PETITION SEEKING AMENDMENT OF 40 C.F.R. § 120.2, 33 C.F.R. § 328.3

DEFINING "WATERS OF THE UNITED STATES"

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DEFINING "WATERS OF THE UNITED STATES"

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Re: Petition Seeking Amendment of 40 C.F.R. § 120.2, 33 C.F.R. § 328.3

Dear Administrator and Assistant Secretary:

Pursuant to the Administrative Procedure Act, 5 U.S.C. § 553, the Institute for Energy Research respectfully requests that the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers (collectively, the "Agencies") initiate notice-and-comment rulemaking to define the phrase "waters of the United States," 33 U.S.C. § 1362(7), under the Clean Water Act ("CWA").

For years, businesses and private landowners have operated under a sweeping definition of "waters of the United States." This definition results from the Agencies' interpretation of the "significant nexus" test—derived from the concurring opinion of a single Justice in a single Supreme Court decision. In January 2023, the Agencies codified their interpretation of the significant nexus test through rulemaking ("2023 rule"). But in *Sackett v. EPA*, 143 S. Ct. 1322, 1342 (2023), the Supreme Court held that the U.S.

Environmental Protection Agency "has no statutory basis to impose" the significant nexus test as the linchpin of CWA jurisdiction.

Without seeking comment on the effect of *Sackett* on its definition of "waters of the United States," the Agencies promulgated a revision to the 2023 rule that did little more than remove the significant nexus test from the rule text. What remains is a definition of "waters of the United States" that still outstrips the authority that Congress conferred in the CWA and that contradicts the Supreme Court's holding in *Sackett*.

This petition describes the existing regime's numerous defects which necessitate a new rulemaking to substantially redefine "waters of the United States." First, the Agencies' post-*Sackett* conforming rule left parts of the 2023 rule's operative text and the preamble untouched that were rejected by the Supreme Court. Second, *Sackett* conclusively rejects inclusion of all interstate waters, regardless of navigability, as "waters of the United States." But the conforming rule leaves intact the 2023 rule's purported grant of jurisdiction over such waters. Third, in excising references to the significant nexus test, the operative definition of "waters of the United States" now relies solely on the concept of "relatively permanent." But the rule offers no guidance for applying that standard. Fourth, *Sackett* mandates that the CWA covers only wetlands that "'as a practical matter [are] indistinguishable from waters of the United States.'" 143 S. Ct. at 1341 (quoting *Rapanos v. United States*, 547 U.S. 715, 742 (2006) (plurality)). But under the current rule, the Agencies appear to take the position that no hydrologic connection is necessary between a wetland and a covered water. Finally, these errors have a cascading effect, rendering the 2023 rule's coverage of certain tributaries and impoundments untenable.

The Agencies' current interpretation of "waters of the United States" is out of step with Supreme Court precedent and fails to honor the congressional design of the CWA. It will also create widespread regulatory uncertainty—precisely the result the Supreme Court sought to forestall in *Sackett*. The Institute for Energy Research respectfully requests that the Agencies initiate a joint rulemaking to address these flaws.

Sincerely,

Tom Pyle, President
The Institute for Energy Research

Enclosures

Cc (with enclosures): Assistant Administrator, Office of Water, U.S. Environmental Protection Agency

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The Institute for Energy Research has a significant interest in the proper interpretation of the phrase "waters of the United States," which fixes the outer boundaries of federal regulatory authority under the Act. The Agencies' current, unlawful interpretation has produced significant regulatory uncertainty, imposed costs on the regulated public, and undercut Congress's vision in the CWA of a federal-state partnership to protect the Nation's waters.

I. Introduction

For years, businesses and private landowners have operated under a definition of the phrase "waters of the United States" that, by the Agencies' own admission, threatened to subject to federal regulation to virtually every surface water in the country as well as drainage ditches, dry washes, farm fields, and areas of dry land that were rarely if ever inundated. That sweeping coverage resulted largely from the Agencies' interpretation of the so-called "significant nexus" test—derived from the concurring opinion of a single Justice in a single Supreme Court decision.

Most recently, in January 2023, the Agencies codified their sweeping interpretation of the significant nexus test through rulemaking (the "2023 rule"), and then, in *Sackett v. EPA*, 143 S. Ct. 1322, 1341 (2023), invited the Supreme Court "to defer to [their] understanding of the [CWA]'s jurisdictional reach as set out in [that] rule." But the Supreme Court pointedly declined: EPA, the Court declared, "has no statutory basis to impose" the significant nexus standard as the linchpin of jurisdiction. *Id.* at 1342.

In the teeth of defeat, however, the Agencies doubled down on their staggeringly broad vision of their own authority. Without seeking notice and comment on the seismic effect of *Sackett* on its definition of "waters of the United States," the Agencies promulgated a post-*Sackett* revision of the 2023 rule that did little more than excise the significant nexus test from the rule text. Unsurprisingly, given the Agencies' failure to solicit public input, what remains is a definition of "waters of the United States" that *still* far outstrips the authority that Congress conferred in the CWA and that contradicts the Supreme Court's holding in *Sackett.*

The prevailing regime's numerous defects necessitate a new rulemaking to substantially redefine "waters of the United States." *First*, while the Agencies' post-*Sackett* conforming rule tweaked the 2023 rule's operative text in some respects, it left other parts of the text and the 2023 rule's preamble untouched. But *Sackett* outright rejected much of the 2023 rule preamble's underpinnings. In conjoining new regulatory text with an old explanation, the Agencies have left a mash-up of conflicting standards

and concepts. With no coherent explanation of how the Agencies understand their authority after *Sackett*, regulated parties attempting to discern the Agencies' intent can only speculate about the rule's actual coverage.

Second, *Sackett* conclusively rejects inclusion of all interstate waters, regardless of navigability, as "waters of the United States." But the conforming rule leaves intact the 2023 rule's purported grant of jurisdiction over such waters. That interpretation reads "navigability" entirely out of "navigable waters"—the term that the phrase "waters of the United States" defines in setting the boundaries of the Agencies' regulatory authority. *See Sackett*, 143 S. Ct. at 1337 (refusing to countenance a reading of "waters of the United States" that fails to give effect to "navigable waters"); *see also Solid Waste Agency of Northern Cook Cnty. v. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) ("*SWANCC*") (same).

Third, in excising references to the significant nexus test, the operative definition of "waters of the United States" now relies solely on the concept of "relatively permanent." But the rule offers no guideposts (such as a minimum flow volume or duration) for applying that standard, leaving the regulated community only to guess about how the Agencies intend to enforce it in practice. And what little the 2023 rule does say about the relatively permanent standard cannot be squared with *Sackett*'s instruction that the relatively permanent test embraces only those "bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" 143 S. Ct. at 1336 (quoting *Rapanos v. United States*, 547 U.S. 715, 739 (2006) (plurality)).

Fourth, with respect to wetlands, the operative rule contravenes *Sackett*'s mandate that the CWA covers only wetlands that "'as a practical matter [are] indistinguishable from waters of the United States'" such that it is "'difficult to determine where the 'water' ends and the 'wetland' begins." 143 S. Ct. at 1341 (quoting *Rapanos*, 547 U.S. at 742 (plurality)). Under the current rule, however, the Agencies appear to take the position that no hydrologic connection is *necessary* at all between a wetland and a covered water, and even a minimal hydrologic connection can apparently *suffice* to trigger federal jurisdiction over the wetland. Such conditions plainly present no difficulty in discerning where water ends and land begins, yet the Agencies insist nonetheless that wetlands in those conditions are covered.

Finally, the above-described errors have a cascading effect, rendering the 2023 rule's coverage of certain tributaries and impoundments untenable as well.

