January 5, 2026

ELECTRONIC SUBMISSION

Attn: EPA-HQ-OW-2025-0322

Stacey Jensen
Oceans, Wetlands and Communities Division
Office of Water (4504-T)
Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, DC 20460

RE: Updated Definition of "Waters of the United States"

Dear Ms. Jensen:

On November 20, 2025, the U.S. Environmental Protection Agency (EPA) and U.S. Department of the Army (the agencies) published a proposed rule revising the regulations defining the scope of waters covered under the Federal Water Pollution Control Act, as amended, colloquially known as the Clean Water Act (CWA).[1] Specifically, the agencies proposed to clarify their definition of "waters of the United States" as set out within their respective regulations at 40 CFR Part 120 and 33 CFR Part 328.

It is encouraging to see the agencies take this important step to revise their definitions to conform with the U.S. Supreme Court's decision in *Sackett v. Environmental Protection Agency*,[2] published two and a half years ago. The revised definition proposed by the agencies provides much-needed clarity as to the scope of the CWA regulations, which offers valuable guidance to stakeholders who could potentially be bound by these rules, even whilst aligning the relevant regulations more closely to the language and intent of the authorizing statute.

However, there remains room for improvement. In particular, the proposal by the agencies to introduce seasonality into the "relatively permanent" standard would effectively replace the Supreme Court's clear language with a vague, contradictory standard, with an outer bound that potentially regulated stakeholders would face great difficulty in deciphering and applying to their own circumstances. In addition, since the passage of the CWA in 1972, the agencies have consistently expanded jurisdiction beyond both any recognizable limitation of the statutory "navigable waters" language, and beyond the scope of the powers that EPA's own

[1] U.S. Environmental Protection Agency, "Updated Definition of 'Waters of the United States,'" *Federal Register*, Vol. 90, No. 222 (November 20, 2025), p. 52,498.
[2] 598 U.S. 641 (2023).

general counsel recognized when originally interpreting the CWA's provisions.[3] Over the past 30 years, the Supreme Court has shown an increasing emphasis on construing agency interpretations within the "single, best meaning"[4] of the authorizing legislation, as informed by relevant Constitutional limitations.[5] During this time, the agencies' ambitious assertions of CWA jurisdiction have been consistently limited when argued before the Supreme Court.[6] Accordingly, the agencies would be best served to adopt an interpretation that more closely adheres to the limiting "navigable waters" language of the authorizing statute, in light of the caselaw and as understood by the implementing agencies before the scope was expanded to its current, capacious extent.

Discussion

I. The Agencies Should Strengthen the Definition of "Relatively Permanent" to Include Waters that are in Fact Permanent, Not Merely Seasonal

It is helpful that the agencies seek to define the "relatively permanent" standard articulated by the Supreme Court plurality in *Rapanos v. U.S.*[7] in 2006, and later adopted by the Supreme Court majority in *Sackett v. EPA*[8] in 2023. However, at a linguistic level, the proposed definition, read in full, makes little sense: "*Relatively permanent* means standing or continuously flowing year-round or at least during the wet season."[9] Yet the final clause within this definition, "or at least during the wet season," directly contradict and undermines the preceding language of that definitional paragraph, "standing or continuously flowing year-round," not to mention any basic understanding of the plain meaning of the term "permanent."

1. The Proposed Definition of "Relatively Permanent" Violates Plain Language Principles

In rulemaking documents, executive agencies have longstanding obligations to write in plain, understandable language when promulgating regulatory mandates. Executive Order 12866 requires that, in regulatory actions published in the Federal Register, "all information provided to the public by the agency shall be in plain, understandable language,"[10] and applies this same requirement to information provided by the Office of Information and Regulatory Affairs as

