January 5, 2025

The Honorable Lee Zeldin
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

The Honorable Adam Telle
Assistant Secretary of the Army
108 Army Pentagon
Washington, DC 20310

Re: EPA Docket No. EPA-HQ-OW-2025-0322
Updated Definition of "Waters of the United States"

Dear Administrator Zeldin and Assistant Secretary Telle:

I commend you for your proposal to update the regulatory definition of "waters of the United States" to conform to the Supreme Court's decision in *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023). In particular, I commend your discussion of the Legal Background in Part IV.A. of the preamble. This discussion provides a highly relevant recitation of the history and evolution of federal regulatory authority under the Clean Water Act.[1] It strengthens the proposal and will help agency field staff and the public to understand that the Supreme Court *did not* change the definition of "waters of the United States" in its *Sackett* opinion. In *Sackett,* the Court clarified what that definition *has been since it was enacted in 1972*, notwithstanding prior erroneous interpretations by EPA, the Corps of Engineers, and lower courts.

It is important to bear this principle in mind to accurately describe not only the baseline for this rulemaking, but also the legal basis for the regulatory changes being proposed. The Supreme Court's interpretation of the statute, not any prior agency practice or interpretation, is dispositive. *Loper Bright Enterprises v. Raimondo,* 603 U.S. 369 (2024). I recognize that the proposed rule also engages in "gap-filling" and includes matters not addressed by the Court. It would be helpful to identify where the proposed rule directly implements the *Sackett* decision and where it addresses additional matters. This information will assist the inevitable judicial review and may give pause to any subsequent administration that seeks to repeal the regulation. This information also may help EPA and Corps field staff understand the limits of their own discretion when implementing the rule.

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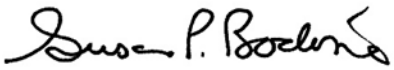
[1] See Bodine, Examining the Term "Waters Of The United States" in Its Historical Context (January 2022) C. Boyden Gray Center for the Study of the Administrative State at George Mason University - Antonin Scalia Law School, available at https://administrativestate.gmu.edu/2022/01/examining-the-term-waters-of-the-united-states-in-its-historical-context/ and attached.

In the attached comments, I offer a few recommendations to help advance your goals of certainty, predictability, and consistency. I am filing these comments on behalf of myself. They are informed by years of overseeing EPA's and the Corps' implementation of the Clean Water Act, as a member of the staff of the House Transportation and Infrastructure Committee and the Senate Committee on Environment and Public Works. My suggestions also are informed by reviewing the legal positions taken by EPA in enforcement actions as an assistant administrator for EPA's Office of Enforcement and Compliance Assurance.

I have limited my comments to address how the agencies propose to implement the *Sackett* opinion because my interest in this rulemaking is to maintain the integrity of the statute. I am not representing any interested party and do not offer comments on the aspects of the proposed rule that are policy calls, except to identify those as such.

Thank you for considering these comments.



Susan Parker Bodine

cc: David Fotouhi
Jessica Kramer
Lee Forsgren

Att.

Comments on Updated Definition of "Waters of the United States"
Docket ID No. EPA–HQ–OW–2025–0322

January 5, 2026
Susan Parker Bodine

On November 20, 2025, EPA and the Corps of Engineers (the agencies) published in the Federal Register a notice of proposed rulemaking to revise the regulatory definitions of "waters of the United States" (WOTUS) under the Clean Water Act (CWA) in light of Supreme Court's 2023 decision in *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023).[1]

The stated goals of the agencies are to provide greater regulatory certainty, increase predictability and consistency, and to implement the statutory objective of restoring and maintaining the quality of the Nation's waters while respecting the State and Tribal authority over their own land and water resources.

In addition to these laudable objectives, I recommend that the agencies take steps to solidify the permanence of this rule and ensure appropriate implementation. As noted in the preamble, the regulated community, states and the public have had to adjust to decades of evolving and often expanding interpretations of the scope of federal authority. It is important to understand that most of the purported expansion of federal authority took place with no change to the statute or the regulations. Rather, the agencies expanded their authority by changing their interpretation of that authority.

To meet the agencies' goals of certainty, predictability, and consistency this regulatory whiplash must cease.

