American Farm Bureau Federation®
600 Maryland Avenue, SW | Suite 1000W | Washington, DC 20024

ph. 202.406.3600
www.fb.org

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Ms. Stacey Jensen
Oceans, Wetlands and Communities Division
Office of Water (4504T)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460
WOTUS-outreach@epa.gov

Mr. Milton Boyd
Office of the Assistant Secretary of the Army
for Civil Works
Department of the Army
108 Army Pentagon
Washington, D.C. 20310-0104
milton.w.boyd.cig@army.mil

Re: Updated Definition of Waters of the United States: EPA-HQ-OW-2025-0322

The American Farm Bureau Federation (AFBF) appreciates the opportunity to provide comments on a revised definition of "waters of the United States (WOTUS)." AFBF is the Voice of Agriculture®. We are farm and ranch families working together to build a sustainable future of safe and abundant food, fiber, and renewable fuel for our nation and the world. The livelihood of farmers and ranchers depends on healthy soil and groundwater. We support the objectives of federal environmental statutes such as the Clean Water Act (CWA). However, the ambiguity of where the line between federal and state jurisdiction lies has created confusion for landowners. Unfortunately, ever-changing rulemakings that redefine the scope of the CWA have created decades of regulatory uncertainty. We have seen WOTUS definitions change with each Administration, guidance documents offered and then rescinded, and confusing litigation that have provided more questions than answers. Landowners, small businesses, and American families are the ones who suffer the most. This Administration has an opportunity to produce a durable rule that injects clarity and certainty into the definition of WOTUS.

It should be obvious by now that the definition of WOTUS is very important to farmers and ranchers across the country, which is why AFBF has participated in rulemaking, legislative proceedings, and litigation related to this issue for decades. Whether they are growing plants or raising animals, farmers and ranchers need water. For that reason, farming and ranching tend to occur on lands where water is available, either from rainfall or from ground or surface water sources. Often there are features on these lands that are wet only after it rains and maybe miles from the nearest navigable water without a discernable connection. These features would be unrecognizable to farmers and ranchers as regulated waters; to them, these features are a normal part of an agricultural landscape.

The Definition of WOTUS Profoundly Affects Everyday Farming and Ranching Activities

Farming and ranching are necessarily water-dependent enterprises. Fields on farms and ranches often have low spots that may have standing water at least some of the time. Some of these areas are ponds that are used for stock watering, irrigation water, or settling and filtering farm runoff. Irrigation ditches also carry flowing water to fields throughout the growing season as farmers and ranchers open and close irrigation gates to move water to active fields and pastures. These irrigation ditches are typically constructed through upland areas to connect sources of water to fields and pastures. The water sources range from wells and surface water management systems capturing tail water to irrigation canals or even navigable waters. At times, irrigation systems

also function as drainage systems, channeling flows back into these sources. In short, America's farm and ranch lands are an intricate maze of surface water management systems including impoundments, ditches, ponds, wetlands, "ephemeral" drainages, and other water features.

Considering drains, ditches, stock ponds, impoundments, irrigation ditches, and low spots in farm fields and pastures as jurisdictional "waters" opens the door to federal regulation of ordinary farming activities that move dirt or apply products to the land. Everyday activities such as plowing, planting, or fence building in or near ephemeral drainages, impoundments, ditches, or low spots could result in enforcement action triggering the CWA's harsh civil and criminal penalties unless a permit was obtained first. Bear in mind that CWA permitting requires the investment of significant amounts of time and money. Most farmers and ranchers have neither of those in abundance. Further, farmers have to protect their crops, requiring them to apply weed, insect, and disease control products. Many farming operations require regular fertilizer application to produce crops on an economically viable basis. Such a simple act could have been swept into the CWA's broad scope under previous WOTUS rules, including application of organic fertilizer (i.e., manure).[1] On much of our most productive farmlands (i.e., areas with plenty of rain), it is practically impossible to avoid impacts to isolated wetlands, ephemeral features and small ditches in and around farm fields when applying crop protection products and fertilizer. But it would be cost prohibitive to obtain permits for farming on so many spots, particularly since they are often completely dry and difficult to differentiate from the rest of the field. The concern is multiplied by the threat of criminal penalties from an even accidental deposition, and from the risk of lawsuits from third party environmental or neighborhood groups, which are authorized by the CWA. For the reasons outlined in these comments, we believe that the Agencies' proposed WOTUS rule is a thoughtful and balanced approach that reflects the Agencies' efforts to align regulatory implementation with current legal standards and stakeholder input.

The Proposed Rule Faithfully Implements Supreme Court Precedent

In 2023, the Supreme Court handed down a highly consequential decision in *Sackett v. EPA*.[2] The Court significantly narrowed the scope of federal CWA jurisdiction by eliminating the broader "significant nexus" standard and providing more context to which waters and wetlands fall under federal jurisdiction. The Court also directed the Agencies to adopt Justice Scalia's "relatively permanent" test of jurisdiction, which was originally outlined in *Rapanos v. United States* (2006).

Sackett leaves no doubt that the *Rapanos* plurality's test for jurisdiction, as further clarified by *Sackett*, governs the reach of federal jurisdiction under the Act. Thus, we believe that the proposed definition of WOTUS appropriately adheres to the following core principles:

- The CWA reaches only "the waters of the United States." A water feature must independently qualify as a WOTUS — meaning it must be indistinguishably part of a water body that itself constitutes "waters" under the Act.[3]

[1] *See, e.g.*, 40 C.F.R. § 122.2 (defining "pollutant").
[2] 598 U.S. 651 (2023).
[3] *Id.* at 676.

