

April 23, 2025

Via www.regulations.gov

Benita Best-Wong
Deputy Assistant Administrator for Management
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Robyn S. Colosimo
Senior Official Performing the Duties of the
Assistant Secretary of the Army (Civil Works)
Department of the Army
108 Army Pentagon
Washington, DC 20310

Re: Recommendations on Implementation of the Definition of “Waters of the United States,” Docket ID No. EPA-HQ-OW-2025-0093

Dear Ms. Best-Wong and Ms. Colosimo:

Together, our 73 organizations write to urge the U.S. Environmental Protection Agency (“EPA”) and U.S. Army Corps of Engineers (“Corps”) (together, “the Agencies”) not to further weaken the federal clean water protections that safeguard the health and well-being of our communities, our economic livelihood, and our environment. Maintaining the Agencies’ definition of “waters of the United States” under the Clean Water Act is critical to restoring and maintaining the integrity of the nation’s waters and supporting the communities that rely on them.

Although the Supreme Court’s May 2023 decision in *Sackett v. EPA* substantially curbed federal clean water protections and put the nation’s waters at serious risk, the Agencies’ definition of “waters of the United States,” as amended in September 2023, faithfully conforms to the Court’s opinion. Accordingly, the Agencies should take no action to change the definition in ways that would go beyond the restrictions imposed by *Sackett* and that would further reduce protections for streams, wetlands, and other waters.

Recommendations on Implementation of the Definition of “Waters of the United States”

April 23, 2025

Page 2

The Southern Environmental Law Center submits these comments on behalf of itself and the following organizations:

A2 - Anthropocene Alliance	Michigan Lakes and Streams Association
Alabama Rivers Alliance	Mill Creek Alliance
American Whitewater	MountainTrue
Amphibian Foundation	National Wildlife Federation
Audubon Mid-Atlantic	Nature Forward
Birds Georgia	NC League of Conservation Voters
Black Warrior Riverkeeper	North American Climate, Conservation and Environment (NACCE)
Blue Water Baltimore	North Carolina Coastal Federation
Cahaba River Society	Piedmont Environmental Council
California Environmental Voters	Potomac Riverkeeper Network
Cape Fear River Watch	Protect Our Aquifer
Carolina Wetlands Association	Public Employees for Environmental Responsibility
Catawba Riverkeeper	River Guardian Foundation
Center for Biological Diversity	Saving Island Green Wildlife & Beyond
Charles River Watershed Association	Shenandoah Riverkeeper
Charleston Waterkeeper	Sierra Club
Chesapeake Bay Foundation	South Carolina Coastal Conservation League
Choctawhatchee Riverkeeper, Inc.	SouthWings
Clean Fairfax	Surfrider Foundation
Clean Water Action / Clean Water Fund	Tennessee Citizens for Wilderness Planning
Coastal Carolina Riverwatch	The 6th Branch
Coastal Plain Conservation Group	The Clinch Coalition
Congaree Riverkeeper	The People’s Justice Council
Cowpasture River Preservation Association	The River Project
Dan Riverkeeper	Upstate Forever
Endangered Habitats League	Virginia Association for Biological Farming
Environmental Integrity Project	Virginia Association for Parks
Florida Wildlife Federation	Virginia Conservation Network
Food & Water Watch	Virginia League of Conservation Voters
Freshwater Future	Waterkeepers Chesapeake
Friends of Dyke Marsh	West Virginia Rivers Coalition
Georgia Interfaith Power and Light	Wetlands Watch
Kentucky Resources Council, Inc.	Wild Virginia
Lake Watch of Lake Martin	Winyah Rivers Alliance
Loudoun Wildlife Conservancy	Yadkin Riverkeeper
Lower Susquehanna Riverkeeper Association	
Memphis Community Against Pollution (MCAP)	

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 we fish, the wetlands that protect our communities from flooding—these resources benefit Americans from the largest cities to the smallest towns. And since Congress’s enactment of the Clean Water Act in 1972, the quality of these resources has depended on 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,”¹ 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 2017, over 55% of the nation’s miles of rivers and streams were impaired, as well as 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.² The nation’s wetlands are struggling, too. Between 2009 and 2019, the country lost 670,000 acres of vegetated wetlands, primarily in the South and Great Lakes region.³ Some 82% of wetland area in the United States is in fair or poor condition due to human-driven physical alteration,⁴ harming fish and wildlife species, reducing recreational opportunities, diminishing water quality, and hindering flood prevention.

As a nation, we are far from achieving the Clean Water 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.”⁵

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

Throughout the nation—and especially in the South—communities rely on industries that cannot thrive without clean water. From commercial and recreational fishing to coastal tourism to seafood, the South is particularly well suited to support these valuable industries. The six states in which SELC works—Virginia, North Carolina, South Carolina, Georgia, Alabama, and

¹ 33 U.S.C. § 1251(a).

