State of West Virginia
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January 5, 2026

The Honorable Lee Zeldin
Administrator, Environmental Protection Agency
1200 Pennsylvania Ave NW, Suite 1101A
Washington, DC 20460

Lt. General William H. "Butch" Graham, Jr.
Chief of Engineers and Commanding General
U.S. Army Corps of Engineers
441 G Street NW
Washington, DC 20314-1000

Submitted Electronically via Regulations.gov

Re: Comments of States of West Virginia, Alabama, Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Texas, and Virginia on "Updated Definition of 'Waters of the United States'" (Docket No. [EPA-HQ-OW-2025-0322; FRL 11132.1-01-OW])

Dear Administrator Zeldin and General Graham:

The States are grateful for the opportunity to write in support of the Agencies' effort to properly define "waters of the United States." *See Updated Definition of "Waters of the United States,"* 90 Fed. Reg. 52498 (Nov. 20, 2025).

In the Clean Water Act of 1972, Congress struck a deliberate balance between federal and state authority over our nation's waters. From the start, Congress intended to "recognize, preserve, and protect the primary responsibilities and rights of States ... to plan the development and use ... of land and water resources." 33 U.S.C. § 1251(b). At the same time, Congress gave the Agencies regulatory authority over certain "navigable waters" only—that is, "the waters of the United States." *Id.* §§ 1344, 1362(7). But Congress did not define "waters of the United States." So courts and agencies have wrestled with the definition for decades.

For too long, the Agencies have over-expanded the definition—far exceeding lawful congressional authorization. The fallout from that overreach has been severe. Expansive definitions stripped States of their ability to regulate their own waters. Congress never intended that affront to traditional state authority.

So the States commend the Agencies for taking steps to recognize States' constitutional sovereignty. Updated definitions are especially welcome given that previous administrations ignored the monumental economic and administrative burdens the Act imposes on States and taxpayers. We welcome the opportunity to close the chapter of historical unlawful overreach.

The States recognize the considerable challenge that the Agencies face in translating general statutory language into workable regulatory standards while respecting both environmental protection and state sovereignty. The Agencies' proposed update to the definition of "waters of the United States" achieves those objectives far more effectively than past versions. We appreciate the Agencies' shift to a more justifiable form of environmental regulation.

But we encourage the Agencies to consider going further. For example, to bring the definition in line with relevant precedent, we urge the Agencies to adopt *Sackett*'s "indistinguishability" standard for identifying when wetlands constitute covered waters. We further recommend that the Agencies remove all language that extends jurisdiction to temporary or ephemeral waters that result from events like "wet seasons" and replace it with unambiguous language confined to ordinary conditions. Finally, the States believe that the Agencies' use of "abandonment" language when addressing prior converted cropland poses potential Fifth Amendment regulatory takings and due process issues; we recommend that the Agencies therefore remove that language.

BACKGROUND

I. States Traditionally Can—And Do—Protect Our Nation's Waters.

Since the morning of the American constitutional experiment, States have had the power to regulate waters within their own borders. *Gibbons v. Ogden*, 22 U.S. 1, 70-75 (1824). As sovereigns, States hold the "absolute right" to their "waters[] and the soil under them." *See, e.g.*, *Martin* v. *Waddell's Lessee*, 41 U.S. 367, 367 (1842). This plenary responsibility encompasses the "full power to regulate" waters to "promote the peace, comfort, convenience, and prosperity of [the States'] people." *Escanaba & Lake Mich. Transp. Co.* v. *City of Chi.*, 107 U.S. 678, 683 (1883).

States have preserved this power in their constitutions. States like Florida lay claim to all relevant "navigable waters[] within the boundaries of the state." FLA. CONST. art. X, § 11; *see also, e.g.*, N.M. CONST. art. XVI (same). Some do so through specific authorizations to the legislative branch. West Virginia, for instance, has preserved its legislature's right to "provid[e] … special laws for the connection, by canal, of the waters of the Chesapeake with the Ohio River by line of the James River, Greenbrier, New River and Great Kanawha." W. VA. CONST. art. XI.

States further grant their citizens water rights. Some do so for water diversion and appropriation purposes. *See*, *e.g.*, CAL. CIV. CODE §§ 1410-22 (water rights acquired by appropriation); COLO. CONST. art. XVI, § 6 (preserving the right to divert water). Others provide specific guarantees. Alaska allows "[f]ree access to the navigable or public waters of the State." ALASKA CONST. art. VIII, § 14. Massachusetts assures a "right to clean … water." MASS. CONST. art. XCVII. Alabama's constitution provides "[t]hat all navigable waters shall remain forever public highways, free to the citizens of the state … without tax, impost, or toll." ALA. CONST. art I, § 24. States have recognized rights over "ditches, drains, flumes, … and aqueducts," MONT. CONST. art. IX, § 3, and even exempted those areas from property tax, UTAH CONST. art. XIII, § 3.

States have used their water rights to regulate every aspect of their water. They've regulated tide-water beds, *Pollard* v. *Hagan*, 44 U.S. 212 (1845), harbor pilots, *Cooley* v. *Bd. of Wardens of Port of Phil.*, 53 U.S. 299 (1851), bridges, *Gilman* v. *City of Philadelphia*, 70 U.S. 713, 729 (1865), fisheries, *McCready* v. *Virginia*, 94 U.S. 391 (1876), and canals, *Kansas v. Colorado*, No. 105, 1994 WL 16189353, at *18 (U.S. Oct. 3, 1994). They've even managed water coming from federal reservoirs within their jurisdictions. *California v. United States*, 438 U.S. 645 (1978). Thus, States have "always exercised" their water regulation "power." *Gilman*, 70 U.S. at 729.

Federal water regulation, on the other hand, does not enjoy the rich plenary intrastate water history of its state counterparts. To be sure, the Commerce Clause allows Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. Applying that power, the Supreme Court has recognized that the federal government holds a meaningful role in regulating "navigable waters." *See Gibbons*, 22 U.S. at 70-75; Robert W. Adler, *The Ancient Mariner of Constitutional Law: The Historical, Yet Declining Role of Navigability*, 90 WASH. U. L. REV. 1643, 1670-71 (2013). But all federal regulation must ensure that its power is "within the scope of the Constitution." *McCulloch v. Maryland*, 17 U.S. 316 (1819).

