WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, N.W.
Washington, D.C. 20036

January 5, 2026

Via regulations.gov
U.S. Environmental Protection Agency
EPA Docket Center, Water Docket
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

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

Dear Sir or Madam:

Washington Legal Foundation (WLF) welcomes the opportunity to comment in response to the joint EPA/Department of the Army Proposed Rule that "revises key aspects of the definition of 'waters of the United States.'"[1] WLF is a public-interest law firm and policy center promoting free enterprise, individual rights, limited government, and the rule of law. As part of that mission, WLF has regularly advocated for the proper interpretation of the Clean Water Act (CWA),[2] including commenting during a previous rulemaking on this exact issue—years before the Supreme Court handed down its opinion in *Sackett v. EPA*.[3]

WLF comments now to ensure that the agencies keep faith with the *Sackett* decision, which held that "the CWA extends to only those wetlands with a continuous surface connection to bodies that are waters of the United States in their own right, so that they are indistinguishable from those waters."[4]

It is no exaggeration to say that the United States's rise to dominance was built on the navigable waters of the Mississippi River basin—nineteenth century

[1] 90 Fed. Reg. 52498, 52499 (Nov. 20, 2025).

[2] Amicus Br. of WLF, et al., *Sackett v. EPA*, 598 U.S. 651 (2023).

[3] *WLF Comment*, Revised Definition of "Waters of the United States," EPA/U.S. Dep't of Army, Docket No. EPA-HQ-OW-2018-0149 (Apr. 15, 2019).

[4] 598 U.S. 651, 684 (2023) (internal quotation marks and citation omitted).

"America's life-sustaining arterial system, the nation's essential transportation spine, the indispensable conduit of commerce and communication in the heartland."[5] Control of the Mississippi "delivered into American hands" had been an essential economic and national security imperative "since the end of the Revolution," and once unencumbered access was secured, "the future . . . vibrated with the sights, sounds, and emotions of a general and accelerating prosperity."[6]

This strategic focus, in turn, has played into American culture—from Huck Finn to Creedence Clearwater Revival, America has long evoked nostalgia and myth in thinking about its navigable rivers. No surprise then, that when "the Cuyahoga River in Cleveland, Ohio, coated with a slick of industrial waste, caught fire . . . Congress responded to that dramatic event, and to others like it, by enacting . . . the Clean Water Act."[7] In terms of protecting navigable waters, "[b]y all accounts, the Act has been a great success."[8] Our rivers and lakes "no longer burn."[9]

But "from the start," there's been a long-running dispute over whether a statute designed to safeguard the Cuyahoga and other "waters of the United States" could reach temporary bodies of water like playa lakes or even "ditches, swimming pools, and puddles."[10] Without a concrete interpretation from the Judicial Branch or additional clarity from the Congress, the agencies have ping-ponged from definition (2015)[11] to definition (2020)[12] to definition (2023)[13] for the term "waters of the United States."

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[5] Akhil Reed Amar, *Born Equal: America's Constitutional Conversations 1840-1920* 210 (Kindle Ed. 2025).

[6] Stanley Elkins & Eric McKitrick, *The Age of Federalism* 439–40 (Oxford Univ. Press 1993) (discussing the Washington administration's successful negotiation of the Treaty of San Lorenzo, which secured navigation rights to the Mississippi for the United States).

[7] *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174–75 (2001) (Stevens, J., dissenting).

[8] *Sackett*, 598 U.S. at 658.

[9] *Solid Waste Agency*, 531 U.S. at 175 (Stevens, J., dissenting).

[10] *Sackett*, 598 U.S. at 658.

[11] 80 Fed. Reg. 37054 (June 29, 2015).

[12] 85 Fed. Reg. 22250 (Apr. 21, 2020).

[13] 88 Fed. Reg. 3004 (Jan. 18, 2023).

Fortunately, the *Sackett* Court "use[d] every tool at [its] disposal to determine the best reading of the statute and resolve[d] the ambiguity" that has so bedeviled this tributary of the law.[14] *Sackett* concluded that the CWA's jurisdiction "extends to only those" bodies "that are as a 'practical matter indistinguishable from waters of the United States.'"[15] And so, unless the disputed pocket is next to "a relatively permanent body of water connected to traditional interstate navigable waters" *and* "has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the [adjacent body] begins," that territory is outside the CWA and firmly under the traditional jurisdiction of the state or tribe in whose borders that pocket resides.[16]

In doing so, the Court rejected the "significant nexus" analysis that had undergirded Justice Kennedy's controlling opinion in *Rapanos v. United States*, and determined that Justice Scalia's plurality opinion in that case got the law right.[17] Unless and until Congress intervenes by changing the CWA itself, this statutory interpretation binds both the EPA and the Army Corps of Engineers, which each "possess only the authority" and jurisdiction "that Congress has provided."[18]

