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January 1, 2026

Honorable Lee M. Zeldin
Administrator
Environmental Protection Agency
EPA Docket Center, Water Docket
1200 Pennsylvania Ave. NW, MC 28221T
Washington, DC 20460

Honorable Daniel P. Driscoll
Secretary of the Army
Department of the Army
Attn: Assistant Secretary (Civil Works)
101 Army Pentagon
Washington, DC 20310-0101

Dear Mr. Administrator and Mr. Secretary:

RE: Environmental Protection Agency and Department of the Army
Notice Titled "Updated Definition of 'Waters of the United States,'"
EPA-HQ-OW-2025-0322, 90 *Fed. Reg.* 52498 (Nov. 20, 2025)

This letter presents comments of the National Federation of Independent Business (NFIB)¹ in response to the notice of proposed rulemaking from the Environmental Protection Agency (EPA) and the Department of the Army, together "the Agencies," titled "Updated Definition of 'Waters of the United States,'" and published in the *Federal Register* of November 20, 2025. The Clean Water Act (the "Act" or CWA) prohibits the discharge of pollutants into "navigable waters," defined as "the waters of the United States" plus the territorial seas.² The proposed rule addresses under what circumstances the CWA covers a wetland.

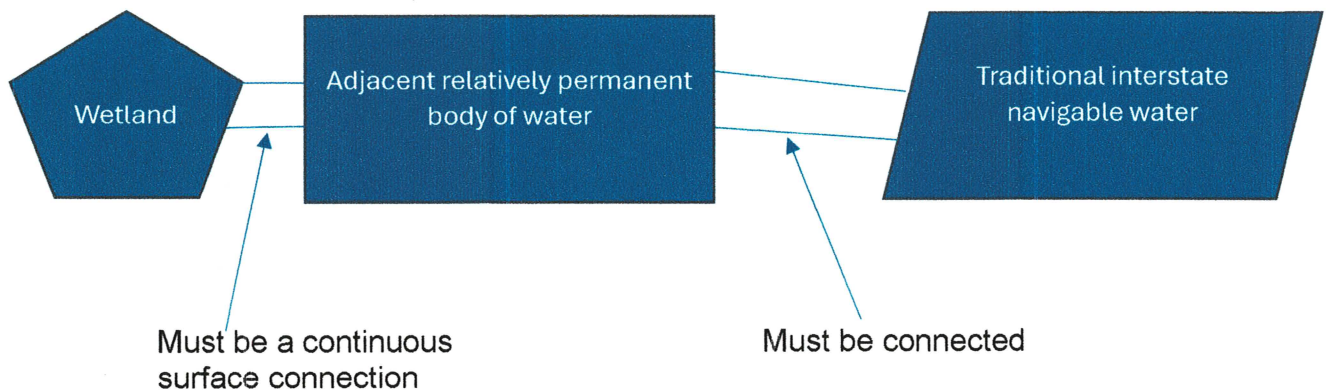
In *Sackett v. EPA* in 2023 ("*Sackett*"), the U.S. Supreme Court determined when the Clean Water Act extends to a wetland:

¹ NFIB is an incorporated nonprofit association representing small and independent businesses. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and ensures that governments of the United States and the fifty states hear the voice of small business as they formulate public policies. NFIB's membership includes landowners affected by the Clean Water Act.

² See 33 U.S.C. 1311(a) (prohibiting "discharge of any pollutant," with exceptions); 1362(6) (defining "pollutant"); 1362(12) (defining "discharge of a pollutant" to include "addition of any pollutant to navigable waters from any point source"); and 1362(7) ("The term 'navigable waters' means the waters of the United States, including the territorial seas.").

In sum, we hold that the CWA extends to only those wetlands that are “as a practical matter indistinguishable from waters of the United States.” This requires the party asserting jurisdiction over adjacent wetlands to establish “first, that the adjacent [body of water constitutes] . . . ‘water[s] of the United States,’ (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”³

The chart below illustrates this *Sackett* two-part test:



As the Agencies assist the President in faithfully executing the Clean Water Act, they must adhere carefully to the proper meaning of the Act, including the statutory phrase “waters of the United States” as the U.S. Supreme Court authoritatively construed it in *Sackett*.⁴ The proposed rule incorporates correctly some of the Court’s interpretations of the CWA, such as in excluding from the definition of wetland “ditches . . . constructed or excavated in dry land” and “groundwater”[.] But the proposed rule fails to implement *Sackett* correctly with its proposed definition of “Relatively permanent,” its proposed definition of “Continuous surface connection,” and the burden on what the Supreme Court called “the party asserting jurisdiction” (that is, the Agencies, in most cases). The proposed rule also fails to take proper account of the needs of small businesses in accordance with the policy of the Regulatory Flexibility Act. Changes to the proposed rule requested and recommended by NFIB appear below in bold typeface for reader convenience.