II. The Clean Water Act Protects America's Waters While Respecting State Authority.

Congress passed the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To do so, Congress commanded the federal government to "co-operate" with States and local agencies. *Id.* § 1251(g). The Act thus formed a "partnership" among States and the federal government. *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992).

In the Act, Congress split up the relevant roles that States and the federal government play to address water pollution. Among other things, States "manage the construction grant program" "and implement the permit programs." 33 U.S.C. §§ 1251(b), 1342, 1381-88. They set and revise their own water quality standards, *see id.* § 1313(b)-(c), identify waters for regulation, *see id.* § 1313(d), and maintain a regulatory plan, *see id.* §§ 1313(e), 1329.

By contrast, EPA "administer[s]" the CWA in "consult[ation]" and "cooperation with the States." *See* 33 U.S.C. § 1251(b), (d)-(e) (cleaned up). It makes grants to State and local agencies, *id.* §§ 1251(b), 1252(c), 1281-1302f, 1381-89, develops programs, *id.* § 1252(a), and sets permit standards, *id.* §§ 1341-46, 1361-77a. EPA and the United States Army Corps of Engineers may also enforce some of the provisions of the Act—at times in conjunction with the States. *Id.* § 1319(a)(1).

Congress anchored many of the enforceable provisions in the CWA, like those requiring permits for certain discharges, to a jurisdictional phrase: "navigable waters." *See, e.g.*, 33 U.S.C. § 1342(a)(4).

Before the Act, the Supreme Court had a long history of shaping the term "navigable waters." Specifically, "navigable waters" were 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*, 107 U.S. at 682. This definition covered the seas, lakes, large rivers, and "small navigable creeks into which the tide flows." *See The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. 443, 452-57 (1851); *see also Wilson* v. *Black-Bird Creek Marsh Co.*, 27 U.S. 245, 252 (1829).

Those waters' touchstone feature was their "navigability." Interstate waters had to be "navigable in fact." *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871). And they were "navigable in fact when they [were] used, or [were] susceptible of being used, in their ordinary condition, as highways for commerce." *Id.* 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) (plurality op.) (cleaned up).

This traditional understanding of "navigable waters" changed slightly in the Clean Water Act. The CWA defined "navigable waters" as "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). That definition, in conjunction with its use in the statute, *see id.* § 1344(g)(1), rendered it somewhat inconsistent with prior case law previously shaping the term. *Rapanos*, 547 U.S. at 723. The result was a slightly enlarged scope of jurisdiction, though the exact parameters were a bit fuzzy. *Id.*

III. The Agencies Have Struggled To Confine Themselves To Their Proper Role.

Unfortunately, because of this small discrepancy, the Agencies then struggled for decades to clearly determine where their authority ends. *See Sackett v. EPA*, 598 U.S. 651, 665-71 (2023). EPA and the Corps have revised their definition of "waters of the United States" more than seven times in the past 30 years. *See, e.g.*, Clean Water Act Regulatory Programs, 58 Fed. Reg. 45008, 45036 (Aug. 25, 1993); Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054, 37104 (June 29, 2015); Definition of "Waters of the United States"—Addition of an Applicability Date to 2015 Clean Water Rule, 83 Fed. Reg. 5200, 5208 (Feb. 6, 2018); Definition of "Waters of the United States" —Recodification of Pre-Existing Rules, 84 Fed. Reg. 56626, 56667 (Oct. 22, 2019); The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22250, 22338 (Apr. 21, 2020); Revised Definition of "Waters of the United

States," 88 Fed. Reg. 3004, 3142 (Jan. 18, 2023); Revised Definition of "Waters of the United States"; Conforming, 88 Fed. Reg. 61964, 61968 (Sept. 8, 2023). Previous administrations have employed these definitional revisions to expand federal jurisdiction beyond statutory limits, increasingly encroaching on State-regulated waters. This expansion has then come at the economic detriment of the States, regulated parties, and taxpayers.

The trouble began with the Corps. In 1994, the Corps decided to assert "federal authority over an abandoned sand and gravel pit in northern Illinois." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs* (*SWANCC*), 531 U.S. 159, 162 (2001); *see also SWANCC v. U.S. Army Corps of Eng'rs*, 163 F.R.D. 268, 270 (N.D. Ill. 1995). To do so, the Corps expanded the definition of "waters of the United States" to "intrastate lakes, rivers, streams, … mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes," and "natural ponds" that could affect interstate or foreign commerce. *SWANCC*, 531 U.S. at 163 (quoting 33 C.F.R. § 328.3(a)(3) (1999)). It further pushed that definition by making a "Migratory Bird Rule" that brought under the Clean Water Act's jurisdiction areas and habitats used by certain migratory birds and endangered species, among other things. *Id.* at 164 (quoting Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986)).

The Supreme Court invalidated the rule. It affirmed that overreaching agency interpretations cannot "alter[] the federal-state framework by" "encroach[ing] upon a traditional state power." *SWANCC*, 531 U.S. at 173. These "significant constitutional questions," it explained, may only be changed when Congress makes "a clear statement" to that effect. *Id.* at 174. It recognized that "Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id.* at 172-73. In other words, only Congress—not federal agencies—can "invoke[] the outer limits of [its] power." *Id.* at 172. Since Congress did not, the Court held that States retain "traditional and primary power over land and water use" within their jurisdictions. *Id.* at 174. The Corps' "Migratory Bird Rule" thus surpassed its authorized jurisdictional bounds.

Later, the Agencies applied a "significant nexus" test to determine covered waters. The Corps' again tried to assert overly broad federal authority—this time over "streams," "mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes," "natural ponds," "ephemeral streams," and "drainage ditches." *Rapanos*, 547 U.S. at 724-25 (citing 33 C.F.R. § 328.3(a) (2004)). They effectively stretched "waters of the United States" to encompass "virtually any land feature over which rainwater or drainage passes and leaves a visible mark." *Id.* at 724-25 (citing 33 C.F.R. § 328.3(a) (2004)).