² See EPA, EPA 841-R-16-011, National Water Quality Inventory: Report to Congress 8, 11, 14, 15 (2017), <https://perma.cc/8LAY-4TWT>.

³ U.S. Fish and Wildlife Serv., Status and Trends of Wetlands in the Coterminous United States 2009 to 2019, 8–9, 26 (2024), <https://perma.cc/6WE7-PA4Y>.

⁴ 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 Apr. 23, 2025).

⁵ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985).

Tennessee—have a combined 12,517 miles of shoreline,⁶ 324,965 miles of rivers,⁷ and myriad streams, lakes, and wetlands. The region is 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.⁸ Freshwater biodiversity in the region is the highest in the nation. Alabama alone supports 38% of native freshwater fish species and 60% of native mussel species.⁹

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. Commercial fishers fish the estuaries and ocean waters of the South, generating more than \$300 million in income in 2022 in the six states where SELC works.¹⁰ And in 2011, a total of \$19 billion was spent on wildlife recreation in those states, including \$5.7 billion on fishing; more than 15.9 million people participated in these recreational activities throughout the six-state region.¹¹ 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.

Southern waters also support a thriving tourism industry. Each year, visitors from across the country vacation on southern beaches. In 2021 alone, tourism around the beaches of the South generated over \$11 billion in gross domestic product and over 200,000 jobs.¹² Visitors to the region also patronize the businesses comprising the South’s flourishing brewing industry—which contributed nearly \$9 billion to the economy and supported over 55,000 jobs in 2023¹³—as well as wineries and distilleries, all of which depend on clean water to thrive. In fact, many industries in the South and throughout the nation depend on reliable sources of clean water:

⁶ Nat’l Oceanic & Atmospheric Admin. (“NOAA”) Off. for Coastal Mgmt., *Shoreline Mileage of the United States*, <https://perma.cc/ZH5Q-3XM3>.

⁷ See Nat’l Wild & Scenic Rivers Sys., *Georgia*, <https://perma.cc/79MF-6F3Y> (last visited Apr. 23, 2025); Nat’l Wild & Scenic Rivers Sys., *North Carolina*, <https://perma.cc/F874-V49X> (last visited Apr. 23, 2025); Nat’l Wild & Scenic Rivers Sys., *South Carolina*, <https://perma.cc/CQ8P-8WQM> (last visited Apr. 23, 2025); Nat’l Wild & Scenic Rivers Sys., *Alabama*, <https://perma.cc/M7UB-YS3P> (last visited Apr. 23, 2025); Nat’l Wild & Scenic Rivers Sys., *Tennessee*, <https://perma.cc/H3XM-4HS9> (last visited Apr. 23, 2025); Nat’l Wild & Scenic Rivers Sys., *Virginia*, <https://perma.cc/JL25-NRPW> (last visited Apr. 23, 2025).

⁸ 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> (“Literature Review”).

⁹ 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.

¹⁰ See NOAA Fisheries, *Fisheries Economics of the United States 2022*, 9 tbl. 3 (2024) (totaling income for Alabama, Georgia, North Carolina, South Carolina, and Virginia), <https://perma.cc/J8FF-8EK3>.

¹¹ 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 at 22.

¹² 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>.

¹³ Brewers Ass’n, *Total Economic Impact 2023*, <https://perma.cc/F2PX-7MUF> (last visited Apr. 23, 2025) (totaling employment and economic impact figures for Alabama, Georgia, North Carolina, South Carolina, Tennessee, and Virginia).

agriculture (including livestock, crops, and shellfish farming), food processing and distribution, beverage bottling, pharmaceutical manufacturing, microelectronic manufacturing, and power generation. Adding the cost of purifying polluted water to their industrial processes will drive up costs for the industries and, ultimately, for consumers.

Without robust clean water protections, industries suffer. For example, harmful algal blooms that result when waters receive excess nutrients¹⁴ can lead to beach and fishery closures, often resulting in millions of dollars in losses to local tourism, seafood, and recreation industries.¹⁵ By contrast, strong clean water protections are good for business: in 2014, the Ecological Economics Journal estimated that the Clean Water Act has been responsible for adding as much as \$15.8 billion in economic benefits for Virginia alone.¹⁶ Clean water protections boost the local economies of the South 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.¹⁷ Water pollution is no exception. Lower-income populations and people of color often face severe and persistent drinking water contamination¹⁸ and limited access to clean water,¹⁹ as they are more likely to live in areas with inadequate water infrastructure.²⁰ According to a 2019 analysis, laws protecting safe drinking water are violated more often in counties with higher

¹⁴ EPA, *The Effects: Dead Zones and Harmful Algal Blooms* (Feb. 5, 2025), <https://perma.cc/DV2Q-77DR>.