In *Rapanos v. United States*, 547 U.S. 715 (2006), a plurality of the Court clarified that regulated waters must include "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." 547 U.S. at 739. Justice Kennedy filed an opinion concurring in the outcome of the case that articulated a completely different set of criteria for asserting jurisdiction: "significant nexus." 547 U.S. at 759. Interpretations of Justice Kennedy's open-ended standard allowed the agencies to claim jurisdiction over almost any water, including isolated waters that the Supreme Court had previously said were not jurisdictional. *Solid Waste Agency of Northern Cook Cnty v. Army Corps of Eng'rs*, 531 U.S. 159 (2001).

Justice Kennedy's "significant nexus" test was rejected by *all nine justices* in *Sackett*. A unanimous court adopted the "relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans,

[1] 90 Fed. Reg. 52,498 (Nov. 20, 2025).

rivers and lakes" interpretation of the scope of waters of the United States put forth by the *Rapanos* plurality.

Amending the regulatory definition of "waters of the United States" to implement the Court's direction is not an exercise in policy preference or a codification of agency practice or experience. As such, agencies can no longer expand their jurisdiction over bodies of water through subsequent interpretations, guidance, enforcement actions, or even regulations.

In *Rapanos,* the plurality also interpreted the scope of jurisdiction over wetlands, explaining that federal jurisdiction extends only to those wetlands that are inseparably bound up with a water that is otherwise jurisdictional under the *Rapanos* test such that there is no clear demarcation between "waters" and "wetlands." In *Sackett,* a majority of the justices also adopted this holding from *Rapanos*. 598 U.S. at 678. Amending the regulatory definition of "waters of the United States" to implement this direction also is not an exercise in policy preference or a codification of agency experience and cannot be revised through guidance or subsequent rule changes.

I recognize that the Supreme Court did not answer all questions related to Clean Water Act jurisdiction. The Court clearly requires relatively permanent water to be present for jurisdiction to attach and, in the case of wetlands, the Court requires that the wetland extend all the way to an otherwise jurisdictional water so there is no clear demarcation between the two. However, the Court did not answer the question of how long water must be present to be considered relatively permanent or how long a surface hydrologic connection between a wetland and a jurisdictional water must last each year. The agencies' proposals on this issue are an exercise in gap-filling. Clearly identifying where the proposed rule is directly implementing the *Sackett* opinion and where the agencies are engaging in gap-filling will be helpful to let the regulated community, states, and the public know where there is room for interpretation and where there is not.

This information is important because in the past decisions of the Supreme Court have narrowed Clean Water Act jurisdiction but the agencies have interpreted those decisions so narrowly as to ignore the decision (*SWANCC*) or even use the decision to expand the scope of federal authority over land and water (*Rapanos*). At a minimum, the agencies should identify what is clearly *not* subject to jurisdiction, even though what is covered remains subject to some site-specific judgment. The agencies should provide that clarity in the definitions, not through exclusions. EPA and the Corps have the burden of proving that a water meets the definition of waters of the United States. However, in enforcement actions the United States takes the position that the burden of proof is on the regulated community to prove that a particular area of land or water falls within an exclusion.

With all of that in mind, I offer the following recommendations.

Recommendations

1. Clarify the baseline

The proposed rule states that the Amended 2023 rule[2] is the baseline for the regulatory impact analysis for the proposed rule.[3] Identifying the Amended 2023 Rule as the baseline creates the impression that the agencies consider that rule to be a faithful implementation of the *Sackett* opinion. It is not.

As I noted in my October 2023 testimony before the Senate Committee on Environment and Public Works, the Amended 2023 Rule failed to fully implement the *Sackett* opinion.[4]

First, the Amended 2023 Rule failed to implement the Court's recognition that Congress did not include interstate waters as an independent category of jurisdictional waters.[5] Thus, interstate waters that were not otherwise waters of the United States were never part of the scope of Clean Water Act jurisdiction following the 1972 amendments and regulation of such waters cannot be considered part of the baseline against which to evaluate the proposed rule.[6]

Second, in the January 2023 Rule, EPA and the Corps hedged their bets regarding the outcome of the then pending *Sackett* case and through preamble language redefined "tributary," "relatively permanent," and "continuous surface connection" to encompass waters that previously had been considered jurisdictional under Justice Kennedy's "significant nexus" test.[7] The Amended 2023 Rule continued to apply those expansive definitions. Remarkably, the definition of tributary in the January 2023 preamble included ephemeral and subsurface flow.[8] The definition of relatively permanent allowed jurisdiction to be found based solely on the presence of a bed and bank (used to regulate ephemeral flow) and the presence of hydric soil, benthic macroinvertebrates, etc. (used to identify wetlands, not jurisdiction) with no reference to flow regimes. The definition of continuous surface connection allowed jurisdiction to be based on a physical connection, in the absence of water, notwithstanding the direction in *Sackett* that jurisdiction under the Clean Water Act extends only to wetlands that are as a practical matter indistinguishable from a regulated water of the United States.[9]