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[3] *See* Envt'l Prot. Agency, Off. Gen. Counsel, Meaning of the Term "Navigable Waters" (February 13, 1973), 1973 WL 21937.
[4] *Loper-Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024).
[5] *E.g.*, *U.S. v. Wilson*, 133 F.3d 251 (4th Cir. 1997) (holding that the Army Corps of Engineers' regulatory definition of "waters of the United States" exceeded both the statutory authority of the CWA and the Constitutional authority of the Commerce Clause).
[6] *E.g.*, *Sackett v. EPA*, 598 U.S. 651 (2023) (holding that EPA's asserted jurisdiction over wetlands not adjacent to navigable waters exceeded its statutory authorization under the CWA); *Sackett v. EPA*, 566 U.S. 120 (2012) (holding that EPA's attempt to preclude judicial review of its determinations under the CWA violated the Administrative Procedure Act); *Rapanos v. U.S.*, 547 U.S. 715 (2006) (vacating attempts to regulate waters that were neither relatively permanent, nor adjacent to Waters of the U.S., and which had not been shown to have any significant nexus to such Waters of the U.S.); and *Solid Waste Agency of Northern Cook Cty v. Army Corps of Engineers*, 531 U.S. 159 (overturning the migratory bird rule).
[7] 547 U.S. 715 (2006).
[8] 598 U.S. 651 (2023).
[9] 90 Fed. Reg. at 52546 (emphasis original).
[10] Regulatory Planning and Review. Exec. Order No. 12866. 58 Fed Reg. 51735, 51742 (September 30, 1993). '

well.[11] This longstanding policy in favor of plain language is similarly reinforced by the Presidential Memorandum of June 1, 1998, which expressly requires that agencies "use plain language in all proposed and final rulemaking documents published in the *Federal Register*."[12] Yet EPA's proposed redefinition of "relatively permanent" to mean "seasonal" violates these requirements.

Black's Law Dictionary defines permanent as meaning, "Fixed, enduring, abiding, not subject to change."[13] More recent laymen's dictionaries include similar meanings, such as "continuing or enduring without fundamental or marked change,"[14] "lasting or continuing for a very long time or forever : not temporary or changing,"[15] "lasting for a long time or forever,"[16] and "Something that is permanent, exists, or happens all the time."[17] Indeed, the online version of the *Cambridge Advanced Learner's Dictionary*, commonly referred to as the *Cambridge Dictionary*, contains as its explanation of the definition, "something that is permanent exists or happens all the time,"[18] and the explanation lists as its leading example: "Mont Blanc has a permanent snow cap,"[19] a reference to the well-known fact that the peak of Mount Blanc is perpetually covered in snow, year-round (hence the name).[20] Common to each of these definitions is the concept of a feature that exists throughout time, the basic definitional element of which is undercut by the proposed qualification that flows during the wet season should be considered "permanent."

In contrast, *Black's* defines seasonality as meaning "a repetitive or periodic pattern that is predictable and occurs in a monthly or seasonal pattern."[21] Thus, the agencies' proposed definition does not merely introduce a concept that is foreign to any plain language meaning of the word "permanent," but would redefine permanent as somehow meaning seasonal. Such counterintuitive regulatory redefinitions can be justified when the agency is implementing a term of art with a specific statutory definition. Yet the term "relatively permanent" makes no such appearance in the CWA, but instead appears in Supreme Court caselaw. To redefine "relatively permanent" as including "seasonal" in this way thus does not merely misconceive the relevant Supreme Court caselaw, but does so in a way that violates longstanding Executive Branch policy that agencies should use plain language that is readily understood by the public.