¹⁵ See NOAA Fisheries, *Hitting Us Where It Hurts: The Untold Story of Harmful Algal Blooms* (Sept. 25, 2024), <https://perma.cc/UZH6-D4SQ>.

¹⁶ 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>.

¹⁷ 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).

¹⁸ 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).

¹⁹ 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>.

²⁰ 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://pure.johnshopkins.edu/en/publications/built-environment-issues-in-unserved-and-underserved-african-amer>; 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>.

racial, ethnic, and language vulnerability.²¹ 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.²²

Further, because lower-income communities and many communities of color have some of the highest rates of fish consumption,²³ they also disproportionately bear the harms of fish contamination from polluted water. 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.²⁴

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 climate-change impacts most acutely because they lack the resources to mitigate and adapt to climate-related changes.²⁵ For communities that rely on fish and other aquatic life for income, changing water temperatures and flows can drastically affect their livelihoods.²⁶ 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.²⁷ And the disproportionate burden on communities of color is only expected to worsen in the coming decades, as such communities face disproportionate increases in flooding caused by climate change. A 2022 study estimated that

²¹ Nat. Res. Def. Council et al., R:19-09-A, Watered Down Justice 18 (2019), <https://perma.cc/R64S-XP72>.

²² EPA, 2006 National Public Water System Compliance Report 4, 15 (2009), <https://perma.cc/E8C7-86QQ>.

²³ 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>.

²⁴ 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>; Susan A.R. Colvin et al., *Headwater Streams and Wetlands Are Critical for Sustaining Fish, Fisheries, and Ecosystem Services*, 44 *Fisheries* 73, 85 (2019).

²⁵ 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>.

²⁶ Food & Agric. Org. of the United Nations, *Climate Change Adaptation and Mitigation in the Food and Agriculture Sector* (2008), <https://perma.cc/3J68-XU9L>.

²⁷ 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>.

communities in which at least 20% of the population is Black will see a 40% increase in flood risk by 2050.²⁸ 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.²⁹ Because wetlands are our most effective natural guards against flooding and other impacts of climate change,³⁰ they must be preserved. Strong 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.

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.³¹ EPA has correctly 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.³²

Broadly, “[r]ising air and water temperatures and changes in precipitation are intensifying droughts, increasing heavy downpours, reducing snowpack, and causing declines in surface water quality, with varying impacts across regions.”³³ More frequent high-intensity rainfall events mobilize pollutants such as sediments and nutrients.³⁴ Future warming will add to the stress on water supplies and adversely affect the availability of water in parts of the United States, especially 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.

²⁸ Oliver E.J. Wing et al., *Inequitable Patterns of US Flood Risk in the Anthropocene*, *Nature Climate Change* 4 (2022).

²⁹ *Id.*

³⁰ Even when they crafted the NWPR, the Agencies admitted that increased flood risk would result from the loss of wetlands protection under the rule. See EPA & Dep’t of the Army, *Economic Analysis for the Navigable Waters Protection Rule: Definition of “Waters of the United States,”* EPA-HQ-OW-2018-0149-11572, 133 (Jan. 22, 2020), <https://perma.cc/5NFZ-GFAE> (“NWPR EA”).

³¹ See Colvin et al., *supra* note 24, at 76.

³² EPA, *Addressing Climate Change in the Water Sector*, <https://perma.cc/CYA9-SXXU> (last visited Sept. 1, 2021).

³³ U.S. Global Change Rsch. Program, *Fourth National Climate Assessment*, Vol. II: Impacts, Risks, and Adaptation in the United States 27 (2018), <https://perma.cc/XDB6-KXQB>.

³⁴ *Id.* at 152.

Increasing temperatures will both reduce the amount of snowpack and cause it to melt earlier, more quickly, and more extensively.³⁵ As a result, flows will be reduced, concentrating pollutants and degrading water quality. These “[i]ncreases in water temperature and changes in seasonal patterns of runoff will [also] very likely disturb fish habitat and affect recreational uses of lakes, streams, and wetlands.”³⁶

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 waters become stressed by drought, overuse, and the changing climate, many perennial and intermittent streams and springs are fading. Many 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, these waters will likely diminish, and the region’s need for scarce clean water will strain river systems even further.³⁷

Meanwhile, changing rainfall patterns, increased storms, and sea level rise induced by climate change are increasing flooding in many parts of the country.³⁸ 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.³⁹ 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.⁴⁰ National Oceanic and Atmospheric Administration (“NOAA”) officials referred to the Spring 2019 flood season as “potentially unprecedented,”⁴¹ with floods causing multiple deaths and billions of dollars in damage throughout the Midwest that year.⁴² 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.⁴³ In the Midwest, the frequency and severity of flooding have risen in recent years.⁴⁴ 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.⁴⁵ Historically high rainfall—as much as 17 inches in one day in some

³⁵ *Id.* at 96.

