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October 9, 2026

The Honorable Lee Zeldin
Administrator, Environmental Protection Agency
1200 Pennsylvania Ave NW, Suite 1101A
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Lt. General William H. "Butch" Graham, Jr.
Chief of Engineers and Commanding General
U.S. Army Corps of Engineers
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Submitted Electronically via Regulations.gov

Re: Comments of States of West Virginia, Alabama, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, and South Carolina on "Updated Definition of 'Waters of the United States'" (Docket No. EPA-HQ-OW-2025-0322; FRL 11132.1-04-OW)

Dear Administrator Zeldin and General Graham:

We are grateful for the chance to comment again on the Agencies' effort to properly define "waters of the United States" under the Clean Water Act. *See Updated Definition of "Waters of the United States,"* 91 Fed. Reg. 57,284 (Sept. 9, 2026). The Agencies' Supplemental Proposed Rule builds on the good work done in the Agencies' November 2025 Notice of Proposed Rulemaking, and the States are pleased to support it. *See* 90 Fed. Reg. 52,498 (Nov. 20, 2025).

The States supported the initial Proposed Rule but offered some further refinements to align the Rule more closely with the statutory text and ordinary understanding of "waters." The States focused their recommendations on terms like "continuous surface connection," "relatively permanent," and "wet season"; we explained how inadequately defining those terms could

reproduce some of the same problems that have plagued the CWA scheme for years. *See* States' Comments at 15-18 (Jan. 5, 2026), Comment ID No. EPA-HQ-OW-2025-0322-0683.

The Agencies' Supplemental Proposed Rule largely avoids the problems we identified. By revising the definitions of "continuous surface connection" and "relatively permanent," and defining "perennial," the Agencies have aligned the terms with *Sackett v. EPA*, 598 U.S. 651 (2023). That alignment ensures the States maintain their constitutional sovereignty and remain meaningful partners in the Clean Water Act's system of cooperative federalism, as Congress intended. The States also recommend two refinements, discussed below, to ensure the new definitions cannot be stretched the way their predecessors were.

We thus urge the Agencies to adopt the Proposed Rule—as further amended by the Supplemental Proposed Rule and tweaked here—as soon as possible.

BACKGROUND

In our prior comments, the States described some of the background principles that should inform any CWA rulemaking efforts. In particular, they explained how States can and do protect their waterways through state-law based protections and prescriptions. In contrast, federal water regulation does not enjoy such a long history, especially when it comes to intrastate waters. States' Comment at 2-3.

Congress reiterated this separation of roles in 1972 when it passed the CWA. While Congress created a partnership between the federal government and the states "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), it also intended to "recognize, preserve, and protect the primary responsibilities and rights of States ... to plan the development and use ... of land and water resources," *id.* § 1251(b).

Congress then anchored many of the CWA's provisions to a bounded jurisdictional phrase: "navigable waters." *See* 33 U.S.C. §§ 1311(a), 1362(12). Before the CWA, courts had defined "navigable waters" as those waters that, "by themselves or their connection with other waters[,] ... form[ed] a continuous channel for commerce among the states or with foreign countries." *Escanaba & Lake Mich. Transp. Co. v. City of Chicago*, 107 U.S. 678, 682 (1883). This common-law definition of "navigable waters of the United States" colored admiralty and maritime jurisprudence for over a century. *See Rapanos v. United States*, 547 U.S. 715, 723 (2006). Congress defined "navigable waters" as "the waters of the United States," 33 U.S.C. § 1362(7), but the Supreme Court has "refused to read 'navigable' out of the statute," holding that it shows Congress was focused on "its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made," *Sackett*, 598 U.S. at 672 (quoting *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corp. of Eng'rs* (*SWANCC*), 531 U.S. 159, 172 (2001)).

The Agencies struggled for decades to clearly determine where their authority ends, leading to multiple revisions of their definition of "waters of the United States." The States' prior comments described how previous administrations employed these definitional revisions to expand federal

jurisdiction beyond statutory limits by increasingly encroaching on State-regulated waters, all at the economic detriment of the States, regulated parties, and taxpayers. States' Comment at 4-6.

The problem came to a head in *Sackett*. There, the Supreme Court rejected EPA's overly broad interpretation of the CWA's reach and held that the Act "extends to only those wetlands that are as a practical matter indistinguishable from waters of the United States." 598 U.S. at 678 (cleaned up). Wetlands are indistinguishable only where: (1) "a relatively permanent body of water connected to traditional interstate navigable waters" has (2) "a continuous surface connection with water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.* at 678-79 (cleaned up).