2. The Proposed Definition of "Relatively Permanent" Defies Supreme Court Caselaw

In light of the normal meaning of the phrase "relatively permanent," the agencies should recall that "construing statutory language is not merely an exercise in ascertaining the outer

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[11] *Id.* at 51743.
[12] Memorandum on Plain Language in Government Writing, 63 Fed. Reg. 31,885 (June 10, 1998).
[13] *Permanent*, BLACK'S LAW DICTIONARY (2nd ed. 1910).
[14] *Permanent*, Merriam-Webster.com (2025).
[15] *Permanent*, The Britannica Dictionary.com (2025).
[16] *Permanent*, Cambridge Dictionary.org (2025).
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] "Mont Blanc," *WorldAtlas.com*, Reunion Technology Inc., 2021, https://www.worldatlas.com/mountains/mont-blanc.html (accessed December 15, 2025).
[21] *Seasonality*, BLACK'S LAW DICTIONARY (2nd ed. 1910).

limits of a word's definitional possibilities."[22] It is true that the phrase "relatively permanent" does not itself appear in the CWA. However, the Supreme Court first used that phrase to erect boundaries to prevent the agencies from exploiting the language of CWA to assert ambitious jurisdiction beyond that which Congress had delegated. Given the origins of the "relatively permanent" verbiage, it is concerning that the agencies would try to exert a maximalist definition of this very phrase that the Supreme Court first articulated in an effort to limit the power of the agencies under the CWA.

In *Sackett*, when the Supreme Court majority adopted the tests first discussed by the plurality in *Rapanos*, the Court spent comparatively little time discussing the meaning of the "relatively permanent" test, as the major focus was on the requirement of a "continuous surface connection" to regulated waters. Yet in discussing the overlap between the "continuous surface connection" and "relatively permanent" tests, the Court in *Sackett* only noted two exceptions to the continuous surface connection requirement, namely low tides, which only occur briefly, twice per day in waters subject to the ebb and flow of the tide, and droughts (which definitionally refer to abnormal, rather than cyclical or seasonal, occurrences).

The Court's deeper discussion of the "relatively permanent" requirement in *Rapanos*, and of the facts that gave rise to the plurality's analysis (subsequently adopted by the majority in *Sackett*), makes it even clearer that the agencies' proposal to include areas that only have waters on a seasonal basis, far from aligning with *Rapanos*, in fact contradicts the Court's reasoning. Indeed, the *Rapanos* plurality specifically decried the practice of the agencies in designating "such typically dry land features as 'arroyos, coulees, and washes'" as "waters of the United States." Yet these very features are, definitionally, dry gullies, ravines, and stream beds, which fill with water in the course of brief seasonal rains. For the agencies here to define such seasonal features as "relatively permanent" directly ignores agency practices being criticized, which led the Court to articulate that standard in the first place.

Throughout the Proposal, the agencies cite as justification the difficulty in establishing a single standard that would cover the "arid West" along with the rest of the country. Yet the *Rapanos* plurality contemplated this same concern, and credited the Ninth Circuit with citing a passage from the movie *Casablanca*, which the *Rapanos* plurality characterized as "portray[ing] most vividly the absurdity of finding the desert filled with waters:

> "Captain Renault [Claude Rains]: What in heaven's name brought you to Casablanca?"
>
> "Rick [Humphrey Bogart]: My health. I came to Casablanca for the waters."
>
> "Captain Renault: "The waters? What waters? We're in the desert."
>
> "Rick: "I was misinformed."[23]

In the relatively restrained linguistic world of Supreme Court opinions, it would be difficult to find a passage more mockingly scathing of the agencies' past attempts to use the

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[22] *FCC v. AT&T Inc.*, 562 U.S. 397, 407 (2011).
[23] *Rapanos*, 547 U.S. 715 at n.2 (*citing Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1117 (9th Cir. 2005)).

CWA to regulate geographic features in arid regions. Yet the agencies' citation of the need to find a way to cover features in, what the agencies themselves describe as the "arid West," belies an effort to redefine the "relatively permanent" standard to include the very types of features that the *Rapanos* reasoning is meant to exclude.

Moreover, the *Rapanos* plurality did not merely describe the geographic features to be excluded, but they were fairly clear in describing the types of features that they considered "relatively permanent." Specifically, the plurality relied on the definition of "waters" found in Webster's New International Dictionary, "As found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes," and "the flowing or moving masses, as of waves or floods, making up such streams or bodies."[24] As the Court noted, "Even the least substantial of the definition's terms, namely 'streams,' connotes a continuous flow of water in a permanent channel—especially when used in company with other terms such as 'rivers,' 'lakes,' and 'oceans.' None of these terms encompass transitory puddles or ephemeral flows of water."