- The statutory term "waters" is limited to "bodies of open water," specifically those "relatively permanent, standing or continuously flowing bodies of water . . . described in ordinary parlance as 'streams, oceans, rivers, and lakes.'"[4]

- The Act's coverage extends only to "certain relatively permanent water bodies connected to traditional interstate navigable waters" and to "wetlands with such close physical connection to those waters that they [a]re as a practical matter indistinguishable from waters of the United States."[5] Mere proximity to a jurisdictional water is insufficient, as the term "adjacent" cannot encompass wetlands that are not part of covered "waters."[6]

- Wetlands satisfy the "continuous surface connection" requirement only where "there is no clear demarcation between 'waters' and wetlands," although "temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells."[7] A "surface connection" means the presence of surface water extending from the body of water over the wetland.[8] A barrier separating a wetland from a WOTUS removes the wetland from federal jurisdiction unless it is illegally constructed.[9]

- The Agencies cannot read the statutory term "navigable" out of the statute. That term demonstrates that in enacting the CWA, Congress was focused on its "traditional jurisdiction over waters that were or had been navigable in fact or could reasonably be so made."[10]

- The term "waters" does not encompass everything characterized by the ordinary presence of water, as such an interpretation would conflict with *SWANCC*'s holding that the CWA does not cover isolated ponds.[11] Such an interpretation would also conflict with the congressional policy in CWA section 101(b) because it "is hard to see how the States' role in regulating water resources would remain 'primary' if the [Agencies] had jurisdiction over anything defined by the presence of water."[12]

- The Agencies must correct their overbroad interpretation of WOTUS given the significant penalties that businesses and property owners face even for inadvertent violations.[13] Due process "requires Congress to define what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[14]

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[4] *Id.* at 671 (quoting *Rapanos,* 547 U.S. at 739 (plurality)).
[5] *Id.* at 667 (quoting *Rapanos,* 547 U.S. at 742, 755 (plurality)).
[6] *Id.* at 682.
[7] *Id.* at 678.
[8] *United States v. Sharfi,* 2024 WL 524431, at *1 (S.D. Fla. Dec. 30, 2014).
[9] 598 U.S. at 678 n.16.
[10] *Id.* at 672 (quoting *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers,* 531 U.S. 159, 172 (2001) ("*SWANCC*").
[11] *Id.* at 674 (citing *SWANCC,* 531 U.S. at 171).
[12] *Id.* at 674 (citation omitted).
[13] *See id* at 660 (citing *Army Corps of Eng'rs. v. Hawkes Co.,* 578 U.S. 590, 602 (2016) (Kennedy, J., concurring)).
[14] *Id.* at 681.

- The CWA does not define jurisdiction "based on ecological importance," and neither courts nor the Agencies can "redraw the Act's allocation of authority" between federal and state governments.[15]

Sackett reinforces fundamental principles consistent with our longstanding positions regarding the definition of WOTUS. Specifically, any durable and defensible WOTUS definition must avoid significant impingement on state primacy over land and water use. A definition that pushes the outer boundaries of CWA authority while failing to give adequate weight to the CWA section 101(b) policy would be legally vulnerable and would undermine the goal of establishing a durable rule. Equally important, the Agencies' interpretation must give effect to the term "navigable" and must avoid both an unduly narrow reading of *SWANCC* and an overly broad reading of *United States v. Riverside Bayview Homes*.[16] As Sackett confirms, *SWANCC* stands for far more than rejection of the Migratory Bird Rule; it reflects the broader holding that the Corps lacks jurisdiction over "ponds that are not adjacent to open water."[17] And *Riverside Bayview* does not authorize regulation of a wetland solely because it abuts an open water body. Rather, *Sackett* and the *Rapanos* plurality both underscore that, in addition to abutment, the wetland in question must be indistinguishably part of otherwise covered WOTUS such that it is "difficult to determine where the 'water' ends and the 'wetland' begins."[18]

Notably since *Sackett*, several lower courts have begun rejecting the Agencies' attempts to circumvent the limits that the Supreme Court has imposed on their CWA jurisdiction. For example, in *Lewis v. United States*, the Fifth Circuit held that "the *Sackett* 'adjacent' test" is whether a wetland is "indistinguishable from those waters" that meet the definition of WOTUS.[19] In that case, the Fifth Circuit rejected the Corps' determination that a wetland is covered by the CWA where the "nearest relatively permanent body of water [was] removed miles away from the Lewis property by roadside ditches, a culvert, and a non-relatively permanent tributary," because "it is not difficult to determine whether the 'water' ends and any 'wetlands' on Lewis's property begin."[20] The Fifth Circuit's analysis in *Lewis* closely resembles the Eleventh Circuit's analysis in *Glynn Environmental Coalition v. Sea Island Acquisition*, which likewise emphasized the indistinguishability requirement from *Sackett* and the *Rapanos* plurality.[21] There, the Court rejected attempts to demonstrate a "continuous surface connection" via occasional flows through pipes and culverts. The Eleventh Circuit underscored that although characteristics such as a high water table, hydraulic soils and vegetation, and occasional surface water might suggest the presence of a wetland "in the colloquial or scientific sense, none supports the conclusion that the wetland had a 'continuous surface connection' to a water of the United States" within the meaning of *Sackett*.[22] Other courts have similarly rejected attempts to classify water features as

[15] *See id.* at 683 (citing *Rapanos,* 598 U.S. at 756 (plurality)).
[16] *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121 (1985).
[17] *See* 598 U.S. at. at 666 (quoting *SWANCC,* 531 U.S. at 168).
[18] *Id*. at 678-79 (quoting *Rapanos,* 547 U.S. at 742 (plurality)).
[19] *Lewis v. United States,* 88 F.4th 1073 1078 (5th Cir. 2023) (citing *Sackett,* 598 U.S. at 684).
[20] *Id.* at 1079.
[21] 146 F.4th 1080, 1088-89 (11th Cir. 2025).
[22] *Id.* at 1089-90.

WOTUS where those features fail to meet the *Rapanos* plurality's jurisdictional test, as clarified by *Sackett*.[23]

The current administration rightly began to take steps to ensure that the regulatory definition of WOTUS aligns with *Sackett* when it issued the March 2025 guidance on "continuous surface connection."[24] We agree with the rationales the Agencies set forth in that guidance. While that guidance marks an important step toward fully conforming the definition of WOTUS to the CWA and the Court's decision in *Sackett,* additional clarification in the form of regulatory revisions is necessary.

Proposed Rule WOTUS Categories

A. Traditional Navigable Waters and Territorial Seas

The Agencies do not propose to change the scope of the traditional navigable waters ("TNWs") category under paragraph (a)(1)(i) of the regulatory definition. As currently codified, the TNW category includes waters "which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide." The Agencies solicit comment on whether to clarify this category, including on what it means for a water to be "susceptible to use in interstate or foreign commerce."