While *Sackett* promised clear guidance on the limits of the CWA's "waters of the United States" language, that promise wasn't initially fulfilled. Instead, the Agencies initially revised their definition of "waters of the United States," *see* 33 C.F.R. § 328.3(a), in a way that was inconsistent with *Sackett*'s "bright line test," *United States* v. *Sharfi*, No. 21-CV-14205-MARRA/MAYNARD, 2024 WL 4483354, at *14 (S.D. Fla. Sept. 21, 2024). Among other things, the Agencies retained a definition for "wetlands" that included "areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 33 C.F.R. § 328.3(c)(1). The Agencies' flawed re-definition can invite—and already has invited—courts to discard *Sackett*'s command that wetlands be "as a practical matter indistinguishable" from covered waters and have a "continuous surface connection." *See United States v. Andrews*, No. 24-1479, 2025 WL 855763, at *2 (2d Cir. Mar. 19, 2025) (holding that the CWA "does not require surface water but only soil that is regularly saturated by surface or ground water" (cleaned up)), *cert. denied*, *Andrews v. United States*, 146 S. Ct. 2692 (2026).

In response to problems with past rules and some post-*Sackett* lower court decisions, the Agencies proposed a rule that would "revise[] key aspects of the definition of 'waters of the United States'" to "clarify the scope of Federal jurisdiction" under the Act. 90 Fed. Reg. at 52,499. The Agencies' Proposed Rule sought to align the jurisdictional definition with the "text, structure, and history of the [Act] and Supreme Court precedent, [while] taking into account other relevant factors." *Id.*

For exactly those reasons, the States agreed that the Agencies should revise their definition of the "waters of the United States." And while the Agencies' Proposed Rule represented a great step toward reversing decades of overreach, the States suggested additional changes to further improve the Agencies' revisions. The States' comments particularly pressed for more tailored definitions of permanence and connection that prevent creative courts from wrongly stretching the CWA's regulatory reach, as in *Andrews*.

The Supplemental Proposed Rule makes those changes. The Agencies now propose to revise the definitions of "continuous surface connection" and "relatively permanent." 91 Fed. Reg. at 57,301. And the Agencies define "perennial" as a clarifying term used in those definitions. *Id.* The Supplemental Proposed Rule takes a practical approach, declining to implement minimum flow volumes while nevertheless providing real limits through common-sense definitions. By

redefining these terms, the Agencies have restored their and the States' proper roles by ensuring the CWA can no longer be used to strip States of their constitutional authority.

DISCUSSION

The Proposed Rule significantly narrowed an area of vast federal overreach. For decades, the Agencies have pushed a broad—and ever-expanding—"wetlands" definition; likewise, they had sought to assert authority over all manner of ephemeral waters and geographic features far afield from traditionally regulated waters. In the process, they lost sight of Congress's limited grant of authority over "navigable waters" and snatched regulatory power from States, who have always held primary responsibility to regulate their own waters. The Agencies' Proposed Rule reins in much of that federal overreach. The Supplemental Proposed Rule finishes the job.

Our prior comments explained why federal jurisdiction should be construed narrowly to align the Agencies' definitions with Congress's policy, intent, affirmation of state power, and explicit constraint on federal overreach. States' Comment at 8-10. And we explained how nondelegation issues, arbitrariness and capriciousness problems, and major-questions concerns confirm that the Agencies are right to implement a more restrained vision of "waters of the United States." *Id.* at 10-15.

The Supplemental Proposed Rule modifies two of the Proposed Rule's definitions, "continuous surface connection" and "relatively permanent," and adds a third, "perennial." The Proposed Rule was the first to define the first two terms, but it tied both to an undefined term, "wet season." That term could have been manipulated to accomplish the very expansions the Agencies were trying to stop. 90 Fed. Reg. at 52,545.

The Supplemental Proposed Rule largely eliminates that concern by dispensing with any reference to "wet seasons." It defines "continuous surface connection" to mean "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." 91 Fed. Reg. at 57,301. That definition—focusing on actual, hydrological connection—builds *Sackett*'s test into the definition, 598 U.S. at 678-79, and sets easily identifiable parameters. "Perennial" means "having standing or continuously flowing water every day of the year during ordinary conditions." 91 Fed. Reg. at 57,301. With that understanding, "continuous surface connection" cannot be easily stretched to reach intermittent, ephemeral, or seasonal waters.

The rest of the "continuous surface connection" definition helps avoid jurisdictional confusion. It explains that a "temporary interruption in the surface water connection" may occur without rendering the water non-perennial or erasing the jurisdictional nature of the water. 91 Fed. Reg. at 57,301. The States agree that "it would make no sense for an extraordinary departure from the wetland's ordinary condition due to a natural and uncontrollable weather event to remove the jurisdictional status from an otherwise adjacent wetland." *Id.* at 57,294. The proposed definition thus ensures that federal jurisdiction ends where the statute says it does—no matter the weather.

But by the same token, the Supplemental Proposed Rule's reference to *temporary* interruptions ensures that the federal rule will not reach areas that are not typically wet.