A plurality of the Court rejected the increasingly broad interpretation and any "significant nexus" notions. *Rapanos*, 547 U.S. at 742. It recognized that such an overextension would "impinge[]" state water regulatory rights. *Id.* at 738. It maintained that those rights are a part of "quintessential state and local power." *Id.* But in a concurring opinion, Justice Kennedy alone relied on this "significant nexus" language, which did "not align perfectly with the traditional extent of federal authority." *Id.* at 782. Under his "significant nexus" test, wetlands would be evaluated on a "case-by-case basis." *Id.*

Decades of mass confusion ensued. EPA revised its definitions to include a "significant nexus standard" encompassing "waters that, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, or interstate waters." *Revised Definition of "Waters of the United States,"* 88 Fed. Reg. 3004, 3006 (Jan. 18, 2023); *see also* EPA, CLEAN WATER ACT JURISDICTION FOLLOWING THE U.S. SUPREME COURT'S DECISION IN RAPANOS V. UNITED STATES & CARABELL V. UNITED STATES 1 (2008), https://bit.ly/499no6Q (adopting a fact-specific analysis). This definition pushed federal authority to a climax; statutory jurisdiction was determined on a "fact-specific" analysis, considering things like the "flow characteristics and functions of the tributary" and "hydrologic and ecological factors." CLEAN WATER ACT JURISDICTION, *supra*, at 1.

Everyone suffered. Farmers at the time reported significant federal overreach. In California, the Corps required permits for "puddles in dirt roads," "puddles in tire racks," "depressions in parking lots," and "gravel parking lots." *Erosion of Exemptions and Expansion of Federal Control – Implementation of the Definition of Waters of the United States: Hearing Before the Subcomm. on Fisheries, Water and Wildlife of the S. Comm. on Env't and Pub. Works* 114th Cong. 292 (2016) (statement of Don Parrish on behalf of the American Farm Bureau Federation). The Agencies claimed jurisdiction over "converted crop land, stock ponds, water and soil far beneath the surface … and on activities in adjacent lands such as plowing and changing crops." *Erosion of Exemptions and Expansion of Federal Control – Implementation of the Definition of Waters of the United States: Hearing Before S. Comm. on Env't and Pub. Works, Subcomm. on Fisheries, Water, and Wildlife*, 114th Cong. 292 (2016) (opening statement of Hon. Dan Sullivan, U.S. Senator, Alaska). Even a rancher in Arizona was unsure whether he could build a bridge on his property to cross a dry wash more than 270 miles from the navigable Colorado River without a permit. *The Future of WOTUS: Examining the Role of States: Hearing Before the Subcomm. on Env't of the H. Comm. on Sci., Space, and Tech.*, 115th Cong. 39, at 36 (2017) (statement by Jim Chilton, Chilton Ranch LLC).

And lower courts struggled to apply a standard "plagued with uncertainty." *West Virginia v. EPA*, 669 F. Supp. 3d 781, 792-94, 801-04 (D.N.D. 2023).

IV. *Sackett* Offers A Solution—But An Incomplete One.

The problem came to a head when the Agencies swallowed up a landowner's residential lot near Priest Lake in Idaho. *Sackett*, 598 U.S. at 661-62. The landowner had been filling in his lot with dirt and rocks to build a home when EPA issued a compliance order, demanding restoration. *Id.* at 662. Using its "significant nexus" formulation, EPA said the property was in the same neighborhood as an unnamed tributary which fed into a non-navigable creek, which in turn fed into Priest Lake. *Id.* at 662-63. So, it asserted that the landowner had "illegally dumped soil and gravel onto 'the waters of the United States.'" *Id.* at 663.

The Supreme Court used these unfortunate facts to end the "significant nexus" experiment. The Court rejected EPA's "overly broad interpretation of the [Clean Water Act's] reach" because it would "impinge on [state] authority." 598 U.S. at 680. It acknowledged that "[r]egulation of land and water use lies at the core of traditional state authority." *Id.* The Court held that the Act "extends to only those wetlands that are as a practical matter indistinguishable from waters of the United States." *Id.* at 678 (cleaned up). And to make it clear, it explained that 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). So, *Sackett* promised clear guidance on the limits of the Clean Water Act's "waters of the United States."

Sackett "cleared the air" "both legally and factually." *Lewis* v. *United States*, 88 F.4th 1073, 1078 (5th Cir. 2023). It created a "bright line test" for the lower courts to follow. *United States* v. *Sharfi*, No. 21-CV-14205-MARRA/MAYNARD, 2024 WL 4483354, at *14 (S.D. Fla. Sept. 21, 2024). As a result, many courts have faithfully applied *Sackett* to restrain overreaching federal interpretations. *See, e.g.*, *Lewis* v. *United States*, 764 F. Supp. 3d 362, 378 (M.D. La. 2025); *Glynn Env't Coalition, Inc. v. Sea Island Acquisition, LLC*, 146 F.4th 1080 (11th Cir. 2025); *Sharfi*, 2024 WL 4483354; *Ragsdale v. JLM Constr. Servs., Inc.*, 737 F. Supp. 3d 449, 465 (W.D. Tex. 2024).

But this peace is unlikely to last. In response to *Sackett*, the Agencies revised again their definition of "waters of the United States." Yet, they retained the definition for "wetlands" that includes "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). That's very different from a bright-line rule. And this definition invites courts to discard *Sackett*'s command that wetlands be "as a practical matter indistinguishable" from covered waters and have a "surface connection." It asserts instead that those wetlands need only be "saturated" by ground water.

In the face of this definition, some lower courts have struggled to find meaningful mooring. Some courts have since found a surface connection despite clear separation between wetlands and rivers. *Waste Action Project v. Girard Res. & Recycling LLC*, No. 2:21-cv-00443-RAJ-GJL, 2024 WL 4366978, at *14 (W.D. Wash. Sept. 4, 2024) (citing *United States v. Bobby Wolford Trucking & Salvage, Inc.*, No. C18-0747 TSZ, 2023 WL 8528643, at *2 (W.D. Wash. Dec. 8, 2023)). Some refuse to reexamine their earlier erroneous determinations where even "four miles" separated wetlands from traditional navigable waters. *Precon Dev. Corp. v. United States Army Corps of Eng'rs*, No. 2:24-cv-337, 2025 WL 510234, at *4 (E.D. Va. Feb. 14, 2025). Others assert they cannot see from "aerial photographs" "what infrastructure exists" to "form or sever a continuous surface connection." *Conservation Law Found., Inc. v. Town of Barnstable*, No. 24-cv-11886-ADB, 2025 WL 1596278, at *6 (D. Mass. June 5, 2025). Further, more have resorted to "parsing" *Sackett*—rather than applying it—to evaluate EPA's jurisdictional reach. *White v. EPA*, 737 F. Supp. 3d 310, 326 (E.D.N.C. 2024). And a New Jersey court failed to consider *Sackett* altogether. *N.J. Dep't of Env't Prot. v. Hexcel Corp.*, No. A-1889-22, 2024 WL 1693714, at *4-5 (N.J. Sup. Ct. App. Div. Apr. 19, 2024).

