Attorneys General of California, New York, Colorado, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Oregon, Rhode Island, Vermont, Washington, Wisconsin, and District of Columbia, and the City of New York

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Via Electronic Submission

Lee Zeldin, Administrator
U.S. Environmental Protection Agency
EPA Docket Center, Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Adam Telle
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Washington, D.C. 20310-0104

RE: Updated Definition of "Waters of the United States," 90 Fed. Reg. 52,498 (Nov. 20, 2025); Docket ID No. EPA–HQ–OW–2025–0322

Dear Administrator Zeldin and Assistant Secretary Telle:

The Attorneys General of California, New York, Colorado, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Oregon, Rhode Island, Vermont, Washington, Wisconsin, and District of Columbia, and the City of New York (the States) submit these comments regarding the U.S. Environmental Protection Agency's (EPA) and the U.S. Army Corps of Engineers' (Army Corps) (collectively, the Agencies) proposed *Updated Definition of "Waters of the United States"* (Proposed Rule). *See* 90 Fed. Reg. 52,498 (Nov. 20, 2025). We urge you to withdraw this proposal and not take any action to alter the existing "waters of the United States" definition, *see* 33 C.F.R. § 328.3 (2023) (Conforming Rule), which incorporates all the relevant requirements set forth in *Sackett v. EPA*, 598 U.S. 651 (2023). Moreover, the Proposed Rule introduces ambiguous terms and restrictive requirements that are inconsistent with both applicable law and accepted science. If finalized, the Proposed Rule may result in removal of federal protections from countless rivers, streams, and wetlands, rolling back and undermining the improvements achieved under the Clean Water Act, 33 U.S.C. § 1251 *et seq.* over the last 50 years.

The definition of "waters of the United States" determines which waters receive basic Clean Water Act protections under multiple provisions of the Act, creating a uniform "national floor" of water quality protection by establishing minimum pollution controls for those waters. *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992) (the Clean Water Act authorizes EPA "to create and manage a uniform system of interstate water pollution regulation"). Without these

protections, our water resources become at risk for uncontrolled pollution and destruction since in many of the states the Clean Water Act also is the touchstone for state protection. We oppose any attempt to further narrow Clean Water Act protections beyond the limits under the *Sackett* decision.[1]

When considering how to protect public health and the environment from water pollution, the importance to clean water of small streams and wetlands is indisputable, and protection of these aquatic resources is essential for the Clean Water Act to function as Congress intended. In concurring in the judgment in *Sackett*, Justice Kagan described how, in the Clean Water Act, Congress comprehensively addressed a water pollution problem of "crisis proportions" through an "all-encompassing program of water pollution regulation . . . broad enough to achieve the codified objective of 'restor[ing] and maintain[ing] the chemical, physical and biological integrity of the Nation's waters [33 U.S.C.] § 1251(a)'". *Sackett*, 598 U.S. at 711 (internal citations omitted). The concurrence further described the importance of wetlands, which "function as integral parts of the aquatic environment," quoting *U.S. v. Riverside Bayview Homes*, 474 U.S. 121, 134 (1985). *Id*. "[W]etlands play a crucial part in flood control (if anything, more needed now than when the statute was enacted)" and "serve to filter and purify water," thereby "protecting neighboring water if themselves healthy, [and] imperiling neighboring water if instead degraded." *Id.* at 711-12 (internal citations omitted).

The science demonstrating the functional connectivity of smaller streams and wetlands to larger downstream waters, and the significant effect that the health of these upstream waters has on downstream waters' health, has become clearer since the findings by EPA's Office of Research and Development in the peer-reviewed report, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Final Report)* (EPA/600/R-14/475F, 2015). In the interest of a science-based approach to public health and to secure our shared environmental resources, now is the time to strengthen, not weaken, clean water protections for all Americans.

The Agencies' stated goals in the Proposed Rule are to adhere to the *Sackett* decision, respect cooperative federalism principles, carry out the Clean Water Act's objective to restore and maintain the integrity of the Nation's waters, and provide predictability, clarity, and consistency to states, tribes, and the public. The Proposed Rule not only fails to meet these goals but also flouts the requirements of the Administrative Procedure Act, 5 U.S.C. § 551 et seq. Specifically, the Proposed Rule illegally removes "interstate waters" as a category of "waters of the United States," defines "relatively permanent" inconsistently with *Sackett*, defines "continuous surface connection" in a way that is contrary to law and lacks rational basis, and incorrectly expands the "ditches" exclusion from "waters of the United States."