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[2] 88 Fed. Reg. 61,964 (Sept. 8, 2023) (Amended 2023 Rule).
[3] 90 Fed. Reg. at 52,512.
[4] See Testimony of Susan Parker Bodine, Partner, Earth & Water Law, Before The Senate Committee On Environment And Public Works, Hearing On Supreme Court's Ruling In Sackett V. U.S. Environmental Protection Agency, October 18, 2023, available at https://www.epw.senate.gov/public/_cache/files/4/6/46354bde-1b54-49c3-b8bb-6896b14fec81/FDAD11820156C6814D14FA28DDEEA4C3F46679AE3721375661BEB887AE4F4409.10-18-2023-bodine-testimony.pdf and attached.
[5] 598 U.S. at 661.
[6] The Regulatory Impact Analysis should be appropriately revised. See, e.g., RIA at 13.
[7] 88 Fed. Reg. 3004 (Jan. 18, 2023).
[8] 88 Fed. Reg. at 3084.
[9] 88 Fed. Reg. at 3095-96; *Sackett*, 598 U.S. at 678.

Any extension of jurisdiction to waters that the Supreme Court has said are not federally regulated under the Clean Water Act is *ultra vires* of the agencies' authority and cannot be considered part of the baseline against which to evaluate the proposed rule.

2. Clarify the basis for the proposed regulatory provisions.

At various places in the preamble, it states that the basis for proposed rules is "the agencies long-standing practice and technical judgment." 90 Fed. Reg. at 52,534. Any regulation based on practice and technical judgment is not durable and fails to meet the agencies' goals of regulatory certainty, predictability and consistency. Further, most of the proposed rule is compelled by the *Sackett* case and is not based on the judgment of field staff. I recommend that the agencies clarify in the final rule those provisions that implement the *Sackett* decision and those provisions that are an exercise in gap-filling.

3. Clarify the preamble language on implementation.

As noted by the Supreme Court and others, the implementation of the definition of waters of the United States has been an exercise in expansion through interpretation, not statutory or regulatory changes.[10] With that in mind, I note there are examples of implementation guidance in the preamble of the proposed rule that could lead to a similar result.

The proposed rule would define relatively permanent flow to require flow during the wet season.[11] The preamble states that the basis for this proposed definition is the Clean Water Act, Supreme Court decision, and the agencies' "expertise and desire to establish a clear and easily implementable definition."[12] I recognize that the Court did not define "relatively permanent." However, the *Rapanos* plurality opinion adopted by the *Sackett* court clearly excluded occasional or intermittent flows and clearly included seasonal rivers that contain flow during some months of the year. 547 U.S. at 733. This means that jurisdiction must be based on the actual presence of water, not indicators that some amount water may have been present at some point in time.

Like the preamble to the Biden Administration's January 2023 WOTUS rule, the preamble of the proposed rule says that a relatively permanent water can result from back-to-back precipitation events.[13] It is hard to see how water from two precipitation events can be considered relatively permanent. The reference to jurisdiction based on precipitation events is an invitation to expand jurisdiction to include rainwater runoff in ephemeral channels, ditches, or storm sewers and should be repudiated.

Like the preamble to the Biden Administration's January 2023 WOTUS rule, the preamble of the proposed rule says that the agencies will use indicators like floodplain maps, aerial photographs, the presence of hydrophytic vegetation and benthic macroinvertebrates to determine whether a

[10] *Sackett,* 598 U.S. at 666-668 (discussing jurisdiction following *SWANCC* and *Rapanos*).
[11] Proposed 33 C.F.R. 328(c)(8).
[12] 90 Fed. Reg. at 52,517-18.
[13] 88 Fed. Reg. at 3086; 90 Fed. Reg. at 52,524.

tributary is relatively permanent.[14] As documented by the Senate Environment and Public Works Committee in a report issued in 2016, the use of such indirect indicators can be abused.[15]

For example, the Senate Report provided an example of the use of aerial photographs to identify so-called tributaries underneath a tree canopy with no on-the-ground confirmation. [16] The implementation guidance in the preamble of the proposed rule on the use of aerial photographs could lead to a similar result.

