



**STATE OF IDAHO**  
OFFICE OF THE ATTORNEY GENERAL  
**RAÚL R. LABRADOR**

January 5, 2026

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

*Submitted electronically via  
Regulations.gov only*

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

**RE:** Comments by the State of Idaho on the Proposed Definition of Waters of the United States;  
Docket ID No. EPA-HQ-OW-2025-0322; No. FRL 11132.1-01-OW

The State of Idaho, by and through Idaho Attorney General Raúl Labrador, submits these comments on the Environmental Protection Agency and the United States Army Corps of Engineers' (collectively "the Agencies") proposed rule revising the definition of "waters of the United States" ("WOTUS") under the Clean Water Act ("CWA"). The Idaho Attorney General represents the State of Idaho in ongoing litigation challenging the 2023 WOTUS rule promulgated by the Biden administration. *See State of Texas v. U.S. Envtl. Protection Agency*, No. 3:23-cv-17 (S.D. Tex. 2023). Additionally, the dispute that resulted in the United States Supreme Court case *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023) ("Sackett"), the most recent Supreme Court precedent on the definition of WOTUS, took place in Idaho. The Idaho Attorney General therefore has a substantial interest in ensuring that any revised WOTUS definition complies with constitutional limits, Supreme Court precedent, and does not infringe on the property rights of the citizens of Idaho.

- 1. A bright-line rule in line with U.S Supreme Court precedent is needed to avoid repeated litigation and to put landowners on notice of CWA requirements.**

Together, *Sackett and Rapanos v. United States*, 547 U.S. 715 (2006), require any WOTUS rule to employ clear, bright-line standards based on strong physical connections. Both decisions emphasize constitutional limits, fair notice, and administrability in defining federal jurisdiction under the CWA. In *Rapanos*, the plurality rejected open-ended ecological tests that left landowners guessing about federal authority and instead favored relatively permanent waters and a continuous surface connection—criteria intended to be readily identifiable on the ground. *Sackett* reinforced this approach by expressly repudiating the “significant nexus” test as unmoored from statutory text and incapable of providing predictable outcomes.

The proposed rule fails to provide the bright-line standards required by the Supreme Court and instead perpetuates longstanding uncertainty. The inclusion of language in the proposed rule such as “at least during the wet season,” along with the convoluted definition of “tributary” does not provide the certainty required to successfully implement the *Sackett* holding. Instead, the Agencies should provide a bright-line rule for what waters are considered WOTUS.

Justice Thomas’s concurrence in *Sackett v. EPA* supplies the only workable bright-line rule. *See Sackett*, 598 U.S. at 684–710 (Thomas concurrence). Federal jurisdiction must be limited to waters that are navigable in fact or serve as highways of interstate or foreign commerce, consistent with Congress’s Commerce Clause authority. *Id.* at 686. As Justice Thomas explains, this approach aligns with the CWA’s text and history and avoids unconstitutional intrusion into traditional state authority over land and water use. *Id.* at 686–705.

The Agencies’ proposed rule perpetuates a longstanding misinterpretation of the Supreme Court’s decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (“*SWANCC*”), which “restored navigability as the touchstone of federal jurisdiction under the CWA, and rejected the key arguments supporting an expansive interpretation of the CWA’s text.” *Id.* at 703 (citing *SWANCC*, 531 U.S. 159 (2001)). As Justice Thomas correctly notes, “the plain text of the CWA and our opinion in *SWANCC* demonstrate that the CWA must be interpreted in light of Congress’ traditional authority over navigable waters,” but for decades, the Agencies “have issued substantively identical regulatory definitions of ‘the waters of the United States’ that completely ignore navigability and instead expand the CWA’s coverage to the outer limits of the Court’s New Deal-era Commerce Clause precedents.” *Id.* at 705. *SWANCC* and Justice Thomas’ concurrence cautioned against interpretations of the CWA that raise serious constitutional concerns—warnings the proposed rule again ignores.

Most importantly to the citizens of Idaho, ordinary landowners must be able to determine whether features on their property are jurisdictional without technical expertise or agency consultation. That clarity is constitutionally required, particularly given the severe civil and criminal penalties imposed by the CWA. *See* 33 U.S.C. § 1319(c)–(d) (imposing harsh criminal and civil penalties for violations of the CWA). Under the proposed rule, “the only prudent move for any landowner in America would be to ask the Federal Government for permission before undertaking any kind of development” because the Agencies interpretation “amounts to a federal police power, exercised in the most aggressive possible way.” *Sackett*, 598 U.S. at 706. It is impractical, expensive, and onerous to require technical expertise or agency consultation for the average landowner to determine if a water body on their private property is WOTUS. Justice

Thomas's *Sackett* concurrence provides the necessary clarity and should instead govern WOTUS determinations.

