January 5, 2026

Ms. Stacey Jensen
Oceans, Wetlands and Communities Division
Office of Water (4504-T)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Mr. Milton Boyd
Office of the Assistant Secretary of the Army
for Civil Works
Department of the Army
108 Army Pentagon
Washington, D.C. 20310

Re: Updated Definition of "Waters of the United States" Proposed Rule, Docket No. EPA-HQ-OW-2025-0322, RIN 2040-AG44

Dear Ms. Jensen and Mr. Boyd:

The Tulane Institute on Water Resources Law & Policy is pleased to provide the following comment on the U.S. Environmental Protection Agency and U.S. Department of the Army, U.S. Army Corps of Engineers' (hereinafter "the agencies") proposed rule titled "Updated Definition of 'Waters of the United States.'"

1. Qualifications

The Tulane Institute on Water Resources Law & Policy ("the Institute") is a program of Tulane University Law School that prioritizes utilizing law and policy to build networks and solve problems related to water. It has a staff of six lawyers supported by a wide array of interdisciplinary student research assistants from Tulane Law School and many of Tulane University's undergraduate schools.

The Institute is keenly aware that water issues are rarely just legal problems; they implicate cultural, technical, and economic dimensions. A thorough understanding of the law and the legal systems involved in agency decision-making, however, is often essential when grappling with environmental and natural resource issues. Having an interdisciplinary and multifaceted approach allows the Institute to view water issues through a prism that embraces a wide range of interests and perspectives that the constructs of adversarial and transactional legal approaches often fail to consider. We believe that our approach is well-suited to assessing the issues surrounding defining "waters of the United States" and makes us uniquely qualified to comment on this proposed rule. The following comment reflects the opinions of the Institute staff alone and does not speak for Tulane University as a whole or for any other body within Tulane University.

2. Summary

The Agencies' attempt to follow both the language and intent of the Clean Water Act (CWA) and recent Supreme Court decisions is unsuccessful. It severs many waters from CWA jurisdiction in the name of clarity and bright-line rules without actually providing either. It retreats from the federal role in water protection beyond what the most recent relevant Supreme Court majority opinion intends. It confuses the intent of the CWA, replacing one definition of federalism with another and elevating it above actual clean water as the purpose of the CWA. It removes federal participation from contexts where it is essential, such as interstate waters. It uses seemingly simple terms like "wet season" to determine jurisdiction despite the difficulty in determining what that is or the availability of what would be needed to make that determination. The stated intent of much of the proposed rule is to make CWA jurisdiction determinations easy bright lines for the layperson to follow while simultaneously referencing technical tools from federal agencies that have no assurances of continued upkeep or availability. In doing so, it needlessly eliminates vital tributaries and nationally important resources from jurisdiction. It offers a rule that conflicts with a much longer Supreme Court jurisdiction in service to a single recent case. In sum, it doesn't actually make anything better. It takes the application of the CWA farther away from the language of the act, and, rather than eliminating confusion, it just shifts the confusion around.

3. Overarching Concerns on Effects of the Rule

With their joint proposed rule-making, the agencies are embarking on yet another effort to define the reach of the Federal Water Pollution Control Act (Clean Water Act) by defining the term "waters of the United States" as that term has been interpreted and reinterpreted by the United States Supreme Court, including most recently in *Sackett v. EPA*.[1] The proposed rule purports to make clear what waters and wetlands the Act applies to and to appropriately honor the respective roles of the state and federal governments under the Act. It succeeds at neither.

Specifically, the question before the *Sackett* court was whether the Ninth Circuit set forth the proper test for determining whether wetlands are "waters of the United States" under the Clean Water Act, 33 U.S.C. §1362(7).[2] The proposed rule, like the litany of previous rules and proposed rules, seeks to develop a rule that implements section 404 of the CWA as Congress intended in accordance with Supreme Court rulings. Indeed, this is the second attempt by the agencies to do that in light of the *Sackett* decision. That first attempt faced criticism that it did not fully embrace the restrictions on the reach of the CWA contained in *Sackett*. The result in this proposed rule is the wide application of the *Sackett* Court's wetlands test reasoning to tributaries writ large.