³⁶ *Id.* at 11.

³⁷ 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>.

³⁸ See NOAA, 2021 State of High Tide Flooding and Annual Outlook 6–10 (2021) (“State of High Tide Flooding”), <https://perma.cc/6GHT-AEUE>.

³⁹ Wing et al., *supra* note 28, at 2.

⁴⁰ EPA, Climate Change Indicators: River Flooding, <https://perma.cc/JZ76-SRLJ>.

⁴¹ NOAA, Spring Outlook: *Historic, Widespread Flooding to Continue Through May* (Mar. 21, 2019), <https://perma.cc/7LE5-LNV3>.

⁴² 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>.

⁴³ EPA, EPA843-F-06-001, Wetlands: Protecting Life and Property from Flooding (May 2006).

⁴⁴ Gary Galluzzo, *Study Finds Midwest Flooding More Frequent*, Iowa Now (Feb. 9, 2015), <https://perma.cc/CT5P-6LGZ>.

⁴⁵ Nat’l Weather Serv., *August 21, 2021 Flash Flooding* (Sept. 28, 2021), <https://perma.cc/4R2Z-G6RJ>.

places—led to flooding that killed at least 20 people and inflicted severe damage to communities across Middle Tennessee.⁴⁶ Experts expect these types of catastrophic flooding events to increase in frequency in the coming decades due to climate change.⁴⁷ And elsewhere in the South, 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 2000.⁴⁸

In just the last nine years, North Carolina and other southern 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, with much of the damage caused by floodwaters.⁴⁹ These types of storms are projected to increase in frequency, power, and duration, making it more important than ever to preserve the nation’s water resources in order to 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 one million gallons of water; when that acre of wetland is removed, those one million gallons flow unimpeded downstream, increasing the risk of flooding.⁵⁰ Similarly, during Hurricane Sandy in 2012, the storage capacity of wetlands prevented \$625 million in flood damage by shielding property in twelve states.⁵¹ 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.⁵² It is thus critically important that wetlands are protected.

In addition to guarding against flooding, wetlands filter upstream pollution and prevent pollution from entering our sensitive estuaries and marine environments. With a warming climate and pollution mobilized through increases in precipitation, wetlands play a critical role in removing sediment and excess nutrients⁵³—pollutants that have the potential to decimate

⁴⁶ 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>.

⁴⁷ 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>.

⁴⁸ NOAA Off. for Coastal Mgmt., *High Tide Flooding* (Mar. 31, 2025), <https://perma.cc/3595-EYL3>; see also *generally* State of High Tide Flooding.

⁴⁹ NOAA Off. for Coastal Mgmt., *Hurricane Costs* (Mar. 31, 2025), <https://perma.cc/H47B-Y7DZ>.

⁵⁰ EPA, EPA843-F-06-001, *Wetlands: Protecting Life and Property from Flooding* (2006).

⁵¹ 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>.

⁵² 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>.

⁵³ 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> (“2023 Rule Technical Support Document”).

valuable commercial and recreational fisheries. Millions of people in the South and across the country get their drinking water from surface waters kept clean by wetlands. Wetlands also recharge groundwater supplies,⁵⁴ 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.⁵⁵ Small streams transform and store carbon before it can be transported downstream.⁵⁶ These streams break down leaf litter and other organic matter, releasing it downstream in pulses during storm events.⁵⁷ The pulses provide an important source of carbon for downstream animals.⁵⁸

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 must maintain the broadest possible protections for waters that assist in combating the effects of a warming climate.

II. Narrowing the definition of “waters of the United States” would defy Congress’s mandate to restore and maintain the integrity of the nation’s waters.

A. The Supreme Court’s *Sackett* decision already presents a severe threat to the nation’s waters.

The term “waters of the United States” is the jurisdictional “linchpin” for virtually every one of the Clean Water Act’s critical safeguards,⁵⁹ including the Act’s core prohibition established by Section 301 against the discharge of pollutants without a National Pollutant Discharge Elimination System permit, the prohibition against the discharge of dredge and fill material without a Section 404 permit, and the obligation that states develop water quality standards. A robust definition of “waters of the United States” also helps to ensure a strong federal baseline of clean water protections, to ensure that states and tribes are not unfairly harmed by pollution carried downstream from neighboring jurisdictions.

⁵⁴ N.C. Dep’t of Env’t Quality, *North Carolina Coastal Habitat Protection Plan*, 2021 Amendment 87 (2021), <https://perma.cc/C4JV-R7FT>.

⁵⁵ Literature Review at 30–31.

