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Via www.regulations.gov

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**Re: Comments on Proposed Updated Definition of “Waters of the United States”
Docket ID No. EPA-HQ-OW-2025-0322**

Dear Ms. Jensen and Mr. Boyd:

Together, our 76 organizations write to urge the U.S. Environmental Protection Agency (“EPA”) and U.S. Army Corps of Engineers (“Corps”) (together, “the Agencies”) not to finalize a revised definition of “waters of the United States” that, as proposed, would dramatically weaken the federal clean water protections that safeguard the health and well-being of our communities, our economic livelihood, and our environment.

The term “waters of the United States” is the jurisdictional linchpin for virtually all of the Clean Water Act’s critical safeguards, including the Act’s core prohibition against the unpermitted discharge of pollutants, the prohibition against the unpermitted discharge of dredge and fill material, and the obligation that states develop water quality standards. A robust definition of “waters of the United States” also helps to provide a strong federal baseline of clean water protections, which ensures that states and tribes are not unfairly harmed by pollution carried downstream from neighboring jurisdictions and promotes national security, the economy, and the health and welfare of all Americans.

By carving countless streams, wetlands, and other waters out of the Clean Water Act’s purview, the Proposed Rule¹ is contrary to the express objective of the Act: to “restore and

¹ Updated Definition of “Waters of the United States,” 90 Fed. Reg. 52498 (Nov. 20, 2025) (“Proposed Rule”).

maintain the chemical, physical, and biological integrity of the Nation’s waters.”² It goes well beyond the judicial precedent it purports to follow, including the Supreme Court’s 2023 decision in *Sackett v. EPA*.³ And it undermines the very goals it claims to serve; by introducing complexity and confusion, it fails to achieve clarity and consistency. Adopting the Proposed Rule would represent arbitrary and capricious rulemaking, and the consequences would be devastating to the nation’s waters and to the communities and ecosystems that depend on them. The Agencies should abandon this fundamentally flawed and misguided rule.

The Southern Environmental Law Center submits these comments on behalf of itself and the following organizations, which collectively represent millions of members and supporters throughout the southeastern United States and across the country who care deeply about protecting the nation’s waters:

Alabama Rivers Alliance
Altamaha Riverkeeper
American Whitewater
Appalachian Voices
Bayou City Waterkeeper
Black-Sampit Riverkeeper
Black Warrior Riverkeeper
Brunswick County Conservation Partnership
Buffalo River Watershed Alliance
Carolina Wetlands Association
Center for Biological Diversity
Center for Food Safety
Charles River Watershed Association
Charleston Waterkeeper
Chesapeake Bay Foundation
Choctawhatchee Riverkeeper
Clean Fairfax
Clean Water Action
Congaree Riverkeeper
Coosa Riverkeeper
Defenders of Wildlife
Flint River Conservation Association
Flint Riverkeeper
Food & Water Watch
Freshwater Future
Friends of Dyke Marsh
Friends of Shades Creek

Georgia Interfaith Power and Light
Great Egg Harbor Watershed Association
James River Association
Kentucky Resources Council, Inc.
Lake Watch of Lake Martin, Inc.
Loudon Wildlife Conservancy
Lower Susquehanna Riverkeeper Association
MountainTrue
Musconetcong Watershed Association
National Trust for Historic Preservation
National Wildlife Federation
Nature Adventures, LLC
Nature Forward
NC Conservation Network
NC League of Conservation Voters
New Jersey Conservation Foundation
North Carolina Wildlife Federation
Northern Virginia Bird Alliance
Ogeechee Riverkeeper
Pasa Sustainable Agriculture
PennFuture
The People’s Justice Council
Public Employees for Environmental Responsibility
River Guardian Foundation
Satilla Riverkeeper
Save Our Saluda

² 33 U.S.C. § 1251(a).

³ 598 U.S. 651 (2023).

Save Sledge Forest
Science for Georgia, Inc.
Sierra Club
Snake River Waterkeeper
South Carolina Environmental Law Project
South Carolina Wildlife Federation
SouthWings
Surfrider Foundation
Tennessee Citizens for Wilderness Planning
Tennessee Environmental Council
Tennessee Scenic Rivers Association

Tip of the Mitt Watershed Council
Upstate Forever
Vermont Conservation Voters
Vermont Natural Resources Council
Virginia League of Conservation Voters
Waterkeepers Chesapeake
West Virginia Rivers Coalition
Wetlands Watch
Wild Virginia
Winyah Rivers Alliance
Yadkin Riverkeeper

I. Clean water benefits all of us—and strong federal protections are essential to ensuring clean water.

All Americans benefit from clean water and healthy wetlands. The rivers and streams that supply our drinking water, the lakes and coastal waters we fish, the wetlands that protect our communities from flooding—these resources benefit Americans from the largest cities to the smallest towns. However, during the twentieth century, the nation’s water quality was in dire straits. It is well understood that the Clean Water Act was drafted in response to nationwide water quality degradation, such as the repeated Cuyahoga River fires of the 1960s.⁴ Since Congress’s enactment of the statute in 1972, the quality of the nation’s water resources has depended on—and benefitted from—strong federal protections.

Yet five decades after Congress announced its objective “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,”⁵ the Clean Water Act’s mandate remains unfulfilled. Pollution, storms, droughts, algal blooms, and other stressors continue to threaten the nation’s waters. As of a 2017 assessment, over 55% of the nation’s miles of rivers and streams were impaired, as were over 70% of the acreage of lakes, ponds, and reservoirs, nearly 80% of the square miles of bays and estuaries, over 90% of ocean and near-coastal waters, and almost 100% of the Great Lakes’ shoreline and open waters.⁶

The nation’s wetlands are struggling, too. Wetlands provide countless benefits to all Americans. Among the many ecosystem services they provide, wetlands:

⁴ Lorraine Boissoneault, *The Cuyahoga River Caught Fire at Least a Dozen Times, but No One Cared Until 1969*, *Smithsonian* (June 19, 2019), <https://www.smithsonianmag.com/history/cuyahoga-river-caught-fire-least-dozen-times-no-one-cared-until-1969-180972444/>.

⁵ 33 U.S.C. § 1251(a).

⁶ See EPA, EPA 841-R-16-011, *National Water Quality Inventory: Report to Congress 8, 11, 14, 15* (2017), <https://perma.cc/8LAY-4TWT>.

- reduce flooding by absorbing stormwater—up to 1.5 million gallons per acre of wetlands—and thereby slow overland movement of stormwater, lower flood heights, and abate storm surges, which can save lives and property;
- protect river, lake, estuary, and ocean shorelines from erosion;
- allow water to slowly infiltrate into the ground to replenish aquifers;
- filter and clean water used for drinking and other household uses;
- filter and clean water used by farmers and businesses for watering livestock, crop irrigation, food processing, pharmaceutical manufacturing, breweries, and other agricultural and industrial processes;
- protect water quality in downstream creeks, rivers, streams, estuaries, and sounds, for the benefit of shellfish and commercial and recreational fisheries;
- improve recreational opportunities for hunters, fishers, birders, paddlers, hikers, and wildlife enthusiasts; and
- provide wildlife habitat for many species, both rare and common, some of which are extremely commercially valuable.

A robust definition of which wetlands constitute waters of the United States and therefore fall within the jurisdiction of the Clean Water Act would help to ensure that these values and benefits are protected. Between 2009 and 2019, the country lost 670,000 acres of vegetated wetlands, primarily in the South and Great Lakes region.⁷ Approximately 82% of wetland area in the United States is in fair or poor condition due to human-driven physical alteration,⁸ which harms fish and wildlife species, reduces recreational opportunities, diminishes water quality, and hinders flood prevention.

Though we have made considerable progress since the Cuyahoga River caught fire and inspired passage of the Clean Water Act, we are far from achieving the Act’s objective. It is thus critical that the Agencies take no action that would undermine Congress’s “broad, systemic view of the goal of maintaining and improving water quality.”⁹

A. Clean water and healthy wetlands are critical to local economies in the Southeast and throughout the nation.

Throughout the nation—and especially in the Southeast—communities rely on industries that cannot thrive without clean water. From commercial and recreational fishing to coastal tourism; from cattle and poultry farmers to vegetable, fruit, and grain growers; from breweries

⁷ U.S. Fish and Wildlife Serv., Status and Trends of Wetlands in the Conterminous United States 2009 to 2019, at 8–9, 26 (2024), <https://perma.cc/6WE7-PA4Y>.

⁸ EPA, EPA 843-R-24-001, National Wetland Condition Assessment: The Third Collaborative Survey of Wetlands in the United States (2024), <https://perma.cc/FFR9-4V8C> (last visited Jan. 2, 2026).

⁹ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985).

and bottling plants to manufacturers of pharmaceuticals, textiles, electronics, and other goods, the southeastern United States is particularly well suited to support these valuable water-dependent industries. The six states in which SELC works—Virginia, North Carolina, South Carolina, Georgia, Alabama, and Tennessee—have a combined 12,517 miles of shoreline,¹⁰ 324,965 miles of rivers,¹¹ and myriad streams, lakes, and wetlands.

Many industries in the Southeast and throughout the nation depend on reliable sources of clean water: agriculture (including livestock, crops, and shellfish farming), food processing and distribution, beverage bottling, pharmaceutical manufacturing, microelectronic manufacturing, and power generation.¹² For example, the Southeast is home to the headquarters and/or major bottling facilities for Coca-Cola, Pepsi, Anheuser-Busch InBev, and myriad other beverage bottlers and breweries, all of which need access to large quantities of pure potable water. North Carolina’s pharmaceutical industry is the third largest in the nation and contributes over 105,000 jobs and \$52.7 billion to the state’s economy.¹³ These pharmaceutical companies need ultra-pure water during the manufacturing process for formulating drugs, eliminating contaminants that compromise drug safety, and cleaning packaging and equipment, as do medical device manufacturers, medical labs, and other sectors of the life sciences industry. North Carolina also boasts the second fastest growing information technology sector in the nation (manufacturing superconductors, microelectronics, and other high-tech products), the second largest animal processing industry, and the largest textile mill industry in the nation.¹⁴ All of these companies depend heavily on access to large amounts of clean water for their manufacturing processes to provide safe, clean, functional products that can compete on the national and international markets; indeed, federal regulations set standards for the level of water purity required for many of their processes.¹⁵ Other states in the southeastern United States are likewise home to industries that provide important products and services, contribute significantly to the national economy, and depend heavily on access to clean water. Adding the cost of purifying polluted water to their industrial processes will drive up costs for the industries and, if and when passed along as operating expenses, for consumers, and will make American products less competitive.

¹⁰ Nat’l Oceanic & Atmospheric Admin. (“NOAA”) Off. for Coastal Mgmt., *Shoreline Mileage of the United States*, <https://perma.cc/ZH5Q-3XM3>.

¹¹ See Nat’l Wild & Scenic Rivers Sys., *Georgia*, <https://perma.cc/79MF-6F3Y> (last visited Jan. 2, 2026); Nat’l Wild & Scenic Rivers Sys., *North Carolina*, <https://perma.cc/F874-V49X> (last visited Jan. 2, 2026); Nat’l Wild & Scenic Rivers Sys., *South Carolina*, <https://perma.cc/CQ8P-8WQM> (last visited Jan. 2, 2026); Nat’l Wild & Scenic Rivers Sys., *Alabama*, <https://perma.cc/M7UB-YS3P> (last visited Jan. 2, 2026); Nat’l Wild & Scenic Rivers Sys., *Tennessee*, <https://perma.cc/H3XM-4HS9> (last visited Jan. 2, 2026); Nat’l Wild & Scenic Rivers Sys., *Virginia*, <https://perma.cc/JL25-NRPW> (last visited Jan. 2, 2026).

¹² *Water Use and Water Waste at Industrial Facilities*, EPA, <https://perma.cc/ZPF9-FEHH> (Sept. 4, 2025).

¹³ TEC Economy Partners, LLC, *Evidence and Opportunity: Impact of Life Sciences in North Carolina* 20 (Jan. 2025), <https://www.ncbiotech.org/sites/default/files/2025-01/NCBiotech%202024-TEconomy.pdf>.

¹⁴ N.C. Dep’t of Commerce, *Key Industries in North Carolina*, <https://perma.cc/X83W-PPRU> (last visited Jan. 2, 2026).

¹⁵ MECO, *Water Quality Standards Guide* (July 30, 2025), <https://perma.cc/PA3F-YG6Z> (summarizing water quality standards for pharmaceutical and medical device manufacturing and other life sciences industries and mentioning other industries).

The Southeast is also a hotspot for vital species of plants and animals, containing some of the most species-rich amphibian, reptilian, and freshwater fish communities in North America.¹⁶ Freshwater biodiversity in the region is the highest in the nation. Alabama alone supports 38% of North American native freshwater fish species and 60% of native mussel species.¹⁷ Accordingly, the commercial and recreational fisheries enabled by the region’s abundant biodiversity benefit when small streams and wetlands—integral for fish and wildlife habitat—are protected. According to the National Oceanic and Atmospheric Administration (“NOAA”), in 2022, commercial fisheries and seafood industry nationwide “generated \$183.4 billion in sales, \$47.2 billion in income, and \$74.0 billion in value-added impacts, as well as supported 1.6 million full- and part-time jobs.”¹⁸ Commercial fishers fish the estuaries, sounds, and ocean waters of the Southeast, generating 72,761 jobs and contributing more than \$14.4 billion in economic value in 2022 in the five coastal states in SELC’s footprint.¹⁹ And in 2011, a total of \$19 billion was spent on wildlife recreation in the six-state region, including \$5.7 billion on recreational fishing; more than 15.9 million people participated in these recreational activities throughout the region.²⁰ Recreational anglers catch trout in the region’s mountain streams, bass in its piedmont lakes and streams, and any number of saltwater fish in its extensive estuaries and beaches.

Southeastern waters also support a thriving tourism industry. Each year, visitors from across the country vacation on southeastern beaches. In 2021 alone, tourism around the beaches of the Southeast generated over \$11 billion in gross domestic product and over 200,000 jobs.²¹ Visitors to the region also patronize the businesses comprising the Southeast’s flourishing brewing industry—which contributed nearly \$9 billion to the economy and supported over 55,000 jobs in 2023²²—as well as wineries and distilleries. All of these businesses depend on clean water to thrive.

Without robust clean water protections, industries suffer. For example, harmful algal blooms that result when waters receive excess nutrients²³ can lead to beach and fishery closures,

¹⁶ Clinton N. Jenkins et al., *US Protected Lands Mismatch Biodiversity Priorities*, 112 Proc. Nat’l Acad. Scis. 5081, 5082 (2015), <https://www.pnas.org/doi/10.1073/pnas.1418034112>; Elizabeth Guinessey et al., A Literature Review: The Chemical, Physical and Biological Significance of Geographically Isolated Wetlands and Non-Perennial Streams in the Southeast 11, 12, 28 (2019), <https://perma.cc/J485-MURK> (hereinafter “Literature Review”).

¹⁷ Charles Lydeard & Richard L. Mayden, *A Diverse and Endangered Aquatic Ecosystem of the Southeast United States*, 9 Conservation Biology 800, 802 (1995), <https://conbio.onlinelibrary.wiley.com/doi/10.1046/j.1523-1739.1995.09040800.x>; Literature Review at 28.

¹⁸ NOAA Fisheries, *Fisheries Economics of the United States 2022*, 5 (2024), <https://perma.cc/J8FF-8EK3>.

¹⁹ See *id.* at 9 tbl. 3 (2024) (totaling sales, income, and value added for Alabama, Georgia, North Carolina, South Carolina, and Virginia), <https://perma.cc/J8FF-8EK3>.

²⁰ See U.S. Fish & Wildlife Serv., *2011 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation 95–97* (2014), <https://perma.cc/VD3Z-ETUF>; see also Literature Review, *supra* note 16, at 22.

²¹ See Nat’l Ocean Econ. Program, *Ocean Economy Data* (totaling 2021 “Tourism & Recreation” gross domestic product and employment figures for Alabama, Georgia, North Carolina, South Carolina, and Virginia), <https://perma.cc/8APJ-FSBU>.

²² Brewers Ass’n, *Total Economic Impact 2023*, <https://perma.cc/F2PX-7MUF> (last visited Jan. 2, 2026) (totaling employment and economic impact figures for Alabama, Georgia, North Carolina, South Carolina, Tennessee, and Virginia).

²³ EPA, *The Effects: Dead Zones and Harmful Algal Blooms* (Feb. 5, 2025), <https://perma.cc/DV2Q-77DR>.

often resulting in millions of dollars in losses to local tourism, seafood, and recreation industries.²⁴ Increased pollutant loadings can also lead to higher drinking water treatment costs for localities and businesses that require water treatment for their production processes.²⁵ Habitat loss and changes in water quality affect recreational activities such as hunting, fishing, and bird watching and the businesses and localities that support those activities.²⁶ Having to purify water and remove contaminants before use can add exorbitantly to the cost of manufacturing pharmaceuticals, producing delicate computer technologies, and processing and packaging food and beverages.²⁷ These additional costs would likely be passed along to the consumer, making American products less competitive domestically and in international markets.

By contrast, strong clean water protections are good for business: in 2014, the Ecological Economics Journal estimated that the Clean Water Act had been responsible for adding as much as \$15.8 billion in economic benefits for Virginia alone.²⁸ Clean water protections boost the local economies of the Southeast and the nation.

B. Communities hit hardest by environmental threats need strong clean water protections.

Water that is contaminated or otherwise compromised affects all Americans. We all drink and use water every day; allowing more pollution to enter the nation’s waters means devoting more resources—and more ratepayer dollars—to treat water before it reaches our taps.

Yet it is also well established that the burdens of environmental contamination and industrial pollution fall disproportionately on lower-income communities and communities of color.²⁹ Water pollution is no exception. Lower-income populations and people of color often

²⁴ See NOAA Fisheries, *Hitting Us Where It Hurts: The Untold Story of Harmful Algal Blooms* (Sept. 25, 2024), <https://perma.cc/UZH6-D4SQ>.

²⁵ EPA & Dep’t of the Army, Regulatory Impact Analysis for the Proposed *Updated Definition of Waters of the United States* Rule 91 (Nov. 2025), <https://perma.cc/4SCJ-NN99> (hereinafter “Regulatory Impact Analysis”).

²⁶ *Id.* at 90–91.

²⁷ Ana Clara da Rosa Santos & David McCormack, *Demystification of the True Cost of Water Within Industrial Facilities*, 71 AQUA – Water Infrastructure, Ecosystems & Soc’y 1440 (2022), <https://iwaponline.com/aqua/article/71/12/1440/92061/Demystification-of-the-true-cost-of-water-within>; Dominik Seiler et al., *Resource Transparency of Industrial Systems: A Model to Demonstrate the Total Costs of Water Purification*, 80 Procedia CIRP 281 (2019), <https://www.sciencedirect.com/science/article/pii/S2212827119300150>.
²⁸ See Jim Epstein, Letter to the Editor, *Clean Water Is Vital for Business in Virginia*, The Progress-Index, Oct. 16, 2014, <https://perma.cc/3ZDD-ZQH3>; see also Spencer Phillips & Beth McGee, *Ecosystem Service Benefits of a Cleaner Chesapeake Bay*, 44 Coastal Mgmt. 241 (2016), <http://dx.doi.org/10.1080/08920753.2016.1160205> (quantifying economic benefits of clean water in Chesapeake Bay, including Virginia).

²⁹ See generally, e.g., Robert D. Bullard et al., *Toxic Wastes and Race at Twenty, 1987–2007: A Report Prepared for the United Church of Christ Justice and Witness Ministries* (2007), <https://perma.cc/TJ9R-YVVF>; Paul Mohai & Robin Saha, *Which Came First, People or Pollution? A Review of Theory and Evidence from Longitudinal Environmental Justice Studies*, 10 Env’t Rsch. Letters 125011 (2015), <https://perma.cc/S49L-8EG9>; Paul Mohai & Bunyan Bryant, *Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards*, 63 U. Colo. L. Rev. 921 (1992).

face severe and persistent drinking water contamination³⁰ and limited access to clean water,³¹ as they are more likely to live in areas with inadequate water infrastructure.³² According to a 2019 analysis, laws protecting safe drinking water are violated more often in counties with higher racial, ethnic, and language vulnerability.³³ EPA has also reported that drinking water systems on Native American reservations experience more frequent water quality issues than do all public systems in the United States.³⁴

Further, because lower-income communities and many communities of color have some of the highest rates of fish consumption per capita,³⁵ they also disproportionately bear the harms of fish contamination from polluted water, which can lead to cancer and other health problems, increased medical expenses, and neurological issues and developmental delays for fetuses and children.³⁶ Indeed, for communities that rely on subsistence fishing for their way of life, increased pollution and loss of fish habitat threaten a food source and a means of social bonding.³⁷

The impacts of climate change—including sea level rise, flooding, and drought—are also more likely to adversely affect lower-income communities and communities of color. Many such communities experience impacts most acutely because they lack the resources to mitigate and

³⁰ Gary W. Evans & Elyse Kantrowitz, *Socioeconomic Status and Health: The Potential Role of Environmental Risk Exposure*, 23 *Ann. Rev. Pub. Health* 303, 307–11 (2002).

³¹ James VanDerslice, *Drinking Water Infrastructure and Environmental Disparities: Evidence and Methodological Considerations*, 101 *Am. J. Pub. Health* S109, S113 (2011), <https://perma.cc/479U-SVYB>.