³ *Sackett v. EPA*, 598 U.S. 651, 678-79 (2023) (citations omitted). See also *Sackett* at 684 (“In sum, we hold that the CWA extends to only those ‘wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right,’ so that they are ‘indistinguishable’ from those waters.”).

⁴ *Sackett v. EPA*, 598 U.S. 651 (2023) (meaning of “waters of the United States”); see, *Sackett v. EPA*, 566 U.S. 120 (2012) (availability of judicial review).

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1. “Relatively Permanent” Does Not Mean Standing or Continuously Flowing During the “Wet Season”

In the first part of its two-part test for determining what wetlands the Clean Water Act reaches, the Supreme Court said that the party asserting jurisdiction over a wetland must establish: “first, that the adjacent [body of water constitutes] . . . ‘water[s] of the United States,’ (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters)[.]” The Agencies’ proposed rule defines “relatively permanent” as used by the Supreme Court in *Sackett* to mean “standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season.”⁵ The use of the phrase “or at least during the wet season” is inconsistent with the Clean Water Act as construed by the Supreme Court in *Sackett*.

The Supreme Court was clear in *Sackett* that “waters of the United States” means “a relatively permanent body of water connected to traditional interstate navigable waters” plus “only those wetlands that are ‘as a practical matter indistinguishable from waters of the United States.’”⁶ The preamble to the Agencies’ proposed rule addresses properly

⁵ Proposed 33 CFR 328.3(c)(8), 90 *Fed. Reg.* at 52545, col. 3, and proposed 40 CFR 120.2(c)(8), 90 *Fed. Reg.* at 52546.

⁶ *Sackett* at 678-79.

the two cases at the ends of the “waters of the United States” spectrum: “standing or continuously flowing bodies of surface water” are waters of the United States and “ephemeral waters (*i.e.*, those with surface water flowing or standing only in direct response to precipitation (*e.g.*, rain or snow fall))” are not waters of the United States.⁷ But the Agencies addressed the cases that fall in between “standing or continuously flowing” and “ephemeral” only by fiat, dictating that “waters of the United States” include a body of water that stands or flows continuously “at least during the wet season.” The Agencies’ proposed construction of the phrase “relatively permanent” body of water to mean a body of water that stands or flows continuously during the “wet season” has no anchor in the text of the statute or in the *Sackett* decision.

The Clean Water Act regulates discharge into “navigable waters” and defines “navigable waters” as “waters of the United States” plus territorial waters. The statute says nothing about a “wet season.” Indeed, just as the Supreme Court said in *Sackett* “the CWA never mentions the ‘significant nexus’ test, so the EPA has no statutory basis to impose it,”⁸ so, too, the CWA never mentions the “wet season” test, and so the Agencies have no statutory basis to impose it. Absent a definition of “waters of the United States” in the statute, the Agencies must turn for its meaning to the Supreme Court’s controlling decision in *Sackett* in 2023.

The Supreme Court in *Sackett* used the phrase “relatively permanent” in conjunction with the phrase “body of water connected to traditional interstate navigable waters.” Regarding the meaning of the word “relatively,” the Supreme Court acknowledged that sometimes a temporary interruption might occur “because of phenomena like low tides or dry spells.”⁹ Thus, *Sackett* requires that the body of water adjacent to the wetland be a permanent body of water connected to traditional interstate navigable waters, except that “relatively” allows a temporary interruption that occurs because of a phenomenon like low tides or dry spells.

⁷ 90 *Fed. Reg.* at 52517, col. 3, to 52518, col. 1.

⁸ *Sackett* at 680.

⁹ *Sackett* at 678. Note that the acknowledgement in *Sackett* that a temporary interruption because of a phenomenon like low tides or dry spells would not break permanence was much narrower than what four members of the Court had proposed in *Rapanos v. United States*, 547 U.S. 715, 732 n. 5 (2006) (plurality opinion) (“By describing ‘waters’ as ‘relatively permanent’ we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months—such as the 290-day, continuously flowing stream postulated by Justice STEVENS’ dissent (hereinafter the dissent), *post*, at 2259–2260. Common sense and common usage distinguish between a wash and seasonal river.”).