We recommend that the Agencies amend the proposed regulatory text for the (a)(1) category to read: "waters which are currently used, or were used in the past, or may be susceptible to use to transport interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide." This slightly modified phrasing more closely aligns with the statutory text and gives meaning to the term "navigable" as understood by Congress when it exercised its "commerce power over navigation" in enacting the CWA. The proper interpretation of the scope of the (a)(1) traditional navigable waters category is critically important because, as the *Rapanos* plurality and *Sackett* decision make clear, jurisdiction over non-navigable waters is premised on the water's relationship to a TNW. Under the *Rapanos* plurality's jurisdictional test, a non-navigable water is jurisdictional only if it is "a relatively permanent body of water connected to a [TNW]." *Sackett* reinforced the *Rapanos* plurality's holding and explained that a

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[23] *See e.g., United States v. Sharfi,* No. 2:21-cv-14205, 2024 WL 4483354, at *13 (S.D. Fla. Sept. 21, 2024), *report and recommendation adopted,* 2024 WL 5244351 (rejecting government's assertion of jurisdiction over wetland as "ignor[ing] th[e] indistinguishability requirement, which becomes meaningless if abutment alone establishes a 'continuous surface connection'"); *United States v. Ace Black Ranches, LLP,* No. 1:24-cv-00113, 2024 WL 4008545 at *4 .2 (D. Idaho Aug. 29, 2024) (dismissing the government's complaint for failure to "connect any wetlands" it alleged to be WOTUS with a traditional, navigable water "via a sufficient surface-water connection"); *but see United States v. Andrews*, No. 24-1479 (2d Cir. Mar. 19, 2025) (affirming summary judgment in favor of the government and stating that "the CWA does not require surface water but only soil that is regularly 'saturated by surface or ground water.'"). The Second Circuit did not explain how that outcome is consistent with *Sackett*'s discussion on indistinguishability and how a jurisdictional wetland must have a continuous surface connection to an adjacent WOTUS but for "phenomena like low tides or dry spells." *Compare id. with Sackett*, 598 U.S. at 678.

[24] *See* U.S. 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 (Mar. 12, 2025) (hereinafter "2025 Continuous Surface Connection Guidance"), *available at* https://www.epa.gov/system/files/documents/2025-03/2025cscguidance.pdf.

wetland is jurisdictional only if it is adjacent to a "relatively permanent body of water connected to traditional interstate navigable waters" and has a "continuous surface connection with that water[.]" Thus, any ambiguity or improper expansion of the traditional navigable waters category would have cascading effects on the CWA's jurisdictional framework.

B. Interstate Waters

The Agencies propose to remove interstate waters as a standalone category of WOTUS such that interstate waters would be WOTUS only if they qualify under another jurisdictional category under the Proposed Rule (e.g., TNWs, relatively permanent tributaries, or adjacent wetlands). The Agencies correctly recognize that this change is necessary to align the definition of WOTUS with the CWA, as interpreted by the *Rapanos* plurality and *Sackett*. As the Agencies explain, their authority to regulate under the CWA is limited by Congress' use of the term "navigable waters" in the CWA, and thus the Agencies lack authority to regulate waters untethered to that term. Because the current interstate waters category can encompass bodies of water that are not themselves navigable or connected to a TNW or the territorial seas, and because Congress did not treat interstate waters and navigable waters as two distinct categories, we support the Agencies' proposal to eliminate "interstate waters" as a standalone WOTUS category.

We agree with the Agencies' interpretation of the CWA's text, including their detailed recounting of the legislative history and how the language in federal water pollution control statutes have evolved over time. In 1972, when Congress amended the Federal Water Pollution Control Act of 1948, it selected "navigable waters" as the operative term for the newly established regulatory programs under the Act and deliberately removed the definition of "interstate waters" from the statute. As *Sackett* explained, though the "CWA's predecessor encompassed 'interstate or navigable waters,' . . . the CWA prohibits the discharge of pollutants into only 'navigable waters[.]'" The Agencies correctly note that they must treat Congress's removal of "interstate waters" from the Act as intentional.

The Supreme Court has repeatedly interpreted navigability to be the crux of federal jurisdiction under the Act. For example, in *Rapanos*, the Court described navigability as a "central requirement" to jurisdiction, and in *SWANCC*, it held that the statute's language invokes Congress' traditional authority over the channels of interstate commerce, i.e., waters navigable in fact or susceptible of being made so. The Court in *Sackett* effectively confirmed the holding in *Georgia v. Wheeler*[25] that categorically including interstate waters as an independent WOTUS category impermissibly reads "navigable" out of the statute. While the CWA covers "more than traditional interstate navigable waters," WOTUS cannot be defined without reference to such waters. A WOTUS is "a relatively permanent body of water connected to traditional interstate navigable waters." Traditional interstate navigable waters are, in turn, interstate waters that are "either navigable in fact and used in commerce or readily susceptible to being used this way." Prior regulatory definitions that categorically include all interstate waters that are neither navigable nor used in commerce violate the CWA.

The Agencies correctly recognize that, in light of the CWA's legislative history, Section 303(a)'s reference to "interstate waters" does not support retaining "interstate waters" as a standalone WOTUS category. Rather, Section 303(a)'s reference to interstate waters merely reflects

[25] 418 F.Supp.3d 1336 (S.D. Ga. 2019).