The Agencies' current interpretation of "waters of the United States" is out of step with Supreme Court precedent and fails to honor the congressional design in the Clean Water Act. The resulting regime will create widespread regulatory uncertainty—precisely the result the Supreme Court sought to forestall in *Sackett*. The Agencies should not permit this uncertainty to persist. The Institute for Energy Research respectfully requests that the Agencies initiate a joint rulemaking to address the flaws identified in this petition.

II. Background

Defining the phrase "the waters of the United States" has long been "a contentious and difficult task." *National Assn. of Mfrs. v. Dep't of Defense*, 583 U.S. 109, 114 (2018). This section reviews the "decades of agency action and litigation" that should inform the Agencies' decision to initiate rulemaking here. *Sackett v. EPA*, 143 S. Ct. 1322, 1332 (2023).

A. The Clean Water Act

In 1972, Congress amended the Federal Water Pollution Control Act by enacting the Clean Water Act ("CWA" or the "Act") to address longstanding concerns about the quality of the Nation's waters. Before the Act, Congress's regulatory efforts focused on empowering federal officials to seek judicial abatement of pollution in interstate waters. When that mechanism proved inadequate, Congress enacted the Act to effectuate a "total restructuring and complete rewriting of" federal water pollution law. *Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981). The resulting scheme seeks to prevent, reduce, and eliminate pollution in the Nation's waters generally, and to regulate the discharge of pollutants into navigable waters specifically.

The Act's stated objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve that end, "[t]he Clean Water Act anticipates a partnership between the States and the Federal Government." *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). The statute thus expressly highlights "the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of 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). Congress added that "[e]xcept as expressly provided in this Act, nothing in this Act shall . . . 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." *Id.* And through a series of non-regulatory measures, Congress pledged technical support and financial aid to the States "in connection with the prevention, reduction, and elimination of pollution." *Id.*; *id.* § 1255(a)(1); *see generally* 84 Fed. Reg. 56,626, 56,632-33 (Oct. 22, 2019) (collecting examples of CWA's non-regulatory provisions).

Beyond those non-regulatory measures, Congress implemented a federal regulatory regime centered on a permitting program that seeks to address the discharge of pollutants into "navigable waters." Specifically, the Act forbids the "discharge" of "any pollutant" without a permit issued under Section 402 (for discharges covered by the National Pollution Discharge Elimination System) or Section 404 (for discharges of dredged or fill material) of the Act. 33 U.S.C. §§ 1311(a), 1344(a), (d). The Act defines the "discharge of a pollutant" as the "addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12)(A). And "navigable waters," in turn, are defined to mean "the waters of the United States, including the territorial seas." *Id.* § 1362(7). That crucial term defines the scope of the jurisdiction exercised by the U.S. Environmental

Protection Agency (which administers Section 402) and Army Corps of Engineers (which administers Section 404) to regulate under the Act: If a water or land feature falls within the definition of "navigable waters," the Agencies may regulate it under the CWA's permitting regimes.

A determination that a water or land feature is jurisdictional is significant, for "[t]he CWA is a potent weapon." *Sackett*, 143 S. Ct. at 1330. The Act imposes "crushing" consequences "even for inadvertent violations." *Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 602 (2016) (Kennedy, J., concurring). Even negligent discharges of pollutants into covered waters trigger severe criminal penalties, 33 U.S.C. § 1319(c), and the Act's civil penalties—over $60,000 in fines per violation—are no less onerous. 28 U.S.C. § 2461 note; 33 U.S.C. § 1319(d).

Since its enactment in 1972, however, the CWA's outer jurisdictional boundaries have remained notoriously unclear. The "contentious and difficult task" of defining those boundaries have confounded the Agencies and the courts alike. *National Assn. of Mfrs.*, 583 U.S. at 114. "For more than a half century, the agencies responsible for enforcing the Act have wrestled with the problem and adopted varying interpretations." *Sackett*, 143 S. Ct. at 1329. And that problem has "persist[ed]" despite the Supreme Court's interventions. *Id.*; *see also* 85 Fed. Reg. 22,250, 22255 (Apr. 21, 2020) ("Hundreds of cases and dozens of courts have attempted to discern the intent of Congress when crafting the phrase. . . . The federal courts have established different analytical frameworks to interpret the phrase, and the applicable test may differ from State to State."). Before *Sackett*, as discussed next, three Supreme Court cases have largely formed the backdrop against which the Agencies have acted.

B. Agency Rules and Pre-*Sackett* Supreme Court Precedents

1. After a few initial fits and starts in the immediate aftermath of the CWA's passage, the Agencies settled on an interpretation of "waters of the United States" that remained largely unchanged until a flurry of rulemakings that culminated in the 2023 rules. Far from providing clarity, however, the Agencies' rules and guidance spawned interminable litigation. *See Rapanos v. United States*, 547 U.S. 715, 739 (2006) (plurality) (recounting litigation history).

a. The Court first considered the meaning of "waters of the United States" in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985). Confronted with "80 acres of low-lying marshy land near the shores of Lake St. Clair," the Court held that the Corps' assertion of jurisdiction over wetlands physically abutting a traditional navigable water was permissible. *Id.* at 131-35. The Court based that holding on deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to "the Corps' conclusion that adjacent wetlands are inseparably bound up with the 'waters' of the United States." *Riverside Bayview*, 474 U.S. at 131. The Court recognized that "[o]n a purely linguistic level, it may appear unreasonable to classify 'lands,' wet or otherwise, as 'waters.'" *Id.* at 132. But the Court deemed the Corps' conclusion reasonable in light of the difficulty in "choos[ing] some point at which water ends and

land begins." *Id.* at 132. "[B]etween open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs," the Court explained, and "[w]here on this continuum to find the limit of 'waters' is far from obvious." *Id.* The Court concluded that this line-drawing difficulty rendered it "reasonable for the Corps to interpret the term 'waters' to encompass wetlands adjacent to waters as more conventionally defined." *Id.* at 133.

b. The Court next addressed the definition of "waters of the United States" in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"). There, the Agencies claimed federal jurisdiction over an abandoned sand and gravel pit located some distance from a traditional navigable water—merely because the pit at issue was "used as a habitat for migratory birds." *Id.* at 167. The Court rejected the Agencies' claim: "[T]he jurisdiction of the Corps" does not "exten[d]" to "isolated ponds." *Id.* at 168, 171. To hold otherwise, the Court reasoned, would read the term "navigable" in the defined term "navigable waters" out of the statute entirely. The term "navigable waters" must have "at least the import" of showing what Congress had in mind—namely, "its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.* at 172. The Agencies were owed no deference, the Court continued, because constitutional avoidance trumps *Chevron* deference, and the Agencies' interpretation pressed the outer boundaries of Congress's power under the Commerce Clause and threatened "significant impingement of the States' traditional and primary power over land and water use." *Id.* at 173-74.

The Court further reasoned that nothing in *Riverside Bayview* compelled a contrary result, for the wetlands there "actually abutted" and were "inseparably bound up" with a navigable waterway, while *SWANCC* concerned isolated ponds. *Id.* at 167. According to the Court, it was only the "significant nexus between the wetlands and 'navigable waters' that informed [the Court's] reading of the CWA in *Riverside Bayview*." *Id.* But that innocuous distinction of *Riverside Bayview*—and the phrase "significant nexus"—would prove fateful. When the Court next interpreted "waters of the United States," it fractured over the proper test for analyzing that crucial jurisdictional phrase.

c. Five years later, the Court in *Rapanos* confronted the Agencies' assertion of federal jurisdiction over wetlands located near man-made ditches that were ultimately connected to traditional navigable waters. 547 U.S. at 715. Writing for a four-Justice plurality, Justice Scalia would have limited the definition of "waters of the United States" to "includ[e] only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . .oceans, rivers, [and] lakes,'" and "wetlands with a continuous surface connection" to a "relatively permanent body of water connected to traditional interstate navigable waters." *Id.* at 742 (Scalia, J., plurality).