Accordingly, to correct the shortcomings of the Agencies' proposed definition of "Relatively permanent," NFIB recommends and requests that the Agencies revise proposed 33 CFR 328.3(c)(8) and proposed 40 CFR 120.2(c)(8) to read:

(8) *Relatively permanent* means bodies of surface water that are connected to traditional interstate navigable waters and are standing or continuously flowing year-round. Temporary interruptions that occur because of phenomena like low tides or dry spells do not break permanence. Ephemeral bodies of surface water, such as those flowing or standing only in direct response to precipitation (for example, rain or snow fall), are not "relatively permanent."

2. "Continuous Surface Connection" Does Not Mean Having Surface Water During the "Wet Season"

In the second part of its two-part test for determining what wetlands the Clean Water Act reaches, the Supreme Court said that the party asserting jurisdiction over a wetland must establish: "second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." The Supreme Court did not use the phrase "relatively permanent" in connection with the second part of its two-part test, nor any other modifier that would make exceptions to the requirement for a "continuous surface connection."

The Agencies' proposed rule would define "continuous surface connection" to mean "having surface water at least during the wet season and abutting (*i.e.*, touching) a jurisdictional water."¹⁰ The Agencies' proposed rule plainly conflicts with *Sackett* by gutting the meaning of the word "continuous." The Supreme Court in *Sackett* required a "continuous" connection -- which in plain English means a physical connection all the time and not just some of the time -- but the Agencies' proposed rule requires the physical connection only during the wet season. There is no statutory or rational basis upon which the Agencies can convert the Supreme Court's "continuous" connection requirement into a looser requirement for a connection only "during the wet season."

The Agencies state that "[t]he proposed requirement of having surface water at least during the wet season implements the 'indistinguishable' concept articulated in the *Rapanos* plurality and *Sackett* opinions."¹¹ But the proposed rule does not do so. For a wetland to come within the reach of the CWA, it must, as the Court's opinion in *Sackett* stated, have a "continuous" surface connection with the relatively permanent body of water connected to traditional interstate navigable waters, and not a "sometime" surface

¹⁰ Proposed 33 CFR 328.3(c)(3), 90 *Fed. Reg.* at 52545, col. 3, and proposed 40 CFR 120.2(c)(3), 90 *Fed. Reg.* at 52546, col. 2.

¹¹ 90 *Fed. Reg.* at 52528, col. 2.

connection. The Agencies conclude – as if their saying it suffices to make it true -- that “the agencies view indistinguishability during the wet season as sufficient to satisfy the *Sackett* test.”¹² Wishing does not make it so.¹³

The Agencies said that “[r]equiring permanent indistinguishability based on permanent surface water in both the paragraphs (a)(1) through (3) and (a)(5) water and the adjacent wetland would read the modifier ‘relatively’ out of the interpretation of ‘relatively permanent’ (as discussed in section V.C.2. of this preamble) and render the vast majority of wetlands nonjurisdictional, which the agencies propose is not the best reading of the Clean Water Act under *Sackett*.”¹⁴ First, the Agencies do not get to decide or even propose what is the best reading of the Clean Water Act; the Supreme Court has already decided that in *Sackett*.¹⁵ And in *Sackett* the Court stated clearly that the CWA does not reach a wetland absent a “continuous surface connection.” Secondly, the Agencies complain that, without their wet-season-suffices approach, the word “relatively” is read out of the *Sackett* phrase “relatively permanent.” But the *Sackett* phrase “relatively permanent” appears only in the first part of the two-part test, which identifies bodies of water, and not in the second part, which deals with continuous surface connection. And even if the phrase “relatively permanent” were relevant to the second part of the test (which it is not), the Agencies’ proposal reads the “permanent” out of the phrase “relatively permanent.” Requiring a surface connection only during a “wet season” does not even come close to respecting the Court’s use of the phrases “relatively permanent” and “continuous surface connection.” Finally, with regard to the Agencies concern that, absent the Agencies’ “wet season” interpretive approach, *Sackett* will “render the vast majority of wetlands nonjurisdictional,” the Agencies must understand from *Sackett* that maximization of the reach of the Agencies is not a purpose of the Clean Water Act and that the intent of the Act is for the States, and not the Agencies, to have the “primary” role with respect to clean water.¹⁶ In short, the

¹² 90 *Fed. Reg.* at 52528, col. 2.

¹³ Lev Grossman, *The Magicians*, New York: Penguin Press (2009), p. 216. (“If there’s a single lesson that life teaches us, it’s that wishing doesn’t make it so.”).