Congress' intent that certain state water quality standards adopted prior to the 1972 amendments would remain in effect, regardless of whether those waters were subject to federal jurisdiction. The history of that provision demonstrates that Congress did not consider interstate waters and navigable waters to be distinct categories under the pre-1972 regulatory regime. Rather, Congress referred to those two categories conjunctively as "interstate navigable waters." And the legislative history of the 1972 amendments demonstrates that Congress modified the text of the Act in 1972 in part because States had interpreted "interstate" waters to apply only to interstate navigable waters. Indeed, as the Agencies note, the Supreme Court reinforced this interpretation of the pre-1972 regulatory regime in *EPA v. California*. There, the Court noted that prior to the 1972 amendments, the Act "employed ambient water quality standards specifying the acceptable levels of pollution in a State's interstate navigable waters as the primary mechanism in its program for the control of water pollution."[26]

Finally, the *Rapanos* plurality and *Sackett* decision preclude treating interstate waters as "foundational waters" on the same footing as TNWs and the territorial seas. The *Rapanos* plurality tethered its relatively permanent standard to navigable waters and emphasized that for a non-navigable water to be jurisdictional, it must be relatively permanent and connected to a "traditional interstate navigable water." *Sackett* reinforced that formulation, noting that Congress' use of the term "navigable" means that WOTUS "principally refers to bodies of navigable water like rivers, lakes, and oceans."[27] *Sackett* thus makes clear that CWA coverage extends only to: (i) traditional interstate navigable waters; (ii) relatively permanent waters connected to TNWs; and (iii) wetlands with a continuous surface connection to TNWs — leaving no room for a separate, non-navigability-based "interstate waters" category.

Consistent with *Sackett's* interpretation of "waters" under the Act to mean "navigable waters" in the traditional sense, the Agencies have already removed "interstate wetlands" from the (a)(1) category. The proposed elimination of the interstate waters category is the logical outcome: just as interstate wetlands are not jurisdictional solely because they cross state boundaries, non-navigable interstate waters are not jurisdictional solely because they cross state boundaries. Thus, we support the Agencies' proposal to eliminate "interstate waters" as an independent jurisdictional category, which would align the definition of WOTUS with the CWA's text and legislative history, adhere to the *Rapanos* plurality and *Sackett* decisions, and properly limit federal jurisdiction to navigable-rooted waters while preserving State and Tribal primacy over other waters.

C. **Tributaries**

The Agencies propose to define "tributary" to mean "a body of water with relatively permanent flow, and a bed and bank, that connects to a downstream [TNW] or the territorial seas either directly through one or more waters or features that convey relatively permanent flow." The Agencies clarify that under the Proposed Rule, a tributary can connect through certain features, including natural features (e.g., debris piles, boulder fields, beaver dams) and artificial features (e.g., culverts, ditches, pipes, tunnels, pumps, tide gates, dams), even if such features are non-jurisdictional under the Proposed Rule, "so long as those features convey relatively permanent

[26] 426 U.S. 200, 202 (1976).

[27] 598 U.S. at 672.

flow." By contrast, "[f]eatures with non-relatively permanent flow" would "sever jurisdiction upstream under the [P]roposed [R]ule, including flow through non-relatively permanent reaches or streams or wetlands[.]" The Agencies further explain that "lakes and ponds may be considered a tributary" if they meet the relatively permanent standard.

We recommend that the Agencies simplify the regulations by combining the (a)(3) tributary category with the (a)(5) category for lakes and ponds. The combined (a)(3) category could state: "Rivers, lakes, streams, and ponds that are relatively permanent, standing, or continuously flowing bodies of water and that connect to waters identified in paragraph (a)(1), either directly or through one or more waters or features that convey relatively permanent flow."

This revision would better reflect the *Rapanos* plurality and *Sackett* decisions, which emphasize that the term "waters" refers to "rivers, streams, and other hydrographic features more conventionally identifiable as waters."[28] *Sackett* explained that Congress' deliberate use of the plural term "waters" in the phrase "waters of the United States" means that the Act's reach extends only to geographic features "described in ordinary parlance as 'oceans, rivers, and lakes.'"[29] *Sackett* also held that Congress' use of the term "waters" elsewhere in the CWA "confirm[s] the term refers to bodies of open water"[30] and that Congress' "use of 'waters' elsewhere in the U.S. Code likewise correlates to rivers, lakes, and oceans."[31] Indeed, over the past several decades, the Court has repeatedly emphasized that Congress' use of the term "waters" in the CWA refers to "bodies of open water." We recommend that the Agencies revise the regulatory text for this category to specifically refer to the sorts of water bodies Congress had in mind when it enacted the CWA.

We agree with the Agencies' proposal to require that water features have relatively permanent flow and connect to a downstream TNW either directly or through a feature that itself has relatively permanent flow. Requiring relatively permanent flow throughout the features that link to a TNW is the best reading of the statute, as interpreted by the *Rapanos* plurality and *Sackett* opinions. Without such connection, upstream features, including those with permanent standing or flowing water, are more appropriately characterized as isolated water bodies and thus, non-jurisdictional under *SWANCC*. A non-navigable, relatively permanent water feature that is connected to a TNW only through a non-relatively permanent feature has no relationship to the federal government's commerce power over navigation and thus must be excluded from the definition of WOTUS. Consistent with the Congressional policy articulated in CWA section 101(b), such water features must be the states' primary responsibilities over land and water resources.

Under our recommended revision to the (a)(3) category, there is no longer a need for a definition of "tributary." Nonetheless, we recommend including language from the proposed definition of "tributary" in the preamble to the final rule, which provides helpful clarification on whether and when features that do not convey relatively permanent water sever jurisdiction. The Agencies could also state that they expect most rivers and streams will have a bed and bank, but there is no need to codify that as a requirement in regulatory text. Under the *Rapanos* plurality and *Sackett*

[28] 547 U.S. at 734.
[29] 598 U.S. at 671.
[30] *Id*. at 672.
[31] *Id*. at 672-73.

opinions, the key for determining jurisdiction is the presence of relatively permanent flow, not any particular physical characteristic.

D. Definition of Relatively Permanent

The Agencies propose 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." The Agencies explain that "at least during the wet season" is intended to include "periods of predictable continuous surface hydrology occurring in the same geographic feature year after year in response to the wet season, such as when average monthly precipitation exceeds average monthly evapotranspiration." They also clarify that to satisfy the relatively permanent standard, surface hydrology must be "continuous throughout the entirety of the wet season."

