

OFFICE OF THE GOVERNOR  
STATE OF MONTANA

GREG GIANFORTE  
GOVERNOR



KRISTEN JURAS  
LT. GOVERNOR

January 5, 2025

Stacey Jensen  
Oceans, Wetlands and Communities Division  
Office of Water (4504-T)  
Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington, D.C. 20460

Milton Boyd  
Office of the Assistant Secretary of the Army for Civil Works  
Department of the Army  
108 Army Pentagon  
Washington, D.C. 20310

Re: State of Montana Comment on Docket ID No. EPA-HQ-OW-2025-0322

Dear Ms. Jensen and Mr. Boyd:

I write today to express my strong support for the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers' proposed rule revising the definition of "Waters of the United States" under the Clean Water Act (CWA).<sup>1</sup>

After years of regulatory whiplash from Washington, D.C., Montana appreciates the agencies' efforts to provide a clear and narrow definition of WOTUS that faithfully implements the U.S. Supreme Court's decision in *Sackett v. EPA*.<sup>2</sup> I appreciate the opportunity to comment on this issue of significant importance to Montana. For Montana's part, we have decades of experience protecting our state waters through implementation of the Montana Water Quality Act. Our track record proves we protect our waters, in continued cooperation with federal agencies, and the proposed rule appropriately recognizes the valuable role that states play in the cooperative federalism framework established by the CWA.

Montana commends the agencies for harmonizing their regulations with the *Sackett* decision, and for providing a proposed rule that aligns with the CWA. The "significant nexus" test previously utilized by the agencies required fact-intensive, case-by-case analysis that lacked clear, objective criteria and required expensive hydrological analysis to determine jurisdiction. Thankfully, the

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<sup>1</sup> 90 Fed. Reg. 52498 (proposed Nov. 20, 2025).

<sup>2</sup> *Sackett v. EPA*, 598 U.S. 651 (2023).

Court found the significant nexus test to be inconsistent with the CWA in its ruling.<sup>3</sup> The *Sackett* decision affirmed that the CWA only encompasses those “relatively permanent, standing, or continuously flowing bodies of water” described in ordinary parlance as streams, oceans, rivers, and lakes, and that wetlands are part of those waters when a “continuous surface connection” exists such that it is “difficult to determine where the ‘water’ ends and the ‘wetland’ begin.”<sup>4</sup> The proposed rule eliminates the significant nexus standard entirely and adopts the Supreme Court's relatively permanent standard and continuous surface connection test throughout.<sup>5</sup> This approach delivers the regulatory certainty that Montana requested in our comment letter dated June 1, 2025, on the previous docket.

In that June letter, Montana requested that the agencies provide improved definitions of two important regulatory terms: "wetlands" and "adjacent." The proposed rule directly addresses this request.

In *Sackett*, the Court stated that the CWA granted limited jurisdiction to the federal government over wetlands that are "indistinguishably part of a body of water that itself constitutes 'waters' under the CWA."<sup>6</sup> The Court also clarified that the CWA may apply only to those wetlands that are, as a practical matter, indistinguishable from waters of the United States, which occurs when wetlands have a continuous surface connection to bodies that are waters of the United States in their own right, so that there is no clear demarcation between waters and wetlands.<sup>7</sup> The agencies have relied on the language provided in the *Sackett* decision to construct their definitions, precisely as Montana requested. The proposed definition of "wetlands" at 33 CFR § 328.3(c)(12) includes only those wetlands that have a continuous surface connection with waters of the United States and are indistinguishable from those same waters.<sup>8</sup> Montana strongly supports this definition as it builds upon the foundation of the *Sackett* case and will increase regulatory predictability and certainty to the benefit of hardworking Montana farmers, ranchers, and small business owners.

The proposed definition of "continuous surface connection" at 33 CFR § 328.3(c)(3) and 40 CFR § 120.2(c)(3) appropriately requires direct abutment and surface water connection during at least the wet season, implementing the Supreme Court's directive.<sup>9</sup> This definition implements the *Rapanos* plurality's conclusion that the statutory definition of "navigable waters" can be read to include "some wetlands—namely, those that directly abut covered waters."<sup>10</sup> Montana suggests that an abbreviated definition of “wet season” be included in the final rule to reflect the definition and scope of that term as articulated in 90 Federal Register 52,517-518.<sup>11</sup>

Montana also strongly supports the proposed definition of "relatively permanent" at 33 CFR §

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<sup>3</sup> *Id.* at 679.

<sup>4</sup> *Id.* at 671, 678-679 (quoting *Rapanos v. U.S.*, 547 U.S. 715, 739, 742, 755 (2006).

<sup>5</sup> 90 Fed. Reg. at 52498-550.

<sup>6</sup> *Sackett*, 598 U.S. at 676.

<sup>7</sup> *Id.* at 678 (citing *Rapanos*, 547 U.S. at 742, 755).

<sup>8</sup> 90 Fed. Reg. at 52530-31.

<sup>9</sup> *Id.* at 52528-30.

<sup>10</sup> *Rapanos*, 547 U.S. at 747 n.12.

<sup>11</sup> 90 Fed. Reg. at 52,517-18.

328.3(c)(9), which focuses on waters that are standing or continuously flowing year-round or at least seasonally during the wet season.<sup>12</sup> This definition appropriately implements *Sackett's* holding that the CWA extends to "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.'"<sup>13</sup> The *Rapanos* Court previously noted that its reference to "relatively permanent" waters does "not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought" or "seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months."<sup>14</sup> The proposed rule properly captures this standard while excluding ephemeral features that flow only in direct response to precipitation. This clarity is essential for Montana landowners and businesses who need to understand federal jurisdiction without expensive consultants or hydrological studies.