¹⁴ 90 *Fed. Reg.* at 52528, col. 2.

¹⁵ See *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 392 (2024) (In reference to section 706 of Title 5 of the U.S. Code (a part of what is commonly called the Administrative Procedure Act, or APA): “. . . [B]y directing courts to ‘interpret constitutional and statutory provisions’ without differentiating between the two, Section 706 makes clear that agency interpretations of statutes—like agency interpretations of the Constitution—are *not* entitled to deference. Under the APA, it thus ‘remains the responsibility of the court to decide whether the law means what the agency says.’”).

¹⁶ Section 101 of the Clean Water Act (33 U.S.C. 1251(b)) (“It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act.”).

Supreme Court's construction of the Clean Water Act in *Sackett* to require that the surface connection be "continuous" is a feature, and not a bug, of the Act and *Sackett*.

Accordingly, to correct the shortcomings of the Agencies' proposed definition of "Continuous surface connection," NFIB recommends and requests that the Agencies revise proposed 33 CFR 328.3(c)(3) and proposed 40 CFR 120.2(c)(3) to read:

(3) *Continuous surface connection* means having surface water that year-round abuts (that is, touches) a body of water connected to traditional interstate navigable waters.

3. Need for the Proposed Rule to Recognize the Agencies' Burden of Proof, the Agencies' Duty to Provide Due Process, and the Right to Use An Attorney

The proposed rule should include appropriate safeguards to protect the rights of landowners. First, in *Sackett*, the Supreme Court said that "the party asserting jurisdiction" over a wetland must "establish" the two elements required for the Clean Water Act to reach the wetland. The party asserting jurisdiction, in most situations, would be one of the Agencies. From statements in the preamble to the proposed rule, the Agencies appear to recognize that, when they seek to exercise authority over a wetland, they bear the burden of proving the elements required under the CWA as construed in *Sackett* that are preconditions for the Agencies to exercise such authority.¹⁷ However, the proposed rule itself does not incorporate the Agencies' understanding that they bear the burden of proving that the Clean Water Act applies when they seek to exercise authority over wetlands. While the statements in the preamble are welcome, they do not bind the Agencies, whereas incorporation into the final rule of a clear statement of the burden of proof would bind the Agencies.¹⁸ Secondly, the Agencies must afford due process of law whenever they seek to deprive a person of liberty or property, such as when they propose to limit land use by a

¹⁷ See 90 *Fed. Reg.* at 52515, col. 2 ("When preparing an approved jurisdictional determination, which is typically made at the request of a landowner or applicant, the agencies bear the burden of proof in demonstrating that an aquatic resource meets the requirements under the proposed rule to be jurisdictional or excluded."); 52538, col. 1 (Discussing what happens after the agencies determine that the prior converted cropland exclusion does not apply: "In all cases, the burden to prove that such parcel is a 'water of the United States' remains on the agencies."); and 52541, col. 1 ("Under the proposed rule, the burden of proof lies with the agencies to demonstrate that a ditch serves to relocate a tributary or was constructed or excavated in a tributary or other aquatic resources. Where the agencies cannot satisfy this burden, the ditch at issue would be considered nonjurisdictional under the proposed rule.").

¹⁸ See, e.g., *Peabody Twentymile Mining, LLC v. Secretary of Labor*, 931 F. 3d 992, 998 (10th Cir. 2019) ("Moreover, while the preamble can inform the interpretation of the regulation, it is not binding and cannot be read to conflict with the language of the regulation itself. . . . Here, the limitations that appear in the preamble do not appear in the language of the regulation, and we refuse to engraft those limitations onto the language.").

landowner. As the Supreme Court has made clear, notice of a potential agency action and an opportunity to be heard constitute the principal requirements of due process, with the scope and formality of the notice and the opportunity to be heard varying with the nature of the private interest affected; the risk of erroneous deprivation of liberty or property, and the probable value, if any, of additional safeguards; and the Government's interests, including the function involved and the burdens of additional or different procedures.¹⁹ The Agencies' final rule therefore should afford appropriate due process. Finally, given the complexity of implementation of the Clean Water Act, a party that a potential agency decision or action might affect should have the right to use an attorney in the exercise of the opportunity to be heard. The Government should not, of course, have a duty to fund that legal representation.

Accordingly, NFIB recommends and requests that the Agencies include in the final rule the following:

[33 CFR 328.6]

§ 328.6 Burden of proof; notice and opportunity to be heard; use of attorney.

(a) The Department of the Army shall bear the burden of pleading, production, and persuasion in administrative processes and proceedings and judicial proceedings in which the applicability of the Clean Water Act to a body of water or a wetland is at issue.

