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Via Electronic Submission

Lee Zeldin, Administrator
U.S. Environmental Protection Agency
EPA Docket Center, Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

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Washington, D.C. 20310-0104

RE: Updated Definition of “Waters of the United States,” 91 Fed. Reg. 57,284 (Sept. 9, 2026); Docket ID No. EPA–HQ–OW–2025–0322

Dear Administrator Zeldin and Assistant Secretary Telle:

The Attorneys General of California, New York, Colorado, Connecticut, Delaware, Illinois, Maine, Maryland, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Washington, Wisconsin, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York (the States) submit these comments regarding the U.S. Environmental Protection Agency’s (EPA) and the U.S. Army Corps of Engineers’ (Army Corps) (collectively, the Agencies) supplemental notice of proposed rulemaking for the *Updated Definition of “Waters of the United States”* (Supplemental Proposed Rule). *See* 91 Fed. Reg. 57,284 (Sept. 9, 2026). In the Supplemental Proposed Rule, the Agencies “supplement and seek additional comment on certain aspects of an earlier proposal, published on November 20, 2025, to revise the regulations defining the scope of waters federally covered under the Clean Water Act in light of the U.S. Supreme Court’s 2023 decision in *Sackett v. Environmental Protection Agency*” and provide “additional regulatory options on certain aspects of” the proposed rule published in November 2025. 91 Fed. Reg. 57,284. The States provided detailed comments on the Agencies’ November 20, 2025 proposed rule (Proposed Rule) on January 5, 2026 (Jan. 2026 Comments)¹, and incorporate by reference into this letter those comments in their entirety. Below the States highlight the ways in which the “additional regulatory options” provided by the Agencies in the

¹ The Attorneys General for the States of New Mexico and North Carolina were not signatories to the Jan. 2026 Comments.

Supplemental Proposed Rule are contrary to law and inconsistent with Supreme Court precedent, and arbitrary and capricious.

In the Proposed Rule, the Agencies proffer definitions of “relatively permanent waters” and “continuous surface connection” that the Agencies contend are intended to conform to the Supreme Court’s decision in *Sackett v. EPA*, 598 U.S. 651 (2023) (“*Sackett*”). See 90 Fed. Reg. 52,498 (Nov. 20, 2025). In the Supplemental Proposed Rule, the Agencies propose revised definitions of “relatively permanent waters” and “continuous surface connection,” which both incorporate a key newly-defined term, “perennial.” Specifically, the Agencies propose to define “relatively permanent waters” and “continuous surface connection” as “perennial” waters, where “perennial” waters have “standing or continuously flowing water every day of the year during ordinary conditions.” 91 Fed. Reg. at 57,294. “Ordinary conditions” is itself defined as “the climatic conditions that ordinarily prevail at a particular place and time of year.” *Id.* at 57,288. The Agencies also propose two exceptions to the definition of “perennial” based on conditions that may disrupt an otherwise perennial water’s year-round flow: certain non-anomalous events (*e.g.*, low tide or a regularly-occurring dry spell) that interrupt year-round flow for no more than 30 consecutive days once a year and anomalous events like drought that disrupt year-round flow for longer than 30 days. They also propose to categorically limit “droughts” that qualify as anomalous events by limiting the term to only extreme and exceptional droughts as defined by the U.S. Drought Monitor. And finally, the Agencies may be proposing to require that the new “perennial” requirement apply to entire wetlands, rather than to only the surface connection between a wetland and other waters of the United States, and are proposing to remove the term “adjacent” from the description of wetlands that are covered by the Clean Water Act.

These proposed definitions narrow the waters protected by the Clean Water Act even further than the Proposed Rule and far beyond *Sackett*’s interpretation of the Clean Water Act. The proposed definitions also lack scientific support, are insufficiently reasoned, fail to account for regional differences, and do not appropriately consider reliance interests. Accordingly, they are contrary to the Clean Water Act and arbitrary and capricious. We urge you to withdraw this proposal and the Proposed Rule and not take any action to alter the existing “waters of the United States” definition, see 33 C.F.R. § 328.3 (2023); 40 C.F.R. § 120.2 (2023) (Conforming Rule), which incorporates all the relevant requirements set forth in *Sackett* .

I. The Agencies’ Proposed Definition of “Perennial” Is Contrary to Law and Inconsistent with *Sackett*, and Arbitrary and Capricious.

The Agencies’ proposal in the Supplemental Proposed Rule that “relatively permanent waters” and “continuous surface connections” be limited to “perennial” waters, the exceptions to that requirement for non-anomalous and anomalous events, and the limitations on “drought” as an anomalous event are contrary to law and inconsistent with *Sackett*, and arbitrary and capricious.