Perhaps the best example of current CWA judicial interpretation comes from the Second Circuit. In *United States v. Andrews*, the court held that the Clean Water Act "does not require surface water but only soil that is regularly saturated by surface or ground water." No. 24-1479, 2025 WL 855763, at *2 (2d Cir. Mar. 19, 2025) (cleaned up). So, it believes the Clean Water Act extends to areas like a Connecticut farmer's land, where "[o]ther than during rainfall-runoff events, no surface water connection exists between the farm" and covered waters. *See* Pet. for Cert. at 6, *Andrews v. United States*, No. 25-668 (U.S. Nov. 20, 2025) (cleaned up). Indeed, there is "no continuous surface water connection" between the farm and other covered waters. *Id.* (cleaned up). The Second Circuit's basis? The usual culprit—the overreaching definition of "wetlands." *Andrews*, 2025 WL 855763, at *2 (quoting 33 C.F.R. 328.3(c)(1)). If EPA and the Corps continue to expand the reach of their jurisdictional authority, such definitions will only result in further splintered state authority.

Thankfully, the Agencies now seek to "revise[] key aspects" of their definition to "clarify the scope of Federal jurisdiction" under the Act. 90 Fed. Reg. at 52499. The Agencies are interested in aligning the definition with the "text, structure, and history of the [Act] and Supreme Court precedent, [while] taking into account other relevant factors." *See id.* For exactly those reasons, we agree that the Agencies should revise the definition of the "waters of the United States" to address the problems seen in past rules and some post-*Sackett* lower court decisions.

DISCUSSION

States have always regulated their own waters. The CWA affirmed that role and prohibited intrusive federal overreach. But over the last several decades, the Agencies have repeatedly overreached anyway, precipitously eroding state authority while ignoring the resulting costs. The Agencies must update the definition of the "waters of the United States" to recognize, preserve, and protect States' regulatory powers.

I. Federal Jurisdiction Should Be Construed Narrowly.

The Agencies should be particularly sensitive about stepping too far into the traditional state realm of water regulation. After all, Congress affirmed the traditional state-federal power balance when it passed the Clean Water Act. This affirmation of State power and explicit constraint on federal overreach demands a narrow interpretation of "waters of the United States."

On one side of the ledger, Congress repeatedly emphasized the continued vitality of broad state power over waters.

Start with Congress's policy declaration. "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce and eliminate pollution, [and] to plan the development and use … of land and water resources." 33 U.S.C. § 1251(b). Each word is sweeping. To "recognize" is to "acknowledge the legal standing of []a government, state, etc.[] by some formal action." *Recognize*, WEBSTER'S NEW WORLD

DICTIONARY OF THE AMERICAN LANGUAGE (1972). "Preserve" means to "maintain" the "state of things," or "retain" a "quality" or "condition." *Preserve*, THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH (1964). And "protect" means to "defend," "guard," and even to "set aside funds toward the payment of" something. *Protect*, THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH (1964).

Thus, Congress sought to acknowledge a legal standing, maintain that standing by guarding it, and provide means to further it. What legal standing did Congress seek to maintain, guard, and provide for? The "primary responsibilities and rights of the States" over their water resources. 33 U.S.C. § 1251(b). "Primary" of course means "chief." *Primary*, THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH (1964). It is "basic," "fundamental," or "elemental" "of first rank, importance, [or] value." *Primary*, WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY (1963). A "responsibility" is a "charge for which one is responsible." *Responsibility*, THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH (1964). And a "right" is a "power or privilege" "to which one is justly entitled" "by law, nature, or tradition." *Right*, THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH (1964). It is something "suitable" or "appropriate" for a purpose. *Right*, WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY (1963).

Therefore, Congress sought to maintain, guard, and provide for the States' legal status as the primary actor shouldering the charge and power of regulating its waters.

Even without construing these words "in a vacuum," *Gundy* v. *United States*, 588 U.S. 128, 141 (2019) (cleaned up), the provision's "context" reveals the same balance of power, *Davis* v. *Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). Congress made this declaration at the outset of the Act under the section titled "Congressional Declaration of Goals and Policy." 33 U.S.C. § 1251. Its further subheading confirms its language: "Congressional recognition, preservation, and protection of primary responsibilities and rights of States." *Id.* § 1251(b). Thus, the provision's placement reveals that Congress intended the Act to be read in a light favoring the States' role as chief water regulator.

And not only did Congress *affirm* States' water rights in the CWA, but it also *prohibited* federal overreach. Congress refused to "supersede[], abrogate[], or otherwise impair[]" States' "rights to" and "authority" over "allocat[ing] quantities of water within its jurisdiction." *See* 33 U.S.C. § 1251(g). "Supersede" means "supplant," "to [be] force[d] out of use as inferior," or "obsolete and [to be] replaced by something else." *Supersede*, THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH, (1964). Similarly, "abrogate" means "to cancel," "abolish," "or repeal by authority." *Abrogate*, WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE (1972). Still even more broadly, Congress used the word, "impair," which means to "[d]amage[,] weaken," "reduce," "make worse," or "diminish." *Impair*, THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH (1964). Thus, Congress did not want the Clean Water Act to supplant, abolish, or even diminish States' water rights. Congress did not limit its protection to States' water allocation rights. It further commanded that "nothing" in the CWA "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1370(2).

So, every provision should be read in the light that avoids diminishing state authority to regulate its own water—including the definition of "waters of the United States."

