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Via www.regulations.gov

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Re: Comments on Supplement to Proposed Updated Definition of "Waters of the United States" Docket ID No. EPA-HQ-OW-2025-0322

Dear Ms. Jensen and Mr. Boyd:

Together, our 88 organizations write to comment on the supplemental notice of proposed rulemaking published by the U.S. Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers ("Corps") (together, "the Agencies") that offers new definitions for the terms "relatively permanent," "continuous surface connection," and "perennial" ("Supplemental Options") in connection with the revised definition of "waters of the United States" the Agencies proposed in November 2025 ("Proposed Rule"). We ask that the Agencies consider these comments as well as the comments on the Proposed Rule submitted on January 5, 2026, by the Southern Environmental Law Center on behalf of 76 organizations ("January 2026 SELC Comments").

As written, the Supplemental Options would drastically limit Clean Water Act protections to only those rivers and streams that flow every day of the year (with limited exceptions), and to only those wetlands that have surface water every day of the year and a surface water connection to a jurisdictional water every day of the year (again, with limited exceptions).[1] Without a solid basis in law or science, the proposal would dramatically weaken federal protections that safeguard the health and well-being of our communities, our economic livelihood, and our environment—in the Southeast and throughout the nation.

[1] Updated Definition of "Waters of the United States," 91 Fed. Reg. 57284 (Sept. 9, 2026) ("Supplemental Options").

The term "waters of the United States" is the jurisdictional linchpin for virtually all of the Clean Water Act's critical safeguards, including the Act's core prohibition against the unpermitted discharge of pollutants, the prohibition against the unpermitted discharge of dredge and fill material, and the obligation that states develop water quality standards. A robust definition of "waters of the United States" also helps to provide a strong federal baseline of clean water protections, which ensures that states and tribes are not unfairly harmed by pollution carried downstream from neighboring jurisdictions and promotes national security, the economy, and the health and welfare of all Americans.

By carving countless streams, wetlands, and other waters out of the Clean Water Act's purview, the Supplemental Options are contrary to the express objective of the Act: to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[2] The Supplemental Options go well beyond the judicial precedent they purport to follow, including the Supreme Court's 2023 decision in *Sackett v. EPA*.[3] They undermine the very goals they claim to serve; by introducing even more complexity and confusion, the Supplemental Options fail to achieve clarity and consistency. Moreover, adopting the Proposed Rule with the Supplemental Options would represent arbitrary and capricious rulemaking in violation of the Administrative Procedure Act ("APA"), and the consequences would be devastating to the nation's waters and to the communities and ecosystems that depend on them. The Agencies should abandon this latest misguided proposal along with the Proposed Rule.

The Southern Environmental Law Center submits these comments on behalf of itself and the following organizations, which collectively represent millions of members and supporters throughout the southeastern United States and across the country who care deeply about protecting the nation's waters:

Alabama Environmental Council
Alabama Rivers Alliance
American Whitewater
Amphibian Foundation
Appalachian Voices
Bayou City Waterkeeper
Black Warrior Riverkeeper
Broad Riverkeeper
Brunswick County Conservation Partnership
CalWild
Cape Fear River Watch
Carolina Wetlands Association
Cascade Forest Conservancy
Center for Biological Diversity
Center for Food Safety
Charles River Watershed Association
Charleston Waterkeeper
Chattooga Conservancy
Chesapeake Bay Foundation
Choctawhatchee Riverkeeper
Clean Water Action
Coastal Carolina Riverwatch
Coastal Plain Conservation Group
Congaree Riverkeeper
Coosa River Basin Initiative
Coosa Riverkeeper
Defenders of Wildlife
Farmington River Watershed Association
Forest Keeper

[2] 33 U.S.C. § 1251(a).

[3] 598 U.S. 651 (2023).