The preamble also claims the agencies will use desktop analysis to identify the presence of wetlands.[17] Again, this language would allow agencies to repeat actions like the example discussed in the Senate Report where the Corps used aerial photos to claim jurisdiction over wetlands that were in fact lichen on rocks.[18]

To avoid these outcomes, the agencies should state in rule language that jurisdictional determinations must be confirmed by on-the-ground observations, not desk-top analyses.

The preamble also reaffirms the Corps' long-standing position that the ordinary high-water mark defines the lateral extent of jurisdiction over a tributary.[19] On its face, that appears noncontroversial. However, the Corps has issued guidance defining the ordinary high-water mark in the arid west to extend to an entire floodplain.[20] As noted in the Senate Report, that guidance has been used to redefine isolated wetlands as adjacent.[21] Any suggestion that the existence of a floodplain can be used to establish jurisdiction violates the direction provide by the Supreme Court in *Sackett* and should be repudiated, yet the "Field Guide to the Identification of the

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[14] 90 Fed. Reg. at 52,525.

[15] From Preventing Pollution of Navigable and Interstate Waters to Regulating Farm Fields, Puddles and Dry Land: A Senate Report on the Expansion of Jurisdiction Claimed by the Army Corps of Engineers and the U.S. Environmental Protection Agency under the Clean Water Act, Sept. 20, 2016 (Senate Report) available at https://www.epw.senate.gov/public/_cache/files/9/9/99dc0f4b-50a8-4b9e-a604-cb720e7f19bc/57975D522170C374948C941EED1B492BD2CAF42A78815129A6FA4F537A2AE575.wotus-committee-report-final1.pdf and attached. It is important to note that all of the examples in the Senate Report occurred during the pre-2015 regulatory regime and are based on expansive interpretations by the agencies of the Corps' 1986 regulations.

[16] Senate Report, at 19-20.

[17] 90 Fed. Reg. at 52,530 (endorsing claiming jurisdiction based on USGS topographic maps, NRCS soil maps and properties of soils including flood frequency and duration, ponding frequency and duration, hydric soils, and drainage class, aerial or high-resolution satellite imagery, high resolution elevation data, and NWI maps).

[18] Senate Report, at 18-19.

[19] 90 Fed. Reg. at 52,525.

[20] A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States A Delineation Manual, Robert W. Lichvar and Shawn M. McColley August 2008, at 31-32 (recommending use of a 5 to 10 year precipitation event to identify an OHWM, establishing federal jurisdiction over the entire floodplain), available at https://www.spk.usace.army.mil/Portals/12/documents/regulatory/pdf/Ordinary_High_Watermark_Manual_Aug_2008.pdf

[21] Senate Report, at 19.

Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States" remains on the website of the Sacramento District.

The preamble also asserts jurisdiction over all altered streams or wetlands that may once have met the definition of waters of the United States but no longer do so due to alterations.[22] There have been prior abuses of this concept by the agencies. The Senate Report provides examples of claims that tire ruts were altered wetlands.[23] The *Sackett* case too is an example of land that was previously a wetland but that long ago had been cut off from both the wetland to the north of the property as well as the lake located to the south. Yet none of the nine Supreme Court justices believed that the *Sackett* property was subject to federal jurisdiction under the Clean Water Act.

The door remains open to such spurious claims of jurisdiction over land that is no longer wet by the use of the phrase "normal circumstances" in the Corps' definition of wetlands at 33 CFR 328.3(c)(1). Rather than allow claims of jurisdiction based on allegations that the absence water or other wetland indicators is due to prior alternations the agencies should include in the regulatory language a statement similar to the following from the preamble to the Corps' 1977 regulations, which added the phrase "normal circumstances" to the definition of wetlands:

> We do not intend, by this clarification, to assert jurisdiction over those areas that were once wetlands and part of an aquatic system, but which, in the past, have been transformed into dry land for various purposes. 42 Fed. Reg. 37,122, 37,128 (July 19, 1977).