Starting with "waters," the plurality explained that the statutory text and structure, the canons of construction, and judicial precedent all compelled its "relatively permanent" interpretation. In common usage, the term "waters"—plural—does "not refer to water in general," but to "only relatively permanent, standing or flowing bodies

of water," such as streams, oceans, lakes, and bodies of water. *Rapanos*, 547 U.S. at 732-33. "None of these terms encompasses transitory puddles or ephemeral flows of water." *Id.* at 733.

The plurality buttressed that view by citing Congress's deliberate use of the "traditional phrase 'navigable waters,'" which had long been understood to cover "only discrete *bodies* of water." *Rapanos*, 547 U.S. at 734. And that view tracked "both *Riverside Bayview* and *SWANCC*"—cases where the Court "repeatedly described the 'navigable waters' covered by the Act as 'open water' and 'open waters.'" *Id.* at 735. Finally, the plurality underscored that only its construction honors the CWA's express solicitude for responsibilities and rights of States in Section 101(b) of the Act, while a contrary interpretation would both represent "an unprecedented intrusion into traditional state authority" and "stretc[h] the outer limits of Congress's commerce power." *Id.* at 738. In short, nothing in the CWA authorized the Agencies to exercise powers over intrastate land "that would befit a local zoning board." *Id.*

Turning to wetlands, the plurality rejected the lower court's view that "a wetland may be considered 'adjacent to' remote 'waters of the United States' because of a mere hydrologic connection to them." *Rapanos*, 547 U.S. at 740. The plurality underscored that *Riverside Bayview*'s holding regarding wetlands actually abutting traditional navigable waters turned on "an inherent ambiguity in drawing the boundaries of any 'waters.'" *Id.* at 741. But "[w]etlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a 'significant nexus' in *SWANCC*." *Id.* at 742. What is required, instead, is that the wetland must have a "continuous surface connection" with a water of the United States, "making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.*

Concurring in the judgment only, Justice Kennedy concluded that "to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 759 (Kennedy, J., concurring in the judgment) (citing *SWANCC*, 531 U.S. at 167, 172). According to Justice Kennedy, adjacent wetlands possess the requisite "significant nexus" if the wetlands "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780.

2. With no controlling opinion in *Rapanos*, the Agencies in the ensuing years vacillated between shifting legal standards and differing views of their jurisdiction.

a. In *Rapanos*' wake, the Agencies issued guidance in 2008 to implement the Supreme Court's decision. In practice, however, that guidance only "recognized larger grey areas and called for more fact-intensive individualized determinations in those grey areas." Nick Parillo, *Federal Agency Guidance and the Power To Bind: An Empirical Study of Agencies and Industries*, 36 Yale J. on Reg. 165, 231 (2019); *see* Clean Water Act

Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* 8-12 (2008) ("*Rapanos* Guidance"). The *Rapanos* Guidance directed officials to assert jurisdiction over waters under *either* Justice Kennedy's significant nexus test or the plurality's relatively permanent/continuous surface connection standard. *Id.* at 3 ("regulatory jurisdiction under the CWA exists over a water body if either the plurality's or Justice Kennedy's standard is satisfied"). The result, unsurprisingly, was agency-aggrandizement. It led, for instance, to agency officials asserting "jurisdiction over wetlands 'adjacent' to non-navigable tributaries based on fact-specific determinations regarding the presence of a significant nexus"—a determination made based on a long list of hydrological and ecological factors. *Sackett*, 143 S. Ct. at 1334. Under the *Rapanos* Guidance, "almost all waters and wetlands across the country" were potentially subject to jurisdictional analyses. 80 Fed. Reg. 37,056 (2015).

In 2015, the Agencies promulgated a new rule to define "waters of the United States" by converting many waters otherwise subject to case-specific jurisdictional determinations under the guidance into *categorically* covered waters. Waters considered "jurisdictional by rule" under the 2015 rule included (1) waters currently used, used in the past, or susceptible to use in interstate or foreign commerce; (2) interstate waters, including interstate wetlands; (3) the territorial seas; (4) impoundments of waters otherwise identified as jurisdictional; (5) tributaries of the first three categories; and (6) waters adjacent to a water identified in the first five categories, including "wetlands, ponds, lakes, oxbows, impoundments, and similar waters." *See* 80 Fed. Reg. at 37,104. The 2015 rule, however, retained further categories of waters that remained subject to a case-specific analysis to determine if they bore a "significant nexus" to a jurisdictional water. That included, for example, any water within 4,000 feet of indirect tributaries of interstate or traditional navigable waters. *Id.* at 37,104-05.

To top matters off, the 2015 rule broadened the concepts of "tributary" and "adjacency" that had existed under prevailing agency rules since the 1980s—for instance, counting as "tributaries" any water marked by a bed, banks, and ordinary high-water mark (regardless of flow volume or duration), and including as "adjacent," *inter alia*, any water within *1500 feet* of interstate or traditional navigable waters. And although the rule included a 4,000-foot bright-line cutoff of jurisdiction, the Agencies admitted that "'the vast majority of the nation's water features are located within 4,000 feet of a covered tributary, traditional navigable water, interstate water, or territorial sea." U.S. EPA and Department of the Army, Economic Analysis of the EPA-Army Clean Water Rule at 11 (May 20, 2015). The 2015 rule's approach differed slightly from the *Rapanos* Guidance, but the upshot was the same: Virtually any water or wetland in the country was potentially subject to federal jurisdiction.

b. Recognizing that this "muscular approach" was untenable, the Agencies reversed course and "repealed this sweeping rule in 2019." *Sackett*, 143 S. Ct. at 1335; 84 Fed. Reg 56,626, 56,628 (Oct. 22, 2019). In its place, the Agencies promulgated the Navigable Waters Protection Rule in 2020 that hewed more closely to Justice Scalia's

plurality opinion in *Rapanos*. That rule covered only "relatively permanent flowing and standing waterbodies that are traditional navigable waters in their own right or that have a specific surface water connection to traditional navigable waters, as well as wetlands that abut or are otherwise inseparably bound up with such relatively permanent waters." 85 Fed. Reg. 22,250, 22,273 (Apr. 21, 2020). The 2020 rule eliminated "the case-specific application of the agencies' previous interpretation of Justice Kennedy's significant nexus test." *Id.* at 22,273. And it established guideposts for determining what qualifies as a "relatively permanent" flow and a "continuous surface connection" for waters upstream of traditional navigable waters.[1]

Significantly, the 2020 rule eliminated "interstate waters" as a categorically covered class of jurisdictional waters. Under that rule, for an interstate water to qualify, it must either itself be navigable or "connec[t] to traditional navigable waters." 85 Fed. Reg. at 22,283. Although the CWA's predecessor statutes referred to "interstate or navigable waters," when Congress amended the statute in 1972, it chose "navigable waters" as the operative term. *Id.* That action, the Agencies reasoned, was "an express rejection" of the inclusion of interstate waters as an "independent category." *Id.* Indeed, "the inclusion of all interstate waters in the definition of 'waters of the United States,' regardless of navigability, extends the Agencies' jurisdiction beyond the scope of the CWA because it reads the term navigability out of the CWA." *Id.* at 22,284 (quoting *Georgia v. Wheeler*, 2019 WL 3949922, at *12 (S.D. Ga. Aug. 21, 2019)).

c. The 2020 rule, too, did not last. *See Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949, 957 (D. Ariz. 2021) (vacating 2020 rule after EPA's request for voluntary remand). So the Agencies tried anew in early 2023. 88 Fed. Reg. 3004 (2023).