It was in this context that the *Rapanos* plurality underlined that a relatively permanent body of water "includes, at bare minimum, the ordinary presence of water." In the next paragraph, the plurality used similarly strong language to emphasize, "Under no rational interpretation are typically dry channels described as "*open* waters." Indeed, the section of the opinion concluding the discussion of the "relatively permanent" standard reiterates that the "only plausible interpretation" of the phrase "waters of the United States," "includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,]…oceans, rivers, [and] lakes….The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."

Despite this strong language, the agencies' argument for interpreting "relatively permanent" to allow seasonality hinges entirely on a footnote to the *Rapanos* opinion.[25] In this footnote, the plurality expressly refrained from determining whether seasonality could be included in such a definition, and the extent of permanence required if seasonality were incorporated.[26] However, this footnote is, by its own terms, meant to address the concerns of the dissent. Without attempting to define a bright-line standard, the plurality simply states that they "also do not *necessarily*[27] exclude *seasonal*[28] rivers, which contain continuous flow during some months of the year but no flow during dry months—such as the 290-day, continuously flowing stream postulated by Justice Stevens' dissent."

Leaving aside that this mere footnote is nonbinding *dicta*, this verbiage is noteworthy for at least two reasons. First, the "do not necessarily exclude" formulation signifies that the plurality was, at best, undecided as to whether such purported waters could fit within the

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[24] Webster's New International Dictionary (2d ed. 1954).
[25] 90 Fed. Reg. at 52507.
[26] *Rapanos*, 547 U.S. 715 at n. 5 ("[W]e have no occasion in this litigation to decide exactly when the drying-up of a stream bed is continuous and frequent enough to disqualify the channel as a "wate[r[of the United States").
[27] *Id.* (emphasis added).
[28] *Id.* (emphasis original).

"relatively permanent" standard. More importantly, under the terms of the dissent that they were addressing, the plurality was, expressly by its own terms, only envisioning a hypothetical stream that continuously flowed 290 days (more than nine months) out of the year. It is particularly noteworthy that the agencies' proposal, which cites this footnote seven times, at each point excludes the language referencing to the 290-day hypothetical that the footnote was meant to address.[29] It would be dismaying if the agencies used an incomplete version of this footnote, which by its terms clearly envisioned streams that flow throughout most of the year, to justify a definition of seasonality that according to the agencies could cover several weeks or months out of the year, as suggested in the Proposal.

3. *Introducing Indeterminate "Wet Seasons" into the Proposed Definition of "Relatively Permanent" Exacerbates the very Uncertainties that the Standard is Meant to Address*

It is commendable that the agencies seek to establish a clear and easily implementable definition, but confounding that the agencies assert that defining "relatively permanent" with a geographically inconsistent "wet seasons" test would result in such clarity.[30] The vast majority of stakeholders who are tasked with actual compliance with these standards have made clear their preference for a definition that only covers waters that continuously flow year-round. As the Proposal notes, this includes most of the States, State associations, agricultural organizations, and the larger portion of industry groups.[31] In contrast, the groups arguing for the use of wet seasons in this definition included "environmental advocacy groups, and some industry groups."[32] Yet it is worth noting that these environmental advocacy groups will not be charged with complying with the regulatory definition, in the same way as the States, farmers, and industries. For these regulated stakeholders, there is great value in predictability, which reliance on permanent waters, which are actually permanent, would provide.

Counterintuitively redefining "relatively permanent" waters to include geographic features that are dry for most of the year would make compliance much more difficult, particularly for smaller businesses and individual property owners. Those challenges would only be further exacerbated by adopting the shifting, amorphous standard that the agencies proposed, which not only has no definition, but which is explicitly designed to operate differently in different parts of the country, partly so as to allow the agencies to regulate arid regions more easily. Defining a "relatively permanent" standard that not only has no minimum flow duration, but which operates differently in different parts of the countries, undermines both the ease of applicability and the certainty that the standard was meant to provide, both as justified by the Supreme Court in its opinions and by the agencies in the Proposal.

