a "change in use" policy governing how the USDA may make a PCC eligibility determination for purposes of the conservation compliance programs that USDA administers.[173] The 1996 Farm Bill did not affect how EPA and the Corps make PCC determinations for CWA purposes.[174] Accordingly, the Agencies' incorporation of the "change in use" policy into the CWA context in the 2023 Rule was ill-advised.

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[166] 58 Fed. Reg. 45,008, 45,033 (Aug. 25, 1993).

[167] *Id.* at 45,031.

[168] *See id.* at 45,032.

[169] *See id.* at 45,033-34.

[170] *United States v. Hallmark Const. Co*., 30 F. Supp. 2d 1033, 1035, 1040 (N.D. Ill. 1998)

[171] *New Hope Power Co. v. U.S. Army Corps of Eng'rs*, 746 F. Supp. 2d 1272 (S.D. Fla. 2010).

[172] 58 Fed. Reg. at 45,034.

[173] *See* Pub. L. No. 104-127, 110 Stat. 888, 988 (1996).

[174] *See* H.R. Conf. Rep. No. 104-494, at 380 (1996), *reprinted in* 1996 U.S.C.C.A.N. 683, 745 (clarifying "the amendments to abandonment provisions under swampbuster should not supersede the wetland protection authorities and responsibilities" of the Agencies under the CWA). Similarly, when USDA amended its regulations following the 1996 Farm Bill, it specified that they "do[] not affect the obligations of any person under other Federal statutes, or the legal authorities of any other Federal agency including, for example, EPA's authority to determine the geographic scope of Clean Water Act jurisdiction." *See* 61 Fed. Reg. 47,019, 47,022 (Sept. 6, 1996).

WAC agrees with the Agencies' proposal to return to the abandonment principle articulated in the 1993 Rule's preamble, specifically that a PCC is considered abandoned "if it is not used for, or in support of agricultural purposes at least once in the immediately preceding five years[175] *and* has reverted to wetlands." WAC also appreciates the Agencies' inclusion in the preamble of a non-exhaustive list of agricultural purposes.[176]

Importantly, WAC agrees with the Agencies' clarification that under the Proposed Rule, a cropland that loses PCC designation does not automatically become jurisdictional; rather, the cropland must meet the requirements for a jurisdictional adjacent wetland (*i.e.,* abut and have a continuous surface connection to a WOTUS) to be itself a WOTUS.[177] This clarification adheres to the Court's holding in *Sackett* that the Act extends only to wetlands that are indistinguishably part of a body of water that itself constitutes WOTUS.[178]

WAC also supports the Agencies' approach to the PCC exclusion whereby a site can be a PCC regardless of whether there is a prior PCC determination from either USDA or the Corps. Because USDA does not provide PCC determinations unless a farmer is seeking benefits covered under the wetland conservation provisions, the 2023 definition of PCC was too restrictive in limiting the PCC exclusion to areas that are designated as PCC by the USDA. By contrast, the approach in the Proposed Rule appropriately recognizes that PCC determinations for CWA purposes should not depend on USDA actions, and EPA has the final authority to determine PCC status, consistent with longstanding CWA policy. This approach will alleviate unnecessary burden placed on USDA to process requests for PCC designations that are not required for Food Security Act purposes.[179]

C. Ditches

The Agencies propose to define the term ditch to mean "a constructed or excavated channel used to convey water."[180] Under the Proposed Rule, non-navigable ditches (including roadside ditches) that are constructed or excavated entirely in dry land are not WOTUS, even if those ditches have relatively permanent flow and connect to a jurisdictional water.[181]

WAC supports the Agencies' proposal to retain a standalone exclusion for ditches and their efforts to provide increased clarity with respect to the regulation of ditches. The jurisdictional status of ditches is one of the most important issues for WAC members with respect to the reach of federal jurisdiction over WOTUS. Ditches long pre-date the CWA's enactment, and they are prevalent in every type of landscape across the country. Every day,

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[175] 58 Fed. Reg. 45,008, 45,031 (Aug. 25, 1993).