French Broad Riverkeeper
Friends of Big Ivy
Friends of Dyke Marsh
Friends of Shades Creek
Friends of the Reedy River
Friends of the Rivers of Virginia
Georgia Canoeing Association
Georgia Rivers
Great Egg Harbor Watershed Association
Green Riverkeeper
Haw River Assembly
Kentucky Resources Council
Lake Watch of Lake Martin, Inc.
Lynnhaven River NOW
Minnesota Center for Environmental Advocacy
MountainTrue
National Trust for Historic Preservation
National Wildlife Federation
Nature Adventures, LLC
Nature Forward
NC League of Conservation Voters
New Jersey Conservation Foundation
North Carolina Coastal Federation
North Carolina Conservation Network
North Carolina Environmental Justice Network
North Carolina Herpetological Society
North Carolina Wildlife Federation
Ogeechee Riverkeeper
One Hundred Miles
Oregon Wild
Pasa Sustainable Agriculture
Public Employees for Environmental Responsibility
River Guardian Foundation
Satilla Riverkeeper
Savannah Riverkeeper
Save Our Saluda
Save the Sound
Science for Georgia, Inc
Snake River Waterkeeper
Sound Rivers
South Carolina Environmental Law Project
South Carolina Wildlife Federation
SouthWings
Surfrider Foundation
Tennessee Citizens for Wilderness Planning
Tennessee Ecological Restoration Association
Tennessee Environmental Council
Tennessee Riverkeeper
Tennessee Scenic Rivers Association
Tucson Bird Alliance
Upper New Riverkeeper
Upstate Forever
Virginia Conservation Network
Watauga Riverkeeper
Waterkeepers Chesapeake
Wild Virginia
Winyah Rivers Alliance
Yadkin Riverkeeper

I. Strong federal clean water protections are necessary to ensure clean water and to mitigate and adapt to the effects of a changing climate.

All Americans benefit from clean water and healthy wetlands. In enacting the Clean Water Act, Congress announced its objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[4] Yet the Supplemental Options, like the Proposed Rule, would reverse decades of progress made toward realizing that goal.

[4] 33 U.S.C. § 1251(a).

Strong federal protections for wetlands and other waters are critical for the reasons described at length in the January 2026 SELC Comments. People count on clean water for drinking, cooking, cleaning, and other household uses. Clean lakes, rivers, and oceans support tourism and recreation sectors of the economy. The nation's farmers need vast amounts of clean water for watering their livestock and crops, and for processing food to feed all Americans and support exports. And myriad industries require enormous amounts of clean water for their processes and products—from the nation's pharmaceutical and medical device industries to textile mills, from power plants to data centers, from breweries and bottling plants to manufacturers of microchips and superconductors. These industries provide important products and services, contribute significantly to the national economy, and depend on access to a reliable supply of clean water. The Supplemental Options, like the Proposed Rule, will dramatically reduce their access to that supply. Adding the cost of purifying polluted water to their industrial processes will drive up costs for those industries and for consumers, and will make American products less competitive in the world market.

Healthy wetlands promote our economy, health, and safety in many ways, including by filtering pollutants, recharging aquifers, abating flooding, buffering shorelines from erosion, providing habitat for commercial species and wildlife alike, and protecting water quality in groundwater and surface waters. Because a single acre of wetlands can store up to 1.5 million gallons of water, it can slow overland movement of stormwater, lower flood heights, and abate storm surges.[5] When that acre of wetlands is filled for development or otherwise removed, that stormwater will flow unimpeded downstream instead, increasing the risk of flooding. Consequently, as we discussed in detail in our comments on the Proposed Rule, wetlands are critical in providing communities with resilience in the face of increased storm activity, sea level rise, and flooding associated with climate change—harms that communities will face with accelerating frequency in the coming years.

In a time of increasingly erratic supplies of clean water and more frequent and extreme damage from flooding, the nation can ill afford to take backward steps that exacerbate these problems.

II. The Supplemental Options are fundamentally flawed and violate the Clean Water Act.

Like the Proposed Rule, the Supplemental Options are flawed in myriad ways and are inconsistent with the objective of the Clean Water Act. They fail to meaningfully address and even exacerbate the problem that the rulemaking claims to address. They contradict Supreme Court precedent. They introduce new concepts that are illogical and have no scientific basis. They would be impracticable, if not impossible, to implement. And they fail to account for

[5] EPA Office of Water, EPA843-F-06-001, *Wetlands: Protecting Life and Property from Flooding* 1 (May 2006), https://perma.cc/C97H-MZ2B; *5 Reasons Why We Love Wetlands*, NOAA (May 26, 2020), https://perma.cc/394S-YPL2 ("One acre of wetlands can store as much as 1.5 million gallons of floodwater. Wetlands save coastal communities $23 billion annually by protecting them from the effects of storms.").

reliance interests that would be adversely affected by their elimination of water quality protections. We hereby incorporate the January 2026 SELC Comments and add the following comments specific to the Supplemental Options.