Whatever the flaws were in the first post-*Sackett* rulemaking, they are not cured by this proposed rule, which at best substitutes one level of confusion and uncertainty with another and goes beyond the dictates of the *Sackett* ruling and largely distinguishes out of existence other Supreme Court jurisprudence such as *Riverside Bayview Homes*.[3] The proposed rule also misconstrues the deeper history of federal water regulation including the 1888 River and Harbor Act, the River

[1] Sackett v. Env't. Prot. Agency, 598 U.S. 651 (2023).
[2] The fate of the Sacketts was not an issue in Court's decision; it having already been conceded by the federal government that even under prior jurisprudence the Act did not apply to them.
[3] United States v. Riverside Bayview Homes, 474 U.S. 121 (1985).

and Harbor Act of 1890, and the Rivers and Harbors Act of 1899 to confect a regulatory program that diminishes the national interest in ensuring that the nation's waters are unobstructed, clean, and safe. In short, the proposed rule fails to create a clear and predictable model for protecting the waters of the United State while also failing to correctly reflect the respective roles of the states and the federal government under the Act, and in fact will almost certainly lead more impaired waters, greater burdens on many states, and a sicker American people.

a. The proposed rule misconstrues the purpose and context of the Clean Water Act.

In enacting the Clean Water Act in 1972—and overriding a Presidential veto—Congress, with overwhelmingly bipartisan majorities, undertook to address what it understood to be a crisis facing the nation: the degradation of its surface water resources which were—and are—vital to the nation's health and wellbeing. Specifically, its objective is to "restore *and maintain the chemical, physical, and biological integrity of the Nation's waters.*"[4] And Congress meant to do that with urgency. The initial goal was to eliminate the discharge of pollutants into navigable waters by 1985, with an interim goal of attaining water quality conducive to the protection and propagation of fish, shellfish, and wildlife and supporting recreation by 1983.[5] Congress understood this action was necessary because the preexisting framework of state and federal laws and programs had failed. To be sure, the CWA intended to preserve the role of the states in the aggressive new approach.[6] However, the entire premise of the CWA was the need for broader federal action and coordination that would improve water management in ways states could not while providing for qualifying states and tribes to assume larger roles in administering the CWA if they wanted to.

Since its enactment, the life of the CWA has been marked by agency actions, jurisprudence, and subsequent Congressional inaction. All of which have not only prevented it from fulfilling its objectives but also have defied any semblance of coherence and predictability in its interpretation and application.

The *Sackett* opinion(s) and the proposed rule only continue this incoherence. The Court's ruling in *Sackett* sets the scope of "waters of the United States" at the narrowest definition of "navigable" possible, rather than acknowledge the purpose the CWA as rooted in traditional understandings of waters usable in commerce. The result will only be that the line of demarcation between covered and uncovered waters and wetlands will remain unclear and subject to debate, albeit the battlelines will be different than they were before.

At the heart of the new confusion sown by the proposed rule are three fundamental errors:

i. That the Act as previously interpreted by the agencies undermines the primary authority of states to regulate land and water, by elevating the federal role in "response to ecological concerns."[7]

[4] Clean Water Act § 101(a), 33 U.S.C. § 1251(a) (emphasis added).
[5] *Id.*
[6] ROYAL C. GARDNER, WATERS OF THE UNITED STATES: POTUS, SCOTUS, WOTUS, AND THE POLITICS OF A NATIONAL RESOURCE 143-44 (2024) (noting that states have the initial responsibility to enforce water quality standards, but not the "chief" responsibility).
[7] Updated Definition of Waters of the United States, 90 Fed. Reg. 52,498, 52,514 (Nov. 20, 2025).

ii. That federal jurisdiction over land and water is secondary to the primary power of the states to regulate water.[8]

iii. That the proposed rule is based not only on doctrines of statutory construction but also to "appropriately limit the scope of Federal authority consistent with the centuries-old boundaries of Congress' Commerce Clause authority" (citing Justice Thomas's concurrence in *Sackett*).[9]

That these foundations of the proposed rule are incorrect is clear from the jurisprudential history of federal water regulation and Commerce Clause power. The selective history recounted in the proposal suggests that the CWA, specifically section 404's prohibition against depositing dredged or fill material in a "water of the United States" (which is only substantive aspect of the CWA at issue in *Sackett*) was the unprecedented act of a Congress with a dubious grasp on its Commerce Clause powers in order to address "ecological concerns."[10] History tells a very different story. The roots of the CWA run back to the late Nineteenth Century, and a series of laws enacted by Congress, specifically, the 1888 River and Harbor Act, the River and Harbor Act of 1890, and the Rivers and Harbors Act of 1899. The Nation at that time was growing rapidly and new technologies and modes of transportation were transforming the nation and its land and waterscapes. The federal government's role in facilitating commerce and national security increasingly was coming into conflict with actions and projects by state and local governments and the private sector. These Congressional acts, especially the Rivers and Harbors Act of 1899, established the role of the federal government as a regulator of water, not to eliminate the state's primary power over land and water, but to limit it to be consistent with national interests within the power of Congress. As a result, it became illegal to excavate, fill or obstruct the navigable capacity of any of the waters of the United States or to discharge waste into those waters. Unlike the CWA, the sanctions under the 1899 Act were entirely criminal.