A. The Proposed Definition and Use of “Perennial” Are Contrary to Law and Arbitrary and Capricious.

The Agencies’ proposed definition of “perennial,” as well as the Agencies’ use of the term “perennial” to define the terms “relatively permanent waters” and “continuous surface connection” are contrary to the Clean Water Act’s fundamental objective “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” See 33 U.S.C. § 1251(a). The Agencies acknowledge that the Supplemental Proposed Rule would significantly limit the scope of waters

considered “waters of the United States.” 91 Fed. Reg. at 57,299. By drastically reducing the scope of federally jurisdictional waters, the Agencies’ proposal is a marked departure from its longstanding policy of ensuring broad Clean Water Act protections and is counter to the purpose and objective of the Act. In her concurrence in the *Sackett* decision, Justice Kagan explained that when Congress enacted the Clean Water Act, it comprehensively addressed a water pollution problem of “crisis proportions” through an “all-encompassing program of water pollution regulation . . . broad enough to achieve [its] codified objective.” *Sackett*, 598 U.S. at 711 (internal citations omitted). Courts have already rejected the Agencies’ efforts to limit waters of the United States to only those waters flowing continuously year-round. In *Pasqua Yaqui Tribe v. EPA*, 557 F.Supp.3d 949, 955-56 (D. Ariz. 2021), the court vacated and remanded the 2020 Navigable Waters Protection Rule (“2020 Rule”) because the Agencies failed to consider the effects of the 2020 Rule on the Nation’s waters and the Clean Water Act’s statutory objective, despite “identif[ying] indicators of a substantial reduction in waters covered under the NWPR compared to previous rules and practices.” *Id.* at 956; *see also Navajo Nation v. Regan*, 563 F.Supp.3d 1164 (D. N.M. 2021). Even though the 2020 Rule was vacated, the Agencies now propose to define “perennial” to mean “surface water flowing continuously year-round” so that the definition is “consistent with” the 2020 Rule. 91 Fed. Reg. at 57,288 (citing to 85 Fed. Reg. 22,250, 22,339 (Apr. 21, 2020)). The Agencies do so even though they admit that the 2020 Rule “was vacated by two district courts and has been replaced in the Code of Federal Regulations by the January 2023 Rule, as amended by the Conforming Rule.”² The Agencies’ proposal to define “perennial” consistently with a rule that courts have vacated and the Agencies themselves have replaced is unlawful and displays an ongoing disregard by the Agencies of the Act’s objective.

The Agencies’ proposal is also contrary to law and inconsistent with *Sackett* and the plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006) (“*Rapanos*”), which was endorsed by *Sackett*. *Sackett*, 598 U.S. at 671. The Agencies acknowledge that “waters that are perennial are most obviously ‘permanent’” and that “the term ‘relatively’ in *Sackett* and the *Rapanos* plurality suggest that Clean Water Act jurisdiction is not limited to waters that are always standing or continuously flowing.” 91 Fed. Reg. at 57,288. The Agencies suggest that their two proposed exceptions to the requirement that waters must be “perennial” to be jurisdictional sufficiently allow for temporary interruptions in continuous flow. *See id.* However, even with the Agencies’ proposed exceptions, the Supplemental Proposed Rule narrows Clean Water Act protections far beyond what is required by the *Sackett* decision to the point that it is inconsistent with the Supreme Court’s interpretation of the Act. In neither the *Sackett* decision nor the *Rapanos* plurality does the Supreme Court suggest that “waters of the United States” must maintain continuous flow or that wetlands must be “continuously connected with the surface water in the jurisdictional water” for all but one month of the year. *See id.* at 57,287-88, 57,297.

The Supplemental Proposed Rule is also arbitrary and capricious in numerous respects. First, the Agencies’ failure to include any explanation to justify their reliance on the vacated 2020 Rule also is arbitrary and capricious. In vacating the 2020 Rule, the district court in Arizona found that the rule could not be “remedied through further explanation,” as it suffered “substantive flaws that [could not] be cured without revising or replacing the NWPR’s definition of ‘waters of the United States.’” *Pasqua Yaqui*, 557 F.Supp.3d at 955.

² *See Navigable Waters Protection Rule*, EPA (Nov. 17, 2025), <https://www.epa.gov/wotus/navigable-waters-protection-rule>.

The Supplemental Proposed Rule also is arbitrary and capricious because the Agencies fail to consider an important aspect of the problem: the differing nature of water flows in arid, Western states. Not only do the Agencies concede that their proposed definition of “perennial,” as incorporated into the definition of “relatively permanent waters” and as used to define wetlands with a “continuous surface connection,” will result in a “significant reduction in federally jurisdictional waters,” but the Agencies also admit they “anticipate that the arid West in particular” will be most impacted. 91 Fed. Reg. at 57,298; *see also*, *Fed. Commc’ns Comm’n v. Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009) (Kennedy, J., concurring). In arid Western states it is common to have stream systems with perennial headwaters that flow into intermittent or ephemeral water bodies before reconnecting to downstream traditional navigable waters. And, as EPA has recognized, “ephemeral and intermittent streams in the arid and semi-arid Southwestern U.S. are [not only] ecologically...connected to downstream waters, [but also] have a significant effect on the chemical, physical, and biological integrity of those waters.”³ Ephemeral and intermittent streams and wetlands are the defining characteristic of many watersheds in dry, arid, and semi-arid regions, and are integral to watershed health, providing essential hydrological services such as groundwater recharge, nutrient cycling, pollutant filtration, floodwater storage, and the maintenance of base flows in downstream perennial waters.⁴ The Supplemental Proposed Rule’s total failure to grapple with these facts and prior agency findings renders the Rule arbitrary and capricious.