Although it differed in its particulars, the 2023 rule revived the 2015 rule in spirit and in scope. The Agencies restored categorical coverage of interstate waters, along with traditional navigable waters, the territorial seas, as well as their tributaries and adjacent wetlands. 88 Fed. Reg. at 3143. The rule returned to the overly broad, pre-2020 definition of "adjacent," which did not require physical abutment. *Id.* at 3144. A wetland could be covered based on a "continuous surface connection," but it could also be covered based on nothing more than "shallow subsurface hydraulic connections" to a covered water so long as the wetland bore a significant nexus to a covered water. *Id.* at

[1] For instance, the rule's preamble explained that "tributaries, lakes, ponds, and impoundments of jurisdictional waters" are covered if they "are relatively permanent flowing or standing waterbodies upstream of certain excluded features," and "the non-jurisdictional feature maintains a channelized surface water connection to downstream jurisdictional waters in a typical year." 85 Fed. Reg. at 22,278. Adjacent wetlands, meanwhile, "are subject to a different jurisdictional test" based on physical abutment to other jurisdictional waters, but covered wetlands also include those "physically separated only by artificial structures such as dikes, or barriers, or divided by roads and similar structures so long as the structure allows for a direct hydrologic surface connection in a typical year." *Id.* at 22,279.

3089. And the 2023 rule encompassed "[i]ntrastate lakes and ponds, streams, or wetlands" so long as they bear a significant nexus (again, based on a consideration of a list of open-ended factors) to interstate or traditional navigable waters. *Id.* at 3006, 3143.

Perhaps most fundamentally, the 2023 rule resuscitated the 2015 rule's approach of treating its interpretation of Justice Kennedy's significant nexus test as the jurisdictional touchstone. Although the 2023 rule's preamble and text paid lip service to the "relatively permanent standard"—offering that standard as a purported alternate pathway to federal jurisdiction—the rule made no effort to define that standard's contours independent of the significant nexus standard. 88 Fed. Reg. at 3034. Rather, according to the Agencies, "[t]he relatively permanent standard is administratively useful as it more readily identifies a subset of waters that will virtually always significantly affect paragraph (a)(1) waters, but standing alone the standard is insufficient to meet the objective of the Clean Water Act." *Id.* Relatively permanent water flows are included, in other words, only *because* they "have significant effects on the chemical, physical, or biological integrity" of interstate or traditional navigable waters. *Id.* at 3038. The Agencies concluded that as a standalone test, "the relatively permanent standard has no basis in the text of the statute and is contrary to the statute," and it "runs counter to the science demonstrating how other categories of waters can affect the integrity of downstream waters." *Id.* at 3039.

The 2023 rule similarly made no effort to develop the "continuous surface connection" standard, as the 2020 rule had. Rather, "[w]ith respect to wetlands," the Agencies simply concluded "there is no sound basis in the text of the Clean Water Act or in other Supreme Court precedent for requiring that wetlands can be jurisdictional only if they satisfy the continuous surface connection requirement of the relatively permanent standard." 88 Fed. Reg. at 3040. The only illuminating statement the Agencies made was that the continuous surface connection need not be "a constant hydrologic connection." *Id.* at 3102. Apparently, nothing prevents a connecting swale, rill, pipe, or ditch, even if usually dry, from sufficing as the relevant connection.

Ultimately, then, the 2023 rule criticized the 2020 rule's focus "on Justice Scalia's plurality test from *Rapanos*," 88 Fed. Reg. at 3015, and opted for a far broader rule that covers ephemeral streams and intrastate ponds based on their "effects on water quality and interstate commerce," *id.* at 3029. As of January 2023, the Agencies' had returned to their pre-2020 view—the linguistically challenging position that "whatever (alone or in combination) *affects* waters of the United States *is* waters of the United States." *Rapanos*, 547 U.S. at 755 (plurality).

C. *Sackett* and the 2023 Conforming Rule

Months after the Agencies issued the 2023 rule, the Supreme Court issued its decision in *Sackett* in which a majority of the Court concluded that "the *Rapanos* plurality was correct: the CWA's use of 'waters' encompasses [1] 'only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes,'"

and [2] wetlands that abut such waters and bear a "continuous surface connection" to them, such that the wetland is practically "indistinguishable" from the covered water. *Sackett*, 143 S. Ct. at 1336, 1341 (quoting *Rapanos*, 574 U.S. at 739, 755 (plurality)).

1. *Sackett* concerned the Agencies' assertion of jurisdiction over property containing a wetland separated from a tributary by a 30-foot road. 143 S. Ct. at 1331-32. That tributary flowed into a non-navigable creek, which in turn fed into Priest Lake, a traditional navigable water. *Id.* The Agencies claimed the Sacketts' wetland bore a "significant nexus" to Priest Lake and thus counted as a "water of the United States." *Id.* at 1332.

The Court roundly rejected the Agencies' claim. Echoing the textual considerations advanced by the *Rapanos* plurality, the Court reasoned that the term "waters" typically refers to relatively permanent water bodies like streams, oceans, rivers, and lakes. *Sackett*, 143 S. Ct. at 1336-37. Moreover, in defining the "waters of the United States," the Court noted that while the CWA's predecessor "encompassed 'interstate or navigable waters,' the CWA prohibits the discharge of pollutants into only 'navigable waters.'" *Id.* at 1331 (citations omitted). The Court thus highlighted its prior admonitions against reading the term "navigable" out of the statute, noting that Congress's use of "navigable" "at least shows that Congress was focused on 'its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.'" *Id.* at 1337 (quoting *SWANCC*, 531 U.S. at 172). "At minimum," the Court explained, the use of "navigable" as part of the defined term suggests that the phrase "waters of United States" in the definition "principally refers to bodies of navigable water like rivers, lakes, and oceans." *Id.*

As to wetlands, *Sackett* again followed the *Rapanos* plurality in holding that the CWA covers only wetlands "adjacent" to a jurisdictional water such that they are "indistinguishably part" of that water of the United States. *Sackett*, 143 S. Ct. at 1339. But "[w]etlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby." *Id.* Thus, the wetland must be, "as a practical matter[,] indistinguishable from waters of the United States." *Id.* at 1341. That means (1) the adjacent body of water must be one of the "waters of the United States," that is, a " 'relatively permanent body of water connected to traditional interstate navigable waters'" *and* (2) the wetland must have a "continuous surface connection with that water, making it difficult to determine where 'water' ends and the 'wetland' begins." *Id.* (quoting *Rapanos*, 547 U.S. at 742 (plurality)).

In so holding, the Court expressly rejected the Agencies' reliance on the 2023 rule's "significant nexus" test. 143 S. Ct. at 1342. The Court underscored that "[r]egulation of land and water use lies at the core of traditional state authority," but "the scope of the EPA's conception of 'the waters of the United States' is truly staggering when this vast territory is supplemented by all the additional area, some of which is generally dry, over which the Agency asserts jurisdiction" under that freewheeling test. *Id.* Congress did not authorize such an impingement on traditional state regulatory

authority, the Court concluded, "[p]articularly given the CWA's express policy to 'preserve' the States' 'primary' authority over land and water use." *Id.* (quoting 33 U.S.C. § 1251(b)).

2. Given *Sackett*'s adoption of the *Rapanos* plurality's view, it would have been natural for the Agencies to consider returning to the 2020 rule, which, after all, relied principally "on Justice Scalia's plurality test from *Rapanos*," 88 Fed. Reg. at 3015. Instead, the Agencies doubled down, making only minor revisions to the 2023 rule. In a halfhearted effort to respect *Sackett*'s holding, the Agencies excised the significant nexus test from the regulatory text and redefined the concept of wetland adjacency. 88 Fed. Reg. 61,964, 61,966 (Sept. 8, 2023). The conforming rule now relies solely on the "relatively permanent" and "continuous surface connection" tests. But the Agencies took no further steps to define those tests in the regulatory text, and they did not provide new preamble language with an exposition of those standards, either.