Like the CWA, those Acts dealt with navigable waters but, also like the CWA, they recognized that protecting the nation's interest in navigable waters allowed it to regulate activities in their non-navigable portions of and even to prohibit "anything, wherever done or however done with the limits of the jurisdiction of the United States, which tends to destroy the navigable capacity of one the navigable waters of the United States."[11] These laws were enacted not for ecological reasons but for the broader public interests of the United States. The 1899 Act is still in effect and has been administered largely in tandem with the CWA, though it can apply to certain acts exempt from the CWA. For the proposed rule to view the CWA as an ecologically focused law that was intended to leave most the regulation of water pollution and possible obstacles to navigation to the states is to completely misread its history and purpose. And since the proposed rule speaks only to the CWA, it will lead to an uncoordinated—and potentially harsher—administration of the Rivers and Harbors Act of 1899. That cannot be what Congress, or even the Sackett court, intended.

[8] *Id.*
[9] *Id.* at 52,506 (citing *Sackett,* 598 U.S. at 705 (Thomas, J., concurring)).
[10] *See id.* at 52,514.
[11] United States. v. Rio Grande Dam and Irrig. Co., 174 U.S. 708 (1899).

b. The proposed rule goes well beyond the holding in Sackett and other precedents.

The proposed rule also goes well beyond the actual holding of the *Sackett* court and a vast body of jurisprudence by limiting the proposed rule in reliance on Justice Thomas's concurring opinion which cautions that a more expansive application of the CWA may exceed Congress's power under the Commerce Clause. That is not consistent with the majority opinion in *Sackett*, and it is flatly incompatible with other Supreme Court decisions such as *Sporhase v. Nebraska*,[12] which found that groundwater is an article of commerce and that state regulation of it cannot impinge upon Congress' power to regulate it even if it has not chosen to. Commerce Clause power and navigability are clearly different things. Justice Thomas may wish to revisit a wide range of Commerce Clause-based legislation and jurisprudence, but the agencies cannot bootstrap his conjecture in a concurring opinion into the framing of this proposed rule.

It is not the role of the agencies to do what Congress and previous court rulings have not done by inventing a history for the CWA that turns its context and purpose on its head.

4. The Removal of Interstate Waters from "Waters of the United States"

The agencies propose removing "interstate waters" as a standalone basis for jurisdiction. This is at odds with the proposed rule's use of the term "cooperative federalism" as well as CWA references to interstate agencies in Section 401.[13] Its use is referred to in Executive Order 13132 which provides that "federalism" is grounded in the division of governmental responsibilities between the federal government and the states, consistent with the Constitution and the 10th Amendment.[14] "Cooperative federalism," rather than how it is used in the proposed rule, is more generally understood as the federal government and the state governments working collectively with one another to address common problems.[15] The proposed rule seems more interested in limiting the federal government than enabling cooperation.

It is self-contradictory to invoke "cooperative federalism" as a general principle and at the same time reject parts of the Clean Water Act which require cooperative federalism in order to function. This contradiction is most glaring in the context of the removal of jurisdiction for "interstate waters." Excluding "interstate waters" and ponds and lakes from the Clean Water Act virtually ensures that one state can pollute the waters of an adjacent state which shares those waters. In those situations, cooperative federalism requires involvement of the federal government as set forth in the Clean Water Act expressed statutory to ensure that the "chemical, physical and biological integrity of the nation's Waters" is "restored and maintained."[16]

The proposed rule improperly uses "federalism" as a policy lever to reshape exclusions for ditches and infrastructure,[17] to remove some categories from jurisdictional waters, such as interstate waters,[18] and to remove the "interstate" designation with respect to lakes and ponds.[19]

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[12] Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941 (1982).
[13] 33 § U.S.C. 1341(a)(1).
[14] Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 10, 1999).
[15] SAMUEL FINESURREY & GARY GREAVES, U.S. GOVERNMENT & POLITICS IN PRINCIPLE AND PRACTICE Ch. 5 (2025), https://usgovtpoli.commons.gc.cuny.edu.
[16] Clean Water Act § 101(a)–(b), 33 U.S.C. § 1251(a)–(b).
[17] 90 Fed. Reg. at 52,538.
[18] *Id.* at 52,516.
[19] *Id.* at 52,541.