II. The Proposed Rule Correctly Rolls Back The Agencies' Past Unlawful Definitions.

Past rules went too far. Many of us have explained in litigation exactly why the last iteration of the "Waters of the United States" rule—a Biden-era Amended Rule that was issued post-*Sackett* and immediately enjoined—is unlawful. So as not to belabor the point, we've attached those arguments and incorporate them by reference. *See* Mot. for Summ. Judg., *West Virginia v. EPA*, No. 3:23-cv-00032 (D.N.D. Feb. 26, 2024), ECF No. 201-1 (attached as Exhibit 1). But beyond those found in our litigation briefing, still other problems lurk. Nondelegation issues, arbitrariness and capriciousness problems, and major-questions concerns further confirm that the Agencies are right to implement a more restrained vision of the "waters of the United States" in the Proposed Rule.

A. Overbroad Jurisdictional Definitions Violate the Non-Delegation Doctrine.

The Constitution "vest[s]" "[a]ll legislative Powers" in the "Congress of the United States." U.S. CONST. art. I, § 1. Congress alone is assigned the power to legislate, and it may not "further delegat[e]" its duties to anyone. *Gundy*, 588 U.S. at 135. So when Congress assigns a task to an agency, it must set out an "intelligible principle" to guide it, explaining Congress's general policy and ascertainable boundaries of its delegated authority. *FCC v. Consumers' Research*, 606 U.S. 656, 673 (2025) (cleaned up).

In the CWA, Congress declared an "intelligible principle" and "general policy" when it stated its intent "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). It distinguished the roles that States and EPA play in regulating water pollution. States retain their traditional authority to regulate water within their jurisdictions. *SWANCC*, 531 U.S. at 166-67. Congress set boundaries on EPA's authority to "administer" the Act by making grants, developing programs, and setting and enforcing permit standards in "cooperation" with the States. *See* 33 U.S.C. §§ 1251-1389. Congress further circumscribed those functions to apply only within "navigable waters" which it defined as "the waters of the United States." *See id.*

Unfortunately, the Agencies have historically understood the Act to apply far beyond "the waters of the United States." Their many definitions over the years have pulled into their regulatory ambit "mudflats, sandflats, … sloughs, prairie potholes," "ephemeral streams," and "drainage ditches." *SWANCC*, 531 U.S. at 163; *Rapanos*, 547 U.S. at 724-25. But these "transitory" or "intermittent" flows are outside the scope of congressional authorization. *Rapanos*, 547 U.S. at 730-37. EPA and the Corps cannot stretch "the waters of the United States" to encompass "virtually any land feature over which rainwater or drainage passes and leaves a visible mark." *See id.* at 724-25 (cleaned up).

If the Agencies were historically correct about their jurisdictional authorizations, there would be no way to measure whether they have exceeded their authority. They could keep expanding their jurisdiction to swallow every water source in the country. Such unchecked jurisdiction would be "tyranny"—placing with the executive determinations Congress alone should make. *See, e.g.*, THE FEDERALIST NO. 47 (J. Madison). "[T]he waters of the United States" simply don't stretch that far; they are confined to relatively permanent bodies of water and wetlands that are "as a practical matter indistinguishable" from those bodies. *See Rapanos*, 547 U.S. at 734; *Sackett*, 598 U.S. at 678-79.

B. Overbroad Jurisdictional Definitions Are Arbitrary and Capricious.

Constitutional concerns are not the only issues at play here. Courts will reverse EPA actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). An agency's actions may be considered arbitrary and capricious when it "failed to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). The Agencies' many past jurisdictional definitions do just that, as they entirely overlook the problem of costs.

When Congress passed the Act, it came with a purported "$24 billion price tag." Veto of the Federal Water Pollution Control Act Amendments of 1972, 1 PUB. PAPERS 990 (Oct. 17, 1972). President Nixon vetoed the bill despite its "laudable intent" because it "broke the budget." *Id.* He foresaw the CWA's affordability effects. He claimed the CWA "ignore[d] other very real threats to the quality of life" like "spiraling prices and increasingly onerous taxes." *Id.* Yet, what seemed like an "unconscionable" price at the time, proved to be a gross underestimation. *Id.*

Just two years later, EPA assessed that only one aspect of the CWA could cost a "conservative" $60.7 billion. *1973 EPA Needs Survey: Hearings before the Subcomm. on Water Res. of the H. Comm. on Pub. Works*, 93rd Cong. 3-4 (1973) (statement of Hon. Russell E. Train, Adm'r, EPA). Other program expenses ranged from $40 to $80 billion. *Id.* at 4. "[W]hen all [wa]s said and done," some congressional members estimated the total cost of the program would be "$150 billion" with federal costs being only 25 percent of the "State and local share." *Id.* at 33 (statement of Rep. E. G. Shuster, Member, H. Subcomm. On Water Res.). Even then, Congress was "deep[ly] concern[ed]" and didn't "know where the money [was] going to come from." *Id.* This makes sense because the *entire* national budget was just under $250 billion in 1972. *See* Annual Budget Message to the Congress, Fiscal Year 1973, 1 PUB. PAPERS 78, 83 (Jan. 24, 1972).

Costs "increased steadily over time," engulfing the President, Congress, and EPA's expectations entirely. EPA, EPA-230-12-90-084, ENVIRONMENTAL INVESTMENTS: THE COST OF A CLEAN ENVIRONMENT A SUMMARY 3-3 (1990). Fifteen years after the CWA, EPA estimated hemorrhaging costs at $37.5 billion per year. *Id.* But instead of applying the brakes, EPA stepped on the gas. By 2001, "the costs of water quality regulation totaled $93.1 billion" for consumers and taxpayers. JOSEPH M. JOHNSON, MERCATUS CTR., THE COST OF REGULATIONS IMPLEMENTING THE CLEAN WATER ACT 2 (2004).

That number has grown exponentially. Early estimates revealed that "government and industry ha[d] invested over $1 trillion" "or $100 per person-year" for the entire program. David A. Keiser & Joseph S. Shapiro, *Consequences of the Clean Water Act and the Demand for Water Quality*, 134 Q.J. ECON. 349 (2018). Latest estimates place this number at an almost unimaginable $2.8 trillion (2017 USD). David A. Keiser & Joseph S. Shapiro, *US Water Pollution Regulation over the Last Half Century: Burning Waters to Crystal Springs?*, 33 J. OF ECON. PERSPECTIVES 51 (2019), *available at* https://tinyurl.com/cn55xt8. Yet, federal spending only accounts for $0.6 trillion. *Id.* at Online Appendix B, *available at* https://tinyurl.com/2dxtknte. States, local municipalities, and industry shoulder most of the load at **$2.2 trillion**. *Id.* Put another way, taxes intended to fund education, law enforcement, and emergency services are re-routed to comply with overreaching federal agency mandates.

