

WASHINGTON LEGAL FOUNDATION
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Washington, D.C. 20036

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Via regulations.gov

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

Re: Supplemental Notice of Proposed Rulemaking,
Updated Definition of “Waters of the United States”
(Docket No. EPA-HQ-OW-2025-0322)

Dear Sir or Madam:

Washington Legal Foundation appreciates the opportunity to comment on the “supplemental regulatory options” offered by the EPA and the Department of the Army “to revise 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 regularly advocates for a textually faithful interpretation of the Clean Water Act (CWA).² To that end, when the agencies opened initial comment on the Proposed Rule, WLF provided its take, which was generally supportive.³

Our comment, however, red-flagged two issues. First, it “urge[d] that the definition of ‘relatively permanent’ be delimited to ‘perennial waters’” to provide a “bright line between legal and illegal conduct.”⁴ Second, WLF counseled that “tying federal jurisdiction to the idea of a ‘wet season’ is a dubious application of *Sackett*.”⁵ Wet seasons are, well, seasonal. The very “concept implies that surface water might be absent regularly for months at a time, and yet the agencies could still regulate

¹ 91 Fed. Reg. 57284, 57285–86 (Sept. 9, 2026).

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

³ WLF Comment, *Updated Definition of “Waters of the United States,”* EPA/U.S. Dep’t of Army, Docket No. EPA-HQ-OW-2025-0322 (Jan. 5, 2026).

⁴ WLF Comment at 4 (quoting 90 Fed. Reg. 52499, 52519 (Nov. 20, 2025)).

⁵ *Id.* at 4.

it.”⁶ That standard just can’t be reconciled with the *Sackett* Court’s reading of the CWA to exclude oft-dry lands from the Act’s ambit.

The Supplemental Notice proposes alternative language that addresses those concerns, and WLF recommends adopting it. The agencies suggest swapping the initial “propos[al] to define ‘relatively permanent’ to mean ‘standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season’” for “‘perennial bodies of water.’”⁷ And they propose to define “[c]ontinuous surface connection” as “perennial surface water in a wetland that is continuously connected with the surface water in the jurisdictional water such that it is difficult to determine where the jurisdictional water ends and the wetland begins.”⁸

That puts a lot of weight on the definition of “perennial.” Thankfully, the agencies have wordsmithed well. Proposed 33 C.F.R. § 328.3(c)(6) and 40 C.F.R. § 120.2(c)(6) define “perennial” as “having standing or continuously flowing water every day of the year during ordinary conditions.”⁹ This meaning ensures “federal jurisdiction only over ‘waters,’” not over areas “through which water flows intermittently or ephemerally.”¹⁰ And so, the updated proposal maps perfectly onto *Sackett*, 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.”¹¹

Of course, it’s not enough for the agencies to properly limit the scope of the Act. They must also ensure that the rule is straightforward enough to be understood by the regulated community. Given the Act’s “capacious definition of ‘pollutant,’ its low *mens rea*, and its severe penalties,”¹² such pellucidity isn’t just a nice-to-have—it’s mandated by the Due Process Clause.¹³ That’s why the *Sackett* Court pointedly

⁶ *Id.* (quoting Damien Schiff, *Even Trump’s EPA Can’t Get It Quite Right on This Silly Wetlands Law*, Wash. Post (Nov. 19, 2025)) (ellipses deleted).

⁷ 91 Fed. Reg. at 57286, 57288.

⁸ 91 Fed. Reg. at 57301.

⁹ *Id.*

¹⁰ *Rapanos v. United States*, 547 U.S. 715, 731, 739 (2006) (Scalia, J., plurality).

¹¹ *Sackett*, 598 U.S. at 684 (quoting *Rapanos*, 547 U.S. at 742 (plurality)).

¹² *Id.* at 661.

¹³ “A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment.” *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (internal citations and quotations omitted).

admonished the federal government against an enforcement posture dependent on hazy “guidance in a complicated manual [that] ultimately decides whether” a contested chunk of the United States “contains wetlands.”¹⁴

There’s no risk of such a due-process failure here. As proposed, the Act will reach *only* bodies of water that become dry due to genuinely “anomalous events such as drought or dry spell” or “a single period of up to 30 consecutive days in any given year as a result of non-anomalous events.”¹⁵ That’s precisely the type of clear guidance the Fifth Amendment insists on. Under that rule, any citizen—let alone a sophisticated company counsel advising her client—can determine whether a parcel is CWA-regulated “simply by observation.”¹⁶

All three definitions (“continuous surface connection,” “perennial,” and “relatively permanent”) keep faith with the *Sackett*-established “single, best meaning”¹⁷ of the CWA, while deftly “fill[ing] up the details” for the regulated community.¹⁸ As a result, the Supplemental Notice’s regulatory changes would survive any post-adoption judicial challenge brought under *Loper Bright*.

In short, WLF thanks the agencies for considering its prior comment about the initial proposal’s deficiencies. The proposed regulatory language provided in the Supplemental Notice should be incorporated into the final rule.

Respectfully submitted,

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¹⁴ *Sackett*, 598 U.S. at 669.

¹⁵ 91 Fed. Reg. at 57301.

¹⁶ WLF Comment at 4 (quoting 90 Fed. Reg. at 52519).

¹⁷ *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400 (2024).

¹⁸ *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825).