A. The Supplemental Options would have consequences that are inconsistent with the objective of the Clean Water Act.

As the Agencies acknowledged when they published the Proposed Rule,[6] the Clean Water Act has one vitally important objective: to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[7] The Supreme Court has consistently recognized that this statutory objective incorporates Congress's "broad, systemic view of the goal of maintaining and improving water quality" in crafting the Act.[8] The new Supplemental Options to the Proposed Rule, however, are antithetical to the statutory purpose they purport to carry out.

The Supplemental Options would eliminate Clean Water Act protections from even more wetlands and streams than the Proposed Rule. In place of the Proposed Rule's plan to protect only those wetlands that have surface water for part of the year—during the entirety of an undefined "wet season," which was itself a dramatic departure from decades of practice—the Supplemental Options would protect only those wetlands that contain surface water *every day of the year* and are connected to a jurisdictional water via a connection that also contains surface water *every day of the year*, with limited exceptions that are not based in science (as discussed in Section II.D, below).[9] And rather than protecting only those streams that flow "at least during the wet season," as under the Proposed Rule, the Supplemental Options would cover only streams that flow *every day of the year*—again, with limited (and arbitrary) exceptions.[10]

When EPA's Scientific Advisory Board evaluated the fatally flawed attempt to redefine "waters of the United States" in the 2020 Navigable Waters Protection Rule ("NWPR"),[11] it found that the rule's decreased protections for wetlands potentially introduced new risks to human and environmental health and lacked a scientific basis to demonstrate the rule's consistency with the Clean Water Act's objective.[12] In support of that conclusion, the Scientific

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[6] *See, e.g.*, Updated Definition of "Waters of the United States," 90 Fed. Reg. 52498, 52498 (Nov. 20, 2025) ("Proposed Rule") ("the overall objective of the Clean Water Act"); *see, e.g.*, *id.* at 52502 ("The objective of the new statutory scheme"), 52502 ("in keeping with the objective of the Act"), 52503 ("Congress therefore intended to achieve the Act's objective"), 52514 (the Clean Water Act section 101(a) statutory objective").

[7] 33 U.S.C. § 1251(a). To achieve that objective, the Act also set ambitious goals of making all waters in the nation fishable and swimmable by 1983 and eliminating all discharges of pollution into waters by 1985. *Id.* §§ 1251(a)(1), (2).

[8] *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985).

[9] Supplemental Options, 91 Fed. Reg. at 57288–89, 57294–95.

[10] *Id.* at 58288–89.

[11] The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22250 (Apr. 21, 2020) ("NWPR").

[12] *See* EPA Sci. Advisory Bd., Final Commentary on the Proposed Rule Defining the Scope of Waters Federally Regulated Under the Clean Water Act 2, 4 (Feb. 27, 2020), https://perma.cc/6J5F-GR6A.

Advisory Board cited the extensive body of peer-reviewed scientific literature compiled by the Agencies demonstrating the substantial beneficial effects that upstream wetlands and streams have on the water quality and integrity of downstream water bodies.[13] Based on the NWPR's widespread reductions in waters deemed to be covered under the Clean Water Act, the Agencies subsequently confessed that the rule was "causing significant, ongoing and irreversible environmental damage."[14] Two courts not only granted the Agencies' request that the rule be voluntarily remanded but also vacated the NWPR, in light of the egregiousness of the of Agencies' errors in removing protections from the nation's waters.[15]

Yet under the Supplemental Options, the Agencies propose to remove protections from even more of the nation's wetlands, streams, and other waters than under the NWPR, in direct conflict with the objective of the Clean Water Act. An analysis by the Natural Resources Defense Council estimated that this proposal would leave at least 94% of wetlands and approximately 79% of streams outside the Act's protections.[16] The Supplemental Options would only degrade, rather than restore and maintain, the chemical, physical, and biological integrity of the Nation's waters. The Supreme Court has made clear that the Agencies "do[] not have the power to adopt a policy that directly conflicts with [the] governing statute."[17] On the contrary, when an agency's "positions have consequences that are inconsistent with major congressional objectives, as revealed by the statute's language, structure, and purposes," they must be rejected.[18] Because the Agencies' proposal would have consequences inconsistent with the objective of the Clean Water Act, the Agencies cannot lawfully adopt it.

We offer the following additional reasons that the Supplemental Options' drastic reduction in protections for the nation's waters would be inconsistent with the Act's objective.