³² Sacoby M. Wilson et al., *Built Environment Issues in Unserved and Underserved African-American Neighborhoods in North Carolina*, 1 *Env't Just.* 63 (2008), <https://perma.cc/LYH3-Y375>; Carolina L. Balazs & Isha Ray, *The Drinking Water Disparities Framework: On the Origins and Persistence of Inequities in Exposure*, 104 *Am. J. Pub. Health* 603 (2014), <https://ajph.aphapublications.org/doi/full/10.2105/AJPH.2013.301664?role=tab>.

³³ Nat. Res. Def. Council et al., *Watered Down Justice R: 19-09-A* at 18 (2019), <https://perma.cc/R64S-XP72>.

³⁴ EPA, 2006 National Public Water System Compliance Report at 4, 15 (2009), <https://perma.cc/E8C7-86QQ>.

³⁵ Nat'l Env't Just. Advisory Council, *Fish Consumption and Environmental Justice 2* (2002), <https://perma.cc/HM65-9N25>; see generally Off. of Env't Health Hazard Assessment, Cal. EPA, *Chemicals in Fish: Consumption of Fish and Shellfish in California and the United States* (2001); Jason Corburn, *Combining Community-Based Research and Local Knowledge to Confront Asthma and Subsistence-Fishing Hazards in Greenpoint/Williamsburg, Brooklyn, New York*, 110 *Env't Health Persps.* 241 (2002); Laura Hunter et al., *Env't Health Coal., Survey of Fishers on Piers in San Diego Bay: Results and Conclusions* (2005), <https://perma.cc/XZ85-9E8M>; Fraser M. Shilling, *Fishing for Justice or Just Fishing?*, 36 *Ecology L.Q.* 205 (2009), <https://perma.cc/H2RT-P874>; Rebecca L. Williams et al., *An Examination of Fish Consumption by Indiana Recreational Anglers: An On-Site Survey, Technical Report 99-D-HDFW-2* (2000), <https://perma.cc/6RRR-AR57>; AMAP Working Grp., *AMAP Assessment 2009: Human Health in the Arctic* (2009), <https://perma.cc/3BCX-TDW5>.

³⁶ See, e.g., Marissa Hauptman & Alan D. Woolf, *Childhood Ingestions of Environmental Toxins: What Are the Risks?*, 46 *Pediatric Annals* 466 (noting that the health risks associated with consuming contaminated fish include cancer and developmental delays in children).

³⁷ Ralph B. Brown & John F. Toth Jr., *Natural Resource Access and Interracial Associations: Black and White Subsistence Fishing in the Mississippi Delta*, 17 *S. Rural Sociology* 81, 104–05 (2001), <https://perma.cc/M2M6-66WZ>.

adapt to climate-related changes.³⁸ For communities that rely on fish and other aquatic life for income, changing water temperatures and flows can drastically affect their livelihoods.³⁹

Lower-income communities and communities of color also tend to be particularly vulnerable to increased flooding: they are both more likely to live in flood-prone areas (because the land was historically cheaper to build on) and less likely to have the resources to readily recover from the damage flooding causes.⁴⁰ And the disproportionate burden on communities of color is only expected to worsen in the coming decades, as such communities face disproportionate increases in climate change-induced flooding. A 2022 study estimated that communities in which at least 20% of the population is Black will see a 40% increase in flood risk by 2050.⁴¹ This projected increase in risk for the communities with the proportionally largest Black populations is nearly double the projected increase for communities with the proportionally smallest Black populations.⁴² Because wetlands are our most effective natural guards against flooding and other impacts of climate change,⁴³ they must be preserved through strong federal regulations. Clean water protections are particularly important to the health and well-being of the nation’s most vulnerable populations.

C. Strong clean water protections are necessary to mitigate and adapt to the effects of a changing climate.

The Proposed Rule would hinder the ability of communities and states to adapt to climate change and react to the harms caused by the increased flooding, drought, and storm activity they are already facing and will face with accelerating frequency in the coming years. Wetlands in particular stabilize water levels in other water bodies, abate storm-related flooding, and clean precious and increasingly scarce drinkable water, all issues that are exacerbated by climate change.

³⁸ Rachel Morello-Frosch et al., *The Climate Gap: Inequalities in How Climate Change Hurts Americans & How to Close the Gap* (2009), <https://perma.cc/EDX6-L76A>; Susan Cutter, *The Geography of Social Vulnerability: Race, Class, and Catastrophe*, in *Understanding Katrina: Perspectives from the Social Sciences*, Items (2006), <https://perma.cc/7JKE-QY5K>.

³⁹ Food & Agric. Org. of the United Nations, *Climate Change Adaptation and Mitigation in the Food and Agriculture Sector* (2008), <https://openknowledge.fao.org/items/fe309f1c-469a-4749-affe-42a53576954a>.

⁴⁰ Dalbyul Lee & Juchul Jung, *The Growth of Low-Income Population in Floodplains: A Case Study of Austin, TX*, 18 *KSCE J. Civ. Eng’g* 683, 684 (2014); Jonathan M. Katz, *Who Suffers When Disasters Strike? The Poorest and Most Vulnerable*, *Wash. Post*, Sept. 1, 2017, <https://perma.cc/UGA9-CWH5>; *Historic Black Town in North Carolina Lies One Hurricane Away From Disaster*, *WUNC*, Apr. 28, 2022 (providing example of disparate effects of climate change and describing history and future of flooding in a low-lying historically Black community in North Carolina), <https://perma.cc/US2E-LDTJ>.

⁴¹ Oliver E.J. Wing et al., *Inequitable Patterns of US Flood Risk in the Anthropocene*, *Nature Climate Change* 4 (2022).

⁴² *Id.*

⁴³ The Agencies admit that increased flood risk may accompany the loss of wetlands due to the Proposed Rule. Regulatory Impact Analysis, *supra* note 25, at 90.

1. Climate change is already causing widespread and varied harm to the nation’s water resources.

Studies have shown that climate change has affected and will continue to affect the quality and surface flow of our nation’s waters.⁴⁴ EPA has acknowledged that

[c]limate change is changing our assumptions about water resources. As climate change warms the atmosphere, altering the hydrologic cycle, changes to the amount, timing, form, and intensity of precipitation will continue. Other expected changes include the flow of water in watersheds, as well as the quality of aquatic and marine environments. These impacts are likely to affect the programs designed to protect water quality, public health, and safety.⁴⁵

Broadly, changes in precipitation are “intensifying droughts, increasing heavy downpours, and reducing snowpack, and causing declines in surface water quality” across regions.⁴⁶ More frequent high-intensity rainfall events mobilize pollutants such as sediments and nutrients.⁴⁷ Future warming will add to the stress on water supplies and adversely affect the availability of water in parts of the United States, particularly the already water-strapped West.

Climate change is already altering water supply timing in many parts of the country, especially those areas that rely on snowmelt for late-spring, summer, and early-fall flows. Increasing temperatures will both reduce the amount of snowpack and cause it to melt earlier, more quickly, and more extensively.⁴⁸ As a result, flows will be reduced, concentrating pollutants and degrading water quality. These water temperature increases and changes in seasonal patterns of runoff will likely disturb fish habitat and affect recreational uses of lakes, streams, and wetlands.”⁴⁹

In the southwestern United States, drought and wildfire caused by climate change are adversely affecting water resources, wildlife habitat, and jobs. For example, as the climate warms, more of New Mexico’s waters are drying up. As water bodies become stressed by drought, overuse, and the changing climate, many perennial and intermittent streams and springs are fading. Numerous critical rivers and tributaries in the state are not entirely perennial (e.g., the Rio Grande, Canadian River, Rio Puerco, Rio Galisteo, Dry Cimarron, Ute Creek, and Rio Hondo), and many are fed by streams without continuous flow. With warming temperatures, the

⁴⁴ Susan A.R. Colvin et al., *Headwater Streams and Wetlands Are Critical for Sustaining Fish, Fisheries, and Ecosystem Services*, 44 *Fisheries* 85 (2019).

⁴⁵ EPA, *Addressing Climate Change in the Water Sector*, <https://perma.cc/CYA9-SXXU> (last visited Jan. 2, 2026).

⁴⁶ U.S. Global Change Rsch. Program, *Fourth National Climate Assessment, Vol. II: Impacts, Risks, and Adaptation in the United States* 137 (2018), <https://perma.cc/XDB6-KXQB>.

⁴⁷ *Id.* at 143.

⁴⁸ *Id.* at 150.

⁴⁹ *Id.* at 44.

amount of flow in these waters will likely diminish even more, and the region’s demand for scarce clean water will strain river systems even further.⁵⁰

Meanwhile, changing rainfall patterns, increased storms, and sea level rise induced by climate change are increasing flooding in many parts of the country, making the preservation of the nation’s remaining wetlands more important than ever.⁵¹ Flood losses in the United States—currently estimated at \$32.1 billion on average—are projected to increase by over 25% in the next thirty years.⁵² EPA has attributed the likelihood of larger and more frequent river floods in certain regions to changes in the size and frequency of storms, streamflow, snowmelt, and snowpack accumulation.⁵³ NOAA officials referred to the Spring 2019 flood season as “potentially unprecedented,”⁵⁴ with floods causing multiple deaths and billions of dollars in damage throughout the Midwest that year.⁵⁵ EPA has reported that it would cost \$1.5 million annually to replace the natural flood-control functions of a single 5,000-acre tract of drained Minnesota wetlands.⁵⁶ In the Midwest, the frequency and severity of flooding have risen in recent years.⁵⁷ The year 2021 brought the deadliest flash flooding ever to affect Middle Tennessee and one of the worst natural disasters in the history of the state.⁵⁸ Historically high rainfall—as much as 17 inches in one day in some places—led to flooding that killed at least 20 people and inflicted severe damage to communities across Middle Tennessee.⁵⁹ Experts expect these types of catastrophic flooding events to increase in frequency in the coming decades due to climate change.⁶⁰ And elsewhere in the Southeast, the number of days marked by high tide flooding—sometimes called “sunny-day flooding,” resulting from rising sea levels—has increased by over 400% since 2000.⁶¹

⁵⁰ James Kenney, N.M. Env’t Dep’t, *Comment Letter on Proposed Revised Definition of Waters of the United States* 5 (Apr. 15, 2019), <https://perma.cc/5DR7-SCKL>.

⁵¹ See NOAA, *2021 State of High Tide Flooding and Annual Outlook* 6–10 (2021) (hereinafter “State of High Tide Flooding”), <https://perma.cc/6GHT-AEUE>.

⁵² Oliver E.J. Wing et al., *Inequitable Patterns of US Flood Risk in the Anthropocene*, *Nature Climate Change* 2 (2022).

⁵³ *Climate Change Indicators: River Flooding*, EPA, <https://perma.cc/JZ76-SRLJ>.

⁵⁴ *Spring Outlook: Historic, Widespread Flooding to Continue Through May*, NOAA (Mar. 21, 2019), <https://perma.cc/7LE5-LNV3>.

⁵⁵ John Schwartz, *25 States Are at Risk of Serious Flooding This Spring, U.S. Forecast Says*, *N.Y. Times*, Mar. 21, 2019, <https://perma.cc/RT4A-R9QG>; Mark Berman & Reis Thebault, *Two Dead, Two Missing Amid ‘Historic’ Flooding Across the Midwest*, *Wash. Post* (Mar. 18, 2019), <https://perma.cc/XX6W-X9E4>.

⁵⁶ EPA Office of Water, EPA843-F-06-001, *Wetlands: Protecting Life and Property from Flooding* (May 2006), <https://perma.cc/C97H-MZ2B>.

⁵⁷ Gary Galluzzo, *Study Finds Midwest Flooding More Frequent*, *Iowa Now* (Feb. 9, 2015), <https://perma.cc/CT5P-6LGZ>.

⁵⁸ Nat’l Weather Serv., *August 21, 2021 Flash Flooding* (Sept. 28, 2021), <https://perma.cc/4R2Z-G6RJ>.

⁵⁹ Bob Henson, Yale Climate Connections, *Henri Drenches Northeast; Death Toll at 21 in Catastrophic Tennessee Flash Flood* (Aug. 23, 2021), <https://perma.cc/CY9N-8DTT>; see also Michael Levenson, *At Least 22 Dead and 50 Missing in Tennessee Floods, Officials Say*, *N.Y. Times* (Aug. 24, 2021), <https://perma.cc/65MG-K2Y9>.

⁶⁰ See Vanderbilt Sch. of Eng’g, *Tennessee Flash Floods are an Example of Climate Change Impacts to Come* (Aug. 25, 2021), <https://perma.cc/2XV8-WADX>.

⁶¹ NOAA Off. for Coastal Mgmt., *High Tide Flooding*, <https://perma.cc/3595-EYL3> (last visited Jan. 2, 2026).

In just the last nine years, North Carolina and other southeastern states have been hit with several devastating 500-year storms, including Hurricane Matthew, Hurricane Florence, Tropical Storm Michael, Potential Tropical Cyclone Eight, and Hurricane Helene. The damage from these storms is measured in the billions of dollars, including an estimated \$78.7 billion from Hurricane Helene alone, with much of the damage caused by floodwaters.⁶² These types of storms are projected to increase in frequency, power, and duration, making it more important than ever to preserve the nation’s wetlands and other water resources in order to abate flooding and mitigate the damage from climate change.

2. Protecting water resources will help communities mitigate and adapt to the effects of climate change.

Our natural water resources are among the best defenses against the effects of climate change. A single acre of wetlands can store up to 1.5 million gallons of water and thereby slow overland movement of stormwater, lower flood heights, and abate storm surges.⁶³ When that acre of wetlands is filled for development or otherwise removed, that stormwater will flow unimpeded downstream instead, increasing the risk of flooding. During Hurricane Sandy in 2012, the storage capacity of wetlands prevented \$625 million in flood damage by shielding property in twelve states.⁶⁴ A 2020 analysis of hurricanes and tropical storms along the Atlantic and Gulf coasts found that counties with more wetland coverage experienced significantly less damage, saving an average of about \$4.6 million per square mile.⁶⁵ It is thus critically important that wetlands are protected.

In addition to guarding against flooding, wetlands filter upstream pollution and prevent contaminants from entering our sensitive estuaries and marine environments, as well as rivers and lakes inland. With a warming climate and pollution mobilized through increases in precipitation, wetlands play a critical role in removing from other water bodies sediment and excess nutrients⁶⁶—pollutants that have the potential to cause eutrophication and decimate valuable commercial and recreational fisheries. Millions of people in the Southeast and across the country get their drinking water from surface waters kept clean by wetlands. Wetlands also

⁶² NOAA Off. for Coastal Mgmt., *Hurricane Costs*, <https://perma.cc/H47B-Y7DZ> (last visited Jan. 2, 2026).

⁶³ *Wetlands: Protecting Life and Property from Flooding*, *supra* note 56, at 1; NOAA, *5 Reasons Why We Love Wetlands* (May 26, 2020), <https://perma.cc/394S-YPL2> (“One acre of wetlands can store as much as 1.5 million gallons of floodwater. Wetlands save coastal communities \$23 billion annually by protecting them from the effects of storms”).

⁶⁴ Siddharth Narayan et al., *The Value of Coastal Wetlands for Flood Damage Reduction in the Northeastern USA*, 7 *Sci. Reps.* 9463 (2017), <https://perma.cc/NJW4-XKBN>.

⁶⁵ Fanglin Sun & Richard T. Carson, *Coastal Wetlands Reduce Property Damage During Tropical Cyclones*, 117 *Proc. Nat’l Acad. Scis.* 5719, 5722 (2020), <https://www.pnas.org/doi/full/10.1073/pnas.1915169117>.

⁶⁶ EPA & U.S. Dep’t of the Army, Technical Support Document for the Final “Revised Definition of ‘Waters of the United States’” Rule 110 (Dec. 2022), <https://perma.cc/K3XQ-WLJ3> (hereinafter “2023 Rule Technical Support Document”).

recharge groundwater supplies,⁶⁷ which is important for the millions more who rely on wells as their source of drinking water. As the climate warms, the nation’s wetlands are becoming ever more critical for the health of our waters and safety of our communities.

Small streams are also becoming more important due to the effects of climate change. Streams with intermittent flow—even more than perennial streams—play a critical role in carbon sequestration, a process in which carbon is stored in sediment or taken up by organisms rather than being released into the atmosphere where it contributes to climate change.⁶⁸ Small streams transform and store carbon before it can be transported downstream.⁶⁹ These streams break down leaf litter and other organic matter, releasing it downstream in pulses during storm events.⁷⁰ The pulses provide an important source of carbon for downstream animals.⁷¹

More frequent and intense extreme weather and climate-related events are expected to continue to damage infrastructure, ecosystems, and social systems that provide essential benefits to communities. Future climate change is expected to further disrupt many areas of life, compounding existing challenges to stressed ecosystems and exacerbating economic inequality. The Agencies cannot afford to eliminate protections for waters that assist in combatting the effects of a warming climate.

D. The Supreme Court’s *Sackett* decision already poses a severe threat to the integrity of the nation’s waters.

The weakening of federal clean water protections that resulted from the Supreme Court’s 2023 decision in *Sackett v. EPA* has opened the door for pollution to enter the nation’s rivers, lakes, wetlands, and drinking water sources—waters that are only as clean as the upstream waters that feed them. In *Sackett*, the Supreme Court held that the Clean Water Act covers only “‘relatively permanent, standing or continuously flowing bodies of water forming geographic[al] features that are described in ordinary parlance as streams, oceans, rivers, and lakes,’” along with 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.’”⁷² Even the Agencies themselves anticipated the substantial potential detrimental effects of *Sackett*’s upending of longstanding judicial and regulatory interpretations of the jurisdictional scope of the Clean Water Act. According to EPA’s own estimates, the *Sackett* decision stripped Clean Water Act coverage from as much as 63% of the nation’s wetlands by

⁶⁷ N.C. Dep’t of Env’t Quality, *North Carolina Coastal Habitat Protection Plan 2021 Amendment* 87 (2021), <https://perma.cc/C4JV-R7FT>.

⁶⁸ Literature Review, *supra* note 16, at 30–31.

⁶⁹ *Id.*

⁷⁰ *Id.* at 30.

⁷¹ *Id.*

⁷² *Sackett v. EPA*, 598 U.S. 651, 678 (quoting *Rapanos v. United States*, 547 U.S. 715, 742 (2006)) (internal quotations omitted).

acreage and up to 4.9 million miles of streams, leaving them vulnerable to destruction and pollution.⁷³

Nevertheless, four months after the *Sackett* decision, the Agencies published revisions to their existing rule defining “waters of the United States.”⁷⁴ Because “the sole purpose” of the amendments was “to conform with *Sackett*,” the Agencies’ amended rule mirrored *Sackett*’s language of *Sackett*, defining “waters of the United States” to include “[w]etlands adjacent to . . . [r]elatively permanent, standing or continuously flowing bodies of water . . . and with a continuous surface connection to those waters,”⁷⁵ and further defining “adjacent” as “having a continuous surface connection.”⁷⁶ As the district court in *White v. EPA* found shortly thereafter in declining to enjoin the amended rule’s implementation, the Agencies’ amended rule “faithfully conforms to the definition of ‘waters of the United States’ as interpreted by *Sackett*.”⁷⁷

Accordingly, there is no need for the Agencies to further revise the definition of “waters of the United States” “to implement the *Sackett* decision”:⁷⁸ they already have. To further restrict the scope of waters protected under the Clean Water Act beyond the Supreme Court’s holding in *Sackett* would be disastrous.

E. The Agencies’ most recent attempt to weaken federal clean water protections—the 2020 Navigable Waters Protection Rule—was an unqualified failure.

In 2020, the Agencies engaged in an ill-fated effort to narrow the breadth of “waters of the United States,” promulgating a definition of the term that was quickly determined to be both unlawful and harmful. The Navigable Waters Protection Rule (“NWPR”) was contrary to the Clean Water Act that it purported to implement and the Administrative Procedure Act (“APA”) for the haphazard way in which it was developed.⁷⁹ After the Agencies themselves acknowledged “substantial concerns about certain aspects of the NWPR . . . including whether the NWPR adequately considered the [Clean Water Act]’s statutory objective” and “the effects of the NWPR on the integrity of the nation’s waters,” the rule was promptly vacated by two

⁷³ Allyson Chiu, *Biden Rule, Heeding Supreme Court, Could Strip Over Half of U.S. Wetlands’ Protections*, Wash. Post, Aug. 29, 2023, <https://www.washingtonpost.com/climate-environment/2023/08/29/epa-new-wetland-rule/>.

⁷⁴ Revised Definition of “Waters of the United States”; Conforming, 88 Fed. Reg. 61964 (Sept. 8, 2023) (hereinafter “2023 Rule”).

⁷⁵ 33 C.F.R. § 328.3(a); 40 C.F.R. § 120.2(a).

⁷⁶ 33 C.F.R. § 328.3(c)(2); 40 C.F.R. § 120.2(c)(2).

⁷⁷ *White v. EPA*, 737 F. Supp. 3d 310, 329 (E.D.N.C. 2024), *appeal docketed*, No. 24-1635 (4th Cir. July 11, 2024).

⁷⁸ Proposed Rule, 90 Fed. Reg. at 52499.