We are particularly happy to see that the supplemental definition forecloses the reasoning of *United States v. Andrews*, which held that the Act "does not require surface water but only soil that is regularly saturated by surface or ground water." 2025 WL 855763, at *2 (cleaned up). Under the supplemental definition, a continuous surface connection exists only where "perennial surface water in a wetland" is continuously connected with surface water in a jurisdictional water. Saturated soil, however regularly saturated, is not surface water, and only surface water can blur into other water so that it is "difficult to determine where the 'water' ends and the 'wetland' begins." Prior attempts to find connection by way of dry features (like swales) or subsurface features (like groundwater) find no support in either the text or the relevant precedents.

The proposed revised definition of "relatively permanent" locks in the delineation between federally regulated waters and state-controlled waters. The Supplemental Proposed Rule defines "relatively permanent" to mean "perennial bodies of water." 91 Fed. Reg. at 57,301. Its use of "perennial" sets the permanency baseline under "ordinary conditions." *Id.* And, like the "continuous surface connection" definition, the "relatively permanent" definition explains that bodies of water don't "lose [their] relatively permanent status if [they] dr[y] up as a result of anomalous events" or for fewer than "30 consecutive days" in a single period due to "non-anomalous events." *Id.*

Still, one feature of this specific supplemental definition does risk reopening the door the Agencies have just closed. A water keeps its status if it "dries up as a result of anomalous events such as drought or dry spell." 91 Fed. Reg. at 57,301. Unlike the parallel allowance for non-anomalous events (just described), that exception carries no duration limit. *See id.* at 57,291 (for an anomalous event, "the duration of flow is not limited"). The preamble would then confine "drought" to extreme and exceptional conditions lasting no more than five years. *Id.* at 57,290-91. But those limits appear nowhere in the regulatory text. And the preamble places no limit at all on an "anomalous" dry spell, which somehow need not rise "to the level of categorical drought." *Id.* at 57,288. The "such as" phrasing also leaves the list of anomalous events open-ended. So whether a dry spell or some other event was "regularly occurring" (and thus subject to the 30-day limit) or "anomalous" (and thus subject to none) would be litigated after the fact, stream by stream. That language thus threatens the same indeterminacy found in "wet season."

The preamble already supplies the fix. The Agencies should treat all dry spells alike under the single 30-day allowance, which tracks *Sackett*'s reference to "low tides or dry spells." 598 U.S. at 678. They then should reserve the open-ended exception for the one extraordinary circumstance the *Rapanos* plurality identified: drought. 547 U.S. at 732 n.5. And they should codify the drought limits and the meaning of "ordinary conditions," so that neither future administrative guidance nor courts can expand them.

Taken together, the supplemental definitions appropriately cabin federal jurisdiction. Tributaries, lakes, and ponds are covered only if they are relatively permanent, meaning perennial. And

wetlands are covered only to the extent they share a perennial surface-water connection with a traditional navigable water, the territorial seas, or a relatively permanent water connected to them, such that the wetland and the water are indistinguishable. The updated definitions of "relatively permanent" and "continuous surface connection" safeguard truly intrastate waters from federal interference, as Congress intended.[*]

CONCLUSION

Congress preserved state primacy over intrastate waters. The Supreme Court has reaffirmed that principle. The Supplemental Proposed Rule embraces it. Again, the States appreciate the opportunity to be heard and the Agencies' consideration of our comments.

Sincerely,



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[*] The Agencies requested comment on reliance interests, including States' capacity to regulate waters outside federal jurisdiction. To be clear: where a State has chosen to tie its regulation to the federal floor, that connection constitutes a policy choice that Section 1251 leaves to its legislature. It is not a reason for federal agencies to extend jurisdiction beyond what the statute allows. And as the Agencies recognize, reliance interests cannot justify keeping a definition that exceeds the statute, *see* 91 Fed. Reg. at 57,292, particularly one that has changed five times in eleven years. As for whether States are prepared to regulate waters that will be deemed newly non-jurisdictional—the answer is yes. *See, e.g.*, Br. of Amici Curiae State of W. Va. and 20 Other States In Supp. of Pet'r, *Sackett v. EPA*, 598 U.S. 651 (2023) (No. 21-454), 2021 WL 5022302.



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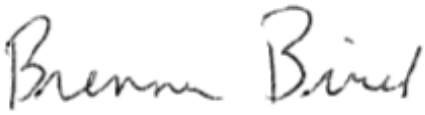
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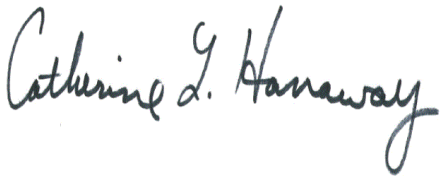
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