⁵⁶ *Id.*

⁵⁷ *Id.* at 30.

⁵⁸ *Id.*

⁵⁹ Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act, 43 Op. Att’y Gen. 197, 200–01 (1979) (“The term ‘navigable waters’ . . . is a linchpin of the Act . . . Its definition is not specific to § 404, but is included among the Act’s general provisions.”).

The weakening of federal clean water protections that resulted from the Supreme Court’s 2023 decision in *Sackett v. EPA*⁶⁰ 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.’”⁶¹ The Agencies’ current regulatory definition of “waters of the United States” adopts the language of *Sackett* and faithfully conforms to the decision. According to EPA estimates, the *Sackett* decision stripped Clean Water Act coverage from as much as 63% of the nation’s wetlands by acreage and up to 4.9 million miles of streams.⁶² To further restrict the scope of “waters of the United States” under the Clean Water Act beyond the Court’s holding in *Sackett* would be disastrous.

B. The Agencies’ most recent attempt to weaken federal clean water protections was an unqualified failure.

In 2020, the Agencies embarked on an ill-fated attempt to narrow the breadth of “waters of the United States,” promulgating a rule 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 for the haphazard way in which it was developed.⁶³ 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 federal courts.⁶⁴ 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.’”⁶⁵

Indeed, the Agencies even admitted during the NWPR rulemaking that lost protections for many streams and wetlands would cause substantial harms, including increased water

⁶⁰ 598 U.S. 651 (2023).

⁶¹ *Id.* at 678 (quoting *Rapanos v. United States*, 547 U.S. 715, 742 (2006)) (internal quotations omitted).

⁶² 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/>.

⁶³ 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* 10–12 (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).

⁶⁴ *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).

⁶⁵ *Pascua Yaqui Tribe*, 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).

pollution, flooding, loss of aquatic habitat, oil spills, reduced ecosystem services, and degraded drinking water.⁶⁶ In the 14-month period in which the rule 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 waters from the Clean Water Act’s safeguards against pollution or destruction.⁶⁷ 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].”⁶⁸ 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.”⁶⁹

Based on these 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.”⁷⁰ Given Congress’s “broad, systemic view of the goal of maintaining and improving water quality”⁷¹ in enacting the Clean Water Act, the Agencies cannot permit such damage to occur by narrowing the definition of “waters of the United States.”

C. The primary beneficiaries of weakening federal clean water protections would be industrial dischargers and developers, not farmers and ranchers.

In announcing their intent to take administrative action to “clarify” the definition of “waters of the United States, the Agencies suggested that weakening clean water protections would benefit farmers and ranchers. But this rhetoric does not reflect the reality that removing waters from federal protection primarily benefits industrial dischargers and developers, not farmers and ranchers.

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.⁷² Moreover, the dredge-and-fill permit program generally does not apply to discharges into covered waters where the discharges are associated with normal agricultural practices—including farming, ranching,

⁶⁶ NWPR EA at 105–06.

⁶⁷ 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>.

⁶⁸ 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 3 (June 8, 2021), <https://perma.cc/2854-5BTQ>.

⁶⁹ 2023 Rule Technical Support Document at 83.

⁷⁰ 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)) (emphasis added).

⁷¹ *Riverside Bayview*, 474 U.S. at 132.

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

silviculture, building or maintaining stock ponds or irrigation ditches, maintaining drainage ditches, and building farm roads using best management practices.⁷³ And the Agencies’ current regulations, in line with longstanding practice, exclude prior converted cropland from Clean Water Act jurisdiction.⁷⁴

Likely as a result of these exclusions, from 2011 to 2020, a mere 0.6% of Section 404 permits went to agriculture projects.⁷⁵ The most frequent recipients of Section 404 permits included the building, oil and gas, and other industries.⁷⁶ Data compiled by the Agencies during the NWPR rulemaking 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.⁷⁷

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 and ranchers.

III. Specific recommendations

While the Supreme Court’s opinion in *Sackett v. EPA* did not directly address the validity of the Agencies’ January 2023 rule defining “waters of the United States,” the Court did conclude that the significant nexus standard that constituted a key element of that rule was inconsistent with the text and structure of the Clean Water Act.⁷⁸ The Court also adopted the *Rapanos v. United States* plurality’s formation of when wetlands are part of the “waters of the United States.”⁷⁹ Accordingly, in September 2023, the Agencies published revisions to the January 2023 rule with “the sole purpose” of ensuring that their regulations “conform with *Sackett*.”⁸⁰ (In these comments, we use the term “2023 Rule” to refer to the January 2023 rule as amended in September 2023.) The Agencies’ revisions were limited to those necessary “to remove the significant nexus standard and to amend [the rule’s] definition of ‘adjacent’” to match the Court’s decision in *Sackett*—specifically, by changing the definition of “adjacent” from “bordering, contiguous, or neighboring” to “having a continuous surface connection.”⁸¹ And as one court has since confirmed, those revisions faithfully conform to both the Court’s opinion

⁷³ See *id.* § 1344(f)(1) (identifying discharges not requiring Section 404 permits).