⁷⁹ A report by EPA’s Office of Inspector General found that the NWPR process was one of the rulemakings between 2015 and 2019 “least adherent” to EPA’s own policies and procedures. EPA Off. of Inspector Gen., *Report No. 21-P-0115, EPA Does Not Always Adhere to Its Established Action Development Process for Rulemaking* at 9–12 (2021), <https://perma.cc/DQ2N-TQD8> (discussing NWPR in analysis of 58 EPA rulemakings from fiscal years 2015 through 2019 for their adherence to EPA’s internal rulemaking process).

federal courts.⁸⁰ The courts held that the concerns identified by the Agencies “involve fundamental, substantive flaws that cannot be cured without revising or replacing the NWPR’s definition of ‘waters of the United States.’”⁸¹

Indeed, the Agencies even admitted during the NWPR rulemaking that by reducing protections for many streams and wetlands, that rule could cause substantial harms including increased water pollution, flooding, loss of aquatic habitat, oil spills, reduced ecosystem services, and degraded drinking water.⁸² In the 14-month period in which the NWPR was in effect, these concerns were borne out. Developers and other project proponents applied for safe harbor under the NWPR at a record-setting pace, and the Agencies issued approved jurisdictional determinations that excluded entire categories of previously protected waters from the Clean Water Act’s safeguards against pollution or destruction.⁸³ According to the Agencies, “[i]n 2020–2021, there [was] a threefold (338%) increase from 2019–2020 and a fourfold (412%) increase from 2018–2019 in the number of projects being determined to not require section 404 permits under the [Clean Water Act].”⁸⁴ And as the Agencies recognized, “indicators of a substantial reduction in waters protected” by the NWPR “likely account for only a fraction of the 2020 NWPR’s impacts, because many project proponents did not seek any form of jurisdictional determination for waters that the 2020 NWPR categorically excluded . . . and the Corps would not have knowledge of or ability to track such projects.”⁸⁵ Based on the NWPR’s widespread reductions in waters deemed to be covered under the Clean Water Act, the Agencies subsequently confessed that the rule was “causing significant, ongoing and irreversible environmental damage.”⁸⁶

Now, barely four years after confessing error, the Agencies are again pursuing a misguided effort that they freely admit will result in fewer streams, wetlands, and other waters coming within the Clean Water Act’s coverage. In fact, many key elements of the Proposed Rule mirror provisions in the NWPR, including the elimination of categorical protections for interstate waters,⁸⁷ a restrictive approach to evaluating the status of tributaries,⁸⁸ and the expansion of the

⁸⁰ *Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949, 955, 956–57 (D. Ariz. 2021); *Navajo Nation v. Regan*, 563 F. Supp. 3d 1164, 1168, 1170 (D.N.M. 2021).

⁸¹ 557 F. Supp. 3d at 955 (internal citation omitted); *Navajo Nation*, 563 F. Supp. 3d at 1168 (quoting *Pascua Yaqui Tribe*, 557 F. Supp. 3d at 955).

⁸² EPA & Dep’t of the Army, Economic Analysis for the Navigable Waters Protection Rule: Definition of “Waters of the United States” at 105–06 (Jan. 22, 2020), <https://perma.cc/4JK2-FD8W> (hereinafter “NWPR Economic Analysis”).

⁸³ See, e.g., Amena H. Saiyid, *Companies Eager to ‘Lock In’ Trump-Era Water Rule Exemptions*, Env’t & Energy Rep. (Sept. 10, 2020), <https://perma.cc/8LU4-YM9G>.

⁸⁴ EPA & Dep’t of the Army, Memorandum for the Record re: Review of U.S. Army Corps of Engineers ORM2 Permit and Jurisdictional Determination Data to Assess Effects of the Navigable Waters Protection Rule at 3 (June 8, 2021), <https://perma.cc/2854-5BTQ>.

⁸⁵ 2023 Rule Technical Support Document, *supra* note 66, at 83.

⁸⁶ Decl. of Ronnie Ben, Ex. 1, *Navajo Nation*, No. 20-CV-602-MV/GJF (D.N.M. July 2, 2021), ECF No. 34-2 (email from Karen Gude, EPA, to Tribal Partners (June 9, 2021)).

⁸⁷ See *infra* Section III.B.

⁸⁸ See *infra* Section III.D.

exclusion for prior converted cropland.⁸⁹ The Agencies would be ill-advised to repeat the mistakes of their disastrous NWPR rulemaking.

II. The Proposed Rule is fundamentally flawed and violates the Administrative Procedure Act, the Clean Water Act, and the Endangered Species Act.

A. The Agencies failed to consider the most important aspect of the problem addressed by redefining “waters of the United States”: the definition’s impact on water quality.

An agency rule is arbitrary and capricious “if the agency . . . entirely failed to consider an important aspect of the problem” that its rulemaking purports to address.⁹⁰ In crafting the Proposed Rule, just as they did in crafting the short-lived NWPR, the Agencies have failed to consider the *most* important aspect of the problem at issue in the current rulemaking: the effects of the Proposed Rule on the Clean Water Act’s statutory “objective” to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”⁹¹ The Agencies acknowledge that restoring and maintaining water quality is an important aspect of the problem; on its first page, the Proposed Rule asserts that it is “intended to implement the overall objective of the Clean Water Act to restore and maintain the quality of the Nation’s waters.”⁹² Yet the Agencies repeatedly admit that they have not evaluated the Rule’s effects on water quality.

To begin, the Agencies acknowledge that “the proposed rule would define fewer waters and wetlands as within the scope of the Clean Water Act.”⁹³ And they speculate that narrowing the scope of waters that are jurisdictional under the Act *could* have adverse effects: it “may result in a reduction in the ecosystem services provided by some waters and wetlands”⁹⁴ and “could also result in discharges into newly non-jurisdictional waterbodies and lead to ecosystem impacts and related forgone benefits.”⁹⁵

Nowhere in the rulemaking record, however, do the Agencies actually evaluate the Proposed Rule’s potential impacts on water quality. On the contrary, the Agencies go out of their way to emphasize that they have *not* assessed the likely effects of the Proposed Rule. They report in the preamble that “the agencies have not quantified cost savings and forgone benefits for the purposes of this proposed rule.”⁹⁶ And in the Regulatory Impact Analysis, the Agencies repeat their disclaimer that they have not assessed the costs and benefits, including the loss of the many ecosystem services of wetlands and other waters that may be destroyed or degraded under the

⁸⁹ See *infra* Section III.F.2.

⁹⁰ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁹¹ 33 U.S.C. § 1251(a).

⁹² Proposed Rule, 90 Fed. Reg. at 52498.

⁹³ *Id.* at 52542, 52543 (stating that “the agencies anticipate fewer waters would be subject to Clean Water Act regulation under the proposed rule”).

⁹⁴ *Id.* at 52543.

⁹⁵ Regulatory Impact Analysis, *supra* note 25, at 68.

⁹⁶ Proposed Rule, 90 Fed. Reg. at 52500.

Proposed Rule and the cost to water utilities, manufacturers, and other water users to clean polluted water before using it⁹⁷—because, in the Agencies’ words, it would be “extremely difficult.”⁹⁸

To the extent the Agencies claim that their new interpretation of *Sackett* excuses them from considering the Proposed Rule’s effects,⁹⁹ they are wrong. As the Supreme Court has made clear, a new legal interpretation does not obviate the need for reasoned decision-making, which necessarily includes weighing the consequences of the agency’s action. In *Department of Homeland Security v. Regents of the University of California*,¹⁰⁰ the Court held that even if an agency determined that a program it had previously authorized was unlawful, it still had to consider the consequences of the decision to rescind it and whether alternatives to rescission were available.¹⁰¹ Here, the Agencies admit that they have not considered the consequences of the Proposed Rule, in violation of the APA.

Notably, when the Agencies sought remand of the NWPR in 2021, they questioned whether they had omitted “a critical element in assuring consistency with the statutory objective of the [Act]” by adopting a rule without adequately considering its effects on water quality.¹⁰² The Agencies now arbitrarily and capriciously take the opposite view: that the effects on water quality are *not* an appropriate basis for their decision as to how to define the scope of “waters of the United States” and implement the Clean Water Act.¹⁰³ But that view is incorrect. In light of the Act’s objective, the water-quality impacts that result from modifying the Clean Water Act’s jurisdictional scope are plainly a necessary consideration for revising the definition of “waters of the United States.” With no analysis of the effects that the Agencies’ drastic restriction of Clean Water Act protections will have on the nation’s water quality, the Agencies have failed to consider the most important aspect of the problem their Proposed Rule purports to address.

⁹⁷ Regulatory Impact Analysis, *supra* note 25, at 2, 22, 23, 26, 28, 31, 41, 42, 43, 44, 45, 46, 49, 50, 54, 58, 74, 80, 86.

⁹⁸ *Id.* at 31.

⁹⁹ See Proposed Rule, 90 Fed. Reg. at 52501.

¹⁰⁰ 591 U.S. 1 (2020).

¹⁰¹ *Id.* at 30–32.

¹⁰² Decl. of Radhika Fox ¶ 13, Ex. 1 to Defs.’ Mem. of Law in Support of Mot. for Voluntary Remand Without Vacatur, *S.C. Coastal Conservation League v. Regan*, No. 2:20-cv-01687-BHH (D.S.C. June 21, 2021), ECF No. 140-2; Decl. of Jaime A. Pinkham ¶ 13, Ex. 2 to Defs.’ Mem. of Law in Support of Mot. for Voluntary Remand Without Vacatur, *S.C. Coastal Conservation League v. Regan*, No. 2:20-cv-01687-BHH (D.S.C. June 21, 2021), ECF No. 140-3.

¹⁰³ See Proposed Rule, 90 Fed. Reg. at 52501.

B. The Proposed Rule would have consequences that are inconsistent with the objective of the Clean Water Act.

As the Agencies acknowledge in the Proposed Rule,¹⁰⁴ the Clean Water Act has one objective, set out in section 101(a): to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”¹⁰⁵ The Supreme Court has recognized that this statutory objective incorporates Congress’s “broad, systemic view of the goal of maintaining and improving water quality” in crafting the Act.¹⁰⁶

Had the Agencies endeavored to analyze the Proposed Rule’s anticipated effects on water quality, they could reasonably have reached only one conclusion: stripping federal clean water protections from streams, wetlands, and other waters across the country threatens the federal government’s ability to achieve the objective of the Clean Water Act. After all, it was only six years ago that the Agencies, in finalizing the ill-fated NWPR, predicted that their rollback of federal protections could cause increased water pollution, flooding, loss of aquatic habitat, oil spills, reduced ecosystem services, and degraded drinking water.¹⁰⁷ EPA’s Scientific Advisory Board concurred, finding that the NWPR’s decreased protections potentially introduced new risks to human and environmental health and lacked a scientific basis to demonstrate the rule’s consistency with the Clean Water Act’s objective.¹⁰⁸ In support of that conclusion, the Scientific Advisory Board cited the extensive body of peer-reviewed scientific literature compiled by the Agencies demonstrating the substantial effects that upstream wetlands and streams have on the integrity of downstream water bodies.¹⁰⁹

Removing protections from many of these wetlands, streams, and other waters would squarely conflict with the objective of the Clean Water Act. The Supreme Court has made clear that the Agencies “do[] not have the power to adopt a policy that directly conflicts with [the] governing statute.”¹¹⁰ On the contrary, when an agency’s “positions have consequences that are inconsistent with major congressional objectives, as revealed by the statute’s language, structure, and purposes,” they must be rejected.¹¹¹ Because the Agencies’ proposal would have

¹⁰⁴ See, e.g., *id.* at 52498 (“the overall objective of the Clean Water Act”), 52502 (“The objective of the new statutory scheme”), 52502 (“in keeping with the objective of the Act”), 52503 (“Congress therefore intended to achieve the Act’s objective”), 52514 (the Clean Water Act section 101(a) statutory objective”).

¹⁰⁵ 33 U.S.C. § 1251(a). To achieve that objective, the Act also set ambitious goals of making all waters in the nation fishable and swimmable by 1983 and eliminating all discharges of pollution into waters by 1985. *Id.* § 1251(a)(1), (2).

¹⁰⁶ *Riverside Bayview*, 474 U.S. at 132.

¹⁰⁷ NWPR Economic Analysis, *supra* note 82, at 105–06.

¹⁰⁸ EPA Sci. Advisory Bd., Final Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act at 2, 4 (Feb. 27, 2020), <https://perma.cc/6J5F-GR6A>.

¹⁰⁹ *Id.* at 2–3 (citing, *inter alia*, EPA Office of Res. & Dev., Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Jan. 2015), <https://perma.cc/5KDU-HP4W>).

¹¹⁰ *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 134–35 (1990); see also *Heckler v. Chaney*, 470 U.S. 821, 833 (1985) (“Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers.”).

¹¹¹ *Cnty. of Maui v. Haw. Wildlife Fund*, 590 U.S. 165, 186 (2020).

consequences inconsistent with the objective of the Clean Water Act, the Agencies cannot lawfully adopt it.

C. The Proposed Rule fails to adhere to Supreme Court precedent.

Not only would the Proposed Rule contradict the stated purpose of the Clean Water Act, it would also go well beyond—and potentially contradict—Supreme Court precedent interpreting the Act.

Most recently, the Supreme Court addressed the limits of Clean Water Act jurisdiction in *Sackett v. EPA*. Though the Agencies claim to be undertaking this rulemaking “to implement the *Sackett* decision” to respond to “numerous concerns raised by stakeholders . . . that the Amended 2023 Rule does not adequately comply with the Supreme Court’s interpretation in *Sackett* of the scope of Federal jurisdiction under the Act,”¹¹² the Proposed Rule would not do so. The *Sackett* Court held that the Clean Water Act covers only “‘relatively permanent, standing or continuously flowing bodies of water forming geographic[al] features that are described in ordinary parlance as streams, oceans, rivers, and lakes,’” along with 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.’”¹¹³ As explained in Section I.D, above, four months after the *Sackett* decision, the Agencies amended the regulatory definition of “waters of the United States” to reflect that language, ensuring that the current rule faithfully implements the precise test adopted by *Sackett*, and to remove other portions of the definition implementing the “significant nexus” test that the Court rejected.

The Proposed Rule is not only consequently unnecessary to “implement *Sackett*,” its implementation will go further than required by *Sackett* and will potentially contradict it and prior Supreme Court precedent. The Proposed Rule introduces a definition of “continuous surface connection” not found in the Court’s opinion; the *Sackett* Court requires only a “continuous surface connection” and not a “continuous surface water connection.”¹¹⁴ Moreover, the Court explained that a wetland may still have a continuous surface connection to a traditional navigable water even when there are “temporary interruptions in surface connection” that “may sometimes occur because of phenomena like low tides or dry spells” and even when a landowner has unlawfully constructed a barrier to separate the wetland from the water.¹¹⁵ The Proposed Rule would define “continuous surface connection” to add a limitation that effectively contradicts the Supreme Court’s language; it would require the wetland to contain surface water during the entirety of an undefined “wet season” (which *Sackett* does not require), ignoring the Court’s acknowledgement that waters and connections to them can sometimes run dry. In so doing, the Proposed Rule defies the holding and the reasoning of *Sackett* and does not represent the best reading of the Clean Water Act.

¹¹² Proposed Rule, 90 Fed. Reg. at 52499.

¹¹³ 598 U.S. at 678 (quoting *Rapanos v. United States*, 547 U.S. 715, 742 (2006)) (internal quotations omitted).

¹¹⁴ *Id.* at 678.

¹¹⁵ *Id.* at 678 & n.16.

The Proposed Rule also defies prior Supreme Court precedent, no part of which require that the connection between the wetland and other water body be filled with water at all times or even to be aqueous. The plurality opinion in the 2006 decision in *Rapanos v. United States*, which announced the test that *Sackett* adopted, instead refers interchangeably to a “continuous surface connection” and a “continuous physical connection,” not a “surface water connection.”¹¹⁶ Similarly, in the 1985 decision *United States v. Riverside Bayview Homes, Inc.*, the Court held that a wetland could have a continuous surface connection with a navigable water even it was not inundated or flooded by the adjacent navigable water.¹¹⁷ Neither *Rapanos* nor *Sackett* nor *Riverside Bayview*, nor any other Supreme Court decision, demands that the wetland be continuously filled with water, during a wet season or otherwise, in order to be deemed jurisdictional. The Proposed Rule’s adoption of such a requirement flies in the face of these decades of Supreme Court precedent.

More generally, over the decades, the Supreme Court has consistently recognized that wetlands abutting, or touching, otherwise covered waters are covered under the Clean Water Act. The Proposed Rule’s attempts to limit that coverage should preclude the proposal’s adoption. In *Riverside Bayview*, the Supreme Court unanimously upheld the Corps’ assertion of jurisdiction over adjacent wetlands and held that the “waters of the United States” include “wetland[s] that actually abut[] on a navigable waterway.”¹¹⁸ Twenty-one years later, in describing the Court’s *Riverside Bayview* opinion, the *Rapanos* plurality did not disturb this conclusion. The plurality characterized *Riverside Bayview* as deferring to the Corps’ inclusion of wetlands “actually abut[ting]” traditional navigable waters, as holding that the Corps “could reasonably conclude that a wetland that ‘adjoin[ed]’ waters of the United States is itself a part of those waters,” and as resolving an ambiguity “in favor of treating all abutting wetlands as waters.”¹¹⁹ The *Sackett* Court, too, favorably cited *Riverside Bayview*’s holding that wetlands “actually abutting a navigable waterway” are jurisdictional, as it affirmed that “waters of the United States” include wetlands “contiguous” to navigable waters.¹²⁰

Accordingly, the Agencies, across administrations, have issued rules explaining that wetlands that abut otherwise covered waters are jurisdictional. By seeking to impose additional conditions and limits that constrict the broad jurisdiction announced and repeatedly upheld by the Supreme Court, the Proposed Rule is unnecessary, unreasonable, and potentially fatally flawed. And, should the Agencies nevertheless adopt the Proposed Rule, that action will not be afforded deference under *Loper Bright Enterprises v. Raimondo*, in which the Court held that the authority to resolve congressional ambiguity in statutes falls to the judiciary.¹²¹ The Court has

¹¹⁶ *Rapanos*, 547 U.S. at 742, 747, 751 n.13, 757.

¹¹⁷ *Riverside Bayview*, 474 U.S. at 134–35.

¹¹⁸ *Id.* at 135.

¹¹⁹ *Rapanos*, 547 U.S. at 740–42 (quoting *Riverside Bayview*, 474 U.S. at 135 n.9).

¹²⁰ *Sackett*, 598 U.S. at 677–78.

¹²¹ 603 U.S. 369, 387, 392 (2024) (overruling *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)) (explaining that the “interpretation of the meaning of statutes, as applied to justiciable controversies,” is

already resolved ambiguity by finding that, at a minimum, wetlands are within the Act’s jurisdiction when they have a continuous surface connection to an otherwise covered water—without the additional conditions, limits, and qualifications that the Proposed Rule would impose.

D. The effects of the Proposed Rule would be contrary to its purported goals.

The Agencies maintain that “the agencies’ goals” in developing the Proposed Rule are “providing greater clarity, certainty, and predictability for the regulated public and regulators.”¹²² As an initial matter, even if the Proposed Rule achieved these goals—which, as discussed below, it plainly does not—adopting “a more absolute position” that “may be easier to administer” cannot justify adopting a policy that is contrary to the objective of the governing statute.¹²³

In any event, the Proposed Rule is anything but clear, certain, or predictable. Its key provisions rely on a term—“wet season”—that the Proposed Rule’s text *does not define*. In fact, the term “wet season” appears nowhere in the Clean Water Act, in Supreme Court case law interpreting the jurisdictional scope Act, or in any prior regulatory definition of “waters of the United States.” Identifying the “wet season” for a particular water body apparently relies on estimates from a non-governmental, web-based application, the Web-based, Water-Budget, Interactive, Modeling Program (“WebWIMP”), whose data was last updated in 2009.¹²⁴

Adding even greater confusion, the Agencies say that WebWIMP will represent only “*a primary tool* for determining the wet season at a given location,”¹²⁵ suggesting that they will use other sources. Yet the Agencies do not disclose exactly what other sources they plan to use to discern the “wet season.” Instead, they say only that “other sources of information on identification of wet season *could* include NOAA, NRCS, and USGS sources, among others”¹²⁶

Of course, identifying the “wet season” for a given location is only part of the Proposed Rule’s muddled test for evaluating whether a stream or wetland is “relatively permanent.” According to the proposal, one must also determine the duration of flow in the stream, or the duration of surface water in the wetland. The Agencies “recognize that a single visual observation may not always be sufficient to accurately determine relatively permanent flow.”¹²⁷

“exclusively a judicial function,” and that “agency interpretations of statutes . . . are *not* entitled to deference. Under the APA, it thus remains the responsibility of the court to decide whether the law means what the agency says.”) (citation omitted).

¹²² Proposed Rule, 90 Fed. Reg. at 52541.

¹²³ *Cnty. of Maui*, 590 U.S. 165, 186 (2020); *see also Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 134–35 (1990).

¹²⁴ *See* Proposed Rule, 90 Fed. Reg. at 52519; *WebWIMP*, http://cyclops.deos.udel.edu/wimp/public_html/index.html (last visited Jan. 2, 2026) (noting that the most recent updates to the tool were made in “late 2009”).

¹²⁵ Proposed Rule, 90 Fed. Reg. at 52524 (emphasis added).

¹²⁶ *Id.* (emphasis added).

¹²⁷ *Id.* at 52525.