By plain meaning "interstate waters" and lakes and ponds involve issues between states which themselves often require federal involvement, particularly in terms of the Clean Water Act.

5. The Imprecise Definition of "Relatively Permanent" Waters and "Tributaries"

In the Proposed Rule, the agencies propose to define "relatively permanent" as "standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season."[20] Moreover, the agencies seek to further narrow the definition of "tributary" to "a body of water with relatively permanent flow, and a bed and bank, that connects to a downstream traditional navigable water or the territorial seas, either directly or through one or more waters or features that convey relatively permanent flow" while excluding water bodies that "[contribute] surface water flow to a downstream jurisdictional water through a feature such as a channelized non-jurisdictional surface water feature, subterranean river, culvert, dam, tunnel, or similar . . . or through a debris pile, boulder field, wetland, or similar . . . if such a feature does not convey relatively permanent flow."[21]

a. The proposed definition of "relatively permanent" waters does not reflect hydrological reality.

The proposed definition of "relatively permanent" waters does not comport with hydrology and is a subjective term that not only strips protections from many streams that only exhibit surface flow during the spring thaw or other seasonal events but also decreases agency and judicial efficiency by adopting a vague definition likely to result in litigation. The Agencies should consider adopting an objective, science-based definition for "relatively permanent" waters that considers soil hydrology, alluvial flows, and the variability of precipitation given multi-year precipitation cycles influenced by a variety of meteorological phenomena.

Hydrologists recognize that stream and wetland systems are interconnected components of overarching watersheds that exchange water along with its physical, biological, and chemical traits.[22] Most of the water in larger, navigable rivers that are unquestionably "waters of the United States" originates in smaller streams, some of which may not have continuous surface flow throughout the "wet season," let alone the year.[23] Even these ephemeral streams remain hydrologically connected to larger water bodies through alluvial flows,[24] which is a fact ignored by the proposed rule.[25] These hydrologic realities, by necessity, imply that ephemeral streams have an impact on water quality downstream, even when there is no continuous, visible surface flow.

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[20] *Id.* at 52,517.
[21] *Id.* at 52,521.
[22] SCOTT G. LEIBOWITZ ET AL., *Connectivity of Streams and Wetlands to Downstream Waters: An Integrated Systems Framework*, 54 J. AM. WATER RES. ASS'N 298, 299 (2018), https://doi.org/10.1111/1752-1688.12631.
[23] *Id.* at 300; *See also* LAURIE C. ALEXANDER ET AL., U.S. ENV'T PROT. AGENCY OFFICE OF RSCH. & DEV., EPA/600/R-14/475F, CONNECTIVITY OF STREAMS AND WETLANDS TO DOWNSTREAM WATERS: A REVIEW AND SYNTHESIS OF SCIENTIFIC EVIDENCE, , at 2-18, 3-25 (Jan. 2015), https://www.tucson.ars.ag.gov/unit/publications/PDFfiles/2302.pdf.
[24] LEIBOWITZ ET AL., *supra* note 22, at 304.
[25] 90 Fed. Reg. at 52,517–19.

The agencies assert that "relatively permanent" would be a bright line test, while in the same breath recognizing that the test would have to account for regional variations.[26] This betrays an inconvenient fact for the agencies—the proposed test is anything but a bright line test, and would require a fact-intensive and highly subjective process to make a jurisdictional determination. Moreover, the agencies contend that the "proposed definition incorporates terms that are easily understood in ordinary parlance and should be implementable by both ordinary citizens and trained professionals" continuing that "wet season" is a term that is already in use and well understood, going on to say that a member of the public could make a jurisdictional determination by looking at a stream without professional guidance.[27] This assertion fails to consider the many complex factors that affect a stream's flowrate at any given time, and the seasonal and climactic variations that naturally make streams perennial or close to it for several years and then dry for several years, such as the El Niño–Southern Oscillation cycle.[28] Not only is it unlikely that a lay person would be able to make a jurisdictional determination, but misclassifications by members of the public could also result in even fewer waters receiving protections they are due in practice and could result in costly litigation, in addition to further impairing the CWA's intent. Furthermore, there is no indication of whether this "wet season" term is consistent across states where it is used in statute or regulation and whether this federal definition would be consistent with any or all state definitions.[29]

b. The proposed definition of "tributary" would likely remove multiple urban water bodies from CWA protections.