Further, the agencies should expand this clarification to include tributaries and ponds, as well as wetlands, clarifying that the agencies will evaluate whether body of water is a water of the United States based on current characteristics, not history. Of course, where the agencies can show that the absence of connectivity or wetlands characteristics is the result of illegal post-1972 alterations then the jurisdictional determination can be based on the pre-alternation conditions.

This clarification places the burden of proof where it belongs, on the agencies, and will help prevent claims of jurisdiction over many agricultural drainage ditches, which are often located at low points at the edge of a field. As pointed out by former Environment and Public Works Committee Chairman James Inhofe in a 2015 article, under the theory that altered wetlands and waters remain waters of the United States, EPA and the Corps could even claim federal jurisdiction over the sewer systems of many cities, many of which were formerly streams.[24]

In sum, I recommend that the agencies should incorporate implementation direction into the regulations themselves and specify that remote data can only be used as a starting point for

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[22] 90 Fed. Reg. at 52,525 (altered or relocated streams), 52,540-41 (ditches).
[23] Senate Report, at 21-22.
[24] Senator James M. Inhofe, "Your Sewers and Streets Could Be Waters of the United States," Municipal Water Leader, Oct. 2015, v. 1, issue 3, at 24, available at https://municipalwaterleader.com/vol-1-iss-3/ and attached.

evaluating jurisdiction and that any claim of regulatory control by the federal government needs to be supported by on-the-ground visual inspection of present conditions.

4. Add a definition of "waters."

To avoid later claims by EPA or the Corps that water features constructed in uplands are waters of the United States, I recommend that the agencies codify the definition of waters put forth by the Rapanos court: jurisdictional waters include "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." 547 U.S. at 739. The definition could further state that ditches, stormwater retention ponds, or other features constructed in uplands are not streams, oceans, rivers or lakes. The definition could also include a sentence affirming that all (a)(1) traditional navigable waters are jurisdictional, even if constructed in uplands, like the Erie Canal.

5. Clarify the definition of adjacent wetlands.

The Sackett court provided clear direction about the need for a jurisdictional wetland to directly abut a jurisdictional water and for there to be water present such that there is no clear demarcation between the body of water and the wetland. The proposed rule states this clearly in one place.[25] However, elsewhere the preamble appears to contradict this condition. On page 52,531 the agencies describe the evaluation of whether a wetland abuts and whether a wetland has surface water as two separate steps. "For wetlands that abut a jurisdictional water, the next step under the proposed rule would be to assess if the wetland has surface water at least during the wet season." That direction could be used to claim jurisdiction over a wetland without determining that the wetland is indistinguishable from the jurisdictional water. The agencies should clarify this inconsistency.

6. Provide bright lines for excluding land and waters from jurisdiction. T

It may not be possible to draft a regulation that clearly identifies all water that is included within the definition of water of the United States. Applying concepts such as "relatively permanent" requires some judgment calls. However, it should be possible for the agencies to advance their goals of regulatory certainty, predictability and consistency, by clearly identifying what is not included. I am not suggesting additional exclusions of categories of waters that would otherwise be jurisdictional. Rather, I am suggesting moving the (b)(3) and (b)(8) exclusions into the definition of tributary in (c)(10). I also recommend creating a definition of lakes and ponds and moving the (b)(5), (6), (7) exclusions into that definition. In doing so, the agencies should remove the word "exclusively" from the description of stock watering, irrigation, settling, and rice growing ponds. These changes would place the burden of

[25] 90 Fed. Reg. at 52,532.

proving jurisdiction on the agencies rather than requiring a landowner to prove that their land is not federally regulated.

Attachments

1. Bodine, Examining the Term "Waters Of The United States" in Its Historical Context (January 2022) C. Boyden Gray Center for the Study of the Administrative State at George Mason University - Antonin Scalia Law School.

2. Testimony of Susan Parker Bodine, Partner, Earth & Water Law, Before The Senate Committee On Environment And Public Works, Hearing On Supreme Court's Ruling In *Sackett v. U.S. Environmental Protection Agency*, October 18, 2023.

3. From Preventing Pollution of Navigable and Interstate Waters to Regulating Farm Fields, Puddles and Dry Land: A Senate Report on the Expansion of Jurisdiction Claimed by the Army Corps of Engineers and the U.S. Environmental Protection Agency under the Clean Water Act, Sept. 20, 2016.

4. Senator James M. Inhofe, "Your Sewers and Streets Could Be Waters of the United States," Municipal Water Leader, Oct. 2015, v. 1, issue 3.