The agencies' explanation that allowing the definition to change by region, would in turn allow the agencies to take a tailored approach that accounts for regional variation, is similarly confounding. The most effective, and simplest, way to tailor regulatory treatment on a regional basis is to defer regulatory jurisdiction to the local and regional levels, *i.e.*, the States, which by

[29] 90 Fed. Reg. at 52507, 52518-20, 52528.
[30] 90 Fed. Reg. at 52518.
[31] 90 Fed. Reg. at 52513.
[32] *Id.*

the agencies' own description have for the most part requested a simple, uniform standard of permanence. As the Supreme Court reiterated in both *Sackett* and *Rapanos*, the CWA, by its own terms, intended to respect the primary jurisdiction of States over their own waters, outside the navigable waters reserved to Federal jurisdiction in the statute. To the extent that a regional approach is necessitated, the statutory imperatives, Supreme Court rationales, and the submissions by State stakeholders, all confirm that the best way to respect this regional variation is by allowing the States themselves to choose whether and how to regulate features that do not meet a straightforward standard of "permanent waters."

The Federal Government's strength is in providing a uniform, easily comprehensible standard throughout the United States. To undercut this by applying the same definition differently in different parts of the country creates a regional patchwork that effectively removes the certainty and uniformity that Federal regulations can provide, without in fact providing the kind of tailored approach that State jurisdiction would allow. Moreover, treating different parts of the country differently, in terms of defining the permanence of the water features that are included in this definition, would raise Constitutional due process concerns, for landowners in drier regions whose property would fall under this definition, even while similar features in wetter, more fertile parts of the country would be unregulated.

Thus, the proposal by the agencies to define "relatively permanent" with reference to wet seasons that would be defined differently throughout the country would create grave implementation challenges that would cause confusion and violate basic principles of Federalism and Constitutional due process. Due to these eminently foreseeable implementation challenges, the agencies would be best advised to define the term "relatively permanent" to mean what it actually means, that is, permanent bodies of water.

II. The Agencies Should Narrow the Scope of the Proposed Definition of "Waters of the United States" to Better Align with the Limiting Statutory Term, "Navigable Waters"

In the Proposal, the agencies have articulated a worthy goal of limiting the scope of Federal authority consistent with the long-understood boundaries of Congress's authority under the Commerce Clause. This is commendable both for rule of law purposes, and to provide stakeholders with predictability in the resulting regulatory regime. An ambitious regulatory agenda creates confusion, as the outermost contours of agency authority only become clear through litigation. This creates significant costs for regulated stakeholders, who must bear the cost not only of regulatory uncertainty as challenges wind through the courts, but who in the meantime often suffer financial costs from regulations that may not have been legal or Constitutional.

It is encouraging to see that the agencies have requested comment on whether to restrict the definition of "waters of the United States" to traditional navigable waters, tributaries that flow directly into these waters, and wetlands with a continuous surface connection to such waters,[33] as informed by Justice Thomas's concurring opinion in *Sackett*, which argued that "the

[33] 90 Fed. Reg. at 52515.

term 'navigable waters' refers solely to the aquatic channels of interstate commerce over which Congress traditionally exercised authority."[34]

Such an amendment to the definition of "Waters of the United States" would represent dramatic progress in furthering the President's deregulatory agenda,[35] while respecting the CWA's language about respecting State primacy in the regulation of local waters, and retaining Federal protections over our nation's navigable waters. Such an approach would indeed represent an improvement over the current proposal, not to mention the current regulations.

Yet if the agencies decide not to adopt Justice Thomas's suggested approach at this time, there remains significant room to further narrow the scope of 40 CFR 120.2 and 33 CFR 328.3, to better respect the CWA's statutory purpose and the Commerce Clause's Constitutional limitations, even without adopting the limited approach envisioned in Justice Thomas's concurrence.