[176] 90 Fed. Reg. at 52,537.

[177] *Id.* at 52,536

[178] 598 U.S. at 676.

[179] 90 Fed. Reg. at 52,536.

[180] *Id.* at 52,538-39.

[181] *Id.* at 52,539.

WAC members build, maintain, and depend on hundreds of thousands of miles of ditches as part of the construction, operation, and maintenance of homes, electric generation, transmission, and distribution facilities, railroads and highways, agricultural irrigation and drainage, mines, and pipelines, as well as to support other activities nationwide. Ditches are critically important to WAC members because they ensure that stormwater is properly diverted away from facilities, land, and activities where the accumulation of water would otherwise interfere with land use; prevent flooding in both rural and urban areas; and facilitate the collection and conveyance of excess water while reducing erosion and transport of pollutants that would otherwise occur with surface runoff.

Historically, the Agencies have excluded non-tidal ditches from the definition of "waters of the United States," though the Agencies gradually expanded their jurisdictional reach over ditches beginning in the 1980s. For instance, the Corps' 1975 regulations broadly stated that "[d]rainage and irrigation ditches have been excluded" from the definition.[182] Two years later, the revised regulations more precisely stated that "manmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States under this definition."[183] The preamble to the 1977 rule further clarified that "nontidal drainage and irrigation ditches *that feed into navigable waters* will not be considered 'waters of the United States' under this definition."[184] To the extent ditches cause water quality problems, the Corps appropriately concluded they "will be handled under other programs of the [CWA], including Section 208 and 402."[185]

In the preamble to the 1986 regulations, the Corps began to soften on its historical position regarding the exclusion of ditches and stated that although it "generally do[es] not consider [drainage and irrigation ditches excavated on dry land] to be 'waters of the United States,'" it would reserve authority to claim jurisdiction on a "case-by-case" basis.[186] Subsequently, in 2000, the Corps indicated that "ditches constructed entirely in upland areas" are not considered "waters of the United States," but nontidal ditches *would* be considered "waters of the United States if they extend the [ordinary high water mark] of an existing water of the United States."[187] This gradual expansion of federal regulation over ditches as WOTUS occurred without any Congressional authorization.

WAC thus supports the Agencies' proposed ditch exclusion as it reverses the Agencies' decades-long pattern of expanding jurisdiction over ditches and more appropriately reflects the Agencies' 1977 and 1986 approaches by limiting jurisdiction over ditches to those ditches that were excavated or constructed in tributaries, relocate a tributary, or were constructed or excavated in wetlands or other aquatic resources. This approach is consistent with *Sackett,* which

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[182] *See* 40 Fed. Reg. 31,320, 31,321 (July 25, 1975).

[183] 42 Fed. Reg. 37,122, 37,144 (July 19, 1977).

[184] *Id.* at 37,127 (emphasis added).

[185] *Id.*

[186] 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986).

[187] 65 Fed. Reg. 12,818, 12,823 (Mar. 9, 2000).

reinforced that WOTUS generally only includes bodies of waters "forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes."[188]

The regulation of ditches as WOTUS is not necessary to ensure the protection of such features or connected water bodies because any discharges from ditches to a WOTUS can still be regulated under CWA Section 402 as discharges from a point source. Indeed, the *Rapanos* plurality noted that the Act "treats 'waters' separately from 'ditches, channels, tunnels, and conduits,'" and explained that "[t]he definition of 'discharge' would make little sense" if point sources (including ditches) and "navigable waters" "were significantly overlapping."[189] Thus, the Agencies' proposed exclusion for ditches aligns with the *Rapanos* plurality's clear understanding that ditches generally are distinct from WOTUS. Equally important, the Agencies' proposed ditch exclusion would appropriately limit federal jurisdiction over ditches, thereby restoring primary responsibility over land use and water resources to state and local authorities.[190]