The proposed definition of "tributary" would remove many historically jurisdictional waters that have been altered by human intervention such as channelized urban rivers and streams. A good example of this is the Los Angeles River Basin, most of which has been segmented and channelized.[30] The channelized segments of the mainstem (which is navigable and thus jurisdictional)[31] have notches cut in the bottom of the canal to concentrate flow during the dry season, when many segments run dry.[32] Many of its tributaries, however, are dry for most of the year.[33] Combining the proposed definition of "tributary" with the proposed definition of "relatively permanent" would create the absurd result of reducing the many channelized tributaries of the Los Angeles River to no more than ditches outside of CWA regulation.

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[26] *Id.*
[27] *Id.*
[28] *See* JOSHUA S. RICE & RYAN E. EMANUEL, *How Are Streamflow Responses to the El Niño Southern Oscillation Affected by Watershed Characteristics?*, 53 WATER RES. RSCH. 4393, 4401 (2017), https://doi.org/10.1002/2016WR020097.
[29] *See* FLA. ADMIN. CODE R 40C-44.066(30)(b) (defining wet season as June-October).
[30] Jordyn M. Wolfand et al., *Balancing Water Reuse and Ecological Support Goals in an Effluent-Dominated River*, 15 J. HYDROL. X art. 100,124 at 2 (2022), https://doi.org/10.1016/j.hydroa.2022.100124.
[31] *See* U.S. Env't Prot. Agency, Region IX, *Special Case Evaluation Regarding Status of the Los Angeles River, California, As a Traditional Navigable River* (2010), https://www.spl.usace.army.mil/Portals/17/docs/regulatory/JD/NavigableWater/CA_TNW_Det/EPA_Memo_SPL-LA_River_TNW_2010-06-23.pdf.
[32] Wolfand et al., *supra* note 30, at 2.
[33] Ariel Wittenberg & Jeremy P. Jacobs, *Did Rogue Paddlers, Scalia Cement Protection for LA River?*, E&E NEWS (July 24, 2017, 1:09 PM), https://www.eenews.net/articles/did-rogue-paddlers-scalia-cement-protection-for-la-river/.

6. The Disconnect Between Science and Policy in Defining "Continuous Surface Connection"

The agencies propose defining **continuous surface connection** as "having surface water at least during the wet season and abutting (i.e. touching) a jurisdictional water."[34] This standard is then to be used to determine "**adjacent wetlands**."[35]

In *Sackett v. EPA*, the majority provides that the *Rapanos v. United States* plurality "clearly spells out when adjacent wetlands are part of covered waters."[36] But the aftermath of *Rapanos*, even without the significant nexus standard, still presented a multitude of implementation issues with respect to "relatively permanent" waters. In *Sackett*, Justice Alito acknowledged temporary interruptions but did not address the issue of wetlands with surface connections but for federal infrastructure.[37] In adopting the direct language while failing to acknowledge and address the ambiguities arguably left open by *Sackett*, this proposed rule imposes limitations that go beyond a reasonable reading of the CWA and ignores the practical realities of implementation due to human activities that have dramatically altered critical water resources. The agencies have attempted to accommodate complications by imposing a wet season test but have not addressed serious issues regarding the abutting / continuous surface connection to a traditional navigable water, which is not easily defined or implemented.

The implementation concerns are further amplified in identifying the suite of tools, data, and mapping repeatedly referenced throughout the proposal needed for field jurisdictional determinations not just for adjacent wetlands, but for streams, lakes, and tributaries.[38] At a basic level, high-tech, sophisticated aerial imaging and modeling is not widely accessible to the general public. Moreover, while various federal programs referenced by the agencies, such as those managed by the U.S. Geological Survey and National Oceanic & Atmospheric Administration, could be facing significant staffing and budget cuts.[39] Essentially, the brightline test the proposed rule promises is a line that can only be seen at certain times of year, or rather at various times of year over a period of several years, and seen using certain tools that cannot be assumed to be available to either the expert or to the ordinary citizen.

a. Applying "continuous surface connection" to "adjacent wetlands" reads critical swaths of waters out of CWA jurisdiction.