I. Removing "Interstate Waters" As A Category Conflicts with the Clean Water Act and Undermines the States' Significant Reliance Interests.

The Proposed Rule illegally removes "interstate waters" entirely as a category of "waters of the United States." Congress passed the Clean Water Act in part to prevent harms to

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[1] *See* NRDC. *Mapping Destruction*. *GIS Modeling Reveals Disastrous Impacts of Sackett v. EPA on America's Wetlands.* Natural Resources Defense Group, R:25-03-B, 2025. (Retrieved January 5, 2026), http://www.nrdc/org/sites/default/files/2025-03/Wetlands_Report_R_25-03-B_05_locked.pdf

downstream states from detrimental upstream activities and pollution. For decades, "interstate waters" were included as a category in the definition of "waters of the United States." On September 8, 2023, the Agencies implemented the *Sackett* decision by promulgating the Conforming Rule (*see* 88 Fed. Reg. 61,964), which removed interstate wetlands from the "interstate waters" category, but explained that "open waters," such as "all *rivers, lakes, and other waters* that flow across or form a part of State boundaries" remain protected as "interstate waters." 88 Fed. Reg. at 61,966 (emphasis in original; internal citations omitted). The Proposed Rule, however, would entirely delete the category of "interstate waters" from the definition of "waters of the United States." *See* 90 Fed. Reg. at 52,516. Instead of being categorically protected, interstate waters would be considered "waters of the United States" only if they fall within another jurisdictional category, such as traditionally navigable waters. *Id.* This proposal contradicts the plain language and legislative intent of the Clean Water Act, as well as applicable caselaw.

Section 303(a), which sets forth the Clean Water Act's foundational water quality standards requirements, unequivocally states that interstate waters are categorically protected. 33 U.S.C. §1313(a). Enacted in 1972, this section retains the preexisting protections of "interstate waters," regardless of navigability, by specifically providing that any "water quality standard applicable to interstate waters which was adopted by any State" and was submitted to EPA for approval before the passing of the Clean Water Act "shall remain in effect." 33 U.S.C. §1313(a). The Agencies, however, brush aside the statutory text and instead claim that "the section 303(a) provision relating to existing water quality standards for 'interstate waters' may be best understood as referring to 'interstate navigable waters.'" 90 Fed. Reg. at 52,517. Such an interpretation adds a new term to the plain text of Section 303(a) and is contrary to bedrock principles of statutory construction. *See National Ass'n of Manufacturers v. Department of Defense*, 583 U.S. 109, 128–129 (2018) ("As this Court has noted time and time again, the Court is 'obliged to give effect, if possible, to every word Congress used.'") (citations omitted); *CC/Devas (Mauritius) Limited v. Antrix Corp. Ltd.* (2025) 605 U.S. 223, 234 (in construing a statute, the Supreme Court "does not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply") (citations omitted).

Removal of "interstate waters" from "waters of the United States" would also undermine the Clean Water Act's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Agencies claim that interstate waters that do not fall within another jurisdictional category "are more appropriately regulated by the States and Tribes under their sovereign authorities." 90 Fed. Reg. at 52,517. But the Agencies they do not explain the mechanism by which states and tribes could ensure water quality protections in rivers, streams, or lakes that straddle or form boundaries with upstream states and/or tribes when these rivers, streams, or lakes are not traditional navigable waters or relatively permanent waters that are tributaries to traditional navigable waters. Because such interstate waters would not be "waters of the United States," the Act's mechanisms for protecting water quality in downstream states would not apply. *See, e.g.,* 33 U.S.C. § 1342(b)(3), (5), (d)(2), (4); 40 C.F.R. §§ 122.44(d), 131.10(b). In addition, downstream states and tribes do not have the authority to impose effluent limits on out-of-state point sources impacting out-of-state upstream portions of interstate waters. If upstream states have weaker water quality protections, downstream states and tribes would bear the burden of the upstream pollution impacting water quality within their boundaries.