And this figure encompasses only overall economic burdens. Equally burdensome are the regulatory costs imposed on States, consumers, and taxpayers. States could expect to pay billions of dollars "to comply" with changes in regulatory rules. U.S. CHAMBER OF COMMERCE, SUE AND SETTLE UPDATED: DAMAGE DONE 2013-2016 8 (2017), https://bit.ly/49eViXY. Further, parties who "would deposit fill material in locations denominated 'waters of the United States'" must obtain relevant permits. *Rapanos*, 547 U.S. at 721; *see also* 33 U.S.C. §§ 1311, 1344, 1362(12)(A). These permits are expensive, imposing inordinate fees on regulated parties. *Rapanos*, 547 U.S. at 721. For instance, "[t]he average applicant for an individual permit" spent more than $250,000. *Id.* (citing David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NAT. RES. J. 59, 74-76 (2002)). This amounted to "over $1.7 billion" each year by the "private and public sectors obtaining wetlands permits." *Id.* (cleaned up). Regulated wetlands also suffer property devaluation where home prices are an average of 4% lower than non-regulated properties. *See, e.g.*, KATHERINE A. KIEL, NEW ENGLAND PUB. POL'Y CTR., THE IMPACT OF WETLANDS RULES ON THE PRICES OF REGULATED AND PROXIMATE HOUSES: A CASE STUDY 4 (2007).

Tangible costs are not the only form of tax these regulations extract. Permit seekers must pay with their time as well. The process can take over two years from start to finish. *Rapanos*, 547 U.S. at 721. Never mind that permit seekers suffer additional "disadvantage[s]." *Michigan v. EPA*, 576 U.S. 743, 752 (2015). For example, they take on the headache of dealing with "auditing, insurance, financial, personnel, and other management systems associated with" compliance. *Becerra v. San Carlos Apache Tribe*, 602 U.S. 222, 228 (2024). They spend resources "learning about rights, rules, and demands." Aske Halling & Martin Baekgaard, *Administrative Burden in Citizen-State Interactions: A Systematic Literature Review*, 34 J. PUB. ADMIN. RESEARCH & THEORY 180, 181 (2024).

One would expect these costs to come with extraordinary results, but "it is unclear whether the Clean Water Act has been effective or whether water pollution has decreased at all." Jonathan H. Adler, *The Clean Water Act at 50: Is the Act Obsolete?*, 73 CASE W. RESERVE L. REV. 207, 208 n.8 (2022) (quoting *Consequences of the Clean Water Act*, *supra*, at 350). "[T]he goal of eliminating all surface water pollution within thirteen years of the CWA's adoption appears to be

wildly aspirational, and perhaps even to amount to foolhardy optimism." Robert L. Glicksman & Matthew R. Batzel, *Science Politics, Law, and the Arc of the Clean Water Act: The Role of Assumptions in the Adoption of a Pollution Control Landmark,* 32 WASH. U. J.L. & POL'Y 99, 105 (2010). "The CWA in fact has come nowhere close to meeting its goals." Adler, at 208 n.8 (quoting JAMES SALZMAN & BARTON H. THOMPSON, JR., ENVIRONMENTAL LAW AND POLICY 180 (5th ed. 2019)). It's not "rational ... to impose billions[, never mind *trillions,*] of dollars in economic costs in return for a few dollars in health or environmental benefits." *Michigan*, 576 U.S. at 752.

We don't yet know the full extent of *Sackett*'s relief to States, industry, and taxpayers from these enormous and extra-statutorily imposed regulatory burdens. But early estimates are promising. For instance, EPA initially opined that at least 1.2 million miles of ephemeral streams and 63% of wetlands could be impacted by *Sackett*. EPA, *Public Webinar: Updates on the Definition of "Waters of the United States,"* at 24:09-24:18 (YouTube, Sept. 12, 2023, 03:00 PM EST), https://tinyurl.com/ywh6wsmp. Others estimate that up to "eighty-two million acres … of nontidal wetlands" could be outside the Clean Water Act's jurisdiction after *Sackett*. *See, e.g.*, Adam C. Gold, *Putting WOTUS on the Map: Estimating the Implications of* Sackett v. EPA *on Wetland Protections*, 38 TUL. EVN'T L.J. 269, 273 (2025). Assuming permit-seekers choose to develop all these lands, and the lands would have been subject to EPA mitigation requirements, *see* 33 C.F.R. § 332.4(c); 40 C.F.R. § 230.92, States and industry partners could expect **more than $5 trillion** (2015 USD) in regulatory savings, *see* EPA, ECONOMIC ANALYSIS OF THE EPA-ARMY CLEAN WATER RULE 40 (2015), https://bit.ly/3MY9FIH ("average unit costs ranging from $41,572 to $111,985 per acre of wetlands mitigated and from $95 to $1,000 per linear foot of stream mitigation"). And that figure does not consider the potential resulting economic benefits of cultivating the land for residential, commercial, and agricultural use.

As a matter of logic, these savings and investment opportunities are unavailable when courts and EPA expand the definition of "waters of the United States" back to what it's been for the past several decades. Such definitions operate to pull properties back into the Clean Water Act's regulatory eddy. *See, e.g.*, *Precon Dev. Corp.*, 2025 WL 510234, at *4. As parties spiral down this whirlpool, irrational costs to the aggregate tune of trillions of dollars make development prohibitively expensive. That cost problem explains why many choose to stay out of business completely. *See, e.g.*, Hannah Druckenmiller, Joseph S. Shapiro & Charles A. Taylor, *Extended Abstract: Consequences of Land Use Regulation Under the Clean Water Act* 3 (Working Paper, 2025), *available at* https://bit.ly/4q0DI0Y (finding higher developer request rates where similarly situated land is outside the Clean Water Act's jurisdiction).

Because the Agencies have largely failed before to consider these aggregate economic costs for changes in their jurisdictional definitions, previous expansive definitions were arbitrary and capricious.