In the first landmark ruling on CWA coverage of wetlands in *United States v. Riverside Bayview Homes*, the Supreme Court pointed out that a House Report on CWA legislation noted that the term "navigable" was of "limited import."[40] It is also worth noting that *Riverside Bayview*, which is referenced by *Rapanos*, *Sackett*, and the proposed rule, limited its review to the issue of

[34] 90 Fed. Reg. at 52,527.
[35] *Id.* at 52,530 (emphasis added).
[36] *Sackett*, 598 U.S. at 651.
[37] "We also acknowledge that temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells." *Id.* at 678.
[38] 90 Fed. Reg. at 52,525, 52,530–32, 52538.
[39] Michael Doyle, *USGS Science Centers Face Trump's Chopping Block*, E&E NEWS (Oct. 21, 2025), https://www.eenews.net/articles/usgs-science-centers-face-trumps-chopping-block/; Paul Voosen, *Trump Administration Pushes Ahead With NOAA Climate and Weather Cuts*, SCIENCE (Aug. 25, 2025), https://www.science.org/content/article/trump-administration-pushes-ahead-noaa-climate-and-weather-cuts.
[40] *Riverside Bayview*, 474 U.S. at 133.

"whether it is reasonable, in light of the language, policies, and legislative history of the Act, for the Corps to exercise jurisdiction over wetlands adjacent to, but not regularly flooded by, rivers, streams, and other hydrographic features more conventionally identifiable as 'waters.'"[41]

The Court and the agencies readily acknowledge the CWA includes at least some wetlands.[42] Indeed, the Supreme Court provided outer limits to CWA jurisdiction insofar that isolated wetlands used for migratory bird habitats could not be a basis for jurisdiction.[43] Yet wetlands are unique hydrologic features, distinct from rivers and other waters in their vicinity, making it difficult to understand how the continuous surface connection/indistinguishability aspect truly serves as a bright line when it is in direct contrast to field observations. For example, even if the wetland physically abuts the waterway (sharing soil type, plant life, conditions, and more), as repeatedly referenced in *Rapanos* and *Sackett*, a man-made structure built prior to the passage of the CWA can sever jurisdiction under the proposed rule.

This proposal, in effect, excludes most wetlands that have been separated by manmade structures, like levees. That concern appears nowhere in the proposed rule. In acknowledging the widespread deregulatory nature of the proposed rule, the agencies request specific feedback on impacts to the West and arid regions. However, the proposal fails to discuss how broad the impacts could be in the East given the nature of water infrastructure. For example, a Congressional Research Service report stated that the Army Corps regularly inspects 13,000 miles of nonfederal levee systems across the country.[44] This statistic alone illustrates the scope of infrastructure which inherently severs a continuous surface connection and cuts of what might otherwise be considered "adjacent wetlands" under the proposal. It is hard to imagine Congress intended to read all such wetlands out of the CWA in the 1977 amendments.

From the perspective of the Mississippi River system, the largest and arguably most important waterway in the country, the continuous surface connection and relatively permanent standards will have tremendous consequences for flood control and water quality as the river and its tributaries have been cut off from its surrounding wetlands. How can the Army Corps of Engineers carry out mission-critical civil works programs when it no longer has a grasp on developments bordering the river's flood control and navigation infrastructure? Indeed, Justice Kavanaugh noted the following example in a concurring opinion in the *Sackett* case: "the Mississippi River features an extensive levee system to prevent flooding. Under the Court's 'continuous surface connection' test, the presence of those levees (the equivalent of a dike) would seemingly preclude Clean Water Act coverage of adjacent wetlands on the other side of the levees, even though the adjacent wetlands are often an important part of the flood-control project."[45] He went on to note that "[t]he scientific evidence overwhelmingly demonstrates that wetlands separated from covered waters by those kinds of berms or barriers, for example, still

[41] *Id.* at 131.
[42] 90 Fed. Reg. at 52,527.
[43] Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps Eng'rs, 531 U.S. 159, 170–71 (2001).
[44] NICOLE T. CARTER & ANNA E. NORMAND, CONG. RSCH. SERV., R47946, PROCESS FOR U.S. ARMY CORPS OF ENGINEERS (USACE) PROJECTS 17 (2024), https://www.congress.gov/crs_external_products/R/PDF/R47946/R47946.2.pdf.
[45] *Sackett*, 598 U.S. at 726 (Kavanaugh, J., concurring).

play an important role in protecting neighboring and downstream waters, including by filtering pollutants, storing water, and providing flood control."[46]

b. The proposed wetlands standard upends both federal and state reliance on historical CWA implementation.

Underlying Justice Kavanaugh's concerns is the fact that this proposed rule ignores the scope of federal projects and programs that have been built around decades of CWA interpretations, like the National Flood Insurance Program and multitude of Army Corps flood risk reduction programs. Consistency with U.S. Department of Agriculture programs is mentioned in the proposal, when that has significantly less bearing, as agricultural activities are primarily exempt from both Sections 402 and 404 of the CWA.