We generally support the Agencies' proposed definition of "relatively permanent," as it conforms to the *Rapanos* plurality and *Sackett* opinions. The Supreme Court clearly contemplated that the Agencies could further interpret the term "relatively permanent" by defining what "relatively" means, as the Court did not define that term with more precision and instead left open the possibility that the Agencies could assert jurisdiction over "streams, rivers, or lakes that might dry up in extraordinary circumstances" as well as "seasonal rivers" such as a "290-day, continuously flowing stream." At the same time, the *Rapanos* plurality seemed to put its thumb on the scale closer to the perennial end of the flow spectrum, given that it repeatedly suggested that intermittent flows — in the colloquial, not the scientific, sense — do not meet the relatively permanent standard:

- Terms included in the dictionary definition of "waters" all "connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows."[32]

- "It suffices for present purposes that channels containing permanent flow are plainly within the definition, and that the dissent's 'intermittent' and 'ephemeral' streams…— that is, streams whose flow is '[c]oming and going at intervals . . . [b]roken, fitful,'…, or 'existing only, or no longer than, a day; diurnal . . . short-lived,'…—are not."[33]

- "The restriction of 'the waters of the United States' to exclude channels containing merely intermittent or ephemeral flow also accords with the commonsense understanding of the term."[34]

- "Most significant of all, the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from 'navigable waters,' by including them in the definition of 'point source'. . . . The separate classification of 'ditches, channels, and conduits—which are terms ordinarily used to describe the watercourses through which *intermittent* waters typically flow—shows that these are, by and large, *not* 'waters of the United States.'"[35]

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[32] 547 U.S. at 733.
[33] *Id.* at 547 U.S. 715, 732 n.5.
[34] *Id*. at 733-34.
[35] *Id*. at 735-36

- "On its only natural reading, such a statute that treats 'waters' separately from 'ditch[es], channel[s], tunnel[s], and conduit[s],' thereby distinguishes between continuously flowing 'waters' and channels containing only an occasional or intermittent flow."[36]

- "The phrase ["waters of the United States"] does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[37]

- "Even if the phrase 'the waters of the United States' were ambiguous as applied to intermittent flows, our own canons of construction would establish that the Corps' interpretation of the statute is impermissible."[38]

Because *Sackett* endorsed the *Rapanos* plurality's reading of the statute and the relatively permanent standard, the foregoing statements must be given considerable weight. The Agencies' proposed definition does that by including as WOTUS features only those features that flow throughout the wet season and by excluding features that have less predictable flow, such as flow that only results from individual precipitation events.

The Agencies' proposed wet season concept is also appropriately flexible because it establishes a clear test — when average monthly precipitation exceeds average monthly evapotranspiration — while also accounting for regional variation and precipitation normalcy, which in turn accommodates for climactic variation over time. Moreover, that it may be difficult for water features in certain regions such as the arid West to satisfy the "relatively permanent" definition does not call into question the defensibility of the Agencies' approach. In articulating the relatively permanent test, the *Rapanos* plurality explained that seasonal rivers with flow "during some months of the year," including a stream that flows continuously for 290 days, can qualify as a WOTUS, but a feature with merely intermittent and ephemeral flows, such as "ordinarily dry channels through which water occasionally or intermittently flows" would be excluded. Thus, the *Rapanos* plurality test, endorsed by *Sackett*, clearly excluded dry washes with only sporadic precipitation-driven flow such as those that exist in the arid West.

As the Agencies correctly recognize, certain water features may experience a delay or lag in exhibiting surface hydrology in response to wet season precipitation such that surface hydrology does not overlap exactly with the start and finish of the wet season. For example, a water feature that has predictable, seasonal flow year after year from melting snowpack may not exhibit surface hydrology until several months after repeated snowfall creates a snowpack (i.e., the wet season) because snowpack melt necessarily lags the accumulation of snow. In addition, certain streams experience delay in surface hydrology during the transition from the dry season to the wet season where the water table does not rise to the ground surface until some time after the beginning of the wet season. To accommodate for this lag time, we recommend that the Agencies clarify that the relatively permanent standard's temporal requirement, "at least during the wet season," is satisfied where a water feature's surface hydrology is present for the same amount of time as the duration of the identified wet season and that flow need not occur throughout the exact months of the wet season. Such a standard would still be implementable, while recognizing that a water feature with predictable, annual season flow may not exhibit such flow until some

[36] *Id*. at 736 n.7.
[37] *Id*. at 739.
[38] *Id*. at 737.

time after the start of the wet season. For example, the Agencies could revise the definition of "relatively permanent" to say something like "standing or continuously flowing year-round or at least as long as the duration of the wet season."

1. Implementation of Relatively Permanent Requirement

The Agencies solicit comment on possible approaches on how to implement the "relatively permanent" definition. To determine whether a particular feature is relatively permanent, a landowner must (1) identify the wet season months; and (2) determine whether surface water is standing or continuously flowing for a period of time that is at least as long as the duration of the wet season.

With respect to the first step, landowners and regulators can use the Corps' Antecedent Precipitation Tool (APT), which in turn relies on metrics from the web-based Water-Budget Interactive Modeling Program (WebWIMP) to identify the relevant wet season. Indeed, the Agencies propose to rely on WebWIMP outputs reported in the APT "as a primary tool to help identify the wet season." We agree with the Agencies' proposal to focus on when average monthly precipitation exceeds average monthly evapotranspiration as the primary characteristic for identifying the wet season and to rely on the WebWIMP outputs reported in APT as the "primary tool" to identify the wet season. APT/WebWIMP are familiar tools and have been used for years for Corps regulators and the regulated community alike. We recommend that the Agencies clarify that the "wet season" concept in the proposed rule is not the same as the months where rainfall totals are the highest. Indeed, even in months with increased precipitation, evapotranspiration may be higher, e.g., during the growing season and when temperatures are the highest, which leads to reduced or no surface flows and hence, classification as dry months according to WebWIMP metrics reported in the APT.

With respect to the second step in implementing the "relatively permanent" definition — determining the duration of the presence of surface water or flows — the Agencies correctly recognize that many landowners will be able to determine whether features on their property contain flow for the requisite amount of time (i.e., equal to the length of the wet season) to satisfy the relatively permanent standard. We agree that direct observations of hydrology, e.g., stream gages, game cameras, or other equipment capable of providing real-time flow measurements or photographs, are the most reliable way to verify if a feature has relatively permanent flow. However, when such observations and data are unavailable, the Agencies should implement the relatively permanent standard consistent with the Agencies' proposed "weight of the evidence" approach by considering multiple indicators, data points, and sources of information.