The operative rule remains broad and ill-defined. As amended, the rule includes five categories:

- Paragraph (a)(1) states that "waters of the United States" includes waters that are (i) "[c]urrently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all water which are subjects to the ebb and flow of the tide"; (ii) the territorial seas; or (iii) "[i]nterstate waters." 40 C.F.R. § 120.2(a)(1); 33 C.F.R. § 328.3(a)(1).

- Paragraph (a)(2) covers "[i]mpoundments of waters otherwise defined as waters of the United States under this definition, other than impoundments of waters identified under paragraph (a)(5) of this section." 40 C.F.R. § 120.2(a)(2); 33 C.F.R. § 328.3(a)(2).

- Paragraph (a)(3) includes tributaries of waters identified in paragraphs (a)(1) and (a)(2) if the tributaries are "relatively permanent, standing or continuously flowing bodies of water." 40 C.F.R. § 120.2(a)(3); 33 C.F.R. § 328.3(a)(3).

- Paragraph (a)(4) encompasses "[w]etlands adjacent to" (i) paragraph (a)(1) waters or (ii) "[r]elatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3)(i) of this section and with a continuous surface connection to those waters." 40 C.F.R. § 120.2(a)(4); 33 C.F.R. § 328.3(a)(4). "Adjacent" is defined as "having a continuous surface connection." 40 C.F.R. § 120.2(c)(2); 33 C.F.R. § 328.3(c)(2). The rule does not define "continuous surface connection."

- Paragraph (a)(5) includes intrastate lakes and ponds not identified in paragraphs (a)(1)-(a)(4) that are "relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection

to the waters identified in paragraph (a)(1) or (a)(3)." 40 C.F.R. § 120.2(a)(5); 33 C.F.R. § 328.3(a)(5).

The conforming rule leaves the 2023 rule's preamble undisturbed. That rule's preamble explains that the "relatively permanent standard" means "waters that are relatively permanent, standing or continuously flowing waters" connected to paragraph (a)(1) traditional navigable waters, interstate waters, the territorial seas, "and waters with a continuous surface connection to such relatively permanent waters or to paragraph (a)(1) waters." 88 Fed. Reg. at 3038. Beyond the extended description of the relatively permanent standard as merely derivative of the significant nexus standard, however, the Agencies offered no further exposition. *Id.* at 3038-39.

The Agencies' subregulatory guidance has offered little additional clarity. The Agencies have issued a series of memoranda in *Sackett*'s wake that outline procedures and specific timelines under which the Agencies can review and provide comments on certain draft approved jurisdictional determinations. *See* Extension of Joint Coordination Memoranda to the Field Between the U.S. Department of the Army, U.S. Army Corps of Engineers (Corps), and the U.S. Environmental Protection Agency (EPA) (June 25, 2024), https://www.epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-amended-2023-rule_508c.pdf. But the Agencies do not even appear to be adhering to those procedures and timelines. *See* Joint Coordination Memorandum to the Field Between the U.S. Department of the Army, U.S. Army Corps of Engineers (Corps), and the U.S. Environmental Protection Agency (EPA) 3-5 (Sept. 27, 2023). The Agencies have also issued a set of guidance titled "Headquarters Field Memos Implementing the 2023 Rule, as Amended," which reopen certain jurisdictional determinations made before *Sackett*. *E.g.*, Memorandum on NWP-2023-602 (Mar. 19, 2024), https://www.epa.gov/system/files/documents/2024-03/nwp-2023-602_joint-decision-memo_final_508c.pdf. But those guidance documents have largely left field personnel at sea about the governing standards, and it is not tenable to craft the contours of the "waters of the United States" through case-by-case adjudication.

III. Statement of Grounds and Argument

The Agencies' post-*Sackett* conforming rule fails to abide by *Sackett*'s core teachings. The errors that infect the 2023 rule's reasoning cannot be cured by simply excising the significant nexus test. The Agencies' mistaken supposition to the contrary has left the 2023 rule with a conceptually confused preamble that fails to explain the operative regulatory text. And the rule's continuing inclusion of interstate waters (regardless of whether they are navigable), its failure to delineate the relatively permanent test in a manner consistent with caselaw, and its sweeping wetland coverage cannot be squared with *Sackett*. The Agencies should initiate a new rulemaking to address these serious deficiencies.

A. EPA's conforming rule improperly fails to amend the preamble to the 2023 rule and leaves no coherent explanation for the operative rule.

It is well-established that "the preamble to a regulation is evidence of an agency's contemporaneous understanding of its proposed rules" and serves "as a source of evidence concerning contemporaneous agency intent." *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999). "The purpose of the preamble, after all, is to explain what follows." *Public Citizen v. Carlin*, 184 F.3d 900 (D.C. Cir. 1999); *cf. Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1222-23 (D.C. Cir. 1996) (noting that a preamble may even have "independent legal effect" if the agency clearly intends "to bind either itself or regulated parties").

After the Agencies' conforming rule, however, the Agencies have left intact the 2023 rule's preamble, effectively conjoining that old explanation to new regulatory text. The resulting mishmash of concepts is unintelligible. The 2023 rule preamble's series of pervasive conceptual errors cannot be squared with the amended text or *Sackett*. As a consequence, regulated parties attempting to discern the Agencies' intent will be left only to guess at the rule's coverage. In short, a new rulemaking is required because *Sackett* compels not only a new rule, but a new explanation.

1. *Relatively Permanent.* Most fundamentally, the conforming rule leaves in place a now-incoherent explanation of the "relatively permanent" test. As explained above, the Agencies in the 2023 rule's preamble defined that standard in terms of—and characterized its validity as entirely derivative of—the significant nexus test. In excising the significant nexus test from the operative definition of "waters of the United States," therefore, the Agencies have rendered their own understanding of the "relatively permanent" standard a conceptual husk.

None of the 2023 rule's explanations of the relatively permanent standard can stand after *Sackett*. The preamble described "the relatively permanent standard" as nothing more than an "administratively useful" tool to identify a "subset of waters that will virtually always" satisfy the significant nexus test. 88 Fed. Reg. at 3038. Otherwise, the Agencies *rejected* that standard as having "no basis in the text of the statute" and running "counter to the science demonstrating how other categories of [non-relatively permanent] waters can affect the integrity of downstream waters." *Id.* at 3039. The Supreme Court has now made clear that it is actually the "'significant nexus' test" that lacks any "statutory basis." *Sackett*, 143 S. Ct. at 1342. But if the relatively permanent standard can no longer stand on the significant-nexus foundation, on what basis does it rest? The Agencies have not deigned to explain. Nor have the Agencies explained how the relatively permanent test will be applied in practice, independent of the significant nexus standard.

That is not an explanatory gap the Agencies may leave unfilled. An agency's "failure to explain its reading of the statute" makes it "impossible to conclude" that agency action is "anything other than arbitrary and capricious." *CSI Aviation Services, Inc. v. Dep't of Transp.*, 637 F.3d 408, 416 (D.C. Cir. 2011); *accord Verizon v. FCC*, 740 F.3d

623, 636 (D.C. Cir. 2014) ("The APA's requirement of reasoned decision-making ordinarily demands that an agency acknowledge and explain the reasons for a changed interpretation."); *Williams Natural Gas Co. v. FERC*, 943 F.2d 1320, 1327 (D.C. Cir. 1991) (agency must "lay out for the court its understanding of the statute").

As explained below, the Agencies should also amend the regulatory text to provide further guidance about the "relatively permanent" standard's contours. *See infra* pp. 21-23. But for present purposes, the mismatch between the 2023 rule's preamble and the operative regulatory text alone provides sufficient reason for the Agencies to initiate a new notice-and-comment rulemaking to define "waters of the United States."

2. ***The CWA's Federal-State Balance.*** Equally concerning, the conforming rule leaves undisturbed the 2023 rule preamble's fundamental misunderstanding of the CWA's protection of traditional state authority over land and water use.