1. "Perennial" and "relatively permanent"

After receiving overwhelming opposition to using the concept of the "wet season" to make jurisdictional determinations, the Agencies offer a new approach to determining when

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[13] *Id.* at 2–3 (citing, *inter alia*, EPA Office of Res. & Dev., Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Jan. 2015), https://perma.cc/5KDU-HP4W).

[14] Decl. of Ronnie Ben, Ex. 1, *Navajo Nation*, No. 20-CV-602-MV/GJF (D.N.M. July 2, 2021), ECF No. 34-2 (email from Karen Gude, EPA, to Tribal Partners (June 9, 2021)).

[15] *Navajo Nation v. Regan*, 563 F. Supp. 3d 1164 (D.N.M. 2021); *Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949 (D. Ariz. 2021).

[16] *Trump Administration Takes Another Swing at Dismantling Clean Water Protections*, Nat. Res. Def. Council (Sept. 4, 2026), https://www.nrdc.org/press-releases/trump-administration-takes-another-swing-dismantling-clean-water-protections; *see also U.S. Wetlands and Streams Are Already Losing Protections—Why Make It Worse?*, Nat. Res. Def. Council (Sept. 2, 2026), https://www.nrdc.org/resources/us-wetlands-and-streams-are-already-losing-protections-why-make-it-worse (map showing results of GIS analysis).

[17] *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 134–35 (1990); *see also Heckler v. Chaney*, 470 U.S. 821, 833 (1985) ("Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers.").

[18] *Cnty. of Maui v. Haw. Wildlife Fund*, 590 U.S. 165, 186 (2020).

waters are deemed "relatively permanent" for purposes of subsections (a)(4)(ii) and (5) of the Proposed Rule.[19] The Agencies propose, via the Supplemental Options, to even further restrict federal jurisdiction by defining "relatively permanent" as meaning "perennial," and to define "perennial" as meaning "having standing or continuously flowing water *every day of the year* during ordinary conditions."[20] The Supplemental Options propose two narrow exceptions to the requirement that the water body flow "every day of the year." First, the Supplemental Options would cover a water body that dries up as the "result of anomalous events such as drought or dry spell."[21] Second, they would cover a water body that dries up "for no more than a single period of up to 30 consecutive days in any given year as a result of non-anomalous events . . . such as low tide or regularly occurring dry period."[22]

This proposal is at odds with the Agencies' longstanding recognition of the importance of Clean Water Act protections for intermittent streams—streams that flow continuously only during certain times of the year—in addition to perennial streams. Streams provide benefits to downstream waters even when they do not flow continuously.[23] Streams with intermittent flow make up a majority of the stream miles in the United States[24] and affect the chemical, physical, and biological integrity of downstream waters. Like perennial streams, intermittent streams control the transport of pollution, nutrients, and carbon to downstream waters, with impacts on downstream flooding, base flows, and water quality.[25]

Defining "relatively permanent" as limited to only perennial streams represents an unwarranted leap well beyond Congress's intent in passing the Clean Water Act. It would exclude many waters that have long been covered under the Act,[26] without any consideration of the effects of such a dramatic change on the integrity of the nation's waters or quantification of the foregone benefits that would result.[27]

Make no mistake: the impacts of these extreme new definitions would be dramatic. Although the Agencies state that they "cannot reliably quantify the baseline for the current

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[19] "Relatively permanent" is used twice in the following jurisdictional definition: "Waters of the United States means . . . . [w]etlands adjacent to . . . [r]elatively permanent, standing or continuously flowing bodies of water … [and] [i]ntrastate lakes and ponds . . . that are relatively permanent, standing or continuously flossing bodies of water . . . ." 33 C.F.R. §§ 328.3(a)(4)(ii), (5); 40 C.F.R. §§ 120.3(a)(4)(ii), (5).

[20] Supplemental Options, 91 Fed. Reg. at 57294 (emphasis added).

[21] *Id.*

[22] *Id.* at 57288.

[23] Revised Definition of "Waters of the United States," 88 Fed. Reg. 3004, 3030 (Jan. 18, 2023) ("2023 Rule").

[24] *See, e.g.*, Susan A.R. Colvin et al., *Headwater Streams and Wetlands Are Critical for Sustaining Fish, Fisheries, and Ecosystem Services*, 44 Fisheries 74, 77, 86 (2019).