Finally, the Supplemental Proposed Rule reflects a different policy than the 2023 Conforming Rule and the Agencies also fail to provide a reasoned explanation for that change in policy and/or any evidence that they considered the impacts of the change on the reliance interests of states and others. *See DHS v. Regents of Univ. of Cal.*, 591 U.S. 1, 30 (2020) (longstanding policies may engender serious reliance interests that must be considered); *Fed. Commc’ns Comm’n v. Fox Television Stations, Inc.*, 556 U.S. at 515; *Pasqua Yaqui*, 557 F.Supp.3d at 955. While the Agencies concede that compared to the 2023 Conforming Rule, significantly fewer bodies of water would be considered jurisdictional, the Agencies fail to sufficiently explain or justify impacts to states reliant on current Clean Water Act protections. 91 Fed. Reg. at 57,297-57,298. Instead, the Agencies dismiss the states’ reliance interests, explaining that “reliance interests alone cannot justify retaining a regulation that is in conflict with the Supreme Court’s ruling in *Sackett*.” *Id.* at 57,296. But not only are the Agencies patently incorrect—unlike the Supplemental Proposed Rule, the 2023 Conforming Rule *does not* conflict with *Sackett*⁵—the Supplemental Proposed Rule also does not adequately consider the harms to states of the Rule, which places the full burden of protecting important resources on states. As explained in the States’ Jan. 2026 Comments on the Proposed Rule (p. 4), states and Tribes have developed substantial reliance interests in federal regulation of waters in their states and must fill the regulatory gap left by the Agencies’ proposal to upend federal water quality regulation. While some states have water quality regimes that are

³ Lainie R. Levick et al., *The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest*, EPA 72 (Nov. 2008), https://www.epa.gov/sites/default/files/2015-03/documents/ephemeral_streams_report_final_508-kepner.pdf.

⁴ *Id.* at 37. *See also*, EPA, CONNECTIVITY OF STREAMS AND WETLANDS TO DOWNSTREAM WATERS: A REVIEW AND SYNTHESIS OF THE SCIENTIFIC EVIDENCE. TECHNICAL REPORT (Jan. 2015). A copy of this document is attached as Attachment A.

⁵ *See* Jan. 2026 Comments, p. 1.

more protective than the Clean Water Act, many states are under-resourced and therefore rely heavily on the federal government to aid in protecting their water resources. Moreover, even those states with fulsome water quality regulation must divert financial and programmatic resources and adjust to changes in state regulatory regimes that currently work in tandem with the Agencies. For example, states that rely on the Army Corps to lead and review alternative analyses for high-impact projects would have a higher resource and capacity burden to independently evaluate projects without the benefit of the Agencies' concurrent review. The same is true for those states that rely on the Army Corps' In Lieu Fee process for project impact mitigation and Army Corps resources to lead certain investigations and enforcement of wetland violations. Additionally, the removal of federal wetland jurisdiction will likely create confusion on what wetlands are jurisdictional under state regulations where federal qualification is removed. The Agencies' failure to consider states' reliance interests and to provide a reasoned explanation for their change in policy is arbitrary and capricious.

B. The Agencies' Limited Proposed Exceptions to the Requirement that "Perennial" Waters Flow Year-Round Are Contrary to Law and Lack Reasoned Explanation.

As mentioned above, the Agencies propose two exceptions to the requirement that federally jurisdictional waters maintain year-round flow, which would allow for temporary interruptions to jurisdictional waters due to (1) certain non-anomalous events, such as a low tide or a regularly occurring dry spell, or (2) anomalous events due to extraordinary circumstances, such as drought. *See* 91 Fed. Reg. at 57,288. The Agencies further limit these two exceptions, explaining that "when flow is interrupted for more than a single period in any given year, and the interruptions are non-anomalous and ordinary for that water body, the agencies would consider this to be an ephemeral or intermittent feature even if each period of interruption does not amount to 30 consecutive days." *Id.*

The Agencies fail to provide a reasoned explanation for these two proposed exceptions to the definition of "perennial." *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto.*, 463 U.S. 29, 43 (1983) (an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made" (internal quotations omitted)).