In addition to contradicting the Act's plain language and objective, the Agencies' exclusion of "interstate waters" in the Proposed Rule ignores the importance of federal law in addressing cross-border pollution and the Act's legislative history. The purpose of the 1972 Amendments, which became the Clean Water Act, was to expand, not narrow, federal protection of waters. *See* S. Rep. No. 92-414, at 7 (1971) (1971 WL 11307, at *3674) (prior mechanisms for abating water pollution "ha[d] been inadequate in every vital respect"); *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 318 (1981) ("Congress' intent in enacting the Amendments was clearly to establish an all-encompassing program of water pollution regulation."). Before 1972, the Act already protected navigable *and* interstate waters as separate categories. *See* 33 U.S.C. 466a(d)(1) (1952) (codifying Pub. L. 80–845 section 2(d)(1), 62 Stat. 1156 (1948)) (the 1948 Water Pollution Control Act declared that the "pollution of interstate waters" and their tributaries is "public nuisance and subject to abatement"); 33 U.S.C. 466i(e) (1952) (codifying Pub. L. 80–845 section 10(e), 62 Stat. 1161 (1948) (defining "interstate waters" without reference to navigability as "all rivers, lakes, and other waters that flow across, or form a part of, State boundaries."). Congress's purpose in the 1972 Amendments was to expand federal protections for waters, not limit them, as the Agencies now seem to suggest. Therefore, the Act necessarily continued to protect interstate waters as a standalone category of waters after the 1972 Amendments.

The Agencies' reliance on the *Sackett* decision as the reason for upending the historical protection of interstate waters misses the mark. *Sackett* addressed whether wetlands are "waters of the United States." 598 U.S. at 663, 678. Importantly, *Sackett* did not conclude that "interstate waters" as a category should be excluded from the definition. Instead, while analyzing the history of the Clean Water Act and its predecessor statute, *Sackett* observed that "interstate waters" were at the core of historical federal authority, and that this term includes "'all *rivers, lakes, and other waters* that flow across or form a part of State boundaries.'" *Id.* at 673 (emphasis in original) (citing 33 U.S.C. § 403); *see also id.* at 659–60.

The Proposed Rule's removal of "interstate waters" from "waters of the United States" will undermine many of the states' significant reliance interests. *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221–22 (2016) (when changing their position, agencies must consider serious reliance interests engendered by prior longstanding position). Indeed, rather than meaningfully consider the States' significant reliance interests based on the Agencies' prior long-standing position, the Proposed Rule states that the removal of the "interstate waters" as a category of protected waters "would likely have few practical impacts and would not undermine significant reliance interests, as the agencies rarely identify waters as jurisdictional solely because they are interstate." 90 Fed. Reg. at 52,516. States and tribes have relied on the Act's inclusion of 'interstate waters' as part of their strategies for protecting covered waters within their jurisdiction. For example, California has relied on the "interstate waters" category with respect to the Amargosa River, which has variable flow and crosses the boundary between Nevada and California. The Amargosa River serves as critical habitat for various animals and plants, including threatened and endangered species, and has historically been treated a "water of the United States." Under the Proposed Rule, the interstate Amargosa River will not be jurisdictional unless it is a traditional navigable water or a jurisdictional tributary. 90 Fed. Reg. at 52,516. The removal of "interstate waters" as a category of jurisdictional waters may also deprive of Clean Water Act protections numerous interstate waters such as the streams and

creeks that cross the California-Oregon and California-Nevada borders, as well as those that flow across or form other state boundaries.

The Agencies' new definition would not only remove long-standing Clean Water Act protections for interstate waters but would also subject all states along these boundary-crossing waters to the least restrictive state's water regulations. The only evidence supporting the Agencies' outcome consists of the approved jurisdictional determinations for 15 waters that were found to be "waters of the United States" by the Army Corps because they were interstate waters between 2015 and 2025. 90 Fed. Reg. at 52,516. But jurisdictional determinations are not a prerequisite for protecting rivers and lakes under the Clean Water Act. Indeed, Clean Water Act permits with pollution controls could be issued based on the easily ascertainable fact that rivers, streams or lake cross or form state boundaries, as long as a reasonable methodology is also applied to determine the scope of upstream jurisdiction consistent with the *Sackett* decision and limitations in Section 101(g) of the Act, 33 U.S.C. § 1251(g). The Proposed Rule has failed to consider the States' serious reliance interests impacted by the removal of "interstate waters."