In *Sackett*, the Supreme Court reiterated that the Agencies' sweeping "significant nexus" interpretation is unsupported by the sort of clear congressional statement needed to dramatically alter the States' traditional authority over land and water use. It is, after all, "hard to see how the States' role in regulating water resources would remain 'primary' if the EPA had jurisdiction over anything defined by the presence of water." *Sackett*, 143 S. Ct. at 1338 (quoting 33 U.S.C. § 1251(b)); *SWANCC*, 531 U.S. at 174. And the significant nexus test is fundamentally incompatible with the CWA's vision of a "partnership between the States and the Federal Government." *Sackett*, 143 S. Ct. at 1344 (quoting *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992)).

The Agencies reached a contrary conclusion in the 2023 rule by "subordinat[ing]" Congress's judgment to give States a "primary" role in § 1251(b) to the "overarching objective" of "restoring and maintaining the chemical, physical, and biological integrity of the nation's waters." 88 Fed. Reg. at 3043-44. The Agencies asserted that "section 101(b) as a whole does not reflect a general policy of deference to State regulation to the exclusion of Federal regulation," particularly given the balance of federal and state interests at play. *Id.* at 3044. But the Agencies misunderstood section 101(b), and they were not free to balance the federal-state interests in a manner contrary to Congress's judgment. As *Sackett* explained, under the CWA, "States can and will continue to exercise *their primary authority to combat water pollution* by regulating land and water use." *Sackett*, 143 S. Ct. at 1344 (emphasis added). *Sackett* thus expressly rejects the Agencies' view that the CWA's federalism policies serve only a subordinate, rather than "primary," role.

That error pervades the 2023 rule, and on that ground, too, a new rulemaking is required.

3. ***Other Conceptual Errors.*** Beyond those foundational errors, the 2023 rule's preamble is replete with other gauzy concepts the Supreme Court has now discarded as inconsistent with the statute, while failing to honor the concepts the Supreme Court *did* back in *Sackett*.

Much of the rule's preamble, for example, focuses on unmoored discussions of the Act's objectives and appeals to naked purposivism that stack the deck in favor of a broad interpretation of the Act. *E.g.*, 88 Fed. Reg. at 3023 ("the agencies conclude that a rule defining 'waters of the United States' must substantively consider the effects of a revised definition on the integrity of the nation's waters and advance the protection of the quality of those waters"). In adopting the *Rapanos* plurality's view, *Sackett* rejects that method in construing the Act. *See Rapanos*, 547 U.S. at 752 (plurality) ("We have often criticized that last resort of extravagant interpretation, noting that no law pursues its purpose at all costs, and that the textual limitations upon a law's scope are no less a part of its 'purpose' than its substantive authorizations."). Rather than construe the Act *broadly* in light of its purpose, as the 2023 rule's preamble repeatedly urges, *Sackett* cautioned that the Act must be construed more *narrowly* given its crippling penalties. 143 S. Ct. at 1342 ("Where a penal statute could sweep so broadly as to render criminal a host of what might otherwise be considered ordinary activities, we have been wary about going beyond what 'Congress certainly intended the statute to cover.'").

Relatedly, the 2023 rule's preamble repeatedly invokes the deference purportedly owed to the Agencies in light of their "scientific expertise and judgment." 88 Fed. Reg. at 3030. Even putting aside the Supreme Court's overruling of *Chevron* deference, *see Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024), the *Sackett* Court rejected the Agencies' efforts to substitute the *legal* question of what constitutes "waters of the United States" with scientific judgments: "[T]he CWA does not define the EPA's jurisdiction based on ecological importance." 143 S. Ct. at 1343. And it is untenable to assert after *Sackett*, as the Agencies perplexingly do, that the "scope of jurisdiction" should be informed by scientific determinations about how broad a scope "furthers Congress's objective to restore and maintain the chemical, physical, and biological integrity of the nation's waters." 88 Fed. Reg. at 3030. That simply indulges "the familiar tactic of substituting the purpose of the statute for its text, freeing the [Agencies] to write a different statute"—defining different jurisdictional bounds—"that achieves the same purpose," *Rapanos*, 547 U.S. at 755 (plurality); *see also id.* at 741 (noting that "ecological considerations" provide no "independent basis for including entities like 'wetlands' (or 'ephemeral streams') within the phrase 'the waters of the United States'").

Finally, while attempting to give effect to irrelevant *scientific* principles, the 2023 rule utterly fails to effectuate the governing *legal* principles *Sackett* established. The 2023 rule purported to give effect to navigability through the following explanation: "The agencies' construction of the Clean Water Act" gives effect to navigability "by defining 'waters of the United States' to include traditional navigable waters, the territorial seas, and interstate waters, and those waters that affect those waters." 88 Fed. Reg. at 3045. That is no explanation at all, and the conforming rule did not amend that discussion even after *Sackett* underscored the importance of "navigability." As discussed next, far from effectuating the term "navigable," the 2023 rule covers interstate waters *regardless of* whether they are navigable, and waters that merely "affect" traditionally navigable waters are of course not *themselves* "navigable waters." *Rapanos*, 547 U.S. at 755

(plurality) ("what possible linguistic usage would accept that whatever (alone or in combination) *affects* waters of the United States *is* waters of the United States?"). For those waters, the 2023 rule gives the term "navigable" no effect, its *ipse dixit* notwithstanding.

B. EPA's categorical inclusion of all interstate waters regardless of navigability violates the CWA.

The Agencies' post-*Sackett* conforming rule leaves in place "[i]nterstate waters" as "waters of the United States." That category of interstate waters includes "*all* rivers, lakes, and *other waters* that flow across, or form a part of, State boundaries." 88 Fed. Reg. 3072 (emphasis added). While the conforming rule eliminated "interstate wetlands" as covered interstate waters, a water remains one of the "waters of the United States" if it crosses a state line, no matter how isolated it is and regardless of navigability. The 2023 rule's preamble offers the Amargosa River—which flows from Nevada into a dry playa in Death Valley, California—as an example: "The Amargosa River is not a traditional navigable water and does not otherwise flow to a traditional navigable water or the territorial seas," 88 Fed. Reg. at 3072, but it is nonetheless a jurisdictional water.

That simply cannot be squared with *Sackett* or other judicial precedents interpreting "waters of the United States." As *Sackett* explained, waters of the United States are principally "bodies of navigable water like rivers, lakes, and oceans." 143 S. Ct. at 1337. While the CWA covers "more than traditional interstate navigable waters," the term "waters of the United States" must at minimum be defined by reference to such waters. *Id.* Accordingly, the "waters of the United States" embrace only "a relatively permanent body of water *connected to traditional interstate navigable waters*." *Id.* at 1340 (emphasis added). Such waters are (1) "*interstate* waters" that (2) are "either navigable in fact *and* used in commerce or readily susceptible to being used this way." *Id.* at 1330 (emphasis added). The 2023 rule's inclusion of intrastate waters and interstate waters that are *not* navigable and *not* used in commerce is incompatible with these principles. If anything, their inclusion reads the term "navigable" out of the statute. *See Georgia v. Wheeler*, 418 F. Supp. 1336, 1358-59 (S.D. Ga. 2019).

The CWA's statutory history confirms the point. As *Sackett* noted, the CWA's predecessor statutes expressly granted federal jurisdiction over "interstate waters," a term Congress proceeded to omit in the CWA. While the prior statute "encompassed 'interstate or navigable waters,' the CWA's geographical reach is *only* to "'navigable waters.'" *Sackett*, 143 S. Ct. at 661 (citations omitted) (emphasis added). If Congress had wanted to cover interstate waters, it "knew exactly how to do so." *SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 364 (2018). Congress's deliberate omission is controlling.

The 2023 rule's *ultra vires* inclusion of interstate waters mandates a new rulemaking. The Agencies should revisit the approach taken in the 2020 rule, excluding interstate waters that are not otherwise jurisdictional from the definition. *See* 85 Fed. Reg. at 22,284.