C. Overbroad Jurisdictional Definitions Tried To Answer A Major Question Without Clear Congressional Authorization.

Previous jurisdictional changes also attempted to answer a major question without congressional authorization.

"Major questions" are issues where "the history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority." *West Virginia v. EPA*, 597 U.S. 697, 721 (2022) (cleaned up). Expansive, ever-changing definitions of "waters of the United States" answer a major question without clear congressional authorization. At least five aspects of these changing definitions demonstrate this.

First, the Agencies' definition of "waters of the United States" necessarily exerts "extravagant statutory power over the national economy." *Util. Air Regul. Grp. v. EPA* (*UARG*), 573 U.S. 302, 324 (2014). Waters under federal jurisdiction are subject to EPA's water pollution "standards that affect the entire national economy." *Whitman v. Am. Trucking, Ass'ns*, 531 U.S. 457, 475 (2001). States and industry partners have spent trillions of dollars in aggregate to implement the Clean Water Act. Implementing EPA's standards and kowtowing before permit-making authority not only involves direct regulatory costs but also lost investment opportunities and other disadvantages. *Id.*

Second, malleable jurisdictional definitions "fundamental[ly] revis[e]" the statute, "changing it from [one] scheme of … regulation" into another. *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994). Congress determined that States chiefly regulate water and forbade anyone from diminishing that role. But when the Agencies change their definitions of "waters of the United States," that choice causes a continental shift in who regulates intrastate waters. The Agencies have continually blown past their lawful congressional authorizations in this area.

Third, "[t]here is little reason to think Congress assigned" this kind of power to the Agencies. *West Virginia*, 597 U.S. at 729. "Where an administrative interpretation of a statute invokes the outer limits of Congress' power," there must be a "clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172. There's no "clear indication" in the CWA that Congress intended for the Agencies to regulate intrastate and ephemeral waters. So ever-changing, expansive definitions of "waters of the United States" can't be what Congress intended.

Fourth, the Agencies "discover[ed] in a long-extant statute an unheralded power representing a transformative expansion [of] its regulatory authority." *West Virginia*, 597 U.S. at 724. Congress passed the Clean Water Act in 1972. *See* 33 U.S.C. §§ 1251-1389. But the Agencies didn't publish their overextending definitions until five years later. *See Regulatory Programs of the Corps of Engineers*, 42 Fed. Reg. 37122 (July 19, 1977). And now—almost 50 years later—EPA and the Corps have revised the definition more than seven times. *See*, *supra*, at 4. These definitions have impermissibly served to regulate "virtually any land feature over which rainwater or drainage passes and leaves a visible mark." *Rapanos*, 547 U.S. at 725. "Given these circumstances, there

is every reason to hesitate before concluding that Congress meant to confer on EPA the authority it claims." *West Virginia*, 597 U.S. at 725 (cleaned up).

Fifth, by changing the definition of "waters of the United States," EPA and the Corps make decisions of "vast … political significance." *West Virginia*, 597 U.S. at 716 (cleaned up). The reach of "waters of the United States" has profound effects on the individuals it regulates and the broader economy. No wonder the Clean Water Act has been "one of the most controversial regulations in U.S. history." David A. Keiser & Joseph S. Shapiro, *Consequences of the Clean Water Act and the Demand for Water Quality* 1 (Nat'l Bureau of Econ. Rsch., Working Paper, Paper No. 23070). The definition swings wildly with each new administration. *See* Kole W. Kelley, *WOTUS: The Water Definition Battle that Defines the Nation*, 46 MITCHELL HAMLINE L. REV. 76, 80-81 (2019) (describing Obama- and Trump-administration differences). But Congress already limited the Clean Water Act's reach into State waters, and the Agencies should not upset that delicate state-federal balance.

So the Agencies would need clear congressional authorization to justify their muscular assertions of power in the past. Yet EPA and the Corps didn't point to clear authorization for expanding their jurisdiction. Instead, they hid behind the veil of *Chevron* deference. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985) (relying on *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). "*Chevron* is dead." *Ozurumba v. Bondi*, 153 F.4th 396, 406 (4th Cir. 2025). That deference no longer applies. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024).

Instead of changing definitions to expand Clean Water Act jurisdiction, the Agencies should "occupy the most defensible terrain." Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 19 (2008). This safe harbor rests in "respect[ing] the words of Congress" in the plain text, context, and structure of the Clean Water Act. *Lamie v. U.S. Tr.*, 540 U.S. 526, 536 (2004). And the Act commands that States—not EPA nor the Corps—regulate intrastate waters.

III. The Proposed Rule Is A Great Step Forward—But Additional Changes Would Strengthen The Rule.

The Agencies have appropriately recognized the need to revise the definition of "Waters of the United States" consistent with the constitutional order that Congress preserved in the Clean Water Act and that the Supreme Court confirmed in *Sackett*. The proposed rule takes a major leap toward reining in decades of overreach. But we encourage the Agencies to consider still further improvements to certain critical provisions.

- **40 C.F.R. § 120.2(a)(4)/40 C.F.R. § 328.3(a)(4)**

  Wetlands ~~adjacent to~~ <u>indistinguishable as a practical matter from</u> the following waters:
  - Waters identified in paragraph (a)(1) of this section: or

> - Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3) of this section and with a continuous surface connection to those waters.

Sackett held that the Clean Water Act's jurisdiction "extends to only those wetlands that are as a practical matter indistinguishable from waters of the United States." *Sackett*, 598 U.S. at 678 (cleaned up). This limitation means that the party asserting jurisdiction over "adjacent wetlands" must establish two facts. First, the adjacent body of water must constitute "waters of the United States"—"a relatively permanent body of water connected to traditional interstate navigable waters." *Id.* (cleaned up). Second, the wetland must have "a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.* at 678-79 (cleaned up).

The current proposed definition of "wetlands" omits the important "indistinguishable as a practical matter" holding from *Sackett*. We thus recommend that this language replace "adjacent to" as that language is covered under *Sackett*'s holding. *Id.* at 678.

- **40 C.F.R. § 120.2(c)(1)/40 C.F.R. § 328.3(c)(1):**

> Wetlands means those 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. Wetlands generally include swamps, marshes, bogs, and similar areas.