Because the proposed exclusion for ditches requires an inquiry as to whether ditches were "constructed" or "excavated" in dry land, the proposed definition would require landowners and regulators to consider the historical conditions of the area at the time the ditch was constructed. Many ditches, such as most railroad ditches, were constructed well before the CWA and well before tools were readily available that would help demonstrate the historic hydrologic conditions. The Agencies state that the burden of proof will be on the Agencies to determine the historic status of a ditch's construction, and "[w]here the [A]gencies cannot satisfy this burden, the ditch at issue would be considered non-jurisdictional."[191] WAC agrees that the burden of proof should be on the Agencies to show that a ditch is WOTUS, and we offer recommendations relevant to the burden of proof below in Section VI of these comments.

Finally, WAC recommends that the Agencies provide additional clarity on the meaning of "dry land," given that the Agencies have sometimes used the term "uplands" when promulgating exclusions in the past. It is WAC's understanding that the Agencies believe the two terms are interchangeable. For example, in the NWPR, the Agencies discussed their "longstanding, historic position that non-tidal ditches excavated in upland (***and historically described as 'dry land'***) are not jurisdictional."[192] Similarly, in 2023, the Agencies explained that while they "consistently use the phrase 'dry land' in the regulatory text to provide clarity to the public, this preamble and documents supporting this rule use the phrase 'dry land' and 'upland' interchangeably."[193] The Agencies also noted in the preamble to the 2023 Rule that "the pre-2015 regulatory regime used the phrases 'dry land' and 'upland' interchangeably in their

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[188] 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739 (plurality)) (internal quotation marks and citations omitted).

[189] *Rapanos,* 547 U.S. at 736 n.7 (plurality).

[190] *See* 33 U.S.C. § 1251(b); *see also Hess v. Port Auth. Trans-Hudson Corp.,* 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments.").

[191] 90 Fed. Reg. at 52,541.

[192] 85 Fed. Reg. at 22,297 (emphasis added).

[193] 88 Fed. Reg. 3,004, 3,111 n.119 (Jan. 18, 2023).

description of features that the agencies considered to be generally non-jurisdictional."[194] To add certainty, WAC recommends that the Agencies consider defining "dry land" in the final rule to mean "**any land area that under normal circumstances does not satisfy all three wetland factors (*i.e.*, hydrology, hydrophytic vegetation, hydric soils) and does not lie below the ordinary high water mark or the high tide line of a jurisdictional water**." This definition would ensure that ditches are still eligible for the exclusion even if they were constructed on land where one or two wetland factors are present, but where that land is not actually a wetland. WAC believes that is consistent with the Agencies' longstanding position on what constitutes "dry land" or "upland."

D. Groundwater

The Agencies propose to exclude "groundwater, including groundwater drained through subsurface drainage systems," from the definition of WOTUS. 90 Fed. Reg. at 52541. As the Agencies explain in the Proposed Rule's preamble, they have "never interpreted [WOTUS] to include groundwater and would continue that practice through this proposed rule by explicitly excluding groundwater." *Id.* WAC supports the Agencies' proposal to expressly exclude groundwater from the definition of WOTUS, which is consistent with the CWA's text, agency practice, and case law finding groundwater is not WOTUS. However, as WAC explained in its comments on the 2019 and 2014 Proposed Rules, there is significant confusion regarding the distinction between groundwater and "shallow subsurface hydrological connections."[195]

To provide clarity on the applicability of the groundwater exclusion, WAC recommends that the Agencies revise the language in proposed paragraph (b)(9) to state "groundwater, including **diffuse or shallow subsurface flow and** groundwater drained through subsurface drainage systems."