First, a single 30-day temporal qualifier to define whether waters are "perennial" lacks any scientific basis and ignores the drastic variations in seasonality and hydrology across the United States. The Agencies claim, without support, that the 30-day temporal qualifier "most closely aligns with the regular and predictable nature of a non-anomalous dry spell," 91 Fed. Reg. at 57,288, and suggest that this proposal creates a bright-line approach that is "predictable, transparent, and easy to administer." *Id.* at 57,290. However, as with the "wet season" concept in the Proposed Rule, *see* 90 Fed. Reg. at 52,517-18, the differences in climate and hydrology in the United States make it impossible to impose one uniform standard. Indeed, the Agencies admit "there are no precise, scientifically-grounded, nationally consistent time limits for the durations of the temporary interruption due to non-anomalous events . . ." 91 Fed. Reg. at 57,290. This basic fact demonstrates the fallacy of the Supplemental Proposed Rule's entire approach and necessarily renders the Rule arbitrary and capricious.

Moreover, even if a uniform temporal standard were possible, the Agencies' proffered examples conflict with their purported need to establish a "bright-line approach." *See, e.g.*, 91 Fed. Reg. 57,289. The Agencies' 30-day temporal qualifier is anything but bright and provides no clarity. The Agencies confusingly explain that even just two 10-day non-anomalous interruptions in flow would result in a water body not being jurisdictional, but they provide no justification for why that scenario should be treated differently than a flow interruption of 20 or 30 consecutive days. 91 Fed. Reg. at 57,288. If the Agencies' goal is simply to provide a straightforward, useable test, it is unclear how landowners can reasonably monitor for brief interruptions in flow and determine whether an interruption results in a water body being considered ephemeral or intermittent. This is not a reasonable basis for a legal standard.

Second, the Agencies fail to provide a reasoned explanation for their proposed definitions of non-anomalous and anomalous events. To inform the meaning of "anomalous," the Agencies explain such events are "extraordinary" because they are "an extraordinary departure from ordinary conditions." *Id.* The Agencies claim this concept will be easily understandable for landowners and therefore will not require constant monitoring. *Id.* at 57,289-57,290. But the Agencies' examples of certain non-disqualifying non-anomalous events promote more confusion than clarity. While regularly occurring dry spells and low tides are identified by the Agencies as non-anomalous events that do not affect whether a water is considered "perennial," it is unclear how these events differ from other regularly occurring interruptions in flow that last less than 30 consecutive days and are not identified by the Agencies as non-anomalous events. The Agencies also fail to provide any explanation for their proposal to arbitrarily remove from jurisdiction waters that experience two 10-day interruptions in flow, but to retain waters that experience low tide or dry spells that are "generally predictable and expected." Nor do the Agencies explain why dry spells that last 30 days are non-anomalous events but some but not droughts that last longer than 30 days, as discussed below.

Third, despite the Agencies' assertion that the Supplemental Proposed Rule will not require continuous surface monitoring to determine whether waters are "perennial," the Agencies' proposed definitions for anomalous and non-anomalous events will almost certainly require data collection and therefore conflict with *Sackett*. In *Sackett*, the Supreme Court sought to provide landowners an easily administrable test for assessing Clean Water Act jurisdiction that would not necessitate "retain[ing] an expensive expert consultant." *See* 598 U.S. at 670. Yet the Agencies propose novel definitions for which existing data is insufficiently comprehensive. Even where streamflow data exists, that data is insufficient to show the cause of flow disruptions or whether it was anomalous. Nowhere in the Supplemental Proposed Rule do the Agencies state otherwise. To reasonably implement the Agencies' proposed definition, delegated States must assume the burden of analyzing whether any temporary interruptions in flow fit either of the Agencies' exceptions for anomalous and non-anomalous events. Again, because the States are not aware that sufficiently comprehensive existing data or historical records exist, the Agencies' proposal almost certainly *will* require continuous monitoring, in conflict with *Sackett*.

Finally, the Agencies' proposal to define anomalous events, like drought, as an extraordinary departure from "ordinary conditions" also lacks a satisfactory explanation and ignores scientific reality. The Agencies propose to only recognize categorically "extreme" and "exceptional" droughts as anomalous events that can temporarily interrupt perennial flow, for no more than five years. 91 Fed. Reg. at 57,290. The Agencies' proposal fails to acknowledge that with changing climate conditions, unforeseen circumstances and conditions are becoming the

norm. “Ordinary conditions” no longer ordinarily prevail, as the changing climate has affected surface hydrology in varied ways throughout the States. EPA itself has recognized that climate change will have increasing influence on stream connectivity in the Southwest, resulting in intensification of droughts, variability in precipitation, reduced snowpack, and changes in streamflow patterns.⁶ In California, for example, droughts can last longer than five years, and drought conditions are becoming increasingly prevalent. The proposed definition of anomalous events—and the Agencies’ attempts to justify it—do not engage with these established facts, leaving it unresponsive to changing hydrological conditions and lacking scientific basis.