The Agencies should exercise caution in using various databases or tools that were not designed for the purpose of determining whether a water feature satisfies the Agencies' proposed new definition of "relatively permanent". To use one example, the Agencies suggest that regional streamflow duration assessment methods (SDAMs) are available tools for determining flow duration. SDAMs are regionalized, field-based methods that use hydrological and other biological indicators to classify streamflow as ephemeral, intermittent, or perennial. However, as the Agencies themselves recognize, SDAM flow classifications are not synonymous with the term "relatively permanent" as used in the Proposed Rule and interpreted by the *Rapanos* plurality and *Sackett* decisions. For that reason alone, SDAM classifications are a poor fit for implementing the proposed definition of "relatively permanent". Moreover, even if such

classifications might be useful in implementing the "relatively permanent" definition—e.g., relying on an SDAM classification as ephemeral to conclude that a feature does not meet the "relatively permanent" definition — SDAM classifications may not be reliable. A recent analysis of several features in Texas illustrates the potential hazard of relying on SDAMs. All five water features in that analysis were classified as ephemeral by both a professional environmental consultant and the local Corps District; yet, the Great Plains (for 1 feature) and Southeast SDAMs (for the remaining 4 features) classified each feature as either "Intermittent" or "Less than Perennial."

Similarly, the proposed rule preamble refers to various other tools and datasets, including the USGS National Hydrography Dataset ("NHD") and the National Wetlands Inventory data, in discussing implementation of the relatively permanent standard as to tributaries. But as the Regulatory Impact Analysis explains in detail, the Agencies have consistently maintained that neither of these datasets was designed to be used to determine the scope of CWA jurisdiction, and neither is consistent with the new definition of "relatively permanent." Moreover, both datasets suffer from errors of omission and commission, as the Agencies previously detailed in a memorandum accompanying the NWPR. We agree that it would be inappropriate for the Agencies to rely on these datasets to differentiate between features that have relatively permanent flow and features that lack relatively permanent flow, though they may be relevant and useful to determining flow paths and whether features connect downstream to traditional navigable waters.

E. Adjacent Wetlands

The Agencies do not propose to revise the definition of "adjacent," which means "continuous surface connection." The Agencies propose, however, to define "continuous surface connection" for the first time to mean "having surface water at least during the wet season and abutting (i.e., touching) a jurisdictional water." The Agencies further explain that they are not changing their longstanding regulatory definition of wetland, but are newly clarifying that only the portions of a wetland that meet the new definition of continuous surface connection would be jurisdictional, regardless of the full delineated scope of the wetland. We generally support the Agencies' proposed definition of "continuous surface connection" as it is consistent with the *Sackett* and *Rapanos* plurality opinions.

Sackett clarified that WOTUS extends only to those wetlands that are "indistinguishably part of a body of water that itself constitutes" WOTUS.[39] The Court "agree[d] with [the *Rapanos* plurality's] formulation of when wetlands are part of the waters of the United States": 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."[40] Thus, *Sackett* established a two-prong test for asserting jurisdiction over a wetland and required that the wetland (1) be adjacent to a body of water that constitutes "waters of the United States"; and (2) have a continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins. The Court recognized that temporary interruptions in surface connection may occur, such as during periods of drought or low tide, thus signaling that the connection must be a surface water connection. Importantly, the *Rapanos*

[39] 598 U.S. at 676.
[40] *Id*. at 678.

plurality held that "adjacent" means "physically abutting," and used "abutting" and "adjacent" interchangeably.

Sackett acknowledged that this indistinguishability requirement "is the thrust of observations in decisions going all the way back to *Riverside Bayview*."[41] In that case, the Court deferred to the Corps' regulation of wetlands "actually abut[ting] on a navigable waterway," while recognizing the inherent difficulty of defining precise bounds to regulable waters. The *Rapanos* plurality subsequently clarified that the Court's holding in *Riverside Bayview* "rested upon the inherent ambiguity in defining where waters end and abutting ('adjacent') wetlands begin[.]"[42] Finally, *Sackett* adopted the *Rapanos* plurality's formulation by holding that "the CWA extends to only those wetlands that are as a practical matter indistinguishable from waters of the United States."[43]

We agree with the Agencies' determination that abutment alone does not satisfy *Sackett's* requirement that a wetland is "indistinguishable" from the adjacent WOTUS such that it is difficult to discern where one ends and the other begins. Rather, the wetland must have a surface water connection with the abutting WOTUS either year-round or at least as long as the duration of the wet season. We also agree that surface water, as opposed to merely saturated soils or an elevated water table, is what makes wetlands as a practical matter indistinguishable from the adjacent WOTUS. A wetland must have flowing or standing water across its surface for there to be no clear demarcation between waters and wetlands. Indeed, the *Sackett* majority's recognition that "temporary interruptions" in surface connection may occur due to "low tides or dry spells" without rending a wetland non-jurisdictional only makes sense if the requisite surface connection is a water connection.

The Agencies should consider revising the definition of "continuous surface connection" to reflect that the presence of surface water need not neatly align with the start and end of the wet season, because surface water may lag the start of the wet season for a period of time. So long as the surface water is driven by the wet season and would occur predictably, year after year, for an amount of time equal to the duration of the wet season, that would satisfy the requirement for a continuous surface connection.