Maintaining "interstate waters" as a category of "waters of the United States" has historically been balanced with other limitations set forth in the Section 101(g) of the Act, 33 U.S.C. § 1251(g), and this historic balance would not be upset by continuing to include interstate waters as a jurisdictional category. Congress and the U.S. Supreme Court have consistently recognized the primary and exclusive authority of each state to "allocate quantities of water within its jurisdiction," which decisions "shall not be superseded, abrogated, or otherwise impaired by th[e CWA]." 33. U.S.C. § 1251(g); *PUD No. 1 of Jefferson Cty. V. Wash. Dept. of Ecology*, 511 U.S. 700, 720–21 (1994). Section 101(g) is particularly important to western states where water resources are often limited, and water rights are carefully administered. Neither the Clean Water Act nor any rule defining the reach of "waters of the United States" would alter or impair any state's rights, duties, or obligations under interstate compacts or decrees of the Supreme Court of the United States equitably apportioning the flows of an interstate stream.

II. The Proposed Definition of "Relatively Permanent Waters" Is Inconsistent with *Sackett*, Irrational, and Contrary to Law.

The Proposed Rule would change the definition of "relatively permanent waters" to "standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season." 90 Fed. Reg. at 52,517. The Agencies provide a confusing explanation of the phrase "at least during the wet season." They state that "at least during the wet season" should "include extended periods of predictable, continuous surface hydrology occurring in the same geographic feature year after year in response to the wet season, such as when average monthly precipitation exceeds average monthly evapotranspiration" with "surface hydrology . . . required to be continuous throughout the entirety of the wet season," which in turn "is intended to be an extended period where there is continuous surface hydrology resulting from predictable seasonal precipitation patterns year after year." *Id.* at 52,518.

The proposed definition of "relatively permanent waters" is inconsistent with *Sackett* and the plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), which was endorsed by *Sackett*. 598 U.S. at 671. The Clean Water Act "extends to more than traditional navigable waters" and encompasses "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.'" *Id.* (quoting *Rapanos*, 547 U.S. at 739). Neither *Sackett* nor the

Rapanos plurality contains a requirement that "relatively permanent waters" must be standing or continuously flowing year-round or "at least during the wet season." Indeed, the *Rapanos* plurality concluded that streams, rivers, and lakes would be relatively permanent if they are flowing or standing "during some months of the year," irrespective of whether those months coincide with the seasons with the greatest precipitation. *Rapanos*, 547 U.S. at 732 n.5 (explaining that "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months" are "not necessarily exclude[d]") (emphasis added)). Accordingly, the Agencies' proposal to define "relatively permanent waters" conflicts with the Supreme Court's interpretation of the term.

Further, the Agencies fail to provide a rational basis for their revised definition of "relatively permanent waters." *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto.*, 463 U.S. 29, 43 (1983) (an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made"). The Agencies claim that the convoluted language of the definition of "at least during the wet season" provides "a bright line test, as it would provide a required duration threshold" and "would also allow for regional variation given the range of hydrology and precipitation throughout the country." *Id.* at 52,519.

The Agencies' test is anything but bright. As the Proposed Rule acknowledges, its reliance on the concept of "wet season" provides no real clarity, recognizing that "surface hydrology may not always overlap with the wet season" because in some areas there is a "time lag or delay in demonstration of surface hydrology," such as when snowpack melts several months after snowfall or when streams transition from the dry to the wet season. *Id.* at 52,518. If the Agencies' goal is simply to provide a straightforward, useable test, their byzantine definition of "wet season" fails to fulfill that goal. This is an irrational basis for a legal standard.

The Agencies also do not explain why they propose to define "relatively permanent waters" in a manner that will exclude certain waters that flow or stand "during some months of the year." *Rapanos*, 547 U.S. at 732 n.5. This ignores the Court's qualifier "relatively," effectively dictating that the Act apply only to "permanent waters."

Not only does this change to the definition of "relatively permanent waters" ignore text and common sense, but the Agencies' proposal also fails to explain how this revision comports with the objective of the Clean Water Act.