Instead, the Agencies suggest that such a determination may require “precipitation and other climate data,” “expected flow seasonality,” and “[r]egionalized SDAMs” (streamflow duration assessment methods) for streams, and “stream gage data, lake gage data, tidal gage data, flood predictions, NWI data, remotely sensed images, soil permeability data, information about vegetative cover, and historical record” for wetlands.¹²⁸

Even if one establishes that a particular stream or wetland has “relatively permanent” flow under the Proposed Rule, one must *then* establish that (1) the stream or wetland contributes flow to a traditional navigable water or the territorial seas; *and* that (2) the entire flowpath has surface water continuously flowing at least during the wet season. According to the Proposed Rule, this further analysis may require the use of “USGS maps, NWI data, knowledge or maps developed at State, Tribal or local levels, on the ground tests, including dye tests or tracers, field observations, [] aerial and satellite imagery or other remote sensing information,” or “models developed by Federal, Tribal, State, and local governments, academia, and the regulated community,” “in conjunction with field observations, data, and other desktop tools.”¹²⁹

And those are the resources to be used by the Agencies themselves. How is a landowner to tell whether a stream or wetland on their property is jurisdictional within the meaning of the Proposed Rule? According to the preamble, the landowner would need access to a dizzying array of technical data, methods, and tools—because, as the Proposed Rule admits, “even landowners familiar with their properties may not know the exact number of days a stream flows per year.”¹³⁰

Nor is the Proposed Rule’s complicated test for jurisdiction likely to deliver consistency. Based on the Agencies’ proposed test, even if it were possible to determine with certainty the relevant “wet season,” a particular stream might flow continuously throughout the wet season one year and might not flow continuously throughout the wet season the next year. Similarly, a wetland might have surface water throughout the wet season in year one and might not have surface water throughout the wet season in year two. Under the Proposed Rule, it appears that filling that wetland without a permit would be illegal during the first year and legal during the second year. In the preamble to the proposed rule, the Agencies even “acknowledge that surface hydrology may not always exactly overlap with the wet season, for example in regions exhibiting a time lag or delay in demonstration of surface hydrology due to various factors,” and they admit that “some streams” may “experience delayed (i.e., lagged) surface hydrology during the transition from the dry season to the wet season, as it may take some time for the water table to rise due to seasonal precipitation patterns.”¹³¹ Thus, use of the ambiguous “wet season” as a metric introduces confusion and uncertainty rather than clarity and certainty.

¹²⁸ *Id.* at 52525, 52532.

¹²⁹ *Id.* at 52526.

¹³⁰ *Id.* at 52520.

¹³¹ *Id.* at 52518.

Because the Agencies’ purported rationale for the Proposed Rule—“clarity, certainty, and predictability”—does not come close to matching what the rule would actually do, the Agencies’ adoption of the Proposed Rule would be arbitrary and capricious.

E. The Agencies have failed to consider reliance interests of entities that would be adversely affected by the Proposed Rule’s elimination of water quality protections.

Adoption of the Proposed Rule would adversely impact the reliance interests that states, tribes, and numerous stakeholders have in continued national uniformity of water quality requirements. The Supreme Court has recognized that an agency must “provide a more detailed justification than would suffice for a new policy . . . when . . . its prior policy has engendered serious reliance interest that must be taken into account.”¹³² The Court continued, “[i]t would be arbitrary and capricious to ignore such matters.”¹³³ Here, the interests of several categories of stakeholders warrant a close look, including the ecological restoration industry, drinking water utilities, and states and tribes.

The Agencies have failed to take into account the interests and economic contributions of the restoration industry, which has grown since the adoption in 2008 of the Clean Water Act rule requiring compensatory mitigation for loss of wetlands and other aquatic resources.¹³⁴ The Regulatory Impact Analysis for the Proposed Rule focuses on the cost savings for property owners who will no longer have to obtain permits and fund mitigation, but merely mentions the lost ecosystem services provided by mitigation and the reduction in demand for restoration and mitigation services without attempting to quantify the value of those losses, or of the lost jobs, income, and other economic contributions of the restoration industry.¹³⁵ Even in the section on “Potential Impacts to Small Business,” the Regulatory Impact Analysis fails to adequately address the potential losses for mitigation and restoration providers. Rather it again focuses on the reduction in the number of businesses that will need to seek a permit and comply with regulatory requirements under the Proposed Rule and, less emphatically, on the loss of ecosystem services for businesses that “depend on habitat, such as those catering to hunters or anglers, or that require water treatment to meet production needs.”¹³⁶ The Agencies downplay the latter, without justification, by stating that “[p]otential changes in ecosystem services are uncertain but may be dispersed over wide geographic areas, thereby limiting the significance of

¹³² *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

¹³³ *Id.*

¹³⁴ 33 C.F.R. § 332 (*Compensatory Mitigation for Losses of Aquatic Resources*, 73 Fed. Reg. 19670 (Apr. 10, 2008)).

¹³⁵ Regulatory Impact Analysis, *supra* note 25, at 55 (“[T]he agencies anticipate that the impacts of the proposed rule would be most significant for the section 404 program, reducing the number of 404 permits issued and acres of wetland impacts mitigated, relative to the baseline. The agencies expect the changes in turn to produce cost savings to project proponents from avoided permitting and mitigation activities, as well as forgone benefits from the avoided impact minimization and mitigation.”), 80 (“At this stage, the agencies cannot reliably estimate whether the CWA section 404-related cost savings from avoided permit applications and mitigation may exceed forgone benefits of wetlands, and if so, the extent to which they may exceed.”), 91–92.

¹³⁶ *Id.* at 87.

these impacts on these business sectors.”¹³⁷ And when it finally addresses the impact to the mitigation and restoration industry, the Regulatory Impact Analysis dismisses any concerns with irrelevant statements intended to downplay the importance of the impacts, such as:

Although primarily a business sector, there are mitigation banks owned and managed by non-profit organizations and government entities, such as State transportation departments. Businesses involved in mitigation banking and providing ecological restoration services are not contained within a single economic sector as defined by the North American Industrial Classification System (NAICS).¹³⁸

and

[I]mpacts to this sector would not be the direct result of these businesses complying with the proposed rule, rather, they would be the indirect result of other entities no longer being required to mitigate for discharges of dredged or fill material into waters and wetlands that would no longer be jurisdictional under the proposed rule.¹³⁹

and

Assessing potential impacts to the restoration sector is challenging . . . Existing data on 404 permits maintained by the agencies does not identify sufficient ownership and business arrangement information to determine the economic profile of mitigation bank ownership, nor does it identify specific entities involved in performing restoration work. In addition, States and Tribes may require mitigation for impacted waters no longer covered under the proposed rule, thereby reducing the future change in mitigation demand.¹⁴⁰

The Agencies’ “analysis” is not sufficient. The restoration industry depends on the existing regulatory structure and protection of streams and wetlands that would be lost under this proposal.¹⁴¹ The industry provides significantly more jobs per \$1 million than the oil and gas industry, school construction, or pipeline construction.¹⁴² In a survey of restoration providers, nearly a third primarily worked in wetland restoration or aquatic and riparian restoration,

¹³⁷ *Id.*

¹³⁸ *Id.* at 91.

¹³⁹ *Id.* at 91–92.

¹⁴⁰ *Id.* at 92.

¹⁴¹ See Todd BenDor et al., *Estimating the Size and Impact of the Ecological Restoration Economy*, PLoS One (2015) (estimating that the value of the domestic ecological restoration sector employs over 120,000 workers and generates \$9.5 billion in economic output annually), <https://perma.cc/7LA9-KNJJ>.

¹⁴² See Todd BenDor et al., *Defining and Evaluating the Ecological Restoration Economy*, 23 Restoration Ecology 209–19 (2015) (calculating that the restoration industry supports approximately 33 jobs per \$1 million invested as compared to, for example, 5.3 jobs per \$1 million by the oil and gas sector), <https://doi.org/10.1111/rec.12206>.

reflecting “the role of the Clean Water Act’s section 404 compensatory mitigation requirements in inducing restoration work.”¹⁴³

A 2015 study determined that the restoration industry directly provided 126,111 jobs a year in a variety of sectors, from engineers and construction firms to greenhouses and nurseries.¹⁴⁴ Including indirect and induced effects, the restoration industry had a total effect of adding 221,398 jobs each year which have a gross economic impact of nearly \$25 billion each year.¹⁴⁵ The agencies cited the 2015 study that summarized these values, but failed to cite the 2023 follow-up by the same author or use those values to evaluate the effect of the proposal on the restoration industry. In fact, the 2023 follow-up showed that the ecological restoration economy grew at a compound annual rate of 5.25%.¹⁴⁶ The Agencies ignored this data in reaching its non-conclusion that assessing the economic impacts to the industry would be “challenging.”

Similarly, the Agencies appear to have given little thought to the costs that will be incurred by downstream drinking water providers. Water treatment plants are not equipped to handle the increasingly polluted water that would result from the Proposed Rule. They have planned, designed, and built facilities based on longstanding protections. Even so, our drinking water infrastructure is in need of significant upgrades nationwide.

Likewise, states and tribes rely on the uniformity of the national set of standards enforced through the Clean Water Act, as many rivers, lakes, wetlands, and other waters cross boundaries. A tragedy of the commons situation will arise if federal protections are eliminated through the Proposed Rule and each state and tribe must depend on its neighbors not to pollute shared waters before they cross boundaries. Moreover, as the Agencies acknowledge, where states or tribes do not regulate beyond federal requirements, the regulated community will benefit by avoiding costs at the expense of the public—including not just water utilities and their customers, but also anyone in those states and tribes and their neighbors who depends on clean water and the ecosystem services of wetlands.¹⁴⁷ Water users—from end-users to public utilities to states and tribes—should not bear the costs and burdens of dealing with the pollution of others.

¹⁴³ *Estimating the Size and Impact of the Ecological Restoration Economy* at 7.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 9.

¹⁴⁶ Todd BenDor et al., *Assessing the Size and Growth of the US Wetland and Stream Compensatory Mitigation Industry*, PLoS ONE 10 (2023), <https://perma.cc/6YBE-TZE4>.

¹⁴⁷ Regulatory Impact Analysis, *supra* note 25, at 31.

F. The Agencies have failed to meet the requirements of the Endangered Species Act.

The Endangered Species Act establishes a vital program for the conservation of both imperiled species and “the ecosystems upon which . . . [they] depend[.]”¹⁴⁸ Central to this program is the consultation requirements of section 7,¹⁴⁹ which the Agencies have ignored.

Under section 7(a)(2) of the Act, “[e]ach Federal agency” is required,

in consultation with and with the assistance of the Secretary [of the Interior or the Secretary of Commerce], [to] insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat[.]¹⁵⁰

This language imposes both substantive and procedural obligations on federal agencies. Substantively, agencies must make certain their actions are “not likely” to leave an imperiled species in jeopardy or adversely modify its critical habitat.¹⁵¹ Procedurally, agencies must evaluate the potential impact of their actions “in consultation with” federal wildlife experts.¹⁵²

At least one third of all threatened and endangered species depend on wetlands for their survival,¹⁵³ with many of them reliant on non-floodplain wetlands that the Proposed Rule’s constrained definition of “continuous surface connection” and treatment of wetland mosaics would likely exclude from coverage.¹⁵⁴ In the Southeast, for example, species like the Hessel’s hairstreak butterfly, pine barrens tree frog, specialized swallowtail, red-cockaded woodpecker, eastern diamondback rattlesnake, and American alligator can be found in pocosins, with many such species relying on pocosins for their habitat.¹⁵⁵ In the wake of the *Sackett* decision, which stripped Clean Water Act coverage from as much as 63% of the nation’s wetlands by acreage,¹⁵⁶ wetland-dependent species are already at serious risk. We cannot afford to further imperil them.

The Agencies acknowledge that by removing essential water-quality protections from wetlands and streams across the United States, the Proposed Rule may diminish habitat and lead to a reduction in ecosystem services.¹⁵⁷ The loss of habitat for listed plants and animals would

¹⁴⁸ 16 U.S.C. § 1531(b).

¹⁴⁹ *Id.* §§ 1536, 1538(a), (g).

¹⁵⁰ *Id.* § 1536(a)(2); *see also id.* § 1536(a)(1) (requiring federal agencies to “utilize their authorities in furtherance of the purposes of . . . [the Endangered Species Act] by carrying out programs for the conservation of endangered species and threatened species listed” under the statute).

¹⁵¹ *Id.* § 1536(a)(2).

¹⁵² *Id.*

¹⁵³ *Why Are Wetlands Important?*, Nat’l Park Serv. (May 16, 2025), <https://perma.cc/WCQ5-2S67>.

¹⁵⁴ *See, e.g., What Is a Pocosin?*, NOAA (June 16, 2024), <https://perma.cc/YY33-N4TV>.

¹⁵⁵ Literature Review, *supra* note 16, at 13.

¹⁵⁶ Chiu, *supra* note 73.

¹⁵⁷ Regulatory Impact Analysis, *supra* note 25, at 5, 90.

imperil sensitive species. Accordingly, the Agencies are obligated to consult with the United States Fish and Wildlife Service to ensure that the implementation of the Proposed Rule would not jeopardize threatened or endangered species. Their failure to do so violates the consultation requirements of the Endangered Species Act.

G. The Agencies have failed to follow the necessary rulemaking requirements for the manuals, tools, and methods that they would use to implement the Proposed Rule.

The Proposed Rule is also fatally flawed because it relies for its implementation on tools, manuals, and methods that have not themselves been subjected to the notice and comment rulemaking processes required by the Administrative Procedure Act—or, in the case of some tools, have not even been identified to the public by the Agencies.

Agencies must undergo notice and comment rulemaking under the Administrative Procedure Act for guidance documents, databases, methodologies, and other tools that effectively carry the force of law or impose legal requirements. In *Appalachian Power Co. v. EPA*, the U.S. Court of Appeals for the D.C. Circuit set aside an EPA guidance document because it had not gone through formal notice and comment rulemaking.¹⁵⁸ The court held as follows:

It is well-established that an agency may not escape the notice and comment requirements (here, of 42 U.S.C. § 7607(d)) by labeling a major substantive legal addition to a rule a mere interpretation. We must still look to whether the interpretation itself carries the force and effect of law, . . . or rather whether it spells out a duty fairly encompassed within the regulation that the interpretation purports to construe.”¹⁵⁹

EPA’s guidance document at issue began as “a six-point bullet point list for permit-writers” and “mutated into a complex flow chart” that requires permit-writers to engage in a “regulatory trade off” and assess “the costs and benefits of available technologies.” Finding that the guidance broadened an existing rule and imposed new legal requirements, the court held that EPA should have gone through notice and comment rulemaking.¹⁶⁰ Because it had not, the court set aside the guidance document.

Several years later, the D.C. Circuit again vacated agency documents that imposed substantive requirements on the regulated community and ruled that they must undergo notice and comment rulemaking. In *U.S. Telecom Ass’n v. FCC*, the court declared unlawful the Federal Communications Commission’s order and practice of delegating regulatory authority to make enforceable decisions regarding unbundling networks to external entities that were not

¹⁵⁸ 208 F.3d 1015 (D.C. Cir. 2000).

¹⁵⁹ *Id.* at 1024 (citations and internal quotations omitted).

¹⁶⁰ *Id.* at 1027 n.25.

subsequently adopted by the agency through rulemaking.¹⁶¹ And a federal district court held that Department of Labor’s “methodology for converting piece rate earnings into” hourly wages “constitutes substantive rule-making that is subject to the notice and comment requirements of the Administrative Procedure Act.”¹⁶² Other cases have since reiterated that a final agency action that imposes enforceable legal requirements and that contradicts prior regulations through a new methodology, position, or guidance must go through formal rulemaking.¹⁶³ And the Supreme Court later held, in *Kisor v. Wilkie*, that an agency may not impose legal requirements through informal documents, but must adopt such requirements as rules through notice and comment rulemaking.¹⁶⁴

Pursuant to this precedent, the Agencies may not enforce the Proposed Rule using databases, computer software, methodologies, guidance documents, or other such tools that have not themselves been the subject of notice and comment rulemaking under the Administrative Procedure Act. Such tools that must themselves be adopted through the rulemaking process, but have not yet, include the Corps’ Antecedent Precipitation Tool (“APT”), which the Agencies explain “is routinely used to inform wetland delineations and jurisdictional determinations” and which they intend to use to “apply the concept of ‘wet season;’”¹⁶⁵ the Web-based, Water-Budget, Interactive, Modeling Program (“WebWIMP”), which the Agencies say will represent “a primary tool for determining the wet season at a given location,”¹⁶⁶ and the Corps’ regional streamflow duration assessment methods (“SDAMs”), rapid field-based methods that the Agencies say could be used for “identifying the occurrence and duration of surface hydrology.”¹⁶⁷ These are three examples of tools and methodologies that the Agencies suggest may be used to implement the Proposed Rule and should have, but have not, gone through formal rulemaking.

¹⁶¹ 359 F.3d 554, 564–71 (D.C. Cir. 2004). *See also U.S. Telecom Ass’n v. FCC*, 400 F.3d 29, 35 (D.C. Cir. 2005) (“fidelity to the rulemaking requirements of the APA bars courts from permitting agencies to avoid those requirements by calling a substantive regulatory change an interpretative rule”).

¹⁶² *Snake River Farmers’ Ass’n, Inc. v. U.S. Dept of Labor*, Nos. CIV. 91-0075-S-MJC, 91-0130-S-MJC, 1994 WL 57401, at *1 (D. Idaho Jan. 8, 1992).

¹⁶³ *See, e.g., Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 100 (1995) (quotation marks omitted) (holding that if an agency adopts “a new position inconsistent with” an existing regulation or effects “a substantive change in the regulation,” notice and comment rulemaking are required); *POET Biorefining, LLC v. EPA*, 970 F.3d 392, 398 (D.C. Cir. 2020) (holding that challenge to agency issuance of guidance and methodology without formal rulemaking was not yet ripe only because methods did not yet exist); *Owner-Operator Indep. Drivers Ass’n, Inc. v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 201 (D.C. Cir. 2007) (holding that agency’s “failure to provide an opportunity for comment on [its] model’s methodology” constituted “a violation of the APA’s notice-and-comment requirements”); *Alaniz v. Off. of Pers. Mgmt.*, 728 F.2d 1460, 1467 (Fed. Cir. 1984) (holding that “changes in the COLA methodology fit within the APA’s definition of rulemaking” necessitating notice and comment requirements).

¹⁶⁴ 588 U.S. 558, 584 (2019).

¹⁶⁵ Proposed Rule, 90 Fed. Reg. at 52518 (noting that the model is available at <https://github.com/erdc/Antecedent-Precipitation-Tool/releases>).

¹⁶⁶ *Id.* at 52524.

¹⁶⁷ *Id.* at 52521.

H. The Agencies have failed to provide a meaningful opportunity for public comment.

Despite proposing a revised definition of “waters of the United States” that relies on new technical concepts and discards the Agencies’ longstanding interpretations of the Clean Water Act, Supreme Court case law, and sound science, the Agencies provided a mere 45 days for public comment, over a period that included three federal holidays (Thanksgiving, Christmas, and New Year’s Day). The Agencies offered no justification for ignoring Executive Order 12866, which specifies that “each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of *not less than 60 days*.”¹⁶⁸ Nor did the Agencies explain their departure from providing at least 60 days during each of their last two comment periods on proposed revisions to the definition of “waters of the United States,” in 2021 and 2019.¹⁶⁹

The Agencies received at least 26 written requests for reasonable extensions of the comment period, on behalf of states, tribes, localities, wetlands managers, clean water administrators, industry representatives, conservation organizations, recreation groups, and community groups.¹⁷⁰ Yet the Agencies refused to extend their abbreviated comment period,

¹⁶⁸ Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Sept. 30, 1993) (emphasis added).

¹⁶⁹ See Revised Definition of “Waters of the United States,” 86 Fed. Reg. 69372, 69372 (Dec. 7, 2021); Revised Definition of “Waters of the United States,” 84 Fed. Reg. 4154, 4154 (Feb. 14, 2019).