Lower courts have adhered to and enforced *Sackett*'s indistinguishability requirement. For example, the Eleventh Circuit has recognized that under *Sackett*, a wetland is jurisdictional only if it has a "continuous surface connection to bodies that are waters of the United States" such that the wetland is "indistinguishable from those waters."[44] That court affirmed a dismissal of a citizen suit alleging CWA violations because environmental petitioners failed to allege sufficient facts to demonstrate that the at-issue wetland "had a continuous surface connection to a water of the United States under *Sackett*."[45] In so holding, the Eleventh Circuit noted that the wetland "was separated from [a] salt marsh and creek by sections of upland and [a] road" such that "[t]he only possible surface connection . . . would flow through pipes and culverts."[46] In another case, a district court confirmed that "'continuous surface connection' means a surface water connection"

[41] *Id*. at 677.
[42] 547 U.S. at 742.
[43] 598 U.S. at 678.
[44] *Glynn Env't Coal*, 146 F.4th at 1088.
[45] *Id*. at 1091.
[46] *Id*. at 1090.

and explained that any interpretation to the contrary would render the Court's assertions in *Sackett* and the *Rapanos* plurality as "hav[ing] no practical meaning."[47]

We support the Agencies' interpretation in the March 2025 Continuous Surface Connection Guidance that a wetland only has a "continuous surface connection" to a WOTUS, and thus is jurisdictional, if that wetland "directly abuts" the WOTUS and is "not separated" from the WOTUS "by uplands, a berm, dike, or similar feature." Indeed, as the Agencies explained, that is the interpretation that the Agencies adopted when they first interpreted *Rapanos* in their 2008 Guidance. That interpretation aligns with *Sackett*'s holding that "a barrier separating a wetland from a [WOTUS] would ordinarily remove that wetland from jurisdiction," unless such barrier was unlawfully constructed specifically to remove CWA jurisdiction. It also aligns with the *Rapanos* plurality's interpretation of "adjacent" as meaning "physically abutting."

Relatedly, we also agree with the Agencies' assertion in the 2025 Guidance that discrete features such as pipes and ditches cannot satisfy the continuous surface connection requirement. Like man-made dikes or barriers and natural barriers, discrete features make it easy to determine as a practical matter where a WOTUS ends and the wetland begins. This is true even if such discrete features carry relatively permanent flow. Such barriers and features constitute clear demarcation[s] between 'waters' and wetlands" such that the wetland is not indistinguishably part of a jurisdictional water and thus is not a "water of the United States" in its own right.

We urge the Agencies to further clarify that reliance on discrete connections to treat two distinct wetlands separated by a barrier as a single wetland is contrary to *Sackett*. Under *Sackett*, a road separating a relatively permanent water from a wetland plainly severs jurisdiction, regardless of whether a culvert carries relatively permanent flow that links the wetland to the adjacent WOTUS. That application of the continuous surface connection requirement does not change even where a second, distinct wetland sits on the other side of the road between the road and the WOTUS. The road constitutes a clear demarcation between the wetland and the WOTUS and eliminates any boundary drawing problem between the wetland and the WOTUS. Thus, the Agencies' treatment of two wetlands as one improperly rewrites the Sackett test to allow for jurisdiction over not just wetlands that have a continuous surface connection such that they are practically indistinguishable from the adjacent WOTUS, but also any additional wetlands that the Agencies can establish have a hydrologic connection — including through a discrete feature such as a culvert — to the jurisdictional wetland. It is irrelevant whether the culvert carries relatively permanent flow. Given *Sackett*'s emphasis on due process, predictability, and the jurisdiction-severing effect of barriers, the Agencies cannot assert jurisdiction through a chain of wetlands separated by clear barriers such as roads.

F. Lakes/Ponds

The Agencies propose to delete the term "intrastate" from the text of the (a)(5) category to ensure that this category includes both interstate and intrastate lakes and ponds not identified in paragraphs (a)(1) through (4) that are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to a TNW, the territorial seas, or a category (a)(3) tributary. We recommend that the Agencies eliminate the existing (a)(5) standalone category and revise the (a)(3) category to include lakes and ponds. The (a)(5) category is unnecessary, and it would be fully consistent with *Rapanos* and *Sackett* to instead assess lakes

[47] *United States v. Sharfi*

and ponds for jurisdiction in the same way as streams and rivers — namely, streams, rivers, lakes, and ponds would be jurisdictional only if they are relatively permanent standing or continuously flowing bodies of water that connect to an (a)(1) water either directly or through a feature that conveys relatively permanent flow. Moreover, because non-wetland waters such as lakes and ponds "do not implicate the boundary-drawing problem" discussed in *Riverside Bayview*, there is no need to evaluate whether they meet the continuous surface connection requirement applicable to wetlands.

G. Prior Converted Cropland

The Agencies propose to continue excluding prior converted cropland from the definition of WOTUS and to codify a definition of PCC in proposed paragraph (c)(7) that is identical to the definition of PCC in the NWPR. Among other things, that definition clarifies that an area is no longer considered PCC for CWA purposes when the "cropland is abandoned (i.e., the cropland has not been used for or in support of agricultural purposes for a period of greater than five years) and the land has reverted to wetlands." The proposed rule also makes clear that the Agencies will recognize USDA designations, but where such designations are not available, a landowner may seek a PCC determination for CWA purposes from either the USDA or the Agencies. The Agencies importantly clarify that a cropland that loses PCC status because it has been abandoned and has reverted to wetlands is not automatically jurisdictional. Rather, the wetland would only be jurisdictional if it has a continuous surface connection to a jurisdictional water to itself be jurisdictional.

We support the Agencies' continued exclusion of PCC and the proposed definition of PCC, because it ensures consistency with the original 1993 rulemaking that first codified the PCC exclusion ("1993 Rule"). Although prior to the NWPR the term "prior converted cropland" was not defined in the regulatory text, the preamble to the 1993 Rule explained that PCC are "areas that, prior to December 23, 1985, were drained or otherwise manipulated for the purpose, or having the effect, of making production of a commodity crop possible [and that are] inundated for no more than 14 consecutive days during the growing season[.]" This exclusion reflects the recognition that PCC generally have been subject to such extensive modification and degradation as a result of human activity that the resulting "cropped conditions" constitute the normal conditions for such lands. The 1993 Rule preamble clarified that PCC do not lose their status merely because the owner changes use. Thus, the Agencies intended that even if the PCC are used for a non-agricultural use, they remain excluded from the definition of WOTUS. That interpretation was upheld in *United States v. Hallmark Construction Co*.[48] and in *New Hope Power Co. v. U.S. Army Corps of Engineers*.[49] The 1993 Rule preamble instead made clear that the critical inquiry for determining whether a PCC loses its status is whether wetland conditions (as determined using the Corps' 1987 Wetlands Delineation Manual) have returned to the area.