The proposed definition is particularly problematic in western states, where large portions of streams are ephemeral or intermittent. As EPA has recognized, ephemeral and intermittent streams are the defining characteristic of many watersheds in dry, arid and semi-arid regions, and serve a critical role in the protection and maintenance of water resources, human health, and the environment.[2] These ephemeral and intermittent waters are integral to watershed health, providing essential hydrological services such as groundwater recharge, floodwater storage, and the maintenance of base flows in downstream perennial waters. These systems also cycle nutrients, trap sediments, filter pollutants, and provide wildlife habitat and migration corridors.[3]

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[2] EPA, The Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-arid American Southwest (Nov. 2008), at 2, https://www.epa.gov/sites/default/files/2015-03/documents/ephemeral_streams_report_final_508-kepner.pdf.

[3] See id. at iii.

Placing the full burden of protecting these important resources on states by including unsupported and unnecessarily limiting definitions in the proposed rule is not reasonable.

The Proposed Rule suggests a number of alternative approaches related to "relatively permanent waters," including limiting the definition only to perennial waters, i.e. waters that flow or stand year-round. 90 Fed. Reg. at 52,519. But, this "alternative" is illegal, because it will entirely eliminate the concept of "relatively permanent" in conflict with *Sackett*. 598 U.S. at 671. The Agencies also suggest that "wet season" could be defined differently "to reflect a flow duration that is more than during the wet season but less than perennial flow" or the setting of minimum flow volume thresholds to define "relatively permanent." 90 Fed. Reg. at 52,519. Based on the Agencies' descriptions of these alternatives, they may suffer the same illegalities as does the Proposed Rule: these approaches lack a rational basis, would be arbitrary, capricious, and contrary to law.

III. The Proposed Definition of "Continuous Surface Connection" Is Contrary to Law, and Arbitrary and Capricious

The term "continuous surface connection" is used to determine whether wetlands are adjacent to "waters of United States," and therefore fall within the scope of that term. 33 C.F.R. § 328.3 (a)(4), (c)(2). The Agencies propose defining "continuous surface connection" as "having surface water at least during the wet season and abutting (*i.e.* touching) a jurisdictional water." 90 Fed. Reg. at 52,527. The proposed definition is "intended to include wetlands that have at least semipermanent surface hydrology that is persistent surface water hydrology uninterrupted throughout the wet season except in time of extreme drought." *Id.*

The proposed "continuous surface connection" definition lacks rational basis and is arbitrary and capricious. While the Agencies claim that the definition is "a bright line test," the definition is far from clear. As one example, the proposal would only include as jurisdictional waters *portions* of wetlands that have surface water at least during the wet season "no matter the full delineated scope of the wetland," 90 Fed. Reg. at 52,527-28. This partial-coverage approach will unquestionably cause confusion and serious implementation challenges. It does not address the potentially significant variations in wet seasons, which could require multiple evaluations to determine which portions of a wetland are jurisdictional. This hardly promotes the regulatory certainty that the Agencies claim they seek to achieve with the Proposed Rule.

The Agencies acknowledge that their proposed "continuous surface connection" definition "might result in few wetlands" being protected as "waters of the United States." *Id.* at 52,527. Despite this novel and seismic shift, the Agencies fail to include any analysis explaining whether the definition is consistent with the water quality objective of the Clean Water Act. The Agencies' disregard of the Act's objective is arbitrary and capricious. *See Pascua Yaqui Tribe v. EPA*, 557 F.Supp.3d 949, 955 (D. Ariz. 2021).

The Proposed Rule's definition of "continuous surface connection" also is contrary to law. The Proposed Rule would add a separate "indistinguishability" requirement, mandating that wetlands must have surface water at least during the wet season in such a way as to make them "indistinguishable" from "traditional navigable waters." According to the Agencies, the requirement that wetlands should have surface water at least during the wet season "implements

the 'indistinguishable' concept articulated in the *Rapanos* plurality and *Sackett* opinions." 90 Fed.Reg. at 52,528.