E. Stormwater Control Features

The Agencies have not proposed to codify an exclusion for stormwater control features, though they welcome feedback on whether to include further exclusions.[196] WAC recommends that the Agencies add an exclusion for "**Stormwater control features constructed or excavated in dry land to convey, treat, infiltrate, or store stormwater runoff.**" This exclusion would be consistent with exclusions that the Agencies promulgated in both the 2015 rule and the NWPR.[197] As the Agencies have previously recognized, "stormwater management systems can address both water quantity and quality concerns," and an exclusion is important "to avoid disincentives to this environmentally beneficial trend in stormwater management practices."[198] Like the proposed ditch exclusion, the stormwater control features exclusion would

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[194] *Id.*

[195] *See* WAC 2019 Comments at 24 (attached as Exhibit 3); WAC 2014 Comments at 63 (attached as Exhibit 6).

[196] 90 Fed. Reg. at 51,514.

[197] *See* 80 Fed. Reg. 37,054, 37,105 (June 29, 2025); *see also* 85 Fed. Reg. at 22,338.

[198] *See* 80 Fed. Reg. at 37,100.

be premised on construction or excavation in dry land and thus, WAC recommends that the Agencies similarly clarify that they bear the burden of proving that a stormwater control feature was constructed or excavated in a tributary or other aquatic resource.

VI. Burden of Proof

The preamble to the Proposed Rule states that "[w]hen preparing an approved jurisdictional determination, . . . the [A]gencies bear the burden of proof in demonstrating that an aquatic resource meets the requirements under the [P]roposed [R]ule to be jurisdictional or excluded."[199] Thus, "if the [A]gencies do not have adequate information to demonstrate that a water meets the jurisdictional standards to be a 'water of the United States,' the [A]gencies would find such a water to be non-jurisdictional."[200] Regarding the ditch exclusion in particular, the Agencies further clarify that "the burden of proof lies with the [A]gencies to demonstrate that a ditch serves to relocate a tributary or was constructed or excavated in a tributary or other aquatic resources" and that "the ditch at issue would be considered nonjurisdictional under the [P]roposed [R]ule" if the agencies cannot meet this burden.[201] In evaluating the historical status of ditches, the [A]gencies commit to using the "most accurate and reliable resources" and note that multiple sources of information will typically be needed, *e.g.*, historic and current topographic maps and aerial photographs, Tribal, State, and local records and surface water management plans, agricultural records, street maintenance data, etc.[202]

WAC agrees that the Agencies should bear the burden of proof in demonstrating that a particular water resource is jurisdictional under *any* of the categories of WOTUS. WAC further agrees that when the water resource at issue is a ditch, the Agencies bear the burden of proving that the ditch is jurisdictional, *e.g.*, because it relocates a tributary or was constructed or excavated in a tributary. As the Agencies acknowledge, this approach to the burden of proof is consistent with the approach in the NWPR.[203] Moreover, it is appropriate to place the burden on the Agencies to establish that a ditch is jurisdictional given that "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.'"[204] Again, ditches typically are not the sorts of features "described in ordinary parlance as 'streams, oceans, rivers, and lakes.'"[205]

To ensure that placing the burden of proof on the Agencies to establish jurisdiction will not unduly delay decision-making and leave landowners in regulatory limbo, WAC recommends that the Agencies provide regulatory guardrails for how this might play out in the field. WAC

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[199] 90 Fed. Reg. at 52,515.

[200] *Id.*

[201] *Id.* at 52,541.

[202] *See id.* at 52,540.

[203] *Id.* (citing 85 Fed. Reg. at 22,299).

[204] *Rapanos*, 547 U.S. at 735-36 (plurality) (cleaned up).