[25] 2023 Rule, 88 Fed. Reg. at 3030–31.

[26] *See, e.g.*, Supplemental Options, 91 Fed. Reg. at 57298 ("The agencies also anticipate that the arid West in particular will see a significant reduction in federally jurisdictional waters due to the definition of 'continuous surface connection' and 'relatively permanent' in [the Supplemental Options] as compared to the baseline.").

[27] *See* Section II.B, *infra*.

regimes to assess changes in the scope of jurisdiction," they nevertheless provide estimates under the National Hydrography Dataset ("NHD") that may reveal the extent of jurisdictional loss.[28] "In the contiguous United States, the NHD high resolution shows about 1.3 million miles of perennial streams and 3.5 million miles of intermittent streams (roughly 21 percent and 55 percent of NHD-mapped stream miles respectively),"[29] with the 55 percent lacking protection under the proposal. What's more, the Agencies also admit that most existing jurisdictional adjacent wetlands would almost certainly lose their status "as most wetlands do not contain perennial surface water."[30] Without federal safeguards, protecting these waters will be left to state and tribal programs, which, as explained in Section II.E, below, are often understaffed and under-resourced and therefore not equipped to regulate additional waters. By so dramatically reducing the scope of rivers, streams, and other water bodies that the Clean Water Act would protect, these definitions of "relatively permanent" and "perennial" amount to an attack on the Act's foundational objective to restore and maintain the integrity of the nation's waters.

Moreover, the impacts of the Supplemental Options' "every-day-of-the-year" rule with its arbitrary, limited exceptions would not be uniform across the country. As the Agencies admit, "the greatest impact would be in regions where intermittent streams drive much of the hydrology, particularly in the arid West."[31] It makes little sense scientifically or legally that the natural hydrology of an entire region of the country should be deemed non-jurisdictional because of ill-fitted definitions drafted in the name of simplicity.

The Agencies' novel definitions would also lead to absurd consequences inconsistent with the Act. For instance, the Supplemental Options could eliminate streams from Clean Water Act jurisdiction depending on the operation of federally licensed hydroelectric power plants constructed within them. Many hydroelectric plants are used as "black start" resources or peak loading resources.[32] A "black start" is the process of restarting a power plant to generate power without relying on external power; hydroelectric plants are well-suited because they can be started quickly and without external power, essentially by allowing water to begin flowing through the turbines.[33] When utilities choose to retain water in reservoirs behind dams to save it for black start capability[34] or periods of peak electricity demand,[35] they create an interruption in flow downstream of the dam. Other dams are purposely operated to collect water for use during times of drought, again creating artificial interruptions in flow. Nothing in the Supplemental

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[28] Supplemental Options, 91 Fed. Reg. at 57297.

[29] *Id.*

[30] *Id.* at 57298.

[31] *Id.* at 57297.

[32] *See* Jose Garcia et al., *Hydropower Plants as Black Start Resources*, U.S. Dep't of Energy iii (May 2019), https://perma.cc/H76L-3KMR.

[33] *Id.* at iii–vii.

[34] *Id.* at 3.9 to 3.12 ("35 to 40% of the units maintained and tested for black start are hydropower turbine-generators").

[35] *Hydropower*, U.S. Fish & Wildlife Serv., https://perma.cc/S9X2-K36U (last visited Oct. 6, 2026) (noting that "[p]eaking facilities store water to be released during peak energy use times when demand and prices are highest.").

Options or original Proposed Rule prevents such practices or the construction and operation of other manmade barriers to interrupt instream flow. Under the Supplemental Options' definition of "relatively permanent," even two non-consecutive days in a year where a stream runs dry downstream of a dam because of such practices or manmade barriers could artificially remove the stream and any adjacent wetlands from the jurisdiction of the Clean Water Act under 33 C.F.R. §§ 328.3(a)(4) and (5).