**2. The proposed rule language “at least during the wet season” is unworkable and unconstitutionally vague.**

The proposed rule defines both “continuous surface connection” and “relatively permanent” as including surface water that is flowing “at least during the wet season.” The proposed language “at least during the wet season” is impermissibly vague and unworkable. “Wet season” does not appear in *Sackett* or even in the CWA itself. Nor is “wet season” a term of art in the scientific community and therefore will be open to disagreements on how to define it. As written, the proposed rule incorporates complex criteria —such as precipitation records, soil saturation indicators, hydrologic models, and long-term climate averages—that inevitably requires expert data interpretation. Because “wet season” is not defined by a simple temporal or geographic standard, its determination may vary depending on which datasets are used, how far back data are analyzed, and how atypical weather patterns are treated. For example, unusually wet years, shifting climate baselines, or localized storm events may lead experts to conclude that a wet season exists where landowners perceive conditions as abnormal or temporary. As a result, jurisdiction hinges on expert analysis rather than observable, objective features.

These overly technical determinations present several problems. It is too esoteric for ordinary landowners to use. Detailed scientific analysis is typically inaccessible to ordinary landowners, builders, and businesses without hiring consultants, thus increasing the financial and administrative burden onto the regulated community. Similarly, the combination of expert-driven standards and data-intensive determinations increases the likelihood of disputes. Whether technical data sufficiently demonstrates flow or surface connectivity allows parties to challenge the validity, selection, and interpretation of the scientific evidence itself. This invites case-by-case litigation over competing expert opinions and datasets, rather than straightforward legal analysis. The result is a greater burden on courts to resolve scientific disagreements that are only tangentially related to statutory interpretation.

A corresponding burden will fall on state agencies to commission site-specific hydrologic studies, historical precipitation data, or assessments to determine whether wet-season conditions trigger federal jurisdiction. Field verification and data analysis will further strain administrative capacity, slow jurisdictional determinations and permitting decisions. This runs counter to the goal of regulatory efficiency and predictability. Since there is no objective benchmark to determine a wet season, there will be arbitrary enforcement by differing agencies. As *Sackett* observed, this reliance is especially problematic given the Clean Water Act's civil and criminal enforcement mechanisms. When jurisdiction depends on interpretation of technical data rather than bright-line legal rules, regulated parties may lack fair notice of when the Clean Water Act applies. A regulatory regime that exposes citizens to severe civil and criminal liability depending on fluctuating seasonal conditions and technical expertise not understood by the average landowner is unconstitutionally vague and cannot be fairly enforced. Absent a bright-line rule, agency determinations will be arbitrary and capricious by definition.

The burdens of obscure legal boundaries, increases in regulatory uncertainty, potential litigation, administrative burdens, and additional financial costs to all involved are not worth the effort in providing guardrails for a “wet season” determination which is not mentioned or required by law. Idaho recommends that the final rule does not include the language “at least during the wet season” and instead limits WOTUS to traditional navigable waters and outlines in Justice Thomas’ concurrence in *Sackett*.

### **3. “Continuous surface connection” requires year-round surface water connectivity.**

Under *Sackett*, jurisdictional waters must have a “continuous surface connection” to traditionally navigable waters, which makes it difficult to determine where the “water” ends and the “wetland” begins. *Sackett*, 598 U.S. at 678-679. “Continuous” is defined by Merriam-Webster Dictionary as “marked by uninterrupted extension in space, time, or sequence.” See Continuous, Merriam-Webster Dictionary, Merriam-Webster.com <https://www.merriam-webster.com/dictionary/continuous>, accessed 29 Dec. 2025. A possible synonym is “nonstop.” *Id.* Because “continuous” means nonstop or uninterrupted in space or time, Supreme Court precedent requires that a body of water have a continuous surface connection year-round to constitute WOTUS. The proposed rule ignores the plain meaning of “continuous” and Supreme Court precedent when it proposed WOTUS to include bodies of water that have “surface water at least during the wet season.” WOTUS cannot include intermittent or seasonal connections; it must be nonstop or uninterrupted by its definition as “continuous.”