C. The Agencies’ Proposed Limitations on “Drought” Are Contrary to Law and Arbitrary and Capricious.

The Agencies propose to limit the definition of the “droughts” that qualify as an “anomalous event that would allow a normally jurisdictional water to remain jurisdictional in the absence of year-round flow.” 91 Fed. Reg. at 57,289-90. Specifically, the Agencies propose to use the U.S. Drought Monitor’s⁷ (“Drought Monitor”) drought level designations, which range from Abnormally Dry (D0) to Exceptional Drought (D4), but consider *only* Extreme Drought (D3) and Exceptional Drought (D4) as anomalous. *Id.* The Agencies’ proposal will exclude, for example, Severe Drought (D2), where on-the-ground impacts include crop loss, water shortages, and water restrictions. *Id.* Additionally, the Agencies propose a five-year limit to an anomalous drought condition, after which time a water of the United States other than a wetland would lose its “relatively permanent” status and a wetland would no longer have a “continuous surface connection.” *Id.* at 57,290, 57,295. These limitations are contrary to law and arbitrary and capricious.

First, the limitations have no basis in the applicable Supreme Court jurisprudence. The sole mention of “drought” in *Rapanos* or *Sackett* is in Justice Scalia’s *Rapanos* plurality opinion, where (in a footnote), he explains that “[b]y describing ‘waters’ as ‘relatively permanent,’ we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought.” *Rapanos*, 547 U.S. at 733, n.5. The Agencies provide no rationale as to why a D0, D1, or D2 drought could not be “extraordinary circumstances,” nor could they given that such an interpretation would plainly flout the Act’s purpose.

Second, both the categorical exclusion of less severe droughts and the five-year limit are arbitrary and capricious. The Agencies describe a drought as “an extraordinary departure from the ordinary climatic condition,” but provide no rationale as to why only a D3 and D4 drought “would qualify as anomalous drought conditions that can temporarily interrupt perennial flow.” *See* 91 Fed. Reg. at 57,288, 57,290. The Agencies fail to provide any scientific or technical basis for excluding less severe droughts nor do they explain how that exclusion is consistent with the objectives of the Clean Water Act. Instead, the exclusion of D0, D1, and D2 droughts appears to simply be a policy choice that arbitrarily limits waters of the United States. The Drought Monitor

⁶ *See* EPA, *supra* note 4, Attachment A.

⁷ NOAA, *U.S. Drought Monitor*, DROUGHT.GOV, <https://www.drought.gov/data-maps-tools/us-drought-monitor> (last visited Oct. 8, 2026).

itself provides the caveat that it is not recommended to use the Monitor “to infer specifics about local conditions.”⁸

Further, the Agencies provide no explanation as to why a “dry spell” that lasts 30 days or fewer in a given year is a non-anomalous event that does not change a water’s jurisdictional status and a D3 or D4 drought is an anomalous event that also does not change that status but a less severe drought that lasts longer than 30 days is categorically excluded from being an anomalous event that preserves a water’s jurisdictional status. In the absence of an explanation for the exclusion of less severe droughts, that exclusion is simply arbitrary. Indeed, if the Agencies intend to provide an “anomalous” exception for droughts, the exception should cover all droughts.⁹

Third and finally, the Agencies justify the five-year limit on droughts on the basis that it aligns with the length of Army Corps jurisdictional determinations. 91 Fed. Reg. at 57,290. Limiting droughts based on one agency’s administrative timeline does not constitute a technical or scientific explanation for the five-year limit, nor does it explain why that limit meets the objectives of the Clean Water Act.

II. The Agencies’ Proposal to Utilize “Perennial” to Define “Relatively Permanent Waters” is Arbitrary and Capricious, Contrary to Law and Lacks Reasoned Explanation.

The Supplemental Proposed Rule would change the definition of “relatively permanent waters” to “generally deem a water to be jurisdictional only if it is perennial.” 91 Fed. Reg. at 57,288. Thus, “relatively permanent waters” would be defined “to mean ‘perennial bodies of water’” with continuous, year-round flow. *See id.* As discussed above (pp. 5-7-), the Agencies state that a water will not lose its “relatively permanent” status if it meets one of the proposed two exceptions for interruptions in year-round flow. The Agencies’ proposal is contrary to law, arbitrary, and lacks a reasonable explanation.

First, the Agencies’ proposed definition for “relatively permanent waters” is arbitrary and capricious due to the unequal impact it will have on States dependent on tributaries for water flows and its lack of a reasoned explanation. The Agencies suggest that, under the proposed definition, “[t]ributaries without standing or continuously flowing water every day of the year, except for under certain anomalous or non-anomalous events, would thus not be considered ‘relatively permanent.’” 91 Fed. Reg. at 57,290. For States dependent on mountain snowpack and seasonal water flows, tributaries are vital water sources but would not be considered “relatively permanent” under the proposed definition. Much of the Western U.S., for example, relies on Sierra Nevada

⁸ *Drought Classifications*, U.S. DROUGHT MONITOR, <https://droughtmonitor.unl.edu/About/AbouttheData/DroughtClassification.aspx> (last visited Oct. 8, 2026).