Bringing the regulatory reach of the EPA and Corps firmly within the proper scope of the statute, as understood by the *Sackett* Court, will bring clarity to a law whose edge cases have long been defined by murky rules and slippery slopes. The Sacketts' ordeal, which involved multiple trips to the U.S. Supreme Court, exemplifies the time and money needed to fight the federal government in a CWA case. So unless the law is pellucid and capable of straightforward understanding by the business community, entrepreneurs and landowners will forgo wealth-maximizing and beneficial land use rather than risk an expensive enforcement fight.

WLF appreciates that the agencies have made an effort to "incorporate[] terms" in the Proposed Rule "that are easily understood in ordinary parlance and should be implementable by both ordinary citizens and trained professionals"—as well as

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[14] *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400 (2024).

[15] *Sackett*, 598 U.S. at 678 (quoting *Rapanos v. United States*, 547 U.S. 715, 742 (2006) (Scalia, J., plurality)).

[16] *Id.* at 678–79 (internal quotation marks and citation omitted).

[17] *Id.* at 678 (describing Justice Scalia's plurality opinion and holding that "[w]e agree with this formulation").

[18] *Nat'l Fed'n of Indep. Bus. v. U.S. Dep't of Labor*, 595 U.S. 109, 117 (2022).

company general counsel and non-scientist entrepreneurs.[19] This is particularly important with the CWA, which can threaten "severe criminal sanctions for even negligent violations."[20] But it's not enough for the government just to speak plainly; it also must ensure that it's not speaking loosely.

To that end, WLF urges that the definition of "relatively permanent" be delimited to "perennial" waters.[21] Should that be the rule, when "members of the public see that waters dry up on a regular basis other than in times of drought, they would know those waters are not jurisdictional simply by observation, without any need for further analysis or professional consultation."[22] Let's not make it any harder than that. Complicated definitions chill desirable economic activity "for the same reason that vague laws chill speech: People of common intelligence must necessarily guess at the law's meaning and differ as to its application."[23] That's unacceptable. When criminal enforcement is at stake, the government must draw a bright line between legal and illegal conduct.[24]

Further, as Damien Schiff—who twice argued *Sackett* at the Supreme Court—has noted, tying federal jurisdiction to the idea of a "wet season" is a dubious application of *Sackett*. That "concept . . . implies that surface water might be absent, regularly, for months at a time, and yet the agencies could still regulate it."[25] The *Sackett* Court's "acknowledge[ment] that *temporary* interruptions in surface connection may *sometimes* occur because of phenomena like low tides or dry spells"[26] is no license to draw often-dry ground into the "waters of the United States." WLF agrees that the final rule must comply with "what the Supreme Court clearly

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[19] 90 Fed. Reg. at 52518.

[20] *Sackett*, 598 U.S. at 681.

[21] 90 Fed. Reg. at 52519.

[22] *Id*.

[23] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 324 (2010) (quoting *Connally v. Gen'l Const. Co.*, 269 U.S. 385, 391 (1926)) (brackets omitted).

[24] "Where a penal statute could sweep so broadly as to render criminal a host of what might otherwise be considered ordinary activities, we have been wary about going beyond what Congress certainly intended the statute to cover." *Sackett*, 598 U.S. at 681 (internal quotation marks and citation omitted).

[25] Damien Schiff, *Even Trump's EPA Can't Get It Quite Right on This Silly Wetlands Law*, Wash. Post (Nov. 19, 2025).

[26] *Sackett*, 598 U.S. at 678 (emphasis supplied).

instructed: that wetlands may be regulated only when they are indistinguishable from a waterbody itself, regardless of season."[27]

* * *

Adoption of the Rule, even as flawed, would be an improvement on the status quo. Eliminating the overbroad understanding of "interstate waters," which could "encompass bodies of water that are *not* relatively permanent, standing, or continuously flowing or are not themselves connected to" waters of the United States, is a welcome change.[28]

But when it comes to the faithful application of the Court's decision, it's not enough to merely swim with the Court's current part of the way. Any final rule must explicitly ensure that "the CWA extends to only those wetlands" and other bodies "that are as a practical matter indistinguishable from waters of the United States."[29]

Respectfully submitted,

Cory L. Andrews
General Counsel

Zac Morgan
Sr. Litigation Counsel

[27] Schiff, *Silly Wetlands Law*.

[28] 90 Fed. Reg at 52516 (emphasis supplied).

[29] *Sackett*, 598 U.S. at 678–79 (internal quotation marks and citation omitted).