Although *Sackett* did not specifically state what a “continuous surface connection” is, the definition of “continuous” requires that that adjacent wetlands have a surface *water* connection. *Sackett* requires that jurisdictional waters must be difficult to determine where WOTUS ends and wetlands begin. Only a nonstop or uninterrupted surface water connection meets this requirement. See *United States v. Sharfi*, No. 21-CV-14205, 2024 WL 4483354, at 13 (S.D. Fla. Sept. 21, 2024)(court disagrees that the “continuous surface connection” required by *Sackett* does not require a water connection.); *United States v. Ace Black Ranches*, No. 1:24-cv-00113, 2024 WL 4008545, at 4 (D. Idaho Aug. 29, 2024) (“nowhere does the Government specify that these wetlands have a continuous surface connection with the River to be considered indistinguishable from the River, satisfying the adjacency test.”)

Idaho, as an arid western state, understands that even traditionally navigable waters can dry up in times of extreme drought. Idaho suggests that an exception be made only for traditionally navigable waters that lose a continuous surface connection in times of severe drought. Importantly, severe drought is not the opposite of the wet season. Idaho law provides an objective mechanism for identifying drought conditions. Idaho Code section 42-222A authorizes the Idaho Department of Water Resources to declare drought emergencies for designated areas, subject to gubernatorial approval. Idaho proposes that the “continuous surface connection” requirement for WOTUS only be waived in times of extreme drought as determined by the relevant state agency.

### **4. “Relatively permanent” should be defined as perennial waters.**

The proposed interpretation of “relatively permanent” fails to provide the bright-line rule

required by the text and history of the CWA and Supreme Court precedent. The proposed definition's inclusion of "at least during the wet season" again fails to provide clarity to the average landowner.

The language "relatively permanent" comes from the plurality opinion in *United States v. Rapanos*. 547 U.S. 739, 742 (Scalia plurality opinion). Justice Scalia's *Rapanos* plurality also notes in a footnote 5 that suggests that "seasonal" rivers *may* be WOTUS. *Id.* at 733 n.5. However, a careful reading of *Rapanos* illustrates that Justice Scalia's plurality only suggested that waters should not be excluded from WOTUS "in extraordinary circumstances, such as drought." *Id.* Further, the footnote in *Rapanos* addressing seasonal waters uses permissive language and is not binding on the Agencies. As discussed above, the only method for fairly and efficiently administering the CWA is a bright-line rule in which only perennial, year-round waters qualify as WOTUS, except where connectivity or permanency is temporarily interrupted by an officially declared extreme drought.

#### **5. Idaho supports the alternative approach discussed on page 52529 of the proposed rule.**

The preferred approach of the State of Idaho is the alternative approach discussed on page 52529 of the proposed rule. This approach would have the Agencies interpret continuous surface water connection to mean the perennial presence of surface water (i.e., year-round) over the body of water. This approach better implements the "indistinguishable" standard articulated in *Sackett*, 598 U.S. at 678, and follows Justice Thomas's *Sackett* concurrence and the holding in *SWANCC* limiting jurisdiction to traditionally navigable perennial waters.

Additionally, this approach would be consistent with how lower courts, including the federal District Court of Idaho, have interpreted the *Rapanos* plurality and *Sackett*. *See United States v. Ace Black Ranches, LLP*, No. 1:24-cv-00113, 2024 WL 4008545, at \*4 n.2 (D. Idaho Aug. 29, 2024) (dismissing the Agencies' complaint alleging violations of the CWA because the Agencies failed to connect any wetlands it believes the defendant polluted with the traditionally navigable river via a sufficient surface-water connection); *see also United States v. Sharfi*, 2024 WL 5244351, at \*1 (S.D. Fla. Dec. 30, 2014) (holding that that "continuous surface connection" means a surface water connection and that "[a] 'continuous surface flow path' can only mean a continuous surface 'water' flow path, rather than a surface path through which water occasionally flows"). Most importantly, this bright-line rule is straightforward for the Agencies to administer and for landowners to apply and could end the incessant litigation caused by the uncertainty of the WOTUS rule.

#### **6. Conclusion**

The State of Idaho urges the Agencies to adopt a true bright-line rule consistent with Supreme Court precedent, the text of the CWA, and the historic jurisdiction of the federal government over water and land use. Ordinary landowners should be able to identify WOTUS on their land without technical expertise or fear of unknowable liability. A bright-line rule in line with U.S. Supreme Court precedent is needed to avoid repeated litigation and to put landowners on

notice of CWA requirements. The proposed rule does not do this, and instead relies on unclear technical expertise, unworkable and unconstitutionally vague definitions, and tramples on states' rights. For these reasons, the State of Idaho does not support the proposed rule defining WOTUS as written and suggests amendments to the proposed rule as discussed above.

Respectfully submitted,



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