2. "Continuous surface connection"

The current regulatory definition of waters of the United States includes wetlands adjacent to water bodies that are themselves jurisdictional, defining "adjacent" as having a "continuous surface connection," consistent with the Supreme Court's interpretation of the Clean Water Act in *Sackett*. The Supplemental Options propose to unnecessarily further restrict Clean Water Act jurisdiction by redefining "continuous surface connection" as follows:

> *Continuous surface connection* means perennial surface water in a wetland that is continuously connected with the surface water in the jurisdictional water such that it is difficult to determine where the jurisdictional water ends and the wetland begins. Temporary interruptions in the surface water connection may occur as the result of anomalous events such as drought or dry spell. A temporary interruption in the surface water connection lasting no more than a single period of up to 30 consecutive days in any given year may also occur as a result of non-anomalous events such as low tide or a regularly occurring dry spell.[36]

As with their novel definition of "relatively permanent," the Agencies' new definition of "continuous surface connection" in the Supplemental Options would drastically reduce the number of "adjacent wetlands" covered by the Clean Water Act—even beyond the already restrictive standard adopted in *Sackett*. The Agencies admit that the Supplemental Options would eliminate Clean Water Act protections for most wetlands: "The agencies anticipate that the majority of wetlands that are jurisdictional as adjacent wetlands under current regimes would not satisfy the supplemental definition of 'continuous surface connection,' as most wetlands do not contain perennial surface water."[37] Indeed, the Agencies already estimated in their Regulatory Impact Analysis for the Proposed Rule that only 19% of wetlands acreage in the coterminous United States "may" have surface water—signifying that the Proposed Rule would exclude at least 81% of wetlands acreage in the coterminous United States from the Clean Water Act's coverage on that basis alone.[38] In certain parts of the country, such as the West, coverage of wetlands would be even more limited: "The agencies also anticipate that the arid West in particular will see a significant reduction in federally jurisdictional waters due to the definition of 'continuous surface connection' and 'relatively permanent' in these supplemental approaches as

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[36] Supplemental Options, 91 Fed. Reg. at 57301.

[37] *Id.* at 57298.

[38] EPA & Dep't of the Army, Regulatory Impact Analysis for the Proposed Updated Definition of Waters of the United States Rule at 46–47, tbl. 3-1 (Nov. 2025), https://perma.cc/4SCJ-NN99 ("Regulatory Impact Analysis").

compared to the baseline."[39] Because the Supplemental Options go even further than the Proposed Rule, they will exclude nearly all wetlands from the Act's protections, without any consideration of the effects on water quality or quantification of foregone benefits.

The Agencies seem unconcerned that their definition of "continuous surface connection" would cause such a drastic reduction in federal protections for wetlands. By prioritizing the holy grail of "a bright line" over the congressionally mandated objective of the Clean Water Act, the Agencies would sacrifice the nation's wetlands and the benefits they provide: filtering pollutants, protecting water quality, absorbing stormwater, abating floods, preserving fisheries, and providing wildlife habitat for commercial and non-commercial species.

B. The Agencies continue to ignore the most important aspect of the problem addressed by redefining "waters of the United States": the definition's impact on water quality.

An agency rule is arbitrary and capricious "if the agency . . . entirely failed to consider an important aspect of the problem" that its rulemaking purports to address.[40] In crafting the Supplemental Options to the Proposed Rule, the Agencies have yet again failed to consider the most important aspect of the problem at issue: the effects of the rulemaking on the Clean Water Act's statutory "objective" to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[41] In the Proposed Rule, the Agencies acknowledged that restoring and maintaining water quality is an important aspect of the problem; on its first page, the Proposed Rule asserted that it was "intended to implement the overall objective of the Clean Water Act to restore and maintain the quality of the Nation's waters."[42] Yet the Agencies repeatedly admitted that they had not evaluated the Proposed Rule's effects on water quality.

The same is true for the Supplemental Options: the Agencies admit that they have not quantified the costs or benefits of the proposed changes[43] and make no statements as to the impact the new definitions may have on the nation's water quality. In light of the Act's objective, the water-quality impacts that result from modifying the Clean Water Act's jurisdictional scope are a necessary consideration for revising the definition of "waters of the United States." With no analysis of the effects that the Agencies' drastic restriction of Clean Water Act protections would have on the nation's water quality, the Agencies have failed to consider the most important aspect of the problem they are purporting to address.

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[39] Supplemental Options, 91 Fed. Reg. at 57298.

[40] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[41] 33 U.S.C. § 1251(a).

[42] Proposed Rule, 90 Fed. Reg. at 52498.

[43] Supplemental Options, 91 Fed. Reg. at 57297–98.

C. The Supplemental Options contradict Supreme Court precedent.

The Supplemental Options would not only have consequences inconsistent with the stated objective of the Clean Water Act. For many of the reasons set forth in the January 2026 SELC Comments, the Supplemental Options would also contradict Supreme Court precedent interpreting the Act—even more plainly than the Proposed Rule would.