⁹ The States also note that funding cuts to the U.S. Department of Agriculture and the National Oceanic and Atmospheric Administration may impact the accuracy of the Drought Monitor. *See* Andrew Ozaki, *Drought Monitor Concerned Over Federal Cuts in USDA and NOAA*, KETV (Mar. 24, 2025, at 8:59 PM CDT), <https://www.ketv.com/article/drought-monitor-concerned-over-federal-cuts-usda-noaa/64278347>.

and Rocky Mountain snowpack for its water.¹⁰ Yet, the Agencies fail to provide a reasoned explanation or any basis for proposing to implement a definition that will provide unequal Clean Water Act protection throughout the U.S. Depriving tributaries of Clean Water Act protections risks degrading the water quality of in areas of the U.S. where essential water resources are scarce.

Second, the Agencies' proposal to define "relatively permanent waters" as "perennial" conflicts with *Sackett*, the *Rapanos* plurality, and the Supreme Court's interpretation of that term. In the *Rapanos* plurality, the Supreme Court concluded that "waters of the United States" encompass waters "described in ordinary parlance as 'streams, oceans, rivers, and lakes'" and that seasonal rivers with "continuous flow during *some* months of the year but no flow during dry months" are deemed relatively permanent. *Rapanos*, 547 U.S. at 732 n.5, 739 (emphasis added). The *Sackett* decision expressly adopted the "relatively permanent" standard. *Sackett*, 598 U.S. at 678.

Despite the Agencies' purported aim to conform the "relatively permanent waters" definition to *Sackett*, the Agencies instead propose an overly restrictive definition that is not consistent with the Court's decision. The Agencies' proposal would define "relatively permanent waters" in a manner that will exclude seasonal waters that flow or stand "during some months of the year." *Rapanos*, 547 U.S. at 732 n.5. This ignores both the Court's explicit endorsement that seasonal waters are "not necessarily exclude[d]," and the qualifier "relatively," effectively dictating that the Act apply only to "permanent waters." *See id.* While the Agencies claim their two proposed exceptions¹¹ from year-round flow ensure that "relatively" permanent waters remain federally jurisdictional, even the Agencies' proposed 30-day temporal qualifier for non-anomalous events inherently contradicts the Court's interpretation of "relatively permanent waters." The proposed definition limits temporary interruptions in continuous flow to a single 30-day period in a given year, even though the Court explicitly stated that *seasonal* waters, that may be dry or have continuous flow for *some* months, are considered "relatively permanent waters." *See Rapanos*, 547 U.S. at 732 n.5. The proposed definition will therefore strip federal jurisdiction from any seasonal water bodies, necessarily excluding the "streams, [], rivers, and lakes" that the Court acknowledged the Clean Water Act is intended to protect. *Sackett*, 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739). Excluding these tributaries from federal jurisdiction is contrary to Supreme Court precedent. Accordingly, the States urge the Agencies to abandon the proposed 30-day temporal qualifier because it would conflict with the Clean Water Act's statutory purpose and is in conflict with the Court's conclusion that "relatively permanent waters" must account for seasonality. *See Rapanos*, 547 U.S. at 732 n.5.

III. The Agencies' Proposal to Utilize "Perennial" to Define "Continuous Surface Connection" Is Contrary to Law and Arbitrary and Capricious.

As discussed in the States' comments on the Proposed Rule, protection of wetlands that are adjacent to waters of the United States is essential because wetlands are critical to the health of downstream waters. Jan. 2026 Comments at 2. As also discussed, *Sackett* ruled that wetlands

¹⁰ For example, on average the Sierra Nevada snowpack supplies about 30 percent of California's water needs. *See, e.g.*, STATE OF CAL. DEP'T OF WATER RES., CALIFORNIA WATER PLAN UPDATE 2023 (Dec. 2023), <https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/California-Water-Plan/Docs/Update2023/Final/California-Water-Plan-Update-2023.pdf>.

¹¹ See pages 5 to 7, above (exceptions to perennial definition).

are waters of the United States when they have a “continuous surface connection” to other waters of the United States. *Id.* at 8 (*Sackett*, 598 U.S. at 678 (quoting *Rapanos*, 547 U.S. at 742)). In the Proposed Rule, the Agencies defined “continuous surface connection” to mean “having surface water at least during the wet season and abutting (*i.e.*, touching) a jurisdictional water.” 90 Fed. Reg. at 52,545. In the Supplemental Proposed Rule, the Agencies propose to require that a “continuous surface connection” be “perennial,” using the same definition discussed above (pp. 3-5) and the same exceptions also discussed above (pp. 5-7). The Agencies also may be proposing that the “perennial” requirement apply to an entire wetland, and make an alternative proposal that would drop “adjacent” from the definition of a wetland that qualifies as a “water of the United States.” Both proposals are contrary to law and arbitrary and capricious.