⁷⁴ 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).

⁷⁵ See EPA & Dep’t of the Army, Economic Analysis for the Final “Revised Definition of ‘Waters of the United States’” Rule 119–20 & tbl. VI-1 (Dec. 2022), <https://perma.cc/JV58-NW94>.

⁷⁶ See *id.*

⁷⁷ NWPR EA at 68–69.

⁷⁸ *Sackett*, 598 U.S. at 679.

⁷⁹ *Id.* at 678.

⁸⁰ Revised Definition of “Waters of the United States”; Conforming, 88 Fed. Reg. 61,964, 61,964–65 (Sept. 8, 2023).

⁸¹ *Id.* at 61,966, 61,969.

in *Sackett* and the plurality opinion in *Rapanos* that *Sackett* adopted.⁸² Indeed, in all material respects, the revisions to the rule embody the language of *Sackett* and *Rapanos* word for word.

Accordingly, the Agencies need not make any additional changes to their current definition of “waters of the United States.” To the extent that the Agencies consider additional changes, they should be few in number and minor in extent. We provide the following recommendations in response to specific topics identified by the Agencies in their notice.

A. Any agency action to define “relatively permanent” must recognize the ecological significance and longstanding legal protection of waters with intermittent flow.

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 with intermittent flow make up a majority of the stream miles in the United States⁸³ and affect the chemical, physical, and biological integrity of downstream waters. Streams provide benefits to downstream waters even when they do not flow continuously.⁸⁴ Intermittent streams, like perennial streams, control the transport of pollution, nutrients, and carbon to downstream waters, with impacts on downstream flooding, base flows, and water quality.⁸⁵

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.’”⁸⁶ 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.”

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 in order to be covered by the Clean Water Act.⁸⁷ 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.”⁸⁸ The plurality also clarified that its “relatively permanent” standard should not be read to exclude

⁸² *White v. EPA*, 737 F. Supp. 3d 310, 326–27, 328 (E.D.N.C. 2024), *appeal docketed*, No. 24-1635 (4th Cir. July 11, 2024).

⁸³ *See, e.g.*, Colvin et al., *supra* note 24, at 74, 77, 86.

⁸⁴ 2023 Rule, 88 Fed. Reg. at 3030.

⁸⁵ *Id.* at 3030–31.

⁸⁶ *Sackett*, 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739) (internal quotations omitted).

⁸⁷ *See Rapanos*, 547 U.S. at 739.

⁸⁸ *Id.* at 732 n.5.

waters “which contain continuous flow during some months of the year but no flow during dry months.”⁸⁹

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.”⁹⁰ “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.”⁹¹ But “relatively permanent” waters “do not include surface waters with flowing or standing water for only a short duration in direct response to precipitation.”⁹²

The Agencies wisely have not adopted a nationwide, bright-line flow regime or flow duration requirement for waters to qualify as “relatively permanent.” As the Agencies correctly observed in the preamble to the 2023 Rule, flow duration varies extensively by region based on climate, hydrology, topography, soils, and other conditions; as a result, setting a uniform flow duration standard would not be scientifically sound.⁹³ Without accounting for regional variations in flow, any such bright line could arbitrarily remove intermittent streams in dryer locales from coverage, with detrimental effects on downstream waters.

To the extent the Agencies take any action to define “relatively permanent,” the Agencies’ interpretation must be broad enough to include intermittent streams with discernible bed and banks, even though such streams may not have year-round flow.

B. Any agency action to define “continuous surface connection” must not narrow the definition of that term beyond its interpretation in *Sackett v. EPA*.

1. The courts and the Agencies have consistently interpreted the Clean Water Act to protect at least those wetlands that abut otherwise covered waters.

The Supreme Court has consistently recognized that wetlands abutting, or touching, otherwise covered waters are covered under the Clean Water Act. In *United States v. Riverside Bayview Homes, Inc.*, the Supreme Court unanimously upheld the Corps’ assertion of

⁸⁹ *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].”).

⁹⁰ 2023 Rule, 88 Fed. Reg. at 3084.

⁹¹ *Id.* at 3085.

⁹² *Id.* at 3084.

⁹³ *Id.* at 3085–86.

jurisdiction over adjacent wetlands and held that the “waters of the United States” include “wetland[s] that actually abut[] on a navigable waterway.”⁹⁴ 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.”⁹⁵ 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.⁹⁶

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.⁹⁷ Indeed, the Agencies under the current administration recently announced in guidance on the implementation of the term “continuous surface connection” that they are currently interpreting “waters of the United States” to include “wetlands that have a continuous surface connection *because they directly abut* the [requisite jurisdictional water].”⁹⁸ The Agencies should take no action that undermines the longstanding treatment of wetlands that abut other covered waters as jurisdictional.