C. The 2023 rule's "relatively permanent" test cannot be squared with *Sackett*.

As described above, the 2023 rule has left a conceptual husk—the relatively permanent standard—to define "waters of the United States" in *Sackett*'s wake. But what little the 2023 rule does say about the relatively permanent standard is inconsistent with *Sackett*, and the failure to amend the rule's operative text to provide greater clarity should compel new rulemaking.

Sackett adopted the *Rapanos* plurality's relatively permanent test, reasoning that "the *Rapanos* plurality was correct: the CWA's use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" *Sackett*, 143 S. Ct. at 1336 (quoting *Rapanos*, 547 U.S. at 739 (plurality)). The 2023 rule's relatively permanent test—which applies to covered tributaries ((a)(3)), wetlands ((a)(4)(ii)), and intrastate waters ((a)(5)), as well as impoundments of (a)(3) and (a)(4) waters (88 Fed. Reg. at 3143)—does not comport with *Sackett*.

In the 2023 rule, the Agencies declined to define the scope of "relatively permanent" waters, construing that phrase in the preamble entirely in terms of the separate, significant nexus test. *See* 88 Fed. Reg. at 3034 ("The relatively permanent standard is administratively useful as it more readily identifies a subset of waters that will virtually always significantly affect paragraph (a)(1) waters"); *supra* pp. 13-14. The Agencies offered no guideposts for that standard, such as a minimum flow or duration. *See id.* at 3084-88.[2]

At best, the 2023 rule's preamble offered mere generalities: "[U]nder this rule the relatively permanent standard encompasses surface waters that have flowing or standing water year-round or continuously during certain times of the year" and does not include "surface waters with flowing or standing water for only a short duration in direct response to precipitation." 88 Fed. Reg. at 3084. But the Agencies did not explain how little flow or how short a duration must be to exclude a water. 88 Fed. Reg. at 3085 ("The agencies decided not to establish a minimum duration because flow duration varies extensively by region").

The result is significant uncertainty for regulated parties—and significant flexibility and discretion for the Agencies. Such regulatory uncertainty countermands *Sackett*'s repeated caution that the Agencies may not construe "waters of the United States" to leave "property owners . . . to feel their way on a case-by-case basis." 143 S. Ct. at 1342. That is precisely what the 2023 rule does.

The 2023 rule preamble's limited exposition of the relatively permanent test, for instance, suggests that it would include not only "flow [that] may occur seasonally," but

[2] The Agencies may also wish to consider whether the 2020 rule's "typical year" limitation is appropriate in light of *Sackett*, and if it chooses to revert to that concept, to consider providing more clarity on how the phrase "typical year" should be construed.

also features where flow ceases due to "various water management regimes and practices." 88 Fed. Reg. at 3085. And the Agencies have wide discretion to determine whether "these types of artificially manipulated regimes" create a relatively permanent flowing water: "the agencies may consider information about the regular manipulation schedule and may potentially consider other remote resources of on-site information to assess flow frequency." *Id.* Such an open-ended approach offers no readily ascertainable standard for regulated parties who may face criminal penalties for noncompliance.

The 2023 rule, to be sure, does note that "[r]elatively permanent waters do not include surface waters with flowing or standing water for only a short duration in direct response to precipitation." 88 Fed. Reg. at 3084. So "tributaries in the arid West" that are "dominated by coarse, alluvial sediments and exhibit high transmission losses, resulting in streams often dry rapidly following a storm event," are not relatively permanent. *Id.* at 3086. But the rule also maintains that "relatively permanent flow may occur as a result of multiple back-to-back storm events throughout a watershed" or even single "larger storm events." *Id.* at 3086-87. Between those poles, property owners are left "feel[ing] their way on a case-by-case basis"—precisely what *Sackett* cautions against. *Sackett*, 143 S. Ct. at 1342.

That said, the Agencies' proffered applications of the standard in the 2023 rule's preamble do make at least one thing clear: Their test permits much more than *Sackett* allows. The *Sackett* Court repeatedly underscored that "waters" under the CWA includes only bodies that would be identified in common parlance as "streams, oceans, rivers, and lakes." 143 S. Ct. at 1336. The 2023 rule, meanwhile, provides that the relatively permanent test "is meant to encompass" not only those quintessential "waters," but also "ponds" and "impoundments that are part of the tributary system." 88 Fed. Reg. at 3085.

The 2023 rule, moreover, fails to account for *Sackett*'s endorsement of the *Rapanos* plurality's illustration of the "relatively permanent" standard. As Justice Scalia explained, that test may encompass "streams, rivers, or lakes that might dry up *in extraordinary circumstances*, such as drought," and "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months—such as [a] *290-day, continuously flowing stream*." *Rapanos*, 547 U.S. at 732 n.5 (some emphases added). The Agencies' view that the "waters of the United States" can encompass features that receive intermittent or ephemeral flow or that flow only in response to occasional large storm events is in deep tension with *Sackett* and the *Rapanos*' plurality's guidance; such flows, of course, run for far less than a "season." "Common sense and common usage" suggest that these features are a mere "wash," not a "seasonal river." *Rapanos*, 547 U.S. at 732 n.5.

The Agencies should initiate a new rulemaking and revisit the guideposts the 2020 rule offered in defining the "relatively permanent" standard. *See* 85 Fed. Reg. at 22,273-76 (defining concepts like "typical year," "perennial," "ephemeral," and "intermittent").

The Agencies should also set a minimum flow duration of perennial flow as required to establish jurisdiction.

D. The 2023 rule's coverage of wetlands contradicts *Sackett*.

The conforming rule seeks to comply with *Sackett* by limiting the CWA's coverage to wetlands adjacent to relatively permanent bodies of water to which the wetland has "a continuous surface connection." 40 C.F.R. § 120.2(a)(4)(ii); 33 C.F.R. § 328.3(a)(4)(ii).

Parroting the right vocabulary is a step in the right direction, but the Agencies problematically offer little guidance on what "continuous surface connection" is required. And, again, what little the Agencies do say contravenes *Sackett*'s core tenets. The 2023 rule notes, for instance, that a continuous surface connection "does not require a constant hydrologic connection." 88 Fed. Reg. at 3102. Even a minimal hydrologic connection, meanwhile, can apparently suffice. The 2023 rule suggests, for instance, that unquantified "seepage" to traditional navigable waters across a barrier can count as a "continuous surface connection." *Id.* at 3076. So nothing precludes *any* physical surface connection—a rill, swale, pipe or ditch, even if usually dry—from triggering federal jurisdiction (and the concomitant threat of the CWA's penalties).

Those views cannot be squared with *Sackett*. Under *Sackett*, "the CWA extends only to those wetlands that are 'as a practical matter indistinguishable from [WOTUS].'" 143 S. Ct. at 1340-41 (quoting *Rapanos*, 547 U.S. at 755 (plurality)). Thus, a wetland must (1) be adjacent to a jurisdictional water (2) in such a way that "the wetland has a continuous surface connection with that water, making it difficult to determine where the water ends and the wetland begins." *Id.* (internal quotation marks omitted). "[A] barrier separating a wetland from a water of the United States would ordinarily remove that wetland from federal jurisdiction." *Id.* at 1341 n.16. When there is no constant surface water connection, there is no difficulty determining where water ends and the wetlands begins.