The Agencies’ first proposal. As currently structured, paragraph (a)(4) of the Agencies’ regulations defines “waters of the United States” to include “wetlands adjacent” to other waters of the United States and incorporates “continuous surface connection” into that description. 33 C.F.R. § 328.3(a)(4); 40 C.F.R. § 120.2(a)(4). Paragraph (c)(2) then defines “adjacent” to mean “having a continuous surface connection.” *Id.* § 120.2(c)(1), (2); 33 C.F.R. § 328.3(c)(1), (2). The Agencies’ first proposal would add a new subsection (c)(3), which reads:

Continuous surface connection means perennial surface water in a wetland that is continuously connected with the surface water in the jurisdictional water such that it is difficult to determine where the jurisdictional water ends and the wetland begins. Temporary interruptions in the surface water connection may occur as the result of anomalous events such as drought or dry spell. A temporary interruption in the surface water connection lasting no more than a single period of up to 30 consecutive days in any given year may also occur as a result of non-anomalous events such as low tide or a regularly occurring dry spell.

91 Fed. Reg. at 57,301 (emphasis in original). This proposal has several flaws.

First, while it is unclear, the Agencies may be proposing that this new definition of “continuous surface connection” applies to the *entire* wetland: “Only the portion of the wetland that is indistinguishably part of the jurisdictional water, due to the presence of surface water, is itself jurisdictional.” 91 Fed. Reg. at 57,295. Thus, as the States understand, even if a wetland has a continuous surface connection to another jurisdictional water, any part of the wetland where water is not continuously present is not protected. To the extent that that is the new definition, it arbitrarily bifurcates and fundamentally redefines “wetlands,” which is inconsistent with the Clean Water Act and *Sackett*, lacks a scientific basis, and is arbitrary and capricious.¹²

If that is the Agencies’ proposal, it robs “wetland,” as used in § 1344(g)(1), of its ordinary meaning, contrary to the rules of statutory construction. When a statute does not define a term, the term is required to be given its ordinary meaning. *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). The

¹² Compare with the Agencies’ fulsome discussion of the scientific literature and technical information supporting their 2022 revision of the Waters of the United States rule. Dep’t of the Army, Corps of Engineers, and EPA, TECHNICAL SUPPORT DOCUMENT FOR THE FINAL “REVISED DEFINITION OF ‘WATERS OF THE UNITED STATES’” RULE (Dec. 2022), https://www.epa.gov/system/files/documents/2022-12/TSD-FinalCombined_508.pdf. A copy of this document is attached as Attachment B.

Act does not define “wetland”, and the ordinary meaning of wetland is *not* a body of water that continuously has water. For example, the Merriam-Webster dictionary defines a wetland as “land or areas (such as marshes or swamps) that are covered *often intermittently* with shallow water or have soil saturated with moisture.”¹³

That proposal would also be inconsistent with *Sackett*. Relying on the reference to “adjacent” wetlands in 33 U.S.C. § 1344(g)(1), *Sackett* explained that “at least some wetlands must qualify as ‘waters of the United States.’” 598 U.S. at 675. The Court further ruled that wetlands qualify as waters of the United States if they are “adjacent” to other waters of the United States, meaning that have a “continuous surface connection” with those other waters, as required by *Rapanos* plurality. *Id.* at 678. Nothing in *Rapanos* or *Sackett* holds that, even if a wetland is “adjacent” to another water of the United States, only that part of the wetland that continuously has surface water is a water of the United States.

Confusingly, the Agencies’ proposal appears to leave intact the definition of wetland in paragraph (c)(1) of their regulations: “Wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.” 33 C.F.R. § 328.3(c)(1); 40 C.F.R. § 120.2(c)(1). Thus, a wetland is one thing for some undefined purpose and may be another thing if it is a “water of the United States.” Again, nothing in *Rapanos* or *Sackett* supports that distinction.