States have also relied on robust federal protections. As discussed above, the CWA's primary goal was not merely to preserve state authority over lands and waters.[47] The 1972 amendments were largely in response to failures of states to address water pollution on their own.[48] States are still inadequately prepared to address the same issues today. Most states in the Mississippi River do not have adequate measures in place to adequately manage waters.[49] In short, this proposal upends the longstanding implementation of the CWA and shifts a massive burden for water protection that states, tribes, and local governments are not prepared to take on. Since the *Sackett* decision, many states—Tennessee, Louisiana, and Kentucky, for example— have enacted measures to further limit state water and wetland regimes as federal protections are rolled back.[50] Though some states, like Colorado, have responded to fill gaps left by *Sackett*, the simple reality is that the removal of the federal floor will push many states further to deregulation, recreating the problem the CWA was meant to solve.

7. The Exclusion of Ditches and Groundwater from Clean Water Act Jurisdiction

In the proposed rule, the agencies propose to modify the exclusion for certain ditches and suggest to "add an additional exclusion to the definition of "water of the United States" for groundwater."[51] The agencies' exclusions are articulated to "draw lines and articulate that certain waters and features would not be subject to the jurisdiction of the Clean Water Act," and to state that the revisions to the exclusion "will enhance implementation clarity."[52]

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[46] *Id.* at 726–27.
[47] Clean Water Act § 101(a), 33 U.S.C. § 1251(a).
[48] N. William Hines, *History of the 1972 Clean Water Act: The Story Behind How the 1972 Act Became the Capstone on a Decade of Extraordinary Environmental Reform*, J. ENERGY & ENV'T L., Summer 2013, at 80, 81–82, available at https://gwjeel.com/wp-content/uploads/2013/10/4-2-hines.pdf.
[49] ERIC SCHAEFFER, ENV'T INTEGRITY PROJ., ONE YEAR AFTER KEY SUPREME COURT DECISION, ALMOST HALF OF STATES LEAVE MANY WETLANDS UNPROTECTED 2 (2024), https://environmentalintegrity.org/wp-content/uploads/2025/09/EIP_Report_WetlandsReport_5.23.pdf.
[50] *See, e.g.,* 2025 Tenn. Pub. Ch. 437 (S.B. 670); 2025 La. Sess. Law Serv. Act 105 (S.B. 94); 2025 Kentucky Laws Ch. 119 (S.B. 89).
[51] 90 Fed. Reg. at 52,533.
[52] *Id*. at 52,334.

a. The proposed rule fails to account for functional equivalents of direct, point-source discharges, causing regulatory uncertainty surrounding NPDES permitting.

Although the agencies seek to "draw lines" for water subject to the Clean Water Act, the proposed rule is no less confusing than the current rule, just different. Even though certain ditches and groundwater would be excluded from the definition of the "waters of the United States", they most certainly would still be subject to Clean Water Act section 402 National Pollutant Discharge Elimination System (NPDES) permitting requirements. The NPDES program requires permits for the discharge of "pollutants" from any "point source" into "waters of the United States."[53] Indeed, the proposed rule indicates that even if a ditch is excluded from the definition of ''waters of the United States,'' it may function as a point source that could require a Clean Water Act permit.[54] Moreover, under *County of Maui, Hawaii v. Hawaii Wildlife Fund*, an NPDES permit may be required "when there is a direct discharge from a point source into navigable waters, or when there is the functional equivalent of a direct discharge."[55]

The blanket assertion that these features are not subject to Clean Water Act jurisdiction ignores the statute's application and case law. The proposed rule states that when a ditch constructed entirely on dry land connects to and extends the length of a tributary, even if the ditch has relatively permanent flow, it would be considered a separate reach and excluded under the proposed rule.[56] The distinction between "ditches" and jurisdictional tributaries ignores that, in some instances, these ditches should be treated as point sources. However, the rule indicates that this may not always be the case, and further clarification is needed. The construction of the ditch does not detract from the fact that it constitutes a point-source conveyance to a jurisdictional "water of the United States." The proposed rule could be interpreted as broadening the exclusion to the entire Act, which could cause confusion and leave open the possibility that discharges that require a permit will be overlooked and unregulated.