When the CWA was first passed, EPA and the U.S. Army Corps of Engineers (ACE) adopted different interpretations of the statute. In particular, ACE defined the "navigable waters" language to be limited to "waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce."[36] This definition, more restrictive even than Justice Thomas's approach, was struck down by the U.S. District Court for the District of Columbia, on the grounds that Congress "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the Water Act, the term is not limited to the traditional tests of navigability."[37]

Thus, the *Callaway* court defined a lower threshold that CWA regulation could not fall below, but *Callaway* did not attempt to define the actual extent of the jurisdiction that Congress intended to exert. In this context, even before *Callaway*, it is helpful to recall that the 6th Circuit held both that Congress intended in the CWA to regulate the discharge of pollutants into tributaries that flowed into navigable waters, and that this exercise of authority was Constitutional.[38] Thus, just two years after the CWA was enacted, and 50 years before Justice Thomas wrote his concurrence, the 6th Circuit in *Ashland Oil* effectively predicted Justice Thomas's standard, which at the time extended Federal jurisdiction of U.S. waters well beyond what ACE initially promulgated. Yet the definition that the agencies have proposed in the current rulemaking, while narrower in scope than the existing regulation, far exceeds anything articulated by the 6th Circuit in in *Ashland Oil*.

In contrast to ACE, EPA promulgated a more expansive definition of navigable waters under the CWA at the outset. Under EPA's original definition, the jurisdictional waters included: (1) all navigable waters of the U.S; (2) tributaries of navigable waters of the U.S.; and (3) interstate waters. In addition, the EPA definition included intrastate lakes, rivers, and streams (4)

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[34] 598 U.S. at 697 (Thomas, J., concurring).
[35] *See* Unleashing Prosperity Through Deregulation. Exec. Order No. 14192. 90 Fed Reg. 9065 (January 31, 2025).
[36] 33 CFR 209.12(d)(1) (1974).
[37] *NRDC v. Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975).
[38] *U.S. v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1329-30 (6th Cir. 1974).

which were utilized by interstate travelers for recreational or other purposes; (5) from which fish or shellfish were taken and sold in interstate commerce; and (6) which were utilized for industrial purposes by industries in interstate commerce.[39] EPA's original definition was worded almost identically to its General Counsel's recommended definition, as stated in an internal memorandum at the time,[40] with one major exception: the general counsel's recommended jurisdiction over "interstate" lakes, rivers, and streams in parts (4), (5), and (6) of the definition was replaced with jurisdiction over "intrastate" lakes, rivers, and streams.

Thus, from the outset, EPA's definition of "navigable waters" was broader than the already expansive definition that its own General Counsel recommended. In particular, EPA's claim of jurisdiction over intrastate waters that did not meet traditional standards of navigability went against EPA's own legal advice. To some extent, the agencies, guided in part by judicial decisions, have corrected that excess in ambition by removing those jurisdictional grounds from the definition. While the proposed deletion of the word "intrastate" from the definition in Proposed § 120(a)(5) represents a natural progression of this process, the definition still needs a limiting principle. Replacing the word "intrastate" with "interstate" would provide that limiting principle, in a way that accords with limitations first suggested by EPA's own General Counsel.

Similarly, there are other ways in which the regulatory definition of navigable waters has evolved over time, which are broader than required by the underlying statute, and which, while respecting Federal caselaw in cases such as *Callaway* and *Ashland Oil*, are not in fact necessitated by Federal caselaw. There is further room for the agencies to pare down their Proposed definition so as to achieve this balance, without necessarily going as far as adopting the approach articulated in Justice Thomas's concurrence in *Sackett*.