2. The Agencies should continue to affirm that the Clean Water Act covers certain wetlands separated from other waters by only a natural berm or similar natural landform.

A natural berm, bank, dune, or similar natural landform between a wetland and an otherwise covered water body does not necessarily sever a continuous surface connection. In both the NWPR and the 2023 Rule, the Agencies recognized that the Clean Water Act covers wetlands separated from otherwise covered waters by only a natural landform where the landform itself provides evidence of a continuous surface connection.⁹⁹ After all, natural berms and similar landforms “are indicators of a direct hydrologic surface connection as they are formed through repeated hydrologic events.”¹⁰⁰ The landforms that result from these natural

⁹⁴ *Riverside Bayview*, 474 U.S. at 135.

⁹⁵ *Rapanos*, 547 U.S. at 740–42 (quoting *Riverside Bayview*, 474 U.S. at 135 & n.9).

⁹⁶ *Sackett*, 598 U.S. at 677–78.

⁹⁷ See The Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 Fed. Reg. 22,250, 22,307 (Apr. 21, 2020) (“NWPR”).

⁹⁸ 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 5 (Mar. 12, 2025), <https://perma.cc/7K9V-QKRR> (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>).

⁹⁹ See NWPR, 85 Fed. Reg. at 22,307; 2023 Rule, 88 Fed. Reg. at 3095.

¹⁰⁰ NWPR, 85 Fed. Reg. at 22,311.

processes can indicate that the wetlands are “inseparably bound up” with their adjacent waters and thus within the universe of wetlands that the Supreme Court has deemed jurisdictional.¹⁰¹

Further, as Justice Kavanaugh pointed out in his concurring opinion in *Sackett*, storms, floods, and erosion frequently shift or breach natural river berms.¹⁰² In the interest of promoting clarity and predictability, the Agencies should not adopt a framework under which a wetland’s jurisdictional status could change with each shifting of natural berms. Wetlands separated from otherwise covered waters by only a natural berm or similar natural landform must remain “waters of the United States.”

3. The Agencies should continue to interpret the Clean Water Act as covering certain wetlands separated from other waters by only an artificial barrier.

Consistent with *Sackett*, wetlands separated from otherwise covered waters by only an artificial barrier—such as a levee or dike—remain jurisdictional under at least two scenarios. First, consistent with the Agencies’ position under both the NWPR and the 2023 Rule, wetlands separated by an artificial barrier are jurisdictional when the barrier has gaps or other structural components that allow for a continuous surface connection.¹⁰³ Second, such wetlands remain jurisdictional when the artificial barrier was illegally constructed on wetlands otherwise covered by the Clean Water Act—to avoid providing incentive for actors to install barriers to circumvent the Act’s protections.¹⁰⁴

4. The Agencies should not contravene *Sackett* and go beyond the requirement that wetlands have a “continuous surface connection” to otherwise covered waters.

In *Sackett*, the Court held that the Clean Water Act covers only those wetlands that “have ‘a continuous surface connection to bodies that are “waters of the United States” in their own right, so that there is no clear demarcation between “waters” and wetlands.’”¹⁰⁵ The Agencies would diverge from the Court’s test if they sought to narrow the definition of “waters of the United States” by adding elements to *Sackett*’s “continuous surface connection” requirement.

In litigation over the Agencies’ existing definition of “waters of the United States,” some parties have argued that wetlands must have a continuous surface *water* connection with otherwise covered waters to be deemed jurisdictional, rather than the “continuous surface connection” identified by the *Rapanos* plurality and the *Sackett* Court. But as a majority of courts

¹⁰¹ *Riverside Bayview*, 474 U.S. at 134.

¹⁰² See *Sackett*, 598 U.S. at 727 (Kavanaugh, J., concurring in the judgment).

¹⁰³ See NWPR, 85 Fed. Reg. at 22,307; 2023 Rule, 88 Fed. Reg. at 3095–96.

¹⁰⁴ See *Sackett*, 598 U.S. at 678 n.16 (“a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the [Act]”).