[205] *Sackett*, 598 U.S. at 684 (quoting *Rapanos*, 547 U.S. at 739 (plurality)).

appreciates the Agencies' attempts to clarify what sorts of information the Agencies will use in determining whether they can meet their evidentiary burden, such as what types of historical information are most reliable to be used to determine whether a ditch is jurisdictional or not. WAC recommends that the Agencies specify that they generally plan to issue one request for additional information from an Approved Jurisdictional Determination ("AJD") applicant on the historical conditions of the area, such as aerial photos or other documentation, and clarify that the applicant is not required to collect or gather new information that is not readily available to respond to that request. WAC further recommends that the Agencies specify the anticipated time periods for making these determinations, such as no longer than 60 days from receipt of responsive information from the applicant.[206] Finally, regulators and stakeholders need finality when it comes to the jurisdictional status of water features. The Agencies therefore should acknowledge in the final rule that if a water feature is determined to be non-jurisdictional because the Agencies are unable to meet the burden of proof, or if a ditch is determined to be excluded from jurisdiction, either because historical information confirms that it is properly excluded or because the Agencies cannot meet their burden, the water feature or ditch will remain excluded. Landowners should not be subjected to perpetual attempts to reassert jurisdiction.

VII. Regulatory Impact Analysis

The Proposed Rule's preamble summarizes the Agencies' analyses of the potential effects of the Proposed Rule on Federal, State, and Tribal regulatory programs, as detailed in the RIA. The RIA contains a qualitative economic analysis to provide the public with information on the potential foregone benefits and cost savings associated with various CWA programs that may result from the "[P]roposed [R]ule's reduced scope of jurisdiction as a response to the *Sackett* decision," but the Agencies continue to evaluate options for developing a quantitative analysis.[207]

WAC generally supports the use of quantitative analysis where possible but appreciates the significant challenges that the Agencies face in trying to conduct an accurate quantitative analysis given the lack of any reliable, comprehensive datasets that depict the jurisdictional extent of waters at any point in time. The Agencies correctly acknowledged the technical limitations in using datasets such as the Corps' Operation and Maintenance Business Information Link, Regulatory Module database, the NHD, and the NWI, given that these were not designed nor able to accurately portray jurisdictional waters under the CWA or provide data that correlates with the definitions and implementation practices in the Proposed Rule.[208] WAC also acknowledges that it can be challenging to quantify the costs and benefits associated with

[206] The Agencies should consider whether to memorialize decision-making time periods in a Memorandum of Understanding or Memorandum of Agreement or perhaps in a future rulemaking. Although the Corps' regulations governing the processing of Department of the Army permits (33 C.F.R. Part 325) do not currently mention AJDs, they do set forth various timeframes for processing permit applications. The Corps could consider codifying procedures for processing AJDs that are comparable to the Part 325 regulations.

[207] 90 Fed. Reg. at 52,542.

[208] *See* RIA, at 22-23.

modifying how federal CWA jurisdiction is determined, particularly because of the uncertainty of how different states may respond to the revised definition of WOTUS.

WAC recommends that the Agencies not rely on NHD, NWI, or any versions of these datasets to try to quantify and monetize impacts of the final rule given, among other things: (i) both datasets have errors of omission and commission; (ii) the Agencies' longstanding and consistent position that these datasets do not represent the scope of waters subject to CWA jurisdiction and were not intended to be used to determine jurisdiction; and (iii) streamflow permanence, flow regimes, water regime modifiers, and other factors classified in these datasets differ from the Agencies' proposed and past definitions and delineation practices. Finally, WAC supports the Agencies' decision to rely on the text of the CWA, as informed by Supreme Court precedent and taking into account agency policy choices, as the basis for the proposed changes to the regulatory definition of WOTUS.[209]

VIII. Conclusion

For all the reasons detailed above, WAC supports the Proposed Rule, which will provide much needed clarity and certainty and is necessary to ensure conformity with *Sackett*. WAC believes the recommendations provided in these comments will help further improve the regulatory definition of WOTUS and the Agencies' implementation of that definition.

Sincerely,

Courtney Briggs, WAC Chair (CourtneyB@fb.org)
David Chung, Counsel for WAC (DChung@crowell.com)

[209] *See* 90 Fed. Reg. at 52,543.

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

ICSC

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 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 Federation

US Chamber of Commerce