(b) In implementing the Clean Water Act, the Department of the Army shall give notice of a proposed action to potentially affected parties and shall afford them an opportunity to be heard, in writing or orally, or both, as appropriate, before the Department makes a final decision or takes final action.

(c) In the implementation of this section, a potentially affected party has a right to be represented by an attorney at no expense to the United States Government.

[40 CFR 120.3]

§ 120.3 Burden of proof; notice and opportunity to be heard; use of attorney.

(a) The Environmental Protection Agency shall bear the burden of pleading, production, and persuasion in administrative processes and proceedings and judicial proceedings in which the applicability of the Clean Water Act to a body of water or a wetland is at issue.

¹⁹ *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976).

(b) In implementing the Clean Water Act, the Environmental Protection Agency shall give notice of a proposed action to potentially affected parties and shall afford them an opportunity to be heard, in writing or orally, or both, as appropriate, before the Agency makes a final decision or takes final action.

(c) In the implementation of this section, a potentially affected party has a right to be represented by an attorney at no expense to the United States Government.

4. Need to Take Proper Account of the Concerns of Small Businesses In Implementing the Clean Water Act

Small businesses cannot afford the lawyers, accountants, and clerks that larger companies use to decipher and comply with complex laws, regulations, and court decisions, such as the Clean Water Act, the Agencies' rules that implement it, and the myriad court decisions that have construed it. Instead, most small business owners engage in do-it-yourself compliance. When the Agencies help small businesses to comply with the CWA and related regulations and judicial decisions, they serve the goals of the Clean Water Act much better than when they impose civil penalties or other remedies or pursue prosecutions. Accordingly, the Agencies should emphasize efforts to educate small businesses about their regulations. Often, a small business owner hears of a regulation for the first time when a government agency finds a violation. Small business owners acting in good faith should have an opportunity to correct such a violation and come into compliance, without penalties or enforcement actions. Thus, when the Agencies write regulations, they should provide for enforcement against small businesses only in cases of willful or repeated violations.

Policies set forth in law by Congress support consideration of the needs of small businesses in the enforcement context. In paragraph 2(a)(4) of the Regulatory Flexibility Act²⁰ (RFA), Congress declared that "the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity" Congress also noted in paragraph 2(a)(6) of the RFA that "the practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems, and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation ."

Accordingly, NFIB recommends and requests that the Agencies include in the final rule the following:

²⁰ Public Law 96-354, 5 U.S.C. 601 note.

[33 CFR 328.7]**§ 328.7 Small businesses; education; enforcement.**

Taking account of the policies established in section 2 of the Regulatory Flexibility Act (5 U.S.C. 601 note), the Department of the Army, in coordination with the Environmental Protection Agency, shall (1) establish or participate in an appropriate program, subject to the availability of appropriations, to educate businesses with fewer than 50 employees on compliance with the Clean Water Act, and (2) not take or pursue enforcement action for a violation of the Clean Water Act or regulations implementing that Act against a business with fewer than 50 employees, or an owner thereof, except in the case of a willful violation or a repeated violation.

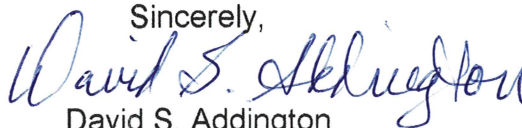
[40 CFR 120.4]**§ 120.4 Small businesses; education; enforcement.**

Taking account of the policies established in section 2 of the Regulatory Flexibility Act (5 U.S.C. 601 note), the Environmental Protection Agency, in coordination with the Department of the Army, shall (1) establish or participate in an appropriate program, subject to the availability of appropriations, to educate businesses with fewer than 50 employees on compliance with the Clean Water Act, and (2) not take or pursue enforcement action for a violation of the Clean Water Act or regulations implementing that Act against a business with fewer than 50 employees, or an owner thereof, except in the case of a willful violation or a repeated violation.

* * * * *

The National Federation of Independent Business appreciates the opportunity to submit comments for consideration by the Environmental Protection Agency and the Department of the Army as they continue to adjust their regulations to implement accurately the Clean Water Act as construed by the courts. Careful adherence by the Agencies to the decisions of the courts construing the Clean Water Act, and especially the decision in 2023 of the U.S. Supreme Court in *Sackett v. EPA*, will help keep America's waters clean and protect the property rights of America's landowners, including America's small businesses.

Sincerely,



David S. Addington

Executive Vice President and General Counsel