If the Agencies are proposing to apply the new definition to the entire wetland, their proposal is also arbitrary and capricious. The Agencies acknowledge that “the majority of wetlands” that are currently protected as adjacent wetlands would not qualify under “the supplemental definition of ‘continuous surface connection,’ as most wetlands do not contain perennial surface water.” 91 Fed. Reg. at 57,298. For example, under the proposed definitions approximately 80% of wetlands across New York State would lose federal protection. In the New York City Watershed, there are 20,493 acres of vegetated wetlands. Of those wetlands, only 49 acres are classified as permanently flooded, meaning that less than 1% of all vegetated wetlands in this critical watershed would be jurisdictional under this proposal.¹⁴

Despite this potentially dramatic shift, the Agencies fail to include any analysis explaining why the definition is consistent with the water quality objectives of the Clean Water Act—likely because it is not consistent because the portion of the wetland that does not continuously have standing water is connected to the rest of the wetland and, as a result, the destruction or alteration of that portion of the wetland would impair the function of the entire wetland, which protects the

¹³ *Wetland*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/wetland> (emphasis added) (last visited Oct. 8, 2026). The Agencies rely on the Merriam-Webster definition of “drought,” 91 Fed. Reg. at 57,289 n. 4, but disregard the Merriam Webster definition of “wetland.”

¹⁴ New York State Department of Environmental Conservation state wetlands lost and New York City Department of Environmental Protection NYC Watershed wetlands lost were calculated from the National Wetlands Inventory. U.S. Department of the Interior, U.S. Fish and Wildlife Service, National Wetlands Inventory (2026), <https://www.fws.gov/program/national-wetlands-inventory>.

chemical, physical, and biological integrity of, the adjacent water of the United States.¹⁵ The Agencies' disregard of the Act's objective is arbitrary and capricious and contrary to law. *See Pasqua Yaqui*, 557 F.Supp.3d at 955.

The Agencies attempt to justify the new definition on the ground that it will make it "relatively simple for landowners to understand whether a portion of a wetland is continuously covered by perennial surface water that is connected with surface water in a jurisdictional water" with the "naked eye." 91 Fed. Reg. at 57,296. But if the Agencies are proposing to apply the new definition to an entire wetland, and even if a naked eye standard were the correct standard (it is not), the Agencies fail to explain why property owners would be unable to understand that "land or areas (such as marshes or swamps) that are covered often intermittently with shallow water or have soil saturated with moisture" (using Merriam-Webster's definition of a wetland) are protected by the Act so long as they have a continuous surface connection to another jurisdictional water.

Third, in addition to the flaws discussed above, the exceptions for anomalous and non-anomalous events are arbitrary and capricious as applied to wetlands. The Agencies' proposal fails to explain how one period of 30 days captures the significant hydrologic variability across regions of the United States. Further, under the proposal a wetland that regularly loses its surface water connection for one "single period" of 30-days annually would remain protected, but a wetland that regularly loses its surface water connection for two 15-day periods annually would no longer be protected. While the Agencies claim that this is a "bright line" standard, the Agencies acknowledge that there are "no precise, scientifically-grounded, nationally consistent time limits" justifying this limit. 91 Fed. Reg. at 57,290. The Agencies' sole justification for the standard is that it is "predictable, transparent, and easy to administer" *id.*, but the Agencies fail to explain why it is easier to administer than a limit that is grounded in robust, verified data sources.

The Agencies' alternative proposal. The Agencies alternatively propose that, instead of defining "adjacent" to mean "continuous surface connection," as the regulations currently do in paragraph (c)(2), 33 C.F.R. § 328.3(c)(2); 40 C.F.R. § 120.2(c)(2), they delete "adjacent" from the definition of wetlands that qualify as waters of the United States. The Agencies propose to do that by rewriting paragraph (a)(4) of the regulation to state that wetlands are waters of the United States if they meet the following definition:

Wetlands that are indistinguishably part of a body of water that itself is jurisdictional under (a)(1) through (3) of this section. This occurs when surface water in a wetland is continuously connected with the surface water in the jurisdictional water such that it is difficult to determine where the jurisdictional water ends and the wetland begins. Only the portion of the wetland that is indistinguishably part of the jurisdictional water, due to the presence of surface water, is itself jurisdictional. The requisite surface water connection is not broken by a temporary interruption in surface connection that may sometimes occur because of phenomena like low tide or a regularly occurring dry spell.

91 Fed. Reg. at 57,295.

¹⁵ EPA, *supra* note 4, Attachment A.

In addition to all the flaws discussed above, the Agencies' proposed major revision is also inconsistent with *Sackett* and the *Rapanos* plurality. When *Sackett* accepted the *Rapanos* plurality's use of "continuous surface connection" to waters of the United States to identify covered wetlands, *Sackett* explained that that "the plurality spelled out clearly when *adjacent* wetlands are part of covered waters." 598 U.S. at 678 (emphasis added). The use of "adjacent" in the current regulation tracks that reasoning. Moreover, as the States explained in their comments on the Proposed Rule, case law applying the *Sackett* test for "adjacency" has found that there is no independent "indistinguishability" requirement that is separate from "continuous surface connection." Jan. 2026 Comments at 8.

* * *

For these reasons, the States urge the Agencies to withdraw the Supplemental Proposed Rule as well as the Proposed Rule and not take any action to alter the existing "waters of the United States" definition, as set forth in the Conforming Rule.

Respectfully submitted,

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