Notably, when the 1993 Rule was published, the abandonment principle was consistent with USDA's implementation of the Food Security Act of 1985. However, three years later, Congress enacted the 1996 farm bill and modified the abandonment principle to incorporate a "change in use" policy governing how the USDA may make a PCC eligibility determination for purposes of the conservation compliance programs it administers. The 1996 farm bill nonetheless did not

[48] 30 F. Supp. 2d 1033 (N.D. Ill. 1998).
[49] 746 F. Supp. 2d 1272, 1283 (S.D. Fla. 2010).

affect how EPA and the Corps make PCC determinations for CWA purposes. Accordingly, the Agencies incorporation of the "change in use" policy into the CWA context in the 2023 Rule was ill-advised.

We agree with the Agencies' proposal to return to the abandonment principle articulated in the 1993 Rule's preamble, specifically that a PCC is considered abandoned "if it is not used for, or in support of agricultural purposes at least once in the immediately preceding five years and has reverted to wetlands." We appreciate the Agencies' inclusion in the preamble of a non-exhaustive list of agricultural purposes.

Importantly, we agree with the Agencies' clarification that under the Proposed Rule, a cropland that loses PCC designation does not automatically become jurisdictional; rather, the cropland must meet the requirements for a jurisdictional adjacent wetland (i.e., abut and have a continuous surface connection to a WOTUS) to be itself a WOTUS. This clarification adheres to the Court's holding in *Sackett* that the Act extends only to wetlands that are indistinguishably part of a body of water that itself constitutes WOTUS.

We also support the Agencies' approach to the PCC exclusion whereby a site can be a PCC regardless of whether there is a prior PCC determination from either USDA or the Corps. Because USDA does not provide PCC determinations unless a farmer is seeking benefits covered under the wetland conservation provisions, the 2023 definition of PCC was too restrictive in limiting the PCC exclusion to areas that are designated as PCC by the USDA. By contrast, the approach in the proposed rule appropriately recognizes that PCC determinations for CWA purposes should not depend on USDA actions, and EPA has the final authority to determine PCC status, consistent with longstanding CWA policy. This approach will alleviate unnecessary burden on USDA to process requests for PCC designations that are not required for Food Security Act purposes.

H. Ditches are not WOTUS

The Agencies propose to define the term "ditch" to mean "a constructed or excavated channel used to convey water." Under the Proposed Rule, non-navigable ditches (including roadside ditches) that are constructed or excavated entirely in dry land are not WOTUS, even if those ditches have relatively permanent flow and connect to a jurisdictional water. We support the Agencies' proposal to retain a standalone exclusion for ditches and their efforts to provide increased clarity with respect to the regulation of ditches. The jurisdictional status of ditches is one of the most important issues for our members with respect to the reach of federal jurisdiction over WOTUS.

Additionally, we support the Agencies' proposed ditch exclusion as it more appropriately reflects the Agencies' 1977 and 1986 approaches by limiting jurisdiction over ditches to those that were excavated or constructed in tributaries, relocating a tributary, or were constructed or excavated in wetlands or other aquatic resources. This approach is consistent with *Sackett*, which reinforced that WOTUS generally only include bodies of waters "forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes."

Because the proposed exclusion for ditches requires an inquiry as to whether ditches were "constructed" or "excavated" in dry land, the proposed definition would require landowners and regulators to consider the historical conditions of the area at the time the ditch was constructed.

Many ditches were constructed well before the CWA and well before tools were readily available that would help demonstrate the historic hydrologic conditions. The Agencies state that the burden of proof will be on the Agencies to determine the historic status of a ditch's construction, and "[w]here the [A]gencies cannot satisfy this burden, the ditch at issue would be considered non-jurisdictional."

I. Groundwater

The Agencies propose to exclude "groundwater, including groundwater drained through subsurface drainage systems," from the definition of WOTUS.[50] As the Agencies explain in the Proposed Rule's preamble, they have "never interpreted [WOTUS] to include groundwater and would continue that practice through this proposed rule by explicitly excluding groundwater." We support the proposal to expressly exclude groundwater from the definition of WOTUS, which is consistent with the CWA's text, agency practice, and case law finding groundwater is not WOTUS.

To provide clarity on the applicability of the groundwater exclusion, we recommend that the Agencies revise the language in proposed paragraph (b)(9) to state "groundwater, including diffuse or shallow subsurface flow and groundwater drained through subsurface drainage systems."

J. Burden of Proof

The preamble to the Proposed Rule states that "[w]hen preparing an approved jurisdictional determination, . . . the agencies bear the burden of proof in demonstrating that an aquatic resource meets the requirements under the proposed rule to be jurisdictional or excluded." Thus, "if the agencies do not have adequate information to demonstrate that a water meets the jurisdictional standards to be a 'water of the United States,' the agencies would find such a water to be non-jurisdictional."

To ensure that placing the burden of proof on the Agencies to establish jurisdiction will not unduly delay decision-making and leave landowners in regulatory limbo, we recommend that the Agencies provide additional clarity on how this might play out in the field. We appreciate the Agencies' attempts to clarify what sorts of information the agencies will use in determining whether they can meet their evidentiary burden, such as what types of historical information are most reliable to be used to determine whether a ditch is jurisdictional or not. We also recommend that the Agencies specify anticipated time periods for making these determinations will be, for example, no longer than 60 days from receipt of responsive information from the applicant. Finally, regulators and stakeholders need finality when it comes to the jurisdictional status of water features. The agencies therefore should acknowledge in the final rule that if a water feature is determined to be non-jurisdictional because the Agencies are unable to meet the burden of proof, or if a ditch is determined to be excluded from jurisdiction, either because historical information confirms that it is properly excluded or because the Agencies cannot meet their burden, the water feature or ditch will remain excluded. Landowners should not be subjected to perpetual attempts to reassert jurisdiction.

Conclusion:

[50] 90 Fed. Reg. at 52541

AFBF recommends that the Agencies make the necessary changes outlined above to bring the WOTUS definitions in line with *Sackett* and *Rapanos*. Farmers and ranchers support the creation of a legally durable rule that injects clarity into the regulatory process and does not leave landowners guessing what parts of their property are subject to regulation. We look forward to the finalization of a rule that upholds Supreme Court precedents, respects congressional intent, and recognizes cooperative federalism. Thank you for the opportunity to provide these comments.

Sincerely,

John Newton, Ph.D.
Vice President, Public Policy and Economic Analysis