However, the Agencies' proffered explanation conflicts with *Sackett* and applicable caselaw. *Sackett* did three things relevant to the concept of indistinguishability: (1) adopted the "continuous surface connection" requirement from the *Rapanos* plurality; (2) held that adjacent wetlands must have a "continuous surface connection" with covered waters to qualify as "waters of the United States"; and (3) explained that wetlands are "as a practical matter indistinguishable from waters of the United States"—and therefore are themselves covered—"when" there is a "continuous surface connection" between wetlands and covered waters. 598 U.S. at 678 (quoting *Rapanos*, 547 U.S. at 755). Thus, under both *Sackett* and the *Rapanos* plurality opinion, "indistinguishability" is not a separate element of adjacency; rather, the term informs the application of the "continuous surface connection" requirement.

Case law applying the *Sackett* test for "adjacency" has found that there is no independent "indistinguishability" requirement that is separate from "continuous surface connection." *See White v. Env't Prot. Agency*, 737 F.Supp.3d 310, 326 (E.D.N.C. June 18, 2024) ("[A] wetland with a continuous surface connection is a 'water[ ] of the United States' *because* that continuous surface connection renders the wetland practically indistinguishable from the jurisdictional water to which it is connected. The continuous surface connection powers the test.") (emphasis in original); *United States v. Valentine*, 751 F.Supp.3d 617, 622 (E.D.N.C. Sept. 27, 2024) (concluding that under *Sackett* indistinguishability "'occurs when wetlands have a continuous surface connection to bodies that are waters of the United States in their own right'" and noting that the court in *White* "rejected the notion that a 'continuous surface connection' and 'practically indistinguishable' are separate jurisdictional requirements under the Act") (internal citations omitted).

Thus, the Agencies' proposed definition for "continuous surface connection" is arbitrary, capricious, and unlawful, and should be abandoned.

To be clear, although the Proposed Rule inaccurately defines "relatively permanent" and "continuous surface connection," the Agencies have correctly concluded that their regulatory definition of "water of the United States" must rely on those terms. The Agencies solicit comment on "an alternative approach" that would cover only "traditional navigable waters, tributaries that directly flow into these waters, and wetlands with a continuous surface water connection to such waters." 90 Fed. Reg. at 52,515. But this approach would flatly contradict *Sackett*, which expressly adopted the "relatively permanent" and "continuous surface connection" (not surface water) standards. 598 U.S. at 678. Indeed, the Agencies recognize that its alternative is "informed" not by the majority opinion in *Sackett*, but by Justice Thomas's concurrence, which was joined by only one other justice. 90 Fed. Reg. at 52,515. That concurrence suggested that the CWA applies only to traditional navigable waters—a position repeatedly and roundly rejected by the Court. *See Sackett*, 598 U.S. at 672 (acknowledging "that the CWA extends to more than traditional navigable waters"); *Rapanos*, 547 U.S. at 730–31 (rejecting that waters of the United States "must be limited to the traditional definition"); *Riverside Bayview Homes*, 474 U.S. at 133 (recognizing "that Congress intended to allow

regulation of waters that might not satisfy traditional tests of navigability"). The Agencies cannot rely on Justice Thomas's concurrence to regulate more narrowly than required by the *Sackett* majority.

IV. The Proposed Rule's Revisions to the Exclusion for "Ditches" Are Contrary to Law and Lack Rational Basis.

The Agencies propose to define "ditches" as "constructed or excavated channel[s] used to convey water." 90 Fed. Reg. at 52,539. The Proposed Rule will exclude from the definition of "waters of the United States" "ditches (including roadside ditches) that are constructed or excavated entirely in dry land, even if those ditches have relatively permanent flow and connect to a jurisdictional water." *Id.* Unlike the Conforming Rule, the revised exclusion is not limited to ditches that drain only dry land and do not carry a relatively permanent flow of water. *See* 33. C.F.R. § 328.3(b)(3). Importantly, "a ditch constructed or excavated entirely in dry land that connects to a tributary would not be considered a jurisdictional ditch under the proposed rule." 90 Fed. Reg. at 52,540.

The proposed revisions would create significant pathways for water degradation. The exclusion would apply to waterbodies that are connected to other jurisdictional waters, are relatively permanent, and drain areas that are not dry land, including areas that provide the headwaters of rivers and streams. According to the *Rapanos* plurality, however, "ditches, channels, conduits and the like can all hold water permanently as well as intermittently" and "when they do, we *usually* refer to them as rivers, creeks, or streams." *Rapanos*, 547 U.S. at 736 n.7 (emphasis added) (cleaned up). Thus, a definition of "ditches" like the one the Agencies now propose to exclude from "waters of the United States" will include waters that are properly considered "rivers, creeks, or streams." *Id.* The proposed definition is therefore contrary to law. *See Sackett*, 598 U.S. at 671 (concluding that WOTUS encompasses waters "that are described in ordinary parlance as 'streams, oceans, rivers, and lakes'") (quoting *Rapanos*, 547 U.S. at 739)).