¹⁷⁰ Letter from Hannah Connor, Ctr. for Biological Diversity, to Stacey Jensen, EPA, & Milton Boyd, Dep’t of the Army (Nov. 20, 2025), <https://perma.cc/B8WN-XVQZ>; Letter from A House Unbuilt et al., to Stacey Jensen, EPA, & Milton Boyd, Dep’t of the Army (Nov. 21, 2025), <https://perma.cc/C6XW-MGVT>; Letter from Nick Tealer, Northwest Indian Fisheries Comm’n, to Stacey Jensen, EPA, & Milton Boyd, Dep’t of the Army (Nov. 21, 2025), <https://perma.cc/BJ8H-97UG>; Letter from Nat’l Ass’n of Counties et al., to Stacey Jensen, EPA, & Milton Boyd, Dep’t of the Army (Nov. 25, 2025), <https://perma.cc/YAT7-ZB3D>; Letter from Citizens Rulemaking All. (Nov. 26, 2025), <https://perma.cc/6QF7-3GHY>; Letter from Julia Anastasio, Ass’n of Clean Water Administrators, to Stacey Jensen, EPA, & Milton Boyd, Dep’t of the Army (Nov. 26, 2025), <https://perma.cc/4LZ6-NKUC>; Letter from Trout Unlimited et al., to Stacey Jensen, EPA, & Milton Boyd, Dep’t of the Army (Nov. 26, 2025), <https://perma.cc/4WZ8-26NY>; Letter from Susan J. Sullivan, New England Interstate Water Pollution Control Comm’n, to Stacey Jensen, EPA, & Milton Boyd, Dep’t of the Army (Dec. 2, 2025), <https://perma.cc/KGH4-G7ZQ>; Letter from Ben Grumbles, Env’t Council of the States, to Stacey Jensen, EPA, & Milton Boyd, Dep’t of the Army (Dec. 4, 2025), <https://perma.cc/N8EL-27AB>; Letter from Michelle Roos, Env’t Prot. Network, to Stacey Jensen, EPA, & Milton Boyd, Dep’t of the Army (Dec. 4, 2025), <https://perma.cc/WK33-PM4C>; Letter from Brandy Toft, Leech Lake Band of Ojibwe (Dec. 5, 2025), <https://perma.cc/CED4-9SLW>; Letter from Jason Kuchnicki, Nev. Dep’t of Env’t Prot., to Stacey Jensen, EPA, & Milton Boyd, Dep’t of the Army (Dec. 5, 2025), <https://perma.cc/FPH2-YYSG>; Letter from Marla J. Stelk, Nat’l Ass’n of Wetland Managers, to Stacey Jensen, EPA, & Milton Boyd, Dep’t of the Army (Dec. 5, 2025), <https://perma.cc/U8BE-LME9>; Letter from Climate Justice All., to Stacey Jensen, EPA, & Milton Boyd, Dep’t of the Army (Dec. 9, 2025), <https://perma.cc/3ZNW-YK8D>; Letter from Emily Shaw, PhD, Keweenaw Bay Indian Community, to Stacey Jensen, EPA, & Milton Boyd, Dep’t of the Army (Dec. 9, 2025), <https://perma.cc/9SQW-KCKT>; Letter from Redge B. Johnson, Utah Dep’t of Env’t Quality, to Stacey Jensen, EPA, & Milton Boyd, Dep’t of the Army (Dec. 9, 2025), <https://perma.cc/9HLV-ME4U>; Letter from Clean Wis. et al., to Stacey Jensen, EPA, & Milton Boyd, Dep’t of the Army (Dec. 10, 2025), <https://perma.cc/92YL-X6EG>; Letter from Heather L. Nelson, Md. Dep’t of the Env’t, to Stacey Jensen, EPA (Dec. 10, 2025), <https://perma.cc/3C4J-ECYR>; Letter from Emily Floore, St. Marys Riverkeeper, to Adm’r Regan & Assistant Sec’y Connor (Dec. 11, 2025), <https://perma.cc/9ZVB-L8D2>; Letter from Louis Geltman, Outdoor All., et

hindering the ability of a wide range of stakeholders to comment meaningfully on the Proposed Rule.

Moreover, the Agencies have denied members of the public the opportunity to comment on the Agencies’ planned analysis of the potential costs and benefits of the Proposed Rule. Under the Administrative Procedure Act, agencies must make the technical studies and data on which they rely in their rulemaking subject to notice and comment.¹⁷¹ Here, the Agencies have indicated in both the Proposed Rule and the accompanying Regulatory Impact Analysis that they have not quantified the cost savings or the value of forgone benefits expected to result from the Proposed Rule, but that they intend to do so for the final rule.¹⁷² By proposing to provide their analysis of the costs and benefits only with the final rule—*after* the comment period has closed—the Agencies are denying the public meaningful notice and opportunity for comment, in violation of the APA.¹⁷³

I. The Proposed Rule’s primary beneficiaries would not be farmers, despite the Agencies’ claims to the contrary.

In public statements accompanying the issuance of the Proposed Rule, the Agencies have suggested that the drastic reduction in the number of waters subject to federal protection will provide “regulatory certainty needed to support our nation’s farmers who feed and fuel the world”¹⁷⁴ and will “cut the red tape and provide predictability, consistency, and clarity for . . . farmers.”¹⁷⁵ But this rhetoric does not reflect the reality that removing waters from federal protection primarily benefits industrial dischargers and developers—not farmers.

al., to Stacey Jensen, EPA, & Milton Boyd, Dep’t of the Army (Dec. 12, 2025), <https://perma.cc/BRS7-6AWJ>; Letter from Courtney Briggs & David Chung, Waters Advocacy Coalition, to the Honorable Jessica Kramer, EPA, & Honorable Adam Telle, Dep’t of the Army (Dec. 15, 2025), <https://perma.cc/68F9-PV95>; Letter from Elizabeth Neville, Save the Manatee Club (Dec. 15, 2025), <https://perma.cc/4KKV-EUYN>; Letter from Felix Chaves, Pueblo of Sandia, to Adm’r Lee Zeldin, EPA (Dec. 15, 2025), <https://perma.cc/L4CM-F4TC>; Letter from Shannon F. Wheeler, Nez Perce Tribe, to Adm’r Lee Zeldin, EPA (Dec. 15, 2025), <https://perma.cc/DBP9-FQQF>; Letter from Vinson Guthreau, Nev. Ass’n of Counties, to Stacey Jensen, EPA, & Milton Boyd, Dep’t of the Army (Dec. 15, 2025), <https://perma.cc/C9M7-BYD6>; Letter from Shasta C. Gaughen, PhD, Pala Band of Mission Indians, to Adm’r Lee Zeldin, EPA (Dec. 17, 2025), <https://perma.cc/TM38-XYNG>.

¹⁷¹ See *Am. Radio Relay League v. FCC*, 524 F.3d 227, 236–37 (D.C. Cir. 2008) (“It would appear to be a fairly obvious proposition that studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment.”).

¹⁷² See, e.g., Proposed Rule, 90 Fed. Reg. at 52500, 52542; Regulatory Impact Analysis, *supra* note 25, at 2, 22, 23, 26, 28, 31, 41, 42, 43, 44, 45, 46, 49, 50, 54, 58, 74, 80, 86.

¹⁷³ See, e.g., *Am. Radio Relay League v. FCC*, 524 F.3d 227, 236–37 (D.C. Cir. 2008) (“It would appear to be a fairly obvious proposition that studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment.”); see 5 U.S.C. § 553(b).

¹⁷⁴ Press Release, EPA, *EPA and Army Corps Unveil, Clear Durable WOTUS Proposal* (Nov. 17, 2025), <https://perma.cc/H8EN-DFEH>.

¹⁷⁵ *Id.*

As the Agencies are well aware, most ordinary agriculture operations do not require permits under the Clean Water Act. The Act excludes “agricultural stormwater discharges and return flows from irrigated agriculture” from its permitting programs.¹⁷⁶ Moreover, the dredge-and-fill permit program generally does not apply to discharges associated with normal agricultural practices—including farming, building or maintaining stock ponds or irrigation ditches, maintaining drainage ditches, and building farm roads using best management practices.¹⁷⁷ And the Agencies’ current regulations, in line with longstanding practice, exclude prior converted cropland from Clean Water Act jurisdiction.¹⁷⁸

Statistics on the number of 404 permits issued bear this out. Between 2011 and 2020, the “top sectors” for number of permits issued included “the public sector, Highway, street, and bridge construction, Pipeline transportation, Dredging, Marinas, Oil and gas extraction, Airport, Residential building construction, Electric power transmission, control, and distribution, and Commercial building construction.”¹⁷⁹ In other words, the most frequent recipients of section 404 permits were decidedly not farmers. Data compiled during the NWPR rulemaking in 2020 painted a similar picture: from 2011 to 2015, agricultural discharges accounted for less than 1% of the wetland area and only about 2% of the stream length for which the Corps issued permits.¹⁸⁰

Meanwhile, those who stand to be harmed by diminished water quality, increased flooding, and other consequences of weakened federal clean water protections represent a broad cross-section of our economy and our society, including municipal water suppliers, commercial fishers, recreational hunters, breweries, bottlers, outdoor recreation businesses, and—yes—farmers.

J. The Proposed Rule should be subject to EPA’s Children’s Health Policy.

A longstanding federal policy is the implementation of a federal scheme for the protection of children’s health.¹⁸¹ EPA has its own policy “to protect children from environmental exposures by consistently and explicitly considering early life exposure and lifelong health in all human health decisions.”¹⁸² In particular, EPA’s Children Health Policy is guided “by the scientific understanding that children may be at greater risk to environmental contaminant” than adults.¹⁸³ Under the policy, EPA is encouraged to “identify and integrate data to conduct risk assessments of children’s health to inform decisions.”¹⁸⁴

¹⁷⁶ 33 U.S.C. § 1362 (14) (defining “point source”).

¹⁷⁷ See *id.* § 1344(f)(1) (identifying discharges not requiring section 404 permits).

¹⁷⁸ See Revised Definition of “Waters of the United States,” 88 Fed. Reg. 3004, 3105–06 (Jan. 18, 2023) (“2023 Rule”); 33 C.F.R. § 328.3(b)(2); 40 C.F.R. § 120.2(b)(2).

¹⁷⁹ Regulatory Impact Analysis, *supra* note 25, at 85 (quotations omitted).

¹⁸⁰ NWPR Economic Analysis, *supra* note 82, at 68–69.

¹⁸¹ Exec. Order No. 13,035, 62 C.F.R. § 19885 (1997).

¹⁸² EPA, *2021 Policy on Children’s Health* at 1 (Oct. 5, 2021), <https://perma.cc/QR2Z-KCFN>.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

The Agencies claim that the Proposed Rule is not subject to the policy because the Rule “does not itself concern human health because it simply a definitional rule, and as such, does not directly authorize discharges into waters of the United States.”¹⁸⁵ However, this is a misguided understanding of the Proposed Rule and the Children’s Health Policy. Children proportionally drink more water than adults¹⁸⁶ and spend a great deal of time swimming and playing in our nation’s waters. As a result, children are more likely to be at risk to environmental contaminants.¹⁸⁷ The Proposed Rule greatly constricts what waters are afforded protections and are subject to permitting processes, leading to diminished water quality that threatens children’s health throughout the country. The Proposed Rule should be subject to EPA’s Children Health Policy, and EPA should undertake a quantitative and qualitative risk assessment of how the proposed changes to the definition of “waters of the United States” could impact children.

K. The Agencies cannot assume that states and tribes will step in to provide water quality protections after the Proposed Rule eliminates them.

The Agencies appear to imagine—without justification—that once they eliminate federal protection for millions of acres of wetlands and many miles of streams, states and tribes will fill the void by enacting and enforcing their own water quality protections.

The Agencies seem to be following the lead of the *Sackett* Court. The majority opinion in *Sackett* notes that “[f]or most of this Nation’s history, the regulation of water pollution was left almost entirely to the States and their subdivisions,” albeit under the common law for much of that time,¹⁸⁸ and asserts hopefully that “States can and will continue to exercise their primary authority to combat water pollution by regulating land and water use.”¹⁸⁹ Following the Court’s lead, the Agencies likewise claim that “States, Tribes, and localities ‘can and will continue to exercise their primary authority to combat water pollution by regulating land and water use’”¹⁹⁰ and express their hope that “States and Tribes may choose to expand their coverage of their waters beyond ‘waters of the United States’ to include other waters as ‘waters of the State’ or ‘waters of the Tribe.’”¹⁹¹

Yet, at the same time, the Agencies concede that this will not happen—or at least that they have no reason to believe that it will. For instance, the Agencies concede that “States and Tribes that seek to cover waters no longer jurisdictional under this proposed rule may incur new costs and administrative burdens.”¹⁹² In other words, states and tribes will face real challenges in

¹⁸⁵ Proposed Rule, 90 Fed. Reg. at 52543.

¹⁸⁶ *2021 Policy on Children’s Health* at 1.

¹⁸⁷ Daniel Axelrad et al., *America’s Children and the Environment (Third Edition)* at 72–76 (2013).

¹⁸⁸ 598 U.S. at 659.

¹⁸⁹ *Id.* at 683.

¹⁹⁰ Proposed Rule, 90 Fed. Reg. at 52501 (quoting *Sackett*, 598 U.S. at 683); see also *id.* at 52504–05 (describing authorities of states and tribes under Clean Water Act).

¹⁹¹ *Id.* at 52542.

¹⁹² *Id.*

filling the void left by the Proposed Rule’s withdrawal of federal authority. The Agencies also explain that “the way States or Tribes would interpret and apply their own laws and regulations is unknown. Further, the extent to which States and Tribes may enact new laws or regulations or alter their interpretations of existing laws and regulations in the future is also unknown.”¹⁹³ The Regulatory Impact Analysis for the Proposed Rule similarly states the possibility that states and tribes may choose to protect non-jurisdictional waters, but acknowledges the uncertainty:

Should they choose, States and Tribes may apply standards under State or Tribal law for waters that are not “waters of the United States,” In such federally non-jurisdictional waters, States could apply their own water quality standards as a matter of State law, and authorized Tribes could apply their own water quality standards to the extent their authority under Tribal law would allow. The question that arises . . . is whether States and Tribes will continue to apply and enforce water quality standards that are no longer federally enforceable for waters that would be newly excluded from Clean Water Act jurisdiction.¹⁹⁴

Indeed, there is no reason to anticipate that states and tribes will take action to fill the void in water quality protections left by the Proposed Rule. Many states lack the resources to devote to strengthening their permitting and enforcement efforts.¹⁹⁵ All told, less than half of the states have surface water or wetland protections that are broader than the Proposed Rule.¹⁹⁶ And many states have laws in place that substantially hinder them from protecting waters left unprotected by the federal government.¹⁹⁷ Such laws would need to be amended or repealed before those states could take action to protect waters that fall outside the Agencies’ definition of “waters of the United States.”

When the Agencies claimed that states would provide a backstop to the NWPR’s significant restriction of federal jurisdiction, numerous states raised serious concerns to the Agencies about legal and practical constraints on their ability to do so. In their comments on the proposed NWPR, 14 states and the District of Columbia spelled out the hardships that accompany taking on additional responsibility to protect waters and “fill the gap” created by the contraction of federal Clean Water Act jurisdiction. As they put it, the rule “would create a gaping hole in water pollution control,” forcing states “either to fill the large gap in water protections that the proposal creates by bearing the administrative burdens of expanding their own water programs, or avoid those costs and suffer the significant harms associated with

¹⁹³ *Id.* at 52501.

¹⁹⁴ Regulatory Impact Analysis, *supra* note 25, at 57.

¹⁹⁵ See Env’t Integrity Project, *State of Decline: Cuts to State Pollution Control Agencies Compound Damage from the Dismantling of EPA 3* (2025), <https://perma.cc/NF2Q-8GPB> (reporting that over the past 15 years, more than half of states cut the budgets of their environmental agencies and almost two-thirds of states cut agency staffing).

¹⁹⁶ Regulatory Impact Analysis, *supra* note 25, at 38–39.

¹⁹⁷ Env’t L. Inst., *State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act* 7 (2013), <https://perma.cc/D3CB-6LJE>; see also EPA and Dep’t of the Army, Resource and Programmatic Assessment for the Navigable Waters Protection Rule: Definition of “Waters of the United States” 46 (Jan. 23, 2020), <https://perma.cc/A6H4-SCA6>.

degradation of their water resources.”¹⁹⁸ Pointing to Maine, California, New York, Maryland, and Virginia, the states illustrated specific problems that would arise under their state laws if and when the NWPR reduced federal protections.¹⁹⁹

Nothing has changed since the adoption of the ill-fated NWPR to eliminate the hurdles states would face in filling the void left by rollbacks of federal jurisdiction. In the wake of the *Sackett* decision, although Colorado and New Mexico enacted new gap-filling state law protections,²⁰⁰ other states did the opposite. North Carolina’s legislature, after an initial executive action to increase protections, eliminated its state-law wetlands protections by redefining the scope of which wetlands are protected under state law to be exactly coextensive with the federal definition of “waters of the United States.”²⁰¹ Now, as federal protections of wetlands constrict, so do North Carolina’s. Tennessee enacted a law removing longstanding state protections from most of the state’s wetlands.²⁰² Indiana also moved to reduce, rather than increase, state wetland and water quality protections in the wake of *Sackett*.²⁰³ There is no reason to believe that the passage of the Proposed Rule—and its further elimination of federal water quality protections—will lead to different results.

L. An alternative approach that mirrors Justice Thomas’s concurring opinion in *Sackett* would be inconsistent with history and case law—and even more devastating to the integrity of the nation’s waters.

The majority opinion in *Sackett* has substantially weakened the Clean Water Act by removing millions of acres of wetlands and millions of miles of streams from the Act’s purview. However, Justice Thomas’s concurring opinion sought to limit federal jurisdiction even further and “pick up where the Court leaves off.”²⁰⁴ In Justice Thomas’s view—adopted in *Sackett* by only one other Justice, Justice Gorsuch—federal jurisdiction should only extend to “traditional navigable waters, tributaries that directly flow into these waters, and wetlands with continuous surface water connection to such waters.”²⁰⁵ Put differently, Justice Thomas’s concurrence seeks to limit federal jurisdiction only slightly beyond those waters “that are, were, or could be used as highways of interstate or foreign commerce.”²⁰⁶ This dramatically limited reading of the Clean Water Act not only is inconsistent with the history of the statute and court precedent but contravenes scientific understandings of water pollution and hydrology. Despite these critical

¹⁹⁸ See, e.g., Barbara D. Underwood et al., Comment Letter on Revised Definition of “Waters of the United States” 3 (Apr. 15, 2019), <https://perma.cc/7CL5-9TML>.

¹⁹⁹ *Id.* at 4, 6, 7, 31.

²⁰⁰ Colo. Rev. Stat. § 25-8-205.1 (added by Colo. Sess. L. 2024-274, § 2 (eff. May 29, 2024)); 2025 N.M. Laws 74-6-2 (S.B. 21).

²⁰¹ N.C. Exec. Order No. 305, *An Order to Protect and Restore North Carolina’s Critical Natural and Working Lands* (Feb. 12, 2024); N.C. Sess. Law 2023-63, § 15 (June 27, 2023) (“Wetlands classified as waters of the State are restricted to waters of the United States as defined by 33 C.F.R. § 328.3 and 40 C.F.R. § 230.3.”).

²⁰² 2025 Tenn. Pub. Acts 437 (S.B. 670).

²⁰³ 2024 Ind. Acts 1383 (Feb. 12, 2024) (reclassifying certain protected wetlands to less regulated classes).

²⁰⁴ *Sackett*, 598 U.S. 651 (Thomas, J., concurring).

²⁰⁵ See Proposed Rule, 90 Fed. Reg. at 52515; 598 U.S. 651.

²⁰⁶ 598 U.S. at 685 (Thomas, J. concurring).

errors, the Agencies seek comment on whether to adopt an approach “informed by Justice Thomas’s approach concurring opinion in *Sackett*.”²⁰⁷ Such an interpretation of the Clean Water Act would dramatically limit the federal government’s ability to restore and maintain the integrity of the nation’s waters.

As mentioned prior, the Clean Water Act was drafted in response to nationwide water quality degradation. Leading up to the Act’s enactment, Congress had delegated authority to the states to create water pollution control programs beginning in 1956.²⁰⁸ By 1965, the states were assigned the responsibility of adopting water quality standards.²⁰⁹ However, by the early 1970s, most states had yet to adopt standards that had been approved by EPA.²¹⁰ It was against this backdrop that the Act was drafted. When enacting the Act, Congress announced its objective to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”²¹¹ This purpose reflected a need for a comprehensive regulatory regime to rectify decades of pollution that had gone unregulated by states. This purpose was further reflected in the Act’s prohibition of “any addition of any pollutant to navigable waters from any point source.”²¹² “Navigable waters” was defined as “the waters of the United States; including the territorial seas.”²¹³

Justice Thomas’s concurrence is based largely on the notion that the terms “navigable waters” and “waters of the United States” should be limited to navigable-in-fact waters.²¹⁴ However, this reading is antithetical to both the legislative history of the Clean Water Act and early courts that interpreted the precise scope of the statute.²¹⁵ In the 1971 House bill, the House of Representatives did in fact use the term “navigable waters of the United States” as the scope of the federal program.²¹⁶ However, by the time that the bill reached the Conference Committee, the “navigable” modifier was removed from the text.²¹⁷ The Conference Committee noted that “[t]he conferees fully intend that the term ‘navigable waters’ be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.”²¹⁸ Congressman John Dingell further added:

The conference bill defines the term “navigable waters” broadly for water quality purposes. It means all “the waters of the United States” in a geographical sense. It

²⁰⁷ Proposed Rule, 90 Fed. Reg. at 52515.

²⁰⁸ S. Rep. No. 92-414 at 2 (1971).

²⁰⁹ *Id.* at 4.

²¹⁰ *Id.*

²¹¹ 33 U.S.C. § 1251(a).

²¹² *Id.* § 1362(12).

²¹³ *Id.* § 1362(7).

²¹⁴ 598 U.S. at 684 (Thomas, J. concurring).

²¹⁵ For a more detailed analysis of Justice Thomas’s concurrence, see Richard J. Lazarus, *Judicial Destruction of the Clean Water Act: Sackett v. EPA*, U. Chi. L. Rev. Online 1 (2023).

²¹⁶ H.R. 11896, 92nd Cong. (1971).

²¹⁷ *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 754 n.15 (9th Cir. 1978) (quoting S. Rep. No. 92-1236, at 144 (1972) (Conf. Rep.)).

²¹⁸ H.R. Rep. No. 92-911, at 76–77 (1972).

does not mean “navigable waters of the United States” in the technical sense as we sometimes see in some laws.

...

Thus, this new definition clearly encompasses all water bodies, including main streams and their tributaries, for water quality purposes. No longer are the old, narrow definitions of navigability, as determined by the Corps of Engineers, going to govern matters covered by this bill.²¹⁹

Justice Thomas’s concurrence ignores the legislative history of the statute and a clear decision by Congress to use a comprehensive definition of the waters covered by the statute.