¹⁰⁵ *Id.* at 678 (quoting *Rapanos*, 547 U.S. at 742) (internal quotations omitted).

addressing the issue have subsequently confirmed,¹⁰⁶ neither *Rapanos* nor *Sackett* demands that surface water be continuously present between the wetland and the water body for the connection—and Clean Water Act jurisdiction—to exist. The *Rapanos* plurality opinion instead refers interchangeably to a “continuous surface connection” and a “continuous physical connection,”¹⁰⁷ while *Sackett* refers to a “continuous surface connection.”¹⁰⁸

Further, in *Riverside Bayview*, the Supreme Court acknowledged a “continuum” of conditions that may exist between land and water.¹⁰⁹ The Court further observed that a wetland can fall within the definition of “waters of the United States” “even when the moisture creating the wetlands does not find its source in the adjacent bodies of water” and held that filling a wetland that “abuts on a navigable waterway” required a Clean Water Act permit, without calling for a continuous aquatic connection between the two.¹¹⁰ The Court in *Sackett* acknowledged and followed that holding from *Riverside Bayview*.¹¹¹ Therefore, applying *Riverside Bayview*, *Rapanos*, and *Sackett*, the Agencies’ existing rule reasonably explains that 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.¹¹²

Relatedly, parties have asserted that wetlands must not only have a “continuous surface connection” to otherwise covered waters but must separately meet an additional threshold: that the wetlands are “indistinguishable” from the other covered waters. But courts have consistently rejected this argument, too,¹¹³ as no such independent “indistinguishability” requirement can be found in either the *Sackett* opinion or the *Rapanos* plurality standard that the *Sackett* Court adopted. While both *Sackett* and *Rapanos* used the term “indistinguishable,” neither used the term in isolation. Rather, both opinions made clear that, for purposes of their holdings, “[t]he thing that makes a wetland practically indistinguishable from an adjacent ‘water[] of the United States’ is the presence of a continuous surface connection” to the adjacent body of water.¹¹⁴ To require an additional showing of “indistinguishability” with some other meaning beyond that prescribed by the Supreme Court would disregard the express language of *Rapanos* and *Sackett*.

¹⁰⁶ *United States v. Andrews*, No. 24-1479, 2025 WL 855763, at *2 (2d Cir. Mar. 19, 2025) (holding that Clean Water Act’s application to wetlands with continuous surface connection “does not require surface water but only soil that is regularly ‘saturated by surface or ground water.’”); *United States v. Valentine*, 751 F. Supp. 3d 617, 624 (E.D.N.C. 2024) (rejecting argument that complaint must allege “continuous surface connection *that is aquatic*” because it “lacks merit and is untethered from the holding in *Sackett*”); *but see United States v. Sharfi*, No. 2:21-cv-14205-KAM, 2024 WL 5244351, at *1 (S.D. Fla. Dec. 30, 2024) (adopting minority view that “continuous surface connection” means surface water connection).

¹⁰⁷ *Rapanos*, 547 U.S. at 742, 751 n.13, 757.

¹⁰⁸ *Sackett*, 598 U.S. at 678, 684.

¹⁰⁹ *Riverside Bayview*, 474 U.S. at 132.

¹¹⁰ *Id.* at 133–35.

¹¹¹ *Sackett*, 598 U.S. at 677 (“In such a situation, we concluded, the Corps could reasonably determine that wetlands ‘adjoining bodies of water’ were part of those waters.”) (quoting *Riverside Bayview*, 474 U.S. at 135 & n.9).

¹¹² 2023 Rule, 88 Fed. Reg. at 3095–96.

¹¹³ *See White*, 737 F. Supp. 3d at 329; *Valentine*, 751 F. Supp. 3d at 624.

¹¹⁴ *White*, 737 F. Supp. 3d at 329 (emphasis added); *accord Valentine*, 751 F. Supp. 3d at 624 (*Rapanos* and *Sackett* “decisions make clear that a continuous surface connection *is* the quality that renders a wetland practically indistinguishable from a water of the United States”) (citing *Rapanos*, 547 U.S. at 742; *Sackett*, 598 U.S. at 678–79).

IV. Conclusion

Our 73 organizations share the Agencies’ interest in a definition of “waters of the United States” that provides clarity, durability, and consistency in implementation. But we caution the Agencies that many of the appeals to “clarity” are not, in fact, calls for a more straightforward interpretation of the Clean Water Act, consistent with the objective that Congress laid out for the Act five decades ago. Instead, they are calls for weaker federal clean water protections and, in turn, fewer safeguards to protect our wetlands and other waters—and the services they provide—from pollution, degradation, and destruction. The effort to bring clarity to the definition of “waters of the United States” cannot come at the expense of achieving the objective of the Clean Water Act: restoring and maintaining the integrity of the nation’s waters.

Because strong federal clean water protections are essential to communities in the South and throughout the nation, and because the Agencies’ current rule faithfully implements the Supreme Court’s opinion in *Sackett v. EPA*, we urge the Agencies not to take any action to reduce protections for streams, wetlands, and other waters.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Sabath". The signature is fluid and cursive, with a long horizontal stroke at the end.

Mark Sabath
Senior Attorney
Southern Environmental Law Center