Further, Montana strongly supports the proposed elimination of interstate waters as an independent basis for federal jurisdiction under paragraph (a)(1)(iii).<sup>15</sup> As the agencies correctly recognize, not all interstate waters meet the *Sackett* standard of being relatively permanent or connected to traditional navigable waters. The Supreme Court emphasized that the CWA does not grant unlimited federal jurisdiction and that states retain "primary authority to combat water pollution by regulating land and water use."<sup>16</sup> This change appropriately recognizes state primacy over water resources while maintaining federal authority over truly navigable waters, consistent with the Court's Commerce Clause analysis and the cooperative federalism framework established by Congress. Montana appreciates the agencies' recognition that Section 101(b) of the CWA expressly protects "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."<sup>17</sup>

In our June 2025 letter, Montana requested that the agencies expand the list of potential exclusions in 33 CFR § 328.3(b). The agencies' proposed exclusions represent critical improvements to regulatory clarity.<sup>18</sup> The exclusions for ditches constructed or excavated in dry land, prior converted cropland devoted to agricultural use, waste treatment systems, and groundwater provide much-needed certainty for Montana's regulated community.<sup>19</sup>

Montana particularly commends the agencies for the proposed ditch exclusion at 33 CFR § 328.3(b)(3) and 40 CFR § 120.2(b)(3).<sup>20</sup> This exclusion recognizes that ditches constructed or excavated entirely in dry land are artificial conveyances essential for agriculture, transportation, and water management in our state. The exclusion applies even if the ditch has relatively permanent flow and connects to jurisdictional waters, appropriately distinguishing between natural watercourses and artificial features. This clarity will substantially benefit Montana's agricultural producers and transportation infrastructure managers.

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<sup>12</sup> 90 Fed. Reg. at 52519-22.

<sup>13</sup> *Sackett*, 598 U.S. at 671 (quoting *Rapanos*, 671).

<sup>14</sup> *Rapanos*, 547 U.S. at 732 n.5.

<sup>15</sup> 90 Fed. Reg. at 52516-18.

<sup>16</sup> *Sackett*, 598 U.S. at 683.

<sup>17</sup> 33 U.S.C. § 1251(b).

<sup>18</sup> 90 Fed. Reg. at 52533-50.

<sup>19</sup> *Id.* at 52533-50 (waste treatment systems); *id.* at 52538-43 (prior converted cropland); *id.* at 52543-49 (ditches); *id.* at 52549-50 (groundwater).

<sup>20</sup> *Id.* at 52543-49.

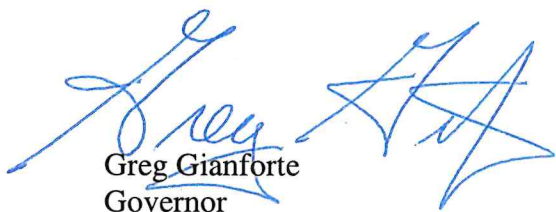
The proposed exclusion and definition for prior converted cropland at 33 CFR §§ 328.3(b)(2) and (c)(7) and 40 CFR §§ 120.2(b)(2) and (c)(7) address Montana's request for consistency with Food Security Act provisions.<sup>21</sup> The proposed definition bases the exclusion on whether the land is devoted to agricultural use, confirming that prior converted cropland retains its excluded status as long as the area remains devoted to agricultural use.<sup>22</sup> This approach aligns with the 1996 amendments to the Food Security Act and promotes consistency across federal programs, reducing confusion for Montana's agricultural producers.

The proposed definition of "waste treatment system" at 33 CFR § 328.3(c)(11) and 40 CFR § 120.2(c)(11) provides clarity Montana requested by appropriately excluding systems designed to treat wastes prior to discharge.<sup>23</sup> This functional definition will promote consistency and predictability in implementation. Montana also commends the agencies for the explicit exclusion of groundwater at 33 CFR § 328.3(b)(9) and 40 CFR § 120.2(b)(9).<sup>24</sup> While groundwater has never been considered jurisdictional under the CWA, expressly stating this exclusion eliminates any potential confusion and confirms that states retain primary authority over groundwater management.

These exclusions, taken together, will substantially reduce regulatory burden while maintaining appropriate environmental protections. The agencies have responded to Montana's request by reviewing and clarifying multiple exclusion categories, providing the clear boundaries between federal and state jurisdiction that our regulated community needs.

We appreciate this opportunity to provide comment on this important matter and stand ready to assist the agencies with additional feedback. The proposed rule represents a significant step forward in implementing the *Sackett* decision and respecting the cooperative federalism framework established by Congress. Montana commends the agencies for their careful work in crafting definitions and exclusions that provide regulatory certainty while maintaining protection of truly navigable waters. On behalf of the State of Montana, I request continuing dialogue as the agencies proceed with their work. Please do not hesitate to reach out if my administration can be of assistance. My door is always open.

Sincerely,



Greg Gianforte  
Governor

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<sup>21</sup> *Id.* at 52538-43.

<sup>22</sup> 16 U.S.C. § 3822(a)(4).

<sup>23</sup> 90 Fed. Reg. at 52533-38.

<sup>24</sup> *Id.* at 52549-50.

Ms. Jensen and Mr. Boyd

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cc: Senator Steve Daines  
Senator Tim Sheehy  
Congressman Ryan Zinke  
Congressman Troy Downing  
EPA Administrator Lee Zeldin  
Secretary of the Army Daniel Driscoll