Thomas’s concurrence is also inconsistent with the early case law that sought to interpret the statute. In *Natural Resources Defense Council v. Callaway*, which is one of the earliest cases to interpret the Clean Water Act and remains good law, the district court held that Congress’s definition of “navigable waters” in the Act was written to “assert[] federal jurisdiction over the nation’s waters to the maximum extent permissible under the Commerce Clause of the Constitution . . . the term is not limited to the traditional tests of navigability.”²²⁰ The Clean Water Act was not inextricably tied to the nineteenth-century understandings of navigability as in *Daniel Ball* or the Rivers and Harbors Act of 1899; rather, the Act was a comprehensive approach to water quality control meant to address water pollution in a broader class of waters. Subsequent decisions have consistently affirmed that interpretation, from early case law to the majority opinion in *Sackett*, despite ample opportunity to adopt to adopt a more restrictive view in line with Justice Thomas’s concurrence. Accordingly, the Agencies should not adopt an interpretation of “waters of the United States” informed by Justice Thomas’s *Sackett* concurrence.

III. Comments on specific elements of the Proposed Rule

A. Traditional navigable waters

Although the Proposed Rule does not change the Agencies’ current definition of “traditional navigable waters,” the preamble notes that the Agencies are “are considering whether clarifications to the scope of that provision may be warranted in the final rule preamble or in a separate administrative action.”²²¹ Given the longstanding interpretation of “traditional navigable waters,” clarification of the phrase’s scope is unwarranted.

Traditional navigable waters are central to the Clean Water Act’s purpose and regulatory scheme. The jurisdictional scope of these and other foundational waters affects the status of nearly every type of jurisdictional water under the Proposed Rule. Here, as with every other category of jurisdictional water, the Agencies must be guided by the Act’s objective to protect

²¹⁹ 118 Cong. Rec. 33756–57 (Oct. 4, 1972).

²²⁰ 392 F. Supp. 685, 686 (D.C. Cir. 1975).

²²¹ Proposed Rule, 90 Fed. Reg. at 52515.

the nation’s water quality²²² and Congress’s “inten[t] that the term ‘navigable waters’ be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.”²²³

The longstanding (and current) definition of traditional navigable waters encompasses “[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.”²²⁴ Consistent with Supreme Court precedent, this definition includes all waters which (1) were navigable-in-fact but are no longer,²²⁵ (2) are presently navigable-in-fact,²²⁶ or (3) are not and were never navigable-in-fact, but may, through the construction of reasonable improvements, become navigable in the future.²²⁷ The Supreme Court has since reaffirmed “that navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flatboats,”²²⁸ and that the “lack of commercial traffic [is not] a bar to a conclusion of navigability where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation.”²²⁹ For all of these reasons, further clarification of “traditional navigable waters” is not necessary.

B. Interstate waters

The Proposed Rule seeks to exclude from the Clean Water Act’s protection certain ponds, lakes, rivers, and streams that cross state lines but that do not fall within one of the Proposed Rule’s other jurisdictional categories. However, ever since Congress began regulating water pollution control, these non-navigable interstate waters have been federally protected. The Proposed Rule’s approach is not only an outlier; it is wrong.

²²² As the Supreme Court has observed, defining the term “navigable waters” “must be predicated upon careful appraisal of the *purpose* for which the concept of ‘navigability’ was invoked in a particular case,” *Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979) (citation and quotations omitted)—here, to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a).

²²³ S. Rep. No. 92-1236 (1972) (Conf. Rep.).

²²⁴ 33 U.S.C. § 328.3(a)(1); 40 C.F.R. § 120.2(a)(1)(i).

²²⁵ See, e.g., *Econ. Light & Power Co. v. United States*, 256 U.S. 113, 123 (1921); *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 408 (1940) (“[W]hen once found to be navigable, a waterway remains so.”). This is the concept of “‘indelible navigability,’ that is, if a water was ever navigable-in-fact, it will always be at least navigable-in-law and subject to federal regulatory power.” William W. Sapp et al., *The Float a Boat Test: How to Use It to Advantage in This Post-Rapanos World*, 38 *Env’t L. Rep.* 10439, 10445 (2008).

²²⁶ See, e.g., *The Daniel Ball*, 77 U.S. 557, 563 (1870).

²²⁷ See, e.g., *The Montello*, 87 U.S. 430, 441–42 (1874); *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1157 (D.C. Cir. 2002) (“[J]ust because a body of water has not been used for commercial use does not mean that it is not *susceptible* to commercial use.”).

²²⁸ *United States v. Utah*, 283 U.S. 64, 76 (1931).

²²⁹ *Appalachian Elec. Power*, 311 U.S. at 416.

1. The Proposed Rule goes against the legislative history of the Clean Water Act, longstanding agency practice, and Supreme Court precedent.

Federal regulation of interstate waters begins well before the Clean Water Act. Under the original Federal Pollution Control Act of 1948, interstate waters were understood to be “all rivers, lakes, and other waters that flow across, or form a part of, State boundaries.”²³⁰ Since 1948, “interstate waters” have fallen under federal jurisdiction.²³¹ In 1961, Congress amended the Water Pollution Control Act to extend the jurisdiction of the Act to all “interstate or navigable waters” and the tributaries of each.²³² Through this change, Congress established two independent bases for federal jurisdiction: (1) all navigable-in-fact waters; and (2) all interstate waters, whether navigable-in-fact or not. Then, in 1965, Congress further amended the Water Pollution Control Act, adding (among other protections) that if states did not set water quality standards for “interstate waters or portions thereof,” the federal government could step in and do so.²³³ Again, without qualification, all interstate waters fell under federal jurisdiction.

Categorically protecting interstate waters is both consistent with longstanding agency practices and the purpose of the Clean Water Act to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”²³⁴ The Clean Water Act’s legislative history confirms this view; the Act was “viewed by Congress as a ‘total restructuring’ and ‘complete rewriting’ of the existing water pollution legislation.”²³⁵ In the Conference Report, the conferees stated that they “fully intend[ed] that the term ‘navigable waters’ be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.”²³⁶ In enacting the Clean Water Act, Congress thus expanded federal jurisdiction over the nation’s waters, including interstate waters.

The Act’s text also supports this interpretation. As explained above, prior to the passage of the Clean Water Act, states were required to establish water quality standards for all interstate waters,²³⁷ whether navigable or non-navigable. Then, when Congress passed the Clean Water Act, section 303(a) of the Act provided that these water quality standards would remain in effect and that EPA would actively assess the standards and promulgate revised standards if

²³⁰ Pub. L. 80–845, Sec. 10(e) (1948).

²³¹ See Pub. L. No. 87-88, § 8(b), 75 Stat. 204, 208 (1961); see 33 U.S.C. §§ 466a, 466g, 466i (1964).

²³² See Federal Water Pollution Control Act Amendments of 1961, P.L. 87-88, § 8(a) (codified at 33 U.S.C. § 1160(a) (1970)).

²³³ Pub. L. No. 89-234, § 5(c)(1), (c)(2), (c)(5), 79 Stat. 903, 908, 909 (1965).

²³⁴ 33 U.S.C. § 1251(a).

²³⁵ See *City of Milwaukee*, 451 U.S. 304, 317 (1981); see also *id.* at 318 (“Congress’ intent in enacting the [Act] was clearly to establish an all-encompassing program of water pollution regulation.”); see also *Middlesex Cnty. Sewerage Auth.*, 453 U.S. 1, 22 (1981) (noting that existing statutory scheme “was completely revised” by enactment of Clean Water Act).

²³⁶ See S. Rep. No. 92-1236.

²³⁷ Pub. L. No. 89-234, § 5(c)(1), (c)(2), (c)(5), 79 Stat. at 908, 909; see also Water Quality Standards Regulation, 63 Fed. Reg. 36,742, 36,745 (July 7, 1998) (discussing the statutory and regulatory history of water quality standards under the Clean Water Act and preceding water quality laws).

necessary.²³⁸ If Congress meant to exclude non-navigable-in-fact interstate waters from the Act’s protections, Congress would have included language signaling a departure from the ongoing requirement that states enact water quality standards for these waters. Congress included no such language,²³⁹ confirming the continued coverage of all interstate waters under the Act.

Further, the manner in which EPA and the Corps have interpreted “waters of the United States” under nearly every administration also demonstrates that the Act was meant to cover interstate waters whether they are navigable-in-fact or not. In 1973, EPA issued its first rule interpreting “waters of the United States,” in which the agency defined its jurisdiction under the Act to cover “interstate waters” in addition to “navigable waters of the United States.”²⁴⁰ Although the Corps initially attempted to confine the Act’s jurisdiction to only cover the “navigable waters of the United States” and their tributaries, claiming it lacked the resources to regulate anything more, by 1977 it had adopted the same test as EPA.

In the preamble to its 1977 regulations, the Corps accepted as correct EPA’s broader interpretation of the Act’s scope, explaining that “[t]he [e]ffects of water pollution in one state can adversely affect the quality of the waters in another, particularly if the waters involved are interstate.”²⁴¹ Of course, this observation is true whether or not an interstate water is navigable-in-fact. Significant discharges of pollutants into any water that is bisected by or runs along a state boundary could cause adverse water quality effects to all of the states that the water touches. The Supreme Court has also repeatedly affirmed the importance—and the breadth—of federal protections for interstate waters and has never limited the scope of those protections based on navigability. As the Court pointed out in *City of Milwaukee v. Illinois*, the Clean Water Act “occupied the field” of water pollution regulation.²⁴² In particular, the Court noted that the Act displaced the “often vague and indeterminate”²⁴³ federal common law to provide a crucial forum for the resolution of interstate water disputes.²⁴⁴ This statutory program was intended to be “comprehensive,” “far-reaching,” and “all-encompassing,” leaving “no room for courts to attempt to improve on that program.” Thus, finding that the Act implicitly excludes interstate waters that are not otherwise jurisdictional is contrary to the Court’s clear affirmance of the Act’s breadth and the importance of the Act’s creation of a statutory program for resolving interstate disputes.

Nor do the Court’s subsequent decisions limit the Clean Water Act’s applicability to interstate waters based on navigability. None of the Court’s key decisions interpreting the scope of “waters of the United States”—*Riverside Bayview*, *Solid Waste Agency of Northern Cook*

²³⁸ 33 U.S.C. § 1313(a).

²³⁹ *Id.*

²⁴⁰ National Pollutant Discharge Elimination System, 38 Fed. Reg. 13528, 13529 (May 22, 1973).

²⁴¹ Regulatory Programs of the Corps of Engineers, 42 Fed. Reg. 37122, 37127 (July 19, 1977).

²⁴² 451 U.S. at 317.

²⁴³ *Id.*

²⁴⁴ *Id.* at 325–26.

*County v. U.S. Army Corps of Engineers (“SWANCC”),*²⁴⁵ *Rapanos*, or *Sackett*—have dealt with interstate waters, and none have overturned *City of Milwaukee*.²⁴⁶

With the exception of the short-lived NWPR, the Agencies have *always* extended jurisdiction to interstate waters, consistent with the Clean Water Act. As the Supreme Court has held, longstanding regulatory interpretations that have been scrutinized by the public and by Congress and have survived statutory amendments should be presumed to be correct.²⁴⁷ The Supreme Court’s repeated recognition of the Act’s breadth, including its coverage of interstate waters, further affirms that interstate waters—even those that are non-navigable—fall under federal jurisdiction.

2. The Agencies have cited no change in facts or law that would justify narrowing the scope of federal protections for interstate waters.

Despite the extensive history of interstate waters *in their entirety* being regulated and no change in factual circumstances or law that would justify it, the Agencies propose to eliminate “interstate waters” as a standalone jurisdictional category. In the Proposed Rule, the Agencies assert that “[n]othing in *Sackett* or the *Rapanos* plurality opinion suggests that Congress intended to separately regulate interstate waters that do *not* meet [the relatively permanent] test.”²⁴⁸ However, it would be equally accurate to say that nothing in *Sackett* or the *Rapanos* plurality opinion suggests that Congress did *not* intend to separately regulate interstate waters. That is because the standalone jurisdictional category of interstate waters were simply not at issue in either case. Moreover, application of longstanding principles of statutory interpretation to the fact that Congress has not amended the Act to correct judicial interpretations militates in favor of assuming that Congress is satisfied with those interpretations.²⁴⁹ In sum, the Agencies have not provided a “reasoned explanation” as to their change in position under this Proposed Rule.²⁵⁰

²⁴⁵ 531 U.S. 159 (2001).

²⁴⁶ See *Riverside Bayview*, 474 U.S. at 133; *SWANCC*, 531 U.S. 159; *Rapanos*, 547 U.S. 715; *Sackett*, 598 U.S. 651.

²⁴⁷ *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982).

²⁴⁸ Proposed Rule, 90 Fed. Reg. at 52516.

²⁴⁹ See, e.g., *Firststar Bank, N.A. v. Faul*, 253 F.3d 982, 988 (7th Cir. 2001) (“If a phrase or section of a law is clarified through judicial construction, and the law is amended but retains that same phrase or section, then Congress presumably intended for the language in the new law to have the same meaning as the old. A closely related principle is that a statute’s longstanding meaning forms the background against which Congress legislates when it amends the law. The courts presume that Congress will use clear language if it intends to alter an established understanding about what a law means; if Congress fails to do so, courts presume that the new statute has the same effect as the older version.”) (citing *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978); *Cottage Savs. Ass’n v. Comm’r*, 499 U.S. 554, 562 (1991); *NBD Bank, N.A. v. Bennett*, 67 F.3d 629, 632 (7th Cir.1995)).

²⁵⁰ *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–22 (2016) (holding that a regulation that changes an agency’s position without “provid[ing] a reasoned explanation for the change” is arbitrary, capricious, and unlawful).

C. “Relatively permanent”

The Agencies have long recognized the importance of Clean Water Act protections for intermittent streams—streams that flow continuously only during certain times of the year—in addition to perennial streams. Streams provide benefits to downstream waters even when they do not flow continuously.²⁵¹ Streams with intermittent flow make up a majority of the stream miles in the United States²⁵² and affect the chemical, physical, and biological integrity of downstream waters. Like perennial streams, intermittent streams control the transport of pollution, nutrients, and carbon to downstream waters, with impacts on downstream flooding, base flows, and water quality.²⁵³

Sackett and *Rapanos* require the protection of many streams that do not have perennial flow. To the extent the Agencies seek to define “relatively permanent” by rule, they must adopt the most expansive definition of “relatively permanent” possible within the parameters of the Act’s language, as interpreted by the Supreme Court. Anything less would be inconsistent with the objective of the Clean Water Act to restore and maintain the integrity of the nation’s waters.

The definition that appears in the Proposed Rule—“standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season”—fails to meet that charge. The proposed definition represents an unwarranted leap beyond the language of Supreme Court precedent. It would exclude many waters that have long been covered under the Clean Water Act,²⁵⁴ without any consideration by the Agencies of the effects of such a dramatic change on the integrity of the nation’s waters or quantification of the foregone benefits that would result.²⁵⁵ And it is confusing, contradictory, and challenging to implement—making it an especially poor vehicle for achieving the “clarity, certainty, and predictability” that the Agencies claim is their goal.²⁵⁶

1. The Proposed Rule’s definition of “relatively permanent” is not supported by Supreme Court precedent.

In *Sackett*, the Supreme Court adopted the *Rapanos* plurality’s conclusion that the “[Clean Water Act]’s use of ‘waters’ encompasses ‘only those relatively permanent, standing or continuously flowing bodies of water forming geographic[al] features that are described in ordinary parlance as streams, oceans, rivers, and lakes.’”²⁵⁷ The Court’s opinion in *Sackett* recited the *Rapanos* plurality’s “relatively permanent” standard but did not further explain what makes a body of water “relatively permanent.”

²⁵¹ 2023 Rule, 88 Fed. Reg. at 3030.

²⁵² See, e.g., Colvin et al., *supra* note 44, at 74, 77, 86.

²⁵³ 2023 Rule, 88 Fed. Reg. at 3030–31.

²⁵⁴ See, e.g., Proposed Rule, 90 Fed. Reg. at 52521 (acknowledging that approach in Proposed Rule “could result in many streams in the arid West not meeting the proposed definition of ‘relatively permanent.’”).

²⁵⁵ See Section II.A, *supra*.

²⁵⁶ Proposed Rule, 90 Fed. Reg. at 52541.

²⁵⁷ *Sackett*, 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739) (internal quotations omitted).

The *Rapanos* plurality, however, did offer some additional explanation as to what it meant by “relatively permanent.” For one thing, by including the term “relatively permanent” in addition to “standing” and “continuously flowing,” the *Rapanos* plurality made clear that waters need not flow perennially to be covered by the Clean Water Act.²⁵⁸ Nor may waters be excluded from coverage simply because their flow ceases during certain months of the year. The plurality explained that “relatively permanent” waters do not necessarily exclude “streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought.”²⁵⁹ The plurality also clarified that its “relatively permanent” standard should not be read to exclude “seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months.”²⁶⁰

Consistent with this language, the Agencies have long interpreted the Clean Water Act as protecting waters that flow intermittently. Under the Agencies’ current rule, “relatively permanent” “encompasses surface waters that have flowing or standing water year-round or continuously during certain times of the year.”²⁶¹ “Certain times of the year” includes “extended periods of standing or continuously flowing water occurring in the same geographic feature year after year, except in times of drought.”²⁶² The current rule also imposes a notable limitation: “relatively permanent” waters “do not include surface waters with flowing or standing water for only a short duration in direct response to precipitation.”²⁶³

The Proposed Rule’s definition of “relatively permanent” includes a novel standard—“standing or continuously flowing year-round or at least during the wet season”—that does not appear in *Rapanos*, *Sackett*, or any other Supreme Court case interpreting the scope of “waters of the United States.” By excluding from jurisdiction waters that *Rapanos* and *Sackett* would include, the Agencies’ proposed definition is contrary to the objective of the Clean Water Act.

2. The Proposed Rule’s reliance on establishing continuous flow throughout the “wet season” renders the “relatively permanent” standard unreliable and unworkable.

Even if the Proposed Rule’s definition of “relatively permanent” were supported by judicial precedent (which it is not), the standard that the Agencies have proposed is so poorly tailored for its claimed purpose as to render its adoption arbitrary and capricious. Indeed, in

²⁵⁸ See *Rapanos*, 547 U.S. at 739.

²⁵⁹ *Id.* at 732 n.5.

²⁶⁰ *Id.*; see also *San Francisco Baykeeper v. City of Sunnyvale*, No. 5:20-CV-00824-EJD, 2023 WL 8587610, at *4 (N.D. Cal. Dec. 11, 2023) (finding creeks to be “waters of the United States” because “they flow seasonally, whereby they contain a continuous flow during some months and no flow during dry months, and more than in direct response to precipitation, which *Rapanos* explicitly does not exclude from the definition of [waters of the United States].”). The plain language of *Rapanos* precludes the alternative definition of “relatively permanent” that Agencies say they evaluated but did not propose: a definition that would limit “relatively permanent” waters to only “perennial” waters. See Proposed Rule, 90 Fed. Reg. at 52519.

²⁶¹ 2023 Rule, 88 Fed. Reg. at 3084.

²⁶² *Id.* at 3085.

²⁶³ *Id.* at 3084.

several places in the Proposed Rule, the Agencies admit the shortcomings of their proposed standard and the tools and methods they propose to implement it.

a. The “wet season” is difficult to determine with certainty and consistency—particularly in light of the effects of climate change.

The climatic databases and tools that the Proposed Rule proposes to rely on, such as WebWIMP, are based on historical climatic data. The Proposed Rule depends on the ability of this historical data to predict current conditions: namely, the ordinary presence of water. Yet it is well-established in the scientific literature that conditions associated with climate change are making the wet season more extreme, variable, and difficult to forecast.²⁶⁴ The distribution, duration, and magnitude of precipitation events (and, thus, the associated hydrological responses) are becoming less predictable every year. Specifically, climate change complicates identification of the applicable “wet season” by altering the timing, frequency, and intensity of precipitation, making historical precipitation data less reliable, particularly at the local scale.²⁶⁵ Wet seasons are now beginning later than they have historically, increasing the likelihood of extended dry spells during what the Proposed Rule would likely consider to be the beginning of the “wet season.” Dry seasons are also becoming longer and drier, reducing the likelihood that waters will have continuous flow throughout the subsequent wet season.²⁶⁶ Yet the anticipated depletion of water supplies making certain streams drier demonstrates the pressing need to protect what water is left—particularly in arid regions of the nation—and weighs in favor of greater, not lesser, protection of those streams.

Despite the weight of this evidence, the Proposed Rule never mentions “climate change,” let alone considers the effects that a changing climate will have on the rule’s reliance on the concept of the “wet season.” The Agencies’ failure to consider the effects of climate change is a significant oversight.

²⁶⁴ See, e.g., Intergovernmental Panel on Climate Change, *Climate Change 2023: Synthesis Report* 69 (2023), <https://perma.cc/Q9YK-CX4M>; Goutam Konapala et al., *Climate Change Will Affect Global Water Availability Through Compounding Changes in Seasonal Precipitation and Evaporation*, 11 *Nature Commc’ns* 3044 (2020), <https://perma.cc/FB5X-7FGL>; Nat’l Aeronautics & Space Admin., *How Does Climate Change Affect Precipitation?*, <https://perma.cc/3QST-C63B> (last visited Jan. 2, 2026).