In particular, the proposed definition at § 120.2(a)(2), which covers "impoundments of waters otherwise defined as waters of the United States under this definition," goes well beyond any traditional meaning of "navigable waters." This is also broader than the original definition promulgated by EPA, or advocated by its General Counsel. This definition also goes beyond any real statutory justification, as regulating water impoundments does not have an obvious relationship to the statutory purposes of preventing discharge or fill. To the extent that impoundments covered by this Proposed paragraph are not already included in other parts of the definition, this paragraph would have the effect of covering manmade features that do not obviously feed into jurisdictional waters, in which the grounds for coverage are not readily apparent to potential stakeholders from a compliance perspective. The potential for confusion is compounded, under the proposed definition, for impoundments in which the presence of water fluctuates on a seasonal basis.

If the agencies decide not to opt for Justice Thomas's approach, as seems to be their inclination in the existing Proposal, the agencies should at least try to tether the definition of "Waters of the United States" to the regulatory history and the caselaw, as clearly possible. Such an approach, while likely requiring that the definitional reach be pared down further, would also

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[39] U.S. Environmental Protection Agency, "National Pollutant Discharge Elimination System," *Federal Register*, Vol. 38, No. 98 (May 22, 1973), 13528, 13529.
[40] *See supra*, n. 3.

ensure that the resulting definition is as legally defensible as possible, while providing more reliable guidance to regulated stakeholders.

Suggested Amendments

The agencies have made promising progress in this Proposal, but for the reasons discussed above, the Proposal can be further improved with the following amendments:

Proposed § 120.2(a)(2)

This definition could be further improved by deleting the Proposed § 120.2(a)(2), which includes impoundments as Waters of the United States. If adopted, conforming changes would need to be adopted in the rest of § 120.2(a), to renumber the subsequent subparagraphs within § 120.2(a) and to delete references to § 120.2(a)(2).

Proposed § 120.2(a)(5)

In addition, the agencies should revise Proposed § 120.2(a)(5), to start this provision with the word "Interstate." Replacing the existing word "intrastate" with the suggested "interstate," instead of simply deleting "intrastate" as currently proposed, would more clearly define a limiting principle that underlies the Proposed change to this provision.

Proposed § 120.2(b)(8)

To incorporate the *Rapanos* plurality's analysis more directly in the list of exclusions, we would suggest revising the parenthetical currently in Proposed § 120.2(b)(8), which currently reads, "gullies, small washes," first to delete the word "small." It is difficult to understand how washes of any size could possibly be understood as "relatively permanent."

Second, the agencies would be well advised to expand this list, also to include arroyos and coulees at minimum, which the *Rapanos* plurality expressly pointed out, categorically, as features that had previously been mischaracterized under the CWA. Adding these two features, at least, to the parenthetical would more explicitly incorporate the *Rapanos* holding, and would also clearly signal the agencies' intent to effectuate that reasoning.

Proposed § 120.2(c)(8)

The agencies should revise the Proposed definition of "relatively permanent" to refer to bodies of water that are actually permanent. This could be done in a way as simple as deleting the phrase, "or at least during the wet season." To further strengthen the wording, the agencies could also replace that deleted phrase with words such as "on a perennial basis," or otherwise, "with potential exceptions for drought."

Amending this Proposed paragraph as suggested would tie the definition of "relatively permanent" more clearly to the language of the governing Supreme Court opinions in *Sackett* and *Rapanos*, which would in turn make the resulting Final Rule more legally defensible and more straightforward to comply with, while providing greater predictability to the regulated stakeholders.

Conclusion

The agencies' proposed revision to the regulatory definition of "Waters of the United States" represents a much needed and commendable effort to update the definition to align with recent Supreme Court caselaw. While the agencies' proposal represents substantial progress, the suggested amendments above would further bolster the definition, to best comply with the Supreme Court's expressed reasoning and bring long overdue stability to the farmers, businesses, industries, and property owners who are affected by the CWA regulations.

Thank you for this opportunity to comment.

Respectfully submitted,

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[41] Affiliation and title provided for identification purposes only. I submit this comment in my personal capacity and not as an employee of The Heritage Foundation.