The proposed rule states that the groundwater exclusion does not apply to the surface expression of groundwater.[57] However, as written, the groundwater exclusion does not address its applicability to other sections of the Act, particularly Section 402. Per the Supreme Court's ruling in *County of Maui*, such potential loopholes could not have been intended by Congress when enacting "one of the key regulatory innovations of the Clean Water Act."[58] Further clarification is needed regarding when surface expression of groundwater is regulated under the Act and how the agencies will implement permitting for such instances. Although the proposed rule purports to apply to the entire act, it appears to focus on section 404, thereby creating confusion because it ignores pivotal regulatory aspects of the Clean Water Act.

b. The proposed rule tells us what "dry land" is not but fails to clearly articulate what "dry land" is.

The agency uses the term "dry land" in the definition of excluded ditches, indicating that the "excluded ditches are not part of the naturally occurring tributary system and do not fall under

[53] 33 U.S.C. § 1342.
[54] 90 Fed. Reg. at 52,540.
[55] County of Maui v. Hawaii Wildlife Fund, 590 U.S. 165, 186 (2020).
[56] 90 Fed. Reg. at 52,540.
[57] *Id*. at 52,541.
[58] *County of Maui,* 590 U.S. at 178–79 (2020).

the ordinary meaning of the term 'waters' within the scope of the Clean Water Act."[59] However, there is concern over the term "dry land" and the fact-finding mission to determine whether a ditch was constructed on dry land or within jurisdictional waterway or wetland systems. The EPA clarifies what "dry land" is not – those that are constructed or excavated in tributaries, relocate a tributary, or are constructed or excavated in wetlands or other aquatic resources, but does not provide a clear, articulate definition of what dry land is.[60]

The agency acknowledges that determining whether a ditch is constructed on dry land is "challenging" due to the absence of historical records and the confluence of multiple information sources.[61] Though it identifies several methodologies for obtaining this information, this places the burden on agencies to secure the necessary resources and analyze the data to make the decision.[62] This process provides no additional insight and does not improve the Act's implementation. There will be a considerable burden on the agencies and interested stakeholders to determine whether the ditch is excluded. The resources and information needed to make this call require funding and staffing at these agencies to reach these determinations, and there is concern that neither the agency nor stakeholders have adequate resources to make proper determinations of "dry land."

8. Conclusion

Although the agencies' study of the costs of the proposed rule deems them unpredictable, the ramifications of this retreat subverting the CWA and exposing connected wetlands to unchecked destruction seem plainly obvious, as alluded to by Justice Kavanaugh. At the very least, decreased flood protection and pollution absorption will increase the scale of disasters. The costs triggered by those disasters will a) be paid for by the Federal government (through taxpayers) at a much higher cost than the proper application of the CWA ever could have caused, b) paid for by the state government, further straining state resources, further decreasing the chances that they will have the adequate resources to protect wetlands, something the vast majority of states have declined to do despite the federalism alluded to in the CWA allowing states to have done so for the past several decades, c) costs will be passed on to private American citizens due to increased insurance rates, or d) American citizens and communities will be not be made whole after otherwise avoidable disasters and left to suffer under burdens the CWA was intended to relieve.

The agencies have been given a nearly impossible task – to create a rule for the application of the Clean Water Act that stays true to both the language and intent of the Act and that also carries out the rulings of the Supreme Court. The result is a proposed rule with only moderate grounding in the realities of hydrology, ecology, and public health— realities that were so imperiled by the lack of state action that they triggered the passing of the CWA in the first place. Following the wishes of the Supreme Court, the agencies aim for a bright-line rule, one that can be plainly obvious to the ordinary citizen. Unfortunately for the agencies' goals—but probably fortunately for the people who live in this country—the American landscape is not always one of bright lines. It still contains much of the subtlety, nuance, and inconsistency endowed upon it by its

[59] 90 Fed. Reg. at 52,541.
[60] *Id.* at 52,540
[61] *Id*.
[62] *Id*. at 52,541

Creator. Nowhere are those lines blurrier than where land and water meet and mix. The goal of bright-line tests, while perhaps admirable, is a distraction from the real point of the CWA. That point isn't the preservation of a narrow concept of federalism, nor is that point the complete occupation of the regulation of land and water by the federal government. The real point of the CWA is to make Americans safer and healthier. The agencies' final rule would be best served by keeping that at its center. Until the agencies do that, they have just another confusing WOTUS rule in a series of confused rules that doesn't serve the United States of America or the Clean Water Act.

For all the above reasons, we oppose the proposed rule and recommend and respectfully request drastic revisions to the proposed rule. Thank you for the opportunity to comment on the proposed rule.

Sincerely,

Tulane Institute on Water Resources Law & Policy