²⁶⁵ Kevin E. Trenberth, *Changes in Precipitation with Climate Change*, 47 *Climate Rsch.* 123 (2011), https://www.int-res.com/articles/cr_oa/c047p123.pdf; Yiannis Moustakis et al., *Seasonality, Intensity, and Duration of Rainfall Extremes Change in a Warmer Climate*, *Earth’s Future* (Feb. 23, 2021), <https://agupubs.onlinelibrary.wiley.com/doi/10.1029/2020EF001824>.

²⁶⁶ Caroline M. Wainwright, *Future Changes in Wet and Dry Season Characteristics in CMIP5 and CMIP6 Simulations*, 22 *J. of Hydrometeorology* 2339 (2021); Korbinian Breinl et al., *Extreme Dry and Wet Spells Face Changes in Their Duration and Timing*, *Env’t Res. Letters* (July 6, 2020), <https://iopscience.iop.org/article/10.1088/1748-9326/ab7d05/pdf>.

b. The “relatively permanent” definition does not account for regions with considerable variability in precipitation and hydrology within the “wet season.”

Certain regions characterized by unpredictable convective storms (such as the Florida Everglades) or frontal systems (such as the Pacific Northwest) can have long, but highly variable, “wet seasons.” These regions include the Florida Everglades, the Pacific Northwest, southern California, and the Southwest (Arizona, New Mexico, and southern Nevada). Precipitation and resulting surface flow within the three- to six-month “wet season” in these areas can be highly variable. The unreliability of the “wet season” approach to forecasting hydrology in these regions makes the approach particularly ill-suited for determining whether waters in these regions can be considered “relatively permanent” under *Rapanos* and *Sackett*.

c. The “primary” tool proposed by the Agencies, WebWIMP, is not a reliable means for identifying the applicable “wet season.”

The Proposed Rule identifies the non-governmental, web-based application WebWIMP as “a primary tool for determining the wet season at a given location.”²⁶⁷ The Agencies’ reliance on WebWIMP to identify a key element of their proposed jurisdictional test is highly problematic for several reasons.

First, WebWIMP *estimates* the wet season based on historical average monthly water-balance statistics—that is, when average precipitation exceeds average evapotranspiration. The tool’s reliance on historical data renders it unlikely to reflect the actual, highly variable conditions specific to a site in a given year. This disparity is likely to be even more pronounced due to the effects of climate change, discussed above.

Second, the historic climatic data in WebWIMP has not been updated since 2009, with no indication that its 16-year-old (or older) data accurately reflect current conditions at any specific site.²⁶⁸ The WebWIMP web page includes a conspicuous and concerning “Disclaimer”: “While the information and other resources contained within this site are periodically updated, no guarantee is given that the information and other resources provided within this Web site are correct, complete or up-to-date.”²⁶⁹ Relying on outdated climatic data is of particular concern in light of the increased variability in the timing of “wet seasons” due to climate change, as discussed above.

²⁶⁷ Proposed Rule, 90 Fed. Reg. at 52524. Aside from WebWIMP, the Agencies do not disclose what sources they plan to use to discern the “wet season.” Instead, the Agencies say only that “other sources of information on identification of wet season *could* include” NOAA, NRCS, and USGS sources, among others” *Id.* at 52524 (emphasis added).

²⁶⁸ Kent H. Sparrow et al., U.S. Army Eng’r Research & Dev. Ctr., ERDC/TN WRAP-25-1, *Antecedent Precipitation Tool (APT) Version 3.0: Technical and User Guide* 7 (2025), <https://downloads.regulations.gov/EPA-HQ-OW-2025-0322-0117/content.pdf> (hereinafter “*APT Guide*”).

²⁶⁹ *Disclaimer*, http://cyclops.deos.udel.edu/wimp/public_html/disclaimer.html (last visited Jan. 3, 2026).

Third, because WebWIMP provides a climatically-averaged, monthly water balance at any node of a one-half degree of latitude by one-half degree of longitude grid,²⁷⁰ it allows for considerable variation within the 20- to 30-mile radius from the area of interest. The historic data generated from WebWIMP does not account for *in situ* conditions such as rain shadows and localized convective storm events that substantially affect the period in which precipitation exceeds evapotranspiration. Nor does WebWIMP sufficiently consider the spatial variability of local stream channel geomorphology (including channel width, depth, cross-sectional area, and slope) necessary for precise, site-specific rainfall analyses, including differences in rainfall distribution and intensity. The Corps itself has recently observed that WebWIMP’s relatively coarse spatial resolution may limit the tool’s effectiveness, particularly during transitional periods between the wet season and dry season.²⁷¹

Finally, the application is hosted and maintained by the University of Delaware’s Department of Geography, not by a federal agency. The Agencies make no representation in the Proposed Rule that they plan to ensure that WebWIMP will continue to exist as a potential resource for implementing the rule or that it will be updated sufficiently regularly to provide accurate data—at least, as accurate as the data can be in light of the tool’s limitations discussed above.

d. Accurately determining the existence of continuous flow would be complicated, costly, and time-intensive.

Even if one could easily and reliably determine the “wet season” for an area (which, as set forth above, is not the case), determining whether a water body has continuous flow “at least during the wet season” is itself problematic—as even the Agencies concede. In the preamble, the Agencies recognize that “even landowners familiar with their properties may not know the exact number of days a stream flows per year.”²⁷² And determining a water body’s flow regime is no simple task. The Agencies “recognize that a single visual observation may not always be sufficient to accurately determine relatively permanent flow, and visual observations should generally be combined with precipitation and other climate data and expected flow seasonality to accurately determine flow duration.”²⁷³ Elsewhere, in dismissing an even more extreme standard, the Agencies acknowledge that identifying whether a stream “flows year-round or a few days less than year-round” “may require repeated or continuous monitoring over the course of a year or longer to ensure water is standing or flowing year-round.”²⁷⁴ It follows that identifying whether a stream flows “at least during the wet season” would *also* require “repeated or continuous monitoring . . . to ensure water is standing or flowing,” just over a shorter period. The Agencies’ admission that landowners would have to consult precipitation data, climate data, and “expected flow seasonality” in addition to compiling their own visual observations using

²⁷⁰ *WebWIMP*, *supra* note 124.

²⁷¹ *APT Guide*, *supra* note 268, at 7.

²⁷² Proposed Rule, 90 Fed. Reg. at 52520.

²⁷³ *Id.* at 52525.

²⁷⁴ *Id.* at 52519.

repeated or continuous monitoring undercuts their claim that the Proposed Rule’s “relatively permanent” standard would be easy for landowners to apply.

In many cases, determining the duration of continuous flow would require costly and time-intensive site-specific hydrological studies. If the site of interest were located near a U.S. Geological Survey (“USGS”) or Corps gage station with at least a recent 10-year period of record (which is far from assured), one *could* extrapolate the frequency and duration of flow from the gage station to the site. But a simple extrapolation would not account for variation in site-specific, stream channel geomorphology, including channel capacity, sediment and detrital dams, crevasse splays, side channels, and other features that affect localized stream flow, overbank flood events, and surface water expansion and inundation. These stream channel geomorphological features can vary widely, even within the same stream reach. An accurate assessment of flow would require surveying the water body from the gage station to the site, including the invert of the localized fluvial geomorphic features. These assessments cannot reliably be made using remote techniques and tools. The necessary site-specific inspections might involve the use of long-term automated hydrologic instruments designed to measure stream stage and wetland hydroperiod. Using regional hydrologic curves would require even more detailed, intensive on-site hydrological and geomorphological assessments.

In short, ascertaining whether a water body flows continuously throughout the wet season is not a cheap or simple exercise—disproving the Agencies’ claim that their proposed “relatively permanent” definition should be easy to implement.²⁷⁵

e. The specific methods proposed by the Agencies may not reliably determine whether a water body flows continuously throughout the “wet season.”

The Proposed Rule refers to five methods and tools that could be used to determine a water body’s duration of flow: streamflow duration assessment methods, or “SDAMs;”²⁷⁶ the USGS Enhanced Runoff Method (“EROM”);²⁷⁷ the USGS Dynamic Surface Water Extent (“DSWE”);²⁷⁸ the North Carolina Division of Water Quality’s *Methodology for Identification of Intermittent and Perennial Streams and Their Origins*;²⁷⁹ and Fairfax County (Virginia)’s *Perennial Stream Field Identification Protocol*.²⁸⁰ Yet all of these methods suffer from

²⁷⁵ See, e.g., *id.* at 52518.

²⁷⁶ *Id.* at 52521, 52525–26.

²⁷⁷ *Id.* at 52519 n.50.

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 52526 n.74.

²⁸⁰ *Id.*

deficiencies that limit their usefulness in reliably determining whether water bodies have continuously flowing water at least during the “wet season.”²⁸¹

SDAMs, for example, are rapid field-based methods that rely on hydrological, biological, and geomorphological indicators to draw conclusions about the flow regimes of streams. Yet those indicators can vary considerably even within individual reaches of a stream. Further, the presence or absence of biological indicators in particular can be influenced by causes other than a stream’s flow—for example, by anthropogenic impairment. And the conclusions one can draw from the presence or absence of certain indicators are highly variable from one region to another, based on differences in climate, soils, vegetation, and hydric regime. The North Carolina Division of Water Quality’s *Methodology* and Fairfax County’s *Protocol*—both of which outline similar rapid field-based methods—have these same limitations.

Meanwhile, EROM and DSWE are desktop methods with their own shortcomings. EROM is a data processing method that uses regression analyses to estimate mean annual streamflow and velocity for stream segments within the National Hydrography Dataset Plus framework. But EROM flow estimates for some regions are absent, while flow estimates for other (particularly northern) regions may contain unreliable data based on an inaccurate representation of baseflows during persistently cold months.²⁸² Finally, because DSWE relies on Landsat satellite imagery with 30-meter resolution, it may be hampered by obstructions (such as clouds) that compromise satellite view and may inaccurately classify smaller water bodies.²⁸³ The Agencies do not address any of these shortcomings of their suggested methods in the Proposed Rule.

f. The “relatively permanent” definition ignores the reality that continuous flow associated with “wet season” precipitation may not align precisely with the bounds of the “wet season.”

The Agencies’ proposed standard ignores the concept of hydrologic response time: the delay that can occur between a precipitation event and the resulting surface or subsurface flow.²⁸⁴ A range of variables can affect how much time elapses between precipitation and demonstrable flow, including slope, soil properties, geology, hydrography, and the extent of impervious surfaces. The extent of hydrologic lag is thus highly variable across the United

²⁸¹ See generally Bruce A. Pruitt, ERDC/TN WRAP-20-1, *Readily Available Hydrologic Models: Pertinence to Regulatory Application* (2020), <https://erdc-library.erdcdren.mil/bitstreams/e0c1f22e-89b4-47db-883f-87fd07f29bb3/download>.

²⁸² *Known Issues with NHDPlus HR Datasets*, USGS, <https://perma.cc/J4NY-726C> (last visited Jan. 3, 2026).

²⁸³ *Landsat Dynamic Surface Water Extent Science Products*, USGS, <https://perma.cc/4BNR-9FQY> (last visited Jan. 3, 2026).

²⁸⁴ See, e.g., J. Curtis Weaver, USGS, Water-Resources Investigations Report 03-4108, *Methods for Estimating Peak Discharges and Unit Hydrographs for Streams in the City of Charlotte and Mecklenburg County, North Carolina 3* (2003), <https://perma.cc/DHZ4-CJKY>.

States.²⁸⁵ For instance, coastal plains, where wetlands abound, exhibit longer lag times due to lower hillside slopes, broad valley flats, mosaic wetland patterns, clayey soils, and topographic diversity.

The result of this well-recognized phenomenon is one that the Agencies openly concede in the preamble to the Proposed Rule: “The agencies acknowledge that surface hydrology may not always exactly overlap with the wet season, for example in regions exhibiting a time lag or delay in demonstration of surface hydrology due to various factors.”²⁸⁶ The Agencies cite two examples of where surface flow lags behind the start (or even the end) of the wet season: where snowpack melt occurs several months after repeated snowfall, and where the water table takes time to rise during the transition from the “dry season” to the “wet season” due to seasonal precipitation patterns.²⁸⁷ Therefore, as the Agencies expressly acknowledge, the proposed standard would exclude waters that meet the *Rapanos* plurality opinion’s description of “relatively permanent”—waters that “contain continuous flow during some months of the year but no flow during dry months”²⁸⁸—but whose flow is not precisely coterminous with the wet season. Anchoring their Proposed Rule to an approach that they acknowledge does not do what it purports to do—determine “the ordinary presence of water,”²⁸⁹—is a textbook case of arbitrary and capricious rulemaking.

D. “Tributary”

Several elements of the Agencies’ restrictive interpretation of “tributary,” discussed below, depart from longstanding agency practice without a reasoned justification, a mandate from judicial precedent, or adequate consideration of the effects of the new interpretation.

1. **The proposed definition of “tributary” would arbitrarily remove protection from segments of a tributary system that lack a defined bed and banks—even when they exhibit relatively permanent flow.**

The Proposed Rule arbitrarily provides that segments of a tributary system that is otherwise jurisdictional would *not* be jurisdictional where they lack a defined bed and banks—even when those segments have “relatively permanent” flow within the meaning of the Proposed Rule, and even when they exhibit an ordinary high water mark, an indicator of permanence.²⁹⁰ The Agencies make only a passing attempt to justify excluding from the Clean Water Act’s coverage such relatively permanent waters (and, by extension, any wetlands that have a

²⁸⁵ See Gregory E. Granato, USGS, Scientific Investigations Report 2012–5110, *Estimating Basin Lagtime and Hydrograph-Timing Indexes Used to Characterize Stormflows for Runoff-Quality Analysis* (2012), <https://perma.cc/4VGJ-GCHZ>.

²⁸⁶ Proposed Rule, 90 Fed. Reg. at 52518.

²⁸⁷ *Id.*

²⁸⁸ *Rapanos*, 547 U.S. at 732 n.5.

²⁸⁹ *Id.* at 734.

²⁹⁰ Proposed Rule, 90 Fed. Reg. at 52522.

continuous surface connection to such waters). The Agencies claim that grassed waterways and similar waters “are not the kind of ‘bodies of water ‘forming geographic[al] features’ . . . described in ordinary parlance as ‘streams, oceans, rivers, and lakes’” that the *Rapanos* plurality and *Sackett* opinions interpreted to be ‘waters of the United States.’”²⁹¹ But neither *Rapanos* nor *Sackett* said anything about grassed waterways or suggested that streams that temporarily lose their bed and banks are no longer streams.

2. The proposed definition of “tributary” would arbitrarily remove protection from relatively permanent tributaries that regularly connect via surface water flow to downstream jurisdictional waters.

By requiring that a “tributary” connect to downstream traditional navigable waters or the territorial seas entirely through “relatively permanent” waters, the Proposed Rule would exclude tributaries that are themselves “relatively permanent” within the meaning of the Proposed Rule and that regularly connect via surface water to those downstream waters. The Agencies acknowledge that the Supreme Court “has not spoken directly to the question.”²⁹² And for decades, the Agencies have taken the opposite view: that so long as a regular surface water connection to downstream jurisdictional waters remains, the existence of an intervening portion with non-relatively permanent flow does not sever jurisdiction in portions upstream. Even the NWPR rejected the interpretation that the Agencies are proposing here, because it “would have severed jurisdiction for certain relatively permanent bodies of water that are regularly ‘connected to’ traditional navigable waters via channelized surface water flow, allowing such waters to connect and become indistinguishable when flowing.”²⁹³ The Agencies fail to offer a reasoned justification for departing from their longstanding practice.

The arbitrariness of the Agencies’ narrow definition of “tributary” is further illustrated by the Agencies’ inclusion of an exception to their jurisdiction-severing language: “except when the tributary is part of a water transfer currently in operation.”²⁹⁴ The Agencies cite a desire to ensure the continuation of certain water management practices²⁹⁵ but offer no defense of the distinction their Proposed Rule makes between water transfers that cause portions of streams to have non-relatively permanent flow (which would *not* remove jurisdiction from upstream waters) and any other natural or human actions that cause portions of streams to have non-relatively permanent flow (which *would* remove jurisdiction from upstream waters). To engage in reasoned decision-making, “[a]n agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so.”²⁹⁶ The Agencies here have failed to justify their inconsistent treatment of non-relatively permanent portions of tributary systems.

²⁹¹ *Id.*

²⁹² *Id.* at 52523.

²⁹³ The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22250, 22277 (Apr. 21, 2020) (hereinafter “NWPR”).

²⁹⁴ Proposed Rule, 90 Fed. Reg. at 52522.

²⁹⁵ *Id.* at 52523.

²⁹⁶ *Indep. Petroleum Ass’n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996),

At the same time, the proposed definition of “tributary” would allow other water management practices—such as operation of a dam—to sever jurisdiction in upstream waters. Particularly in the West, many dams are purposefully operated to contain and collect flow during times of drought. Under the Proposed Rule, that practice would risk eliminating Clean Water Act coverage from waters upstream of the dam.

Moreover, nothing in the proposed definition prevents the construction and operation of features or structures that would prevent relatively permanent flow through a portion of the tributary network with the intent to sever jurisdiction upstream. Incentivizing such a blatant end-run around the Clean Water Act’s jurisdictional provisions would contravene two Supreme Court decisions: *Sackett*’s warning that “a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the” Act,²⁹⁷ and *County of Maui*’s rejection of a reading of the Act that would create “such a large and obvious loophole.”²⁹⁸

3. The Proposed Rule’s approach to identifying the bounds of a stream “reach” is vague, subjective, and difficult to implement.

The Agencies also propose another troublesome change in how they evaluate whether tributaries are “relatively permanent.” While the Agencies will continue to evaluate tributaries on a “reach” basis, the preamble indicates—without justification—that they will identify the bounds of a “reach” as “a section of a stream or river along which similar hydrologic conditions exist, such as discharge, depth, area, and slope.”²⁹⁹ This standard, revived from the vacated NWPR, is vague (“similar hydrologic conditions”) and indeterminate (“such as”), opening the door for subjective, inconsistent determinations. It also establishes a standard that is unlikely to be easily implemented by a layperson without technical expertise. The Agencies should maintain their current approach under the Amended 2023 Rule, where the Agencies evaluate the entire reach of a tributary that is of the same Strahler stream order—that is, from the point where two lower-order streams meet to form the tributary, downstream to the point where the tributary enters a higher-order stream.³⁰⁰ The current, objective approach is more straightforward and easier to implement.

E. “Continuous surface connection”

As with their novel definition of “relatively permanent,” the Agencies’ new definition of “continuous surface connection” in the Proposed Rule—“having surface water at least during the wet season and abutting (*i.e.*, touching) a jurisdictional water”³⁰¹—represents a dramatic departure from longstanding practice that is not required by the Supreme Court’s

²⁹⁷ *Sackett*, 598 U.S. at 678 n.16.

²⁹⁸ *Cnty. of Maui*, 590 U.S. at 179.

²⁹⁹ Proposed Rule, 90 Fed. Reg. at 52525; *see also* Regulatory Impact Analysis, *supra* note 25, at 15.

³⁰⁰ *See* 2023 Rule, 88 Fed. Reg. at 3086.

³⁰¹ Proposed Rule, 90 Fed. Reg. at 52545, 52546.

interpretation in *Sackett*. The proposed definition in the regulatory text—combined with the Agencies’ convoluted approach to implementation set forth in the preamble—would drastically reduce the number of “adjacent wetlands” covered by the Clean Water Act (even beyond the already restrictive standard adopted in *Sackett*) and would pose significant implementation challenges that the Agencies fail to grapple with in the Proposed Rule.

1. The Proposed Rule’s definition of “continuous surface connection” is not supported by Supreme Court precedent.

Neither the *Rapanos* plurality opinion nor the *Sackett* opinion held—or even suggested—that the “relatively permanent” standard should govern the requirement that a wetland have a “continuous surface connection” to an otherwise covered water. Yet that is essentially what the Agencies are proposing: to import their interpretation of “relatively permanent” (having surface water at least during the wet season) into their definition of “continuous surface connection.” They cannot rely on either *Rapanos* or *Sackett* to support their novel approach.

The Agencies also erroneously draw on Supreme Court precedent to support their conclusion that the “continuous surface connection” required by the *Rapanos* plurality (and then adopted by *Sackett*) means the continuous presence of surface water. Not so. The *Rapanos* plurality used “continuous surface connection” interchangeably with “continuous physical connection.”³⁰² As the Agencies explained persuasively just three years ago, the surface connection required for adjacency is a physical connection—a connection that may be, but need not be, demonstrated by the continuous presence of surface water.³⁰³

Indeed, the Supreme Court has long recognized that wetlands abutting, or touching, otherwise covered waters are covered under the Clean Water Act—without an additional requirement that the wetlands “hav[e] surface water at least during the wet season.” As discussed in Section II.C, above, the Supreme Court in *Riverside Bayview* unanimously upheld the Corps’ assertion of jurisdiction over adjacent wetlands and held that the “waters of the United States” include “wetland[s] that actually abut[] on a navigable waterway.”³⁰⁴ Both the plurality in *Rapanos* and the Court in *Sackett* cited this holding from *Riverside Bayview* without disturbing it.³⁰⁵

Accordingly, the Agencies, across administrations, have issued rules explaining that wetlands that abut otherwise covered waters are jurisdictional. Even the NWPR covered abutting wetlands, among other wetlands.³⁰⁶ And just last year, the Agencies under the current administration announced in guidance that they were interpreting “waters of the United States” to include “wetlands that have a continuous surface connection *because they directly abut* the

³⁰² *Rapanos*, 547 U.S. at 742, 751 n.13, 757.