The exclusion of upland ditches from Clean Water Act jurisdiction has long been an aspect of the definition of "waters of the United States" that members of the regulated community likely have relied on. However, there is no basis to expand the exclusion to effectively create a new "break" in jurisdiction for otherwise jurisdictional waters, particularly where a ditch may be constructed within a natural drainage.

Further, and like the other proposed revisions discussed above, the expanded "ditches" exclusion is arbitrary and capricious and lacks rational basis because the Agencies have not evaluated whether it complies with the Clean Water Act's water quality objective. The proposed revision to the "ditches" exclusion is also arbitrary and capricious because the Agencies failed to provide a reasoned explanation for their proposal to change policy from the Conforming Rule and failed to consider the impacts of the proposed revisions. *See Fed. Commc'ns Comm'n v. Fox TV Stations, Inc.*, 556 U.S. 502, 537 (2009) (Kennedy, J., concurring); *Motor Vehicle Mfrs. Ass'n of U.S., Inc.*, 463 U.S. at 43; *Pascua Yaqui Tribe*, 557 F.Supp.3d at 955.

V. The Proposal to Sever Jurisdiction Based on Natural or Human-made Breaks Is Arbitrary and Capricious and Lacks Rational Basis.

The Agencies' proposals to sever jurisdiction when relatively permanent waters flow through natural or human-made breaks are likewise arbitrary and capricious, lack a rational basis, and are inconsistent with *Sackett*. This includes the Agencies' proposed requirements that jurisdiction is severed when 1) tributaries do not maintain relatively permanent surface flow continuously to a downstream traditional navigable water; 2) a relatively permanent feature flows through a non-jurisdictional feature; or 3) wetlands that are separated by a road or berm where the connecting culvert does not continuously convey relatively permanent flow. 90 Fed. Reg. 52,522-3, 52,529.

Severing jurisdiction over "relatively permanent waters" because of arbitrary breaks in the tributary system is inconsistent with *Sackett* and the plurality opinion in *Rapanos.* As explained above, the Clean Water Act "extends to more than traditional navigable waters" and encompasses "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*, 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739). "Relatively permanent" includes "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months." *Rapanos,* 547 U.S. at 732 n.5 (emphasis in original). Notably, neither *Sackett* nor the *Rapanos* plurality contains a requirement that relatively permanent waters must maintain uninterrupted, continuous flow through only natural features.

The Agencies fail to provide sufficient justification for endorsing these arbitrary breaks in jurisdiction when *Sackett* and *Rapanos* plurality mandate such an interpretation. In arid western states it is common to have "interrupted stream" systems with perennial headwaters that flow into intermittent or ephemeral reaches (often crossing alluvial fans or permeable geology), before reconnecting to downstream traditional navigable waters. Similarly, in western states hydrologic systems are highly manipulated and dynamic; it is also common for relatively permanent upstream waters to flow through transbasin tunnels and pipes, culverts, flumes, or human-made ditches before re-entering natural channels. And last, bisected wetlands may use different infrastructure for maintaining hydrologic connections across the waterbody, including using culverts that equalize water levels across the waterbody which may not always convey continuous flow but nonetheless maintain the hydrologic connection.

Severing jurisdiction at such breaks ignores the scientific reality of hydrologic connectivity and is not easier to implement administratively. These waters continue to contribute significantly to the chemical, physical, and biological integrity of downstream waters. Maintaining jurisdiction across these breaks is not only consistent with the scientific realities but is essential for meeting the objectives of the Clean Water Act and consistency with the *Sackett* decision.

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For the reasons discussed above, the Proposed Rule, if promulgated, would violate the Administrative Procedure Act and undermines the objective of the Clean Water Act.

Accordingly, the Agencies should proceed no further with this rulemaking and should instead focus their efforts on implementing the existing regulatory definition of "waters of the United States."

Sincerely,

For the STATE OF CALIFORNIA

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