The Agencies' definition of "wetlands" conflicts with its newly proposed exclusion of "groundwater." *See* 40 C.F.R. §§ 120.2(c)(3), 328.3(c)(3). We agree that "groundwater," "including groundwater drained through subsurface drainage systems," should be excluded in light of *Sackett*. But the "wetlands" definition covers "areas that are inundated or saturated by surface or ground water." 40 C.F.R. §§ 120.2(c)(1), 328.3(c)(1).

To reconcile this difference consistently with *Sackett*, the Agencies should remove "or ground water" and "or saturated." The Act only covers wetlands with a "continuous surface connection." *Sackett*, 598 U.S. at 678 (cleaned up). This revision will also help courts avoid confusion about whether the CWA requires a surface connection.

- **40 C.F.R. § 120.2(c)(3)/40 C.F.R. § 328.3(c)(3):**

> Continuous surface connection means having surface water ~~at least during the wet season and~~ <u>continuously</u> abutting (i.e., touching) a jurisdictional water <u>under ordinary conditions</u>.

- **40 C.F.R. § 120.2(c)(8)/40 C.F.R. § 328.3(c)(8):**

  > Relatively permanent means standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round ~~or at least during the wet season~~ during ordinary conditions, and does not include waters that in ordinary conditions are present only intermittently, ephemerally, or seasonally.

The Agencies' proposed definition of "continuous surface connection" suggests that "continuous" equates to "season[al]," but *Sackett* explained that a "continuous surface connection" should "mak[e] it difficult to determine where the water ends and the wetlands begin[]." *Sackett*, 598 U.S. at 678-79 (cleaned up). "The waters of the United States" cover only bodies of water that are "relatively permanent," not "dry channels" with "occasional," "intermittent," "ephemeral," or "transitory," "flow[]." *Rapanos*, 547 U.S. at 733.

"Wet season" as a term of art can be manipulated to encompass wide swaths of land that experience arbitrary amounts of rainfall for even one month. *See* B.I. Setiawan, *A Simple Method to Determine Patterns of Wet and Dry Seasons*, 542 IOP CONF. SERIES: EARTH & ENV'T SCI. 1 (2020). And those "seasons" are inconsistent. *See, e.g.*, Guillermo Murray-Tortarolo et al., *The Decreasing Range Between Dry- and Wet-Season Precipitation over Land and its Effect on Vegetation Primary Productivity*, 12 PLOS ONE e0190304 (2017). So, it is unclear what a wet season is, and that makes it impossible for States to know whether certain lands will be covered. Regardless, neither the Clean Water Act, nor the Supreme Court's precedents have ever considered "wet season" language. So we recommend the Agencies remove the "wet season" language altogether.

Instead, the final rule should clarify that "continuous surface connection" means "having surface water continuously abutting (i.e., touching) a jurisdictional water under ordinary conditions." This language comports with *Sackett* because it uses "continuously" as an adverb to clarify the nature of the abutment to a jurisdictional water. *See Sackett*, 598 U.S. at 678 (using "continuous" and "adjacent"). "Ordinary conditions" therefore clarifies, as *Sackett* commands, that the waters be "indistinguishable" "making it difficult to determine where the water ends and the wetland begins." *Id.* at 678-79 (cleaned up). And it avoids the risk of overreaching regulation of temporary waters like "prairie potholes." *SWANCC*, 531 U.S. at 163 (quoting 33 C.F.R. § 328.3(a)(3) (1999)).

- **40 C.F.R. § 120.2(c)(7)/40 C.F.R. § 328.3(c)(7):**

  > Prior converted cropland means any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible. EPA and the Corps will recognize designations of prior converted cropland made by the Secretary of Agriculture. ~~An area is no longer considered prior converted cropland for purposes of the Clean Water Act when the area is abandoned and has reverted to wetlands, as defined in paragraph (c)(1) of this section. Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. For the purposes of the Clean Water Act, the EPA~~

~~Administrator shall have the final authority to determine whether prior converted cropland has been abandoned.~~

We appreciate that EPA seeks to exclude "prior converted cropland" that has previously been designated by the Secretary of Agriculture. But we are troubled that these lands can revert to CWA-covered jurisdiction whenever EPA determines that the area is "abandoned." EPA "goes too far" with its "regulation." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

The regulation could raise takings concerns. The Fifth Amendment prohibits state and federal governments from "tak[ing] for public use" "private property" "without just compensation." U.S. CONST. amend. V; *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897). And when the Clean Water Act regulates wetlands, EPA effectively asks the landowner to "leave his property economically idle." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992). Regulated wetlands suffer property devaluation compared to their non-regulated counterparts and spook further developer investment. *See, e.g.*, Kiel, *supra*, at 4; Druckenmiller, *supra*, at 3. The regulation thus leaves an indelible "economic impact" on the landowner, impeding his "distinct investment-backed expectations" and "interfer[ing] with legitimate property interests." *Penn Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104 (1978); *accord Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

Even if this kind of regulatory taking was allowed, the Fifth Amendment also prohibits deprivations of "property without due process of law." U.S. CONST. amend. V (cleaned up). EPA asserts it has the "final authority to determine whether prior converted cropland has been abandoned" without due process for affected landowners. Landowners have a right to fair notice and a meaningful opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). A landowner's property interest is significant, and if EPA is wrong about abandonment, the landowner would have no way to remedy the situation outside litigation. It is not "rational" to deprive citizens of property values "in return for a few dollars in … environmental benefits." *Michigan*, 576 U.S. at 752. EPA asserts authority where Congress has not authorized its inclusion, so due process concerns are heightened. Jonathan H. Adler, *Wetlands, Property Rights, and the Due Process Deficit in Environmental Law*, 2012 CATO SUP. CT. REV. 139, 156 (2012).

CONCLUSION

"Waters of the United States" was never meant to usurp state authority. Yet that is what happened. The States commend the Agencies for reversing course. We urge you to finish the job. Congress preserved state primacy over intrastate waters. The Supreme Court has reaffirmed that principle. The proposed rule should fully embrace it. We stand ready to assist in this effort and appreciate your consideration of these comments.

Sincerely,

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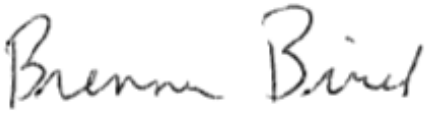

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