³⁰³ 2023 Rule, 88 Fed. Reg. at 3095–96.

³⁰⁴ *Riverside Bayview*, 474 U.S. at 135.

³⁰⁵ *Rapanos*, 547 U.S. at 740–42; *Sackett*, 598 U.S. at 677–78.

³⁰⁶ See NWPR, 85 Fed. Reg. at 22307.

[requisite jurisdictional water].”³⁰⁷ The Agencies’ sudden pivot to include a minimum surface-water duration requirement in their definition of “continuous surface connection” cannot be justified on the basis of adherence to Supreme Court precedent.

2. The Proposed Rule’s definition of “continuous surface connection” would exclude most wetlands from the Clean Water Act’s protection, without any consideration of the effects on water quality or quantification of foregone benefits.

The Corps’ own regulations characterize wetlands not by the constant presence of surface water but by inundation or saturation “at a frequency and duration sufficient to support . . . a prevalence of vegetation typically adapted for life in saturated soil conditions.”³⁰⁸ In their Regulatory Impact Analysis, the Agencies estimate that only 19% of wetlands acreage in the coterminous United States “may” have surface water at least during the wet season—signifying that the Proposed Rule would exclude at least 81% of wetlands acreage in the coterminous United States from the Clean Water Act’s coverage.³⁰⁹ In certain parts of the country, such as the West, coverage of wetlands would be even more limited: “The agencies acknowledge that the requirement for surface water at least during the wet season might result in few wetlands being found to have a continuous surface connection under the proposed rule, particularly in the arid West.”³¹⁰

Yet, as discussed in Section II.A above, the Agencies seek to implement their novel definition of “continuous surface connection” without considering the effects that such a drastic reduction in Clean Water Act protections for wetlands would have on the nation’s water quality—not to mention the effects it would have on flood protection for the nation’s communities, the provision of habitat for sensitive species, or the other benefits that healthy wetlands provide.

3. The Proposed Rule’s definition of “continuous surface connection” would be difficult to implement.

Because the Proposed Rule’s definition of “continuous surface connection” requires that a wetland have surface water “at least during the wet season,” it suffers from many of the same implementation problems as the proposed definition of “relatively permanent,” which these comments detail in Section III.C, above. Those problems include the fallacy that one could

³⁰⁷ U.S. Dep’t of the Army & 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 at 5 (Mar. 12, 2025), <https://perma.cc/7K9V-QKRK> (emphasis added) (quoting U.S. Env’t Prot. Agency & U.S. Army Corps of Eng’rs, Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States* 7 n.29 (Dec. 2, 2008), <https://perma.cc/VBR7-LBPW>).

³⁰⁸ 33 C.F.R. § 328.3(c).

³⁰⁹ Regulatory Impact Analysis, *supra* note 25, at 46–47 tbl. 3-1.

³¹⁰ Proposed Rule, 90 Fed. Reg. at 52527.

reliably identify the relevant “wet season” based on outdated historical data and the time, resources, and sophistication required to determine whether a wetland (or a particular portion of wetland) has surface water for the duration of that “wet season.” For example, the Agencies suggest that “useful” information for assessing duration of surface water in a wetland may include “stream gage data, lake gage data, tidal gage data, flood predictions, NWI data, remotely sensed images, soil permeability data, information about vegetative cover, and historical record.”³¹¹ Applying the Proposed Rule’s definition of “continuous surface connection” to particular wetlands would be anything but clear, certain, and predictable.

4. The Agencies’ assertion that wetlands that meet their restrictive standard are “most likely to provide certain hydrological and ecological benefits” is unsupported—and wrong.

After insisting that they have not based the novel, restrictive provisions in their Proposed Rule on any consideration of ecological benefits, the Agencies share their “understand[ing]” that the small universe of wetlands that fall within their restrictive definition “are most likely to provide the greatest degree of certain key ecological benefits.”³¹² “Specifically,” according to the Agencies, “wetlands that abut and have surface water at least during the wet season are most closely connected to the jurisdictional waters they touch and therefore are most likely to provide certain hydrological and ecological benefits such as recharge of base flow and valuable fish and wildlife habitat.”³¹³

The Agencies point to no judicial precedent, agency policy, or scientific literature as support for their purported “understanding.” They would be hard-pressed to do so. For one thing, wetlands provide a suite of functions beyond the two benefits cited in the Proposed Rule, including surface and subsurface water storage, energy dissipation, moderation of groundwater discharge, nutrient cycling, removal of imported elements and compounds, retention of particulates, organic carbon export, and the maintenance of animal communities, plant communities, and their habitat.³¹⁴ Critically, wetlands perform most of those functions without the perennial or even seasonal presence of surface water.³¹⁵ In fact, just the opposite is true. Wetlands that have surface water only temporarily in micro- and microtopographic features are

³¹¹ *Id.* at 52532.

³¹² *Id.* at 52529.

³¹³ *Id.*

³¹⁴ See Mark M. Brinson et al., U.S. Army Corps of Eng’rs, Wetland Research Program Technical Report WRP-DE-11, *A Guidebook for Application of Hydrogeomorphic Assessments to Riverine Wetlands* 24 (Dec. 1995), <https://perma.cc/P4YZ-QGZF>; Jim Powell et al., State of Alaska, Dep’t of Env’t Conservation, *Wetland Functional Assessment Guidebook, Operational Draft Guidebook for Assessing the Functions for Riverine and Slope River Proximal Wetlands in Coastal Southeast and Southcentral Alaska Using the HGM Approach* 48 (2003), <https://perma.cc/DFL8-FH8Y>; Kristin L. Wolf et al., *Microtopography Enhances Nitrogen Cycling and Removal in Created Mitigation Wetlands*, 37 *Ecological Eng’g* 1398, <https://www.sciencedirect.com/science/article/abs/pii/S0925857411001091?via%3Dihub>.

³¹⁵ See Brinson et al., *supra* note 314, at 24.

more effective at nutrient cycling, removal of imported elements and compounds, and retention of particulates, due to increased retention time.³¹⁶

Even for the two “hydrological and ecological benefits” explicitly mentioned in the Proposed Rule—“recharge of base flow” and “valuable fish and wildlife habitat”—the Agencies’ claim that wetlands with surface water “at least during the wet season” are most likely to provide those benefits does not pass muster. In contrast to permanently flooded wetlands that might be botanically monospecific (that is, dominated by obligate wetland species), temporarily flooded wetlands support a plethora of habitat types with diverse plant communities and a wide distribution and abundance of invertebrates and vertebrates.³¹⁷ And at least in streams in the eastern United States, the majority of base flow augmentation comes from groundwater, not surface water.³¹⁸ The Agencies’ “understanding” about which wetlands are most valuable appears to be mere conjecture.

5. The Agencies’ proposal to assess wetlands portion by portion is an unjustified departure from longstanding practice that would add confusion and complexity to the jurisdictional determination process.

On top of proposing an unprecedented interpretation of what constitutes an “adjacent wetland,” the Agencies go even further, proposing to assess wetlands portion by portion to determine whether individual portions of wetlands have a “continuous surface connection” to a jurisdictional water. Under the Agencies’ proposal, “only the portion of an abutting wetland which demonstrates surface water at least during the wet season would be jurisdictional.”³¹⁹ The Agencies cite no precedent in case law or agency regulation for their new “portion” approach, nor does the Proposed Rule provide any justification (legal, scientific, or otherwise) for the Agencies’ departure from longstanding practice of evaluating the wetland as a whole.

Moreover, the Agencies acknowledge in the Regulatory Impact Analysis that their new “portion” approach may require even more data collection than their longstanding approach and may increase the time it takes to make an approved jurisdictional determination.³²⁰ In other words, the Agencies propose to adopt a methodology that is more complicated, requiring more data and taking more time (presumably at greater cost) than their current approach—belying their purported interest in simplifying and speeding up the process of determining whether a wetland is jurisdictional.

³¹⁶ *See id.*

³¹⁷ *See id.* at 68, 91.

³¹⁸ Fred. D. Tillman et al., *Hydrologic Response of Groundwater and Streamflow to Natural and Anthropogenic Drivers of Change in Headwaters of the Upper Colorado River Basin During Recent Wet (1982–1999) and Drought (2000–2022) Conditions*, 60 *J. of Hydrology: Reg’l Stud.* 102554 (2025).

³¹⁹ Proposed Rule, 90 *Fed. Reg.* at 52527.

³²⁰ Regulatory Impact Analysis, *supra* note 25, at 16.

Even more confusingly, in parts of the preamble, the Agencies suggest that they intend to apply their “portion” approach not only to the Proposed Rule’s requirement that a wetland have surface water at least during the wet season but also to the Proposed Rule’s requirement that a wetland abut a jurisdictional water. For example, the Proposed Rule says that under its proposed “portion” approach, “only those portions of a wetland with continuous surface hydrology at least during the wet season, and that are abutting, would be jurisdictional as adjacent wetlands, no matter the full delineated scope of the wetland.”³²¹ The Proposed Rule provides no explanation as to how even experienced EPA or Corps personnel would determine the *portion* of a wetland that is, or is not, considered to “abut” a jurisdictional water. If this is truly what the Agencies intend, it presents a further problem with the Agencies’ proposed “portion” approach.

6. The Agencies’ proposal to assess wetland mosaics on a wetland-by-wetland basis similarly represents a policy reversal without a reasoned explanation.

In addition to proposing to assess wetlands portion by portion, the Agencies also reverse course on their treatment of wetland mosaics. Under the Proposed Rule, wetland mosaics “would not be considered ‘one wetland,’ but rather the agencies would delineate wetlands in the mosaic individually.”³²² As the Agencies concede,³²³ they have abandoned the approach they adopted in their January 2023 rule, where they cited longstanding agency practice, science (noting that the wetlands in a mosaic generally act as a single ecological unit), and the practical difficulty of delineating individual wetlands in a mosaic.³²⁴ The Agencies point to no new facts or change in the law to justify their reversal—nor do they provide any reasoned explanation at all.

F. Exclusions

In the Proposed Rule, the Agencies propose modifications to three of the existing regulatory exclusions from the definition of “waters of the United States”: (1) wastewater treatment systems, (2) prior converted cropland, and (3) ditches. As provided in greater detail below, the Agencies should revise or withdraw each of these modifications.

1. Waste treatment systems

The Agencies propose to modify the waste treatment system exception to define waste treatment system “[to] include[] 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 to either convey or retain, concentrate, settle, reduce, or remove

³²¹ Proposed Rule, 90 Fed. Reg. at 52527; *see also id.* at 52529 (applying the “portion” approach to wetland mosaics and explaining that “only the portion of a delineated wetland in a wetland mosaic that meets the definition of continuous surface connection (‘having surface water at least during the wet season and abutting (*i.e.*, touching) a jurisdictional water’) would be adjacent under this proposed rule.”).

³²² *Id.* at 52529.

³²³ *Id.*

³²⁴ 2023 Rule, 88 Fed. Reg. at 3093.

pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).”³²⁵ The Agencies are properly retaining the current regulatory language providing that exclusions do not apply to traditional navigable waters or the territorial seas.³²⁶ Otherwise, as we have raised in prior comments to the Agencies, “cooling ponds” that are also traditional navigable waters serving as sources of drinking water and recreation could be excluded from the Act’s protections. In the Southeast, those important water bodies include Lake Keowee and Lake Monticello Reservoir in South Carolina, Hyco Lake and Sutton Lake in North Carolina, and Woods Reservoir in Tennessee.

However, the preamble contains an important statement that should be added to the text of any final rule to promote clear and consistent implementation. Namely, we urge the Agencies to include language in the regulatory text codifying the Agencies’ view that a waste treatment system that is abandoned or otherwise ceases to serve the treatment function for which it was designed does not continue to qualify for the exclusion and “could be deemed jurisdictional” if it meets the criteria for “waters of the United States.”³²⁷

2. Prior converted cropland

We have concerns with two primary aspects of the Agencies’ proposed changes to the exclusion for prior converted cropland: (1) the exclusion’s treatment of abandonment creates a glaring loophole for section 404 oversight; and (2) the Agencies improperly delegate their authority to make prior converted cropland determinations to another federal agency.

a. The proposed changes to the prior converted cropland exclusion would create a major loophole in the implementation of the Clean Water Act.

Under the Proposed Rule, the chances of prior converted cropland ever regaining jurisdictional status are slim—even where land has reverted to wetland and remained idle for years. The Proposed Rule provides that land retains its excluded status if it has been used even once in the preceding five years “for, or in support of, agricultural purposes.”³²⁸ The Proposed Rule does not define “agricultural purposes,” remains undefined, but the preamble includes as examples a broad range of purposes beyond using the land as cropland: “idling land for conservation uses []; irrigation tailwater storage; crawfish farming; cranberry bogs; nutrient retention; . . . idling land for soil recovery . . . crop production, haying, and grazing.”³²⁹

This approach, revived from the vacated NWPR, creates a major loophole in the implementation of the Clean Water Act: prior converted cropland used once for a claimed “agricultural purpose” can then be sold to be developed—for an entirely non-agricultural

³²⁵ Proposed Rule, 90 Fed. Reg. at 52534.

³²⁶ *See id.*

³²⁷ *Id.* at 52535.

³²⁸ NWPR, 85 Fed. Reg. at 22339.

³²⁹ Proposed Rule, 90 Fed. Reg. at 52537.

purpose—with no section 404 oversight for the next five years. Inclusion of “idling land” as an activity that can serve as the single example of an agricultural purpose over the course of five years is particularly problematic and subject to exploitation. Recent history has shown that developers have exploited this loophole. In one example in Orange, Texas, the Corps applied the NWPR to exclude numerous wetlands from jurisdiction as “prior converted cropland” even though the cropland was cleared to make way for the construction of a chemical manufacturing facility.³³⁰

The Proposed Rule’s approach to prior converted cropland is far removed from the exclusion’s original purpose: to maintain consistency across federal programs while furthering the objective of the Clean Water Act. In codifying the prior converted cropland exclusion for the first time in 1993, the Agencies noted that the federal wetlands protection effort would be most effective if all federal agencies involved in that effort were acting in concert.³³¹ Thus, EPA and the Corps implemented the exclusion to enhance consistency with other federal programs affecting wetlands.³³² Further, the Agencies believed that codifying the prior converted cropland exclusion was consistent with their “paramount objective of protecting the nation’s aquatic resources” because, according to the Agencies’ view of the exclusion, only an area that was “significantly modified so that it no longer exhibits its natural hydrology and vegetation” and was “significantly degraded” would fall under the exclusion.³³³

Crucially, while the prior converted cropland exclusion was intended to cover lands that do not exhibit the full range of wetland functions that they would in a natural state, prior converted cropland often continues to exhibit some beneficial wetland functions.³³⁴ Further, prior converted cropland often retains the potential to be restored to wetlands performing a fuller range of wetland functions or revert to such wetlands on its own.³³⁵

Resurrecting the NWPR version of the prior converted cropland exclusion would exclude from Clean Water Act jurisdiction even areas that *do* exhibit the “natural hydrology and vegetation” of a wetland and *do not* resemble the “significantly degraded” land the Agencies envisioned when codifying the exclusion.³³⁶ The Agencies should retain the current exclusion, under which the exclusion no longer applies upon a “change of use”—an action that makes the prior converted cropland no longer available for the production of an agricultural commodity.³³⁷

³³⁰ U.S. Army Corps of Eng’rs, Approved Jurisdiction Determination, SWG-2018-00957 (Dec. 23, 2020), <https://perma.cc/CL74-KYDV>; Dave Rogers, *CP Chem Preps Land, But No Decision*, *The Record* (Apr. 20, 2021), <https://perma.cc/R6J5-KXTD>.

³³¹ Clean Water Act Regulatory Programs, 58 Fed. Reg. 45008, 45031–32 (Aug. 25, 1993).

³³² *Id.* at 45032.

³³³ *Id.*

³³⁴ See U.S. Dep’t of Agric., *Role of Prior Converted Croplands on Nitrate Processing in Mid-Atlantic Agricultural Landscapes* (2017), <https://perma.cc/S6VU-EFCM>.

³³⁵ *Id.*; see also W. Aaron Jenkins, et al., *Valuing Ecosystem Services from Wetlands Restoration in the Mississippi Alluvial Valley*, 69 *Ecological Econ.* 1051 (2010), <https://perma.cc/C5UQ-5HZW>.

³³⁶ *Id.*

³³⁷ 2023 Rule, 88 Fed. Reg. at 3107–08.

b. The Agencies should not mechanically defer to another federal agency’s prior converted cropland determinations.

Under the Proposed Rule, the Agencies would adopt a determination made by the U.S. Department of Agriculture (“USDA”) under the Food Security Act that a parcel is “prior converted cropland.”³³⁸ The Agencies should not delegate their congressionally authority under the Clean Water Act to make prior converted cropland determinations.

3. Ditches

Finally, the Agencies propose to limit jurisdiction over ditches to exclude all non-tidal and non-navigable “ditches” “constructed or excavated entirely in dry land”—even when they carry a “relatively permanent flow” of water and “connect to a jurisdictional water.”³³⁹ This change to the Agencies’ current exclusion for ditches is not consistent with the Clean Water Act. We implore the Agencies to extend the Act’s protections and jurisdiction to ditches that function as relatively permanent tributaries, conveying pollutants, nutrients, biota, and other media along with water to downstream jurisdictional waters. This is supported by both law and science.

In 1975, the U.S. District Court for the District of Columbia held that the Corps’ narrow interpretation of its jurisdiction was unacceptable and demanded that the Corps expand its jurisdiction to include many additional water bodies, including ditches.³⁴⁰ In *Callaway*, the court criticized the Corps for “act[ing] unlawfully and in derogation of their responsibilities under section 404 of the Water Act”³⁴¹ Another federal district court held similarly that the Corps’ jurisdiction under the Clean Water Act was significantly broader than its jurisdiction under the Rivers and Harbors Act.³⁴² As that court stated, the Clean Water Act “was designed to deal with all facets of recapturing and preserving the biological integrity of the nation’s water by creating a web of complex interrelated regulatory programs.”³⁴³ Although the Corps did not initially regulate upland ditches, by 1977 it did.

In *United States v. Eidson*,³⁴⁴ the U.S. Court of Appeals for the Eleventh Circuit articulated the rationale for finding ditches that function as tributaries to be jurisdictional.³⁴⁵ The court held:

There is no reason to suspect that Congress intended to regulate only the natural tributaries of navigable waters. Pollutants are equally harmful to this country’s

³³⁸ Proposed Rule, 90 Fed. Reg. at 52537.

³³⁹ *Id.* at 52538–39.

³⁴⁰ *Nat. Res. Def. Council v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975).

³⁴¹ *Id.*

³⁴² *United States v. Holland*, 373 F. Supp. 665, 671 (M.D. Fla. 1974).

³⁴³ *Id.* at 668.

³⁴⁴ 108 F.3d 1336 (11th Cir. 1997).

³⁴⁵ *Id.* at 1340.

water quality whether they travel along man-made or natural routes. The fact that bodies of water are ‘man-made makes no difference That the defendants used them to convey the pollutants without a permit is the matter of importance.’³⁴⁶

A series of cases since *Eidson* have affirmed that human-made ditches that contribute flow to downstream traditional navigable waters can be “tributaries” and “waters of the United States.”³⁴⁷ While the Supreme Court has subsequently limited the Clean Water Act’s coverage of tributaries to those that are “relatively permanent,” nothing in the *Rapanos* plurality or *Sackett* opinion holds that human-made ditches with relatively permanent flow should be treated differently than streams with relatively permanent flow.

Accordingly, there is no basis for treating ditches that function as tributaries as anything but jurisdictional tributaries. Just like streams, ditches can convey pollutants, nutrients, biota, and other media along with water to downstream waters. Without a “legitimate reason” for treating ditches that convey relatively permanent flow differently than streams that function similarly,³⁴⁸ the Agencies must continue to treat ditches that carry a relatively permanent flow of water as jurisdictional.

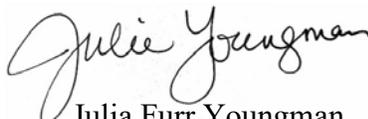
IV. Conclusion

For all of these reasons, our 76 organizations, representing millions of members and supporters, urge the Agencies not to finalize the Proposed Rule and instead to protect the nation’s streams, rivers, lakes, estuaries, wetlands, and other waters to the maximum extent allowed under the Clean Water Act, for the benefit of all Americans and for the protection of their health, welfare, security, environmental interests, and economic interests.

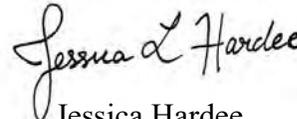
Sincerely,



Mark Sabath
Senior Attorney



Julia Furr Youngman
Senior Attorney



Jessica Hardee
Associate Attorney

³⁴⁶ *Id.* at 1342.

³⁴⁷ See *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001); *Cnty. Ass’n for Restoration of the Env’t v. Henry Bosma Dairy*, 305 F.3d 943, 954–55 (9th Cir. 2002); *Treacy v. Newdunn Assocs.*, 344 F.3d 407, 417 (4th Cir. 2003), *cert. denied sub nom.*, 541 U.S. 972 (2004); *United States v. Deaton*, 332 F.3d 698, 710–11 (4th Cir. 2003); *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1009 (11th Cir. 2004); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1325 (6th Cir. 1974).

³⁴⁸ *Indep. Petroleum Ass’n*, 92 F.3d at 1258.