The Fifth Circuit recently adopted that view of *Sackett*, holding that a wetland must be "indistinguishable from" a covered water to fall within the Agencies' regulatory authority. *Lewis v. United States*, 88 F.4th 1073, 1078 (5th Cir. 2023). Applying that formulation, the *Lewis* court held that the Agencies could not assert jurisdiction over a wetland where the "nearest relatively permanent body of water [was] removed miles away . . . by roadside ditches, a culvert, and a non-relatively permanent tributary." *Id.* at 1079. Federal jurisdiction over the wetland could not lie because "it is not difficult to determine where the 'water' ends and any 'wetlands' on Lewis's property begin." *Id.*

Magistrate Judge Maynard in the Southern District of Florida has backed the same conclusion in an enforcement action by the federal government against private property owners for causing discharges of dredged material into a Florida wetland complex. *United States v. Sharfi*, 2024 WL 4483354, at *1-2, *12 (S.D. Fla. Sept. 21, 2024) (report and recommendation). The wetlands at issue in *Sharfi* abutted manmade drainage ditches that connected to traditional navigable waters. Relying on *Sackett*, Judge Maynard

concluded that the wetlands were not covered and recommended the grant of summary judgment to the property owners.

Judge Maynard first found that the abutting ditches were not themselves navigable waters, because they "are not geographical features ordinarily described as streams, oceans, rivers, or lakes"—that is, "relatively permanent, standing, or continuously flowing bodies of water." 2024 WL 4483354, at *12. Even if those ditches *were* qualifying waters, Judge Maynard continued, "there is no evidence to show a continuous surface connection between the wetlands on Defendants' Site and any of these ditches." *Id.* at *13. And absent a continuous surface *water* connection, there was no difficulty discerning where the wetlands ended and the ditches began. *Id.* The wetlands therefore neither abutted a "water of the United States," nor were "as a practical matter indistinguishable from waters of the United States." *Id.* at *11 (quoting *Sackett*, 598 U.S. at 678).

In sum, "*Sackett* created a bright line test that requires a party asserting federal jurisdiction over wetlands to show an adjacent body of water constituting WOTUS and a continuous surface connection between the waters and the wetlands such that the two are indistinguishable." *Sharfi*, 2024 WL 4483354, at *13. The 2023 rule flouts that principle. Because the 2023 rule requires no connection sufficient to render a wetland "indistinguishable" from a covered water, it violates the CWA.

E. Given the above errors, the Rule's definition of impoundments and tributaries cannot stand.

The above-discussed errors trigger cascading errors throughout the rest of the rule. The 2023 rule (paragraph (a)(2)) covers, for instance, impoundments not only of traditional navigable waters, but also of interstate waters and jurisdictional tributaries and wetlands. To the extent the underlying water body is not properly jurisdictional, impoundments of those waters cannot be jurisdictional, either. An impoundment of an isolated, non-navigable interstate water cannot be one of the "waters of the United States" unless it independently qualifies as one.

The Agencies likewise assert jurisdiction over tributaries of interstate waters. But if coverage of interstate waters is invalid, so too is coverage of non-navigable tributaries of such waters. To compound matters, the 2023 rule's definition of tributary ignores *Sackett*'s requirement that the "waters of the United States" encompass only a relatively permanent body of water that would be considered a river or stream in ordinary parlance. For instance, the Agencies clearly consider many ditches to be tributaries under the Rule, *see* 88 Fed. Reg. at 3142, but these structures (often man-made) bear no resemblance to a river, lake, or stream. *See Sharfi*, 2024 WL 4483354, at *12.[3]

[3] Beyond the 2023 rule's noncompliance with *Sackett*, the Agencies may also wish to consider broadening the exclusions for "prior converted cropland" and "ditches." As to prior converted cropland, the Agencies should consider deeming them non-jurisdictional even upon a change in use. *See* 40 C.F.R. § 140.2(b)(2) (2023). And as to ditches, the Agencies should consider removing the modifier "excavated wholly in

CONCLUSION

The Agencies' numerous errors in defining the "waters of the United States" strongly counsel in favor of a new rulemaking both to bring the Agencies into compliance with federal law and to provide regulated parties with clarity on the scope of federal authority. A proposed revised regulatory text, redlined over the operative 2023 rule, is **attached as Appendix 1**. The Institute for Energy Research respectfully petitions the Agencies to initiate a new rulemaking to define the "waters of the United States."

and draining only dry land"; any ditch that does not carry a relatively permanent flow of water is not a water of the United States, full stop. *See id.* § § 140.2(b)(3).

KEY

Green = addition
Red = deletion

Appendix 1 – Regulatory Text

40 C.F.R. § 120.2

§ 120.2 Definitions.

For the purpose of this regulation these terms are defined as follows:

(a) Waters of the United States means:

(1) Waters which are:

(i) Currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including ~~all~~ waters which are subject to the ebb and flow of the tide; and

(ii) The territorial seas~~; or~~

~~(iii) Interstate waters;~~

~~(2) Impoundments of waters otherwise defined as waters of the United States under this definition, other than impoundments of waters identified under paragraph (a)(5) of this section;~~

(~~3~~2) Tributaries of waters identified in paragraph (a)(1) ~~or (2) of this section~~ that are relatively permanent, standing or continuously flowing bodies of water;

(~~4~~3) Adjacent wetlands; ~~Wetlands adjacent to the following waters:~~

~~(i) Waters identified in paragraph (a)(1) of this section; or~~

~~(ii) 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;~~

(~~5~~4) ~~Intrastate l~~Lakes, ~~and~~ ponds, and impoundments of jurisdictional waters. ~~not identified in paragraphs (a)(1) through (4) of this section that~~

~~are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3) of this section.~~

(b) The following are not "waters of the United States" ~~even where they otherwise meet the terms of paragraphs (a)(2) through (5) of this section~~:

(1) Waters or water features that are not identified in paragraph (a);

(2) Groundwater, including groundwater drained through subsurface drainage systems;

(3) Ephemeral features, including ephemeral streams, swales, gullies, rills, and pools;

(4) Waste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the Clean Water Act;

(~~2~~5) Prior converted cropland designated by the Secretary of Agriculture. ~~The exclusion would cease upon a change of use, which means that the area is no longer available for the production of agricultural commodities.~~ Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA;

(~~3~~6) Ditches (including roadside ditches) ~~excavated wholly in and draining only dry land and~~ that do not carry a relatively permanent flow of water;

(~~4~~7) Artificially irrigated areas that would revert to dry land if the irrigation ceased;

(~~5~~8) Artificial lakes or ponds created by excavating or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;

(~~6~~9) Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating or diking dry land to retain water for primarily aesthetic reasons; and

(~~7~~10) Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is

abandoned and the resulting body of water meets the definition of waters of the United States.~~; and~~

~~(8) Swales and erosional features (e.g., gullies, small washes) characterized by low volume, infrequent, or short duration flow.~~

(c) In this section, the following definitions apply:

(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.

(2) ~~Adjacent means having a continuous surface connection.~~ Adjacent wetlands means wetlands that:

(A) Abut, meaning to touch at least at one point or side of, a water identified in paragraph (a)(1), (2), or (4) of this definition such that the wetland has a continuous surface connection with that water; or

(B) Are inundated by flooding from a water identified in paragraph (a)(1), (2), or (4) of this definition.

(3) High tide line means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

(4) Ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(5) Tidal waters means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(6) Ditch means a constructed or excavated channel used to convey water.

(7) Ephemeral means surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall).

(8) Intermittent means surface water flowing continuously during certain times of the year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts).

(9) Lakes, ponds, and impoundments of jurisdictional waters means standing bodies of open water that contribute surface water flow to a water identified in paragraph (a)(1) of this definition either directly or through one or more waters identified in paragraph (a)(1) or (2) of this definition.

(10) Perennial means surface water flowing continuously year-round.

(11) Tributary means a river, stream, or similar naturally occurring surface water channel that contributes surface water flow to a water identified in paragraph (a)(1) of this definition either directly or through one or more waters identified in paragraphs (a)(3) or (4). A tributary must be perennial or intermittent. The term tributary includes a ditch that either relocates a tributary, is constructed in a tributary, or is constructed in an adjacent wetland as long as the ditch satisfies the flow conditions of this definition.