As explained in our prior comments, the Proposed Rule would not comply with the Supreme Court's holding in *Sackett*. The *Sackett* Court affirmed that the Clean Water Act covers wetlands that are *adjacent* to a jurisdictional water, meaning:

> first, that the adjacent body of water constitutes 'waters 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."[44]

Four months after the *Sackett* decision, the Agencies amended the regulatory definition of "waters of the United States" to incorporate that exact language, ensuring that the current rule faithfully implements the precise test adopted by *Sackett*, and to remove other portions of the definition that the Court had rejected.

Like the Proposed Rule generally, the Supplemental Options' definitions of "relatively permanent," "perennial," and "continuous surface connection," and their alternative proposal to eliminate the use of the words "adjacent" and "abutting," are unnecessary to implement *Sackett* and actually contradict the opinion. Moreover, their implementation will result in a far more restrictive interpretation of the Clean Water Act than dictated by the *Sackett* decision and prior Supreme Court precedent.

1. The Supplemental Options' definitions of "relatively permanent" and "perennial" are contrary to Supreme Court precedent.

In *Sackett*, the Supreme Court adopted the conclusion of the plurality in *Rapanos v. United States* that the "[Clean Water Act]'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.'"[45] The *Rapanos* plurality offered some additional explanation as to what it meant by "relatively permanent."

First, by including the term "relatively permanent" in addition to "standing" and "continuously flowing," the *Rapanos* plurality demonstrated that waters need not be continually

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[44] 598 U.S. at 678-79 (quoting *Rapanos v. United States*, 547 U.S. 715, 742 (2006)) (internal quotations omitted).

[45] *Sackett*, 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739) (internal quotations omitted).

flowing or standing to be covered by the Clean Water Act.[46] Accordingly, the *Sackett* majority, in adopting the *Rapanos* plurality standard, cannot be understood to have intended to impose a requirement that waters be continuously flowing or standing every single day of the year to fall under the jurisdiction of the Clean Water Act.

Second, the *Rapanos* plurality and *Sackett* majority made clear that waters may not be excluded from coverage simply because their flow ceases for more than 30 days of the year, or ceases more than once during the year. The *Rapanos* plurality opinion, endorsed by the *Sackett* Court, explained that "relatively permanent" waters do not necessarily exclude "streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought"[47] or "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."[48]

Consistent with this language, the Agencies have long interpreted the Clean Water Act as protecting waters that flow intermittently. Under the Agencies' current rule, "relatively permanent" "encompasses surface waters that have flowing or standing water year-round or continuously during certain times of the year."[49] "Certain times of the year" includes "extended periods of standing or continuously flowing water occurring in the same geographic feature year after year, except in times of drought."[50] The current rule also imposes a notable limitation: "relatively permanent" waters "do not include surface waters with flowing or standing water for only a short duration in direct response to precipitation."[51] The current rule thereby faithfully implements both the letter and intent of *Sackett* and *Rapanos*.

The Supplemental Options propose to define "relatively permanent" as meaning "perennial," and to further define "perennial" as meaning "having standing or continuously flowing water *every day of the year* during ordinary conditions."[52] This proposal contradicts both *Rapanos* and *Sackett* on its face, both in its "every day of the year" requirement and in its use of "perennial." The term "perennial" never appeared in the *Sackett* decision and appeared only appeared once in the *Rapanos* plurality opinion, when the plurality *declined* to impose "perennial" flow as a requirement and also implied that "perennial" means something less than continuous flow every day of the year.[53] Limiting "relatively permanent" waters to only

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[46] *See Rapanos*, 547 U.S. at 739.

[47] *Id.* at 732 n.5.

[48] *Id.*; *see also San Francisco Baykeeper v. City of Sunnyvale*, No. 5:20-CV-00824-EJD, 2023 WL 8587610, at *4 (N.D. Cal. Dec. 11, 2023) (finding creeks to be "waters of the United States" because "they flow seasonally, whereby they contain a continuous flow during some months and no flow during dry months, and more than in direct response to precipitation, which *Rapanos* explicitly does not exclude from the definition of [waters of the United States].").

[49] 2023 Rule, 88 Fed. Reg. at 3084.

[50] *Id.* at 3085.

[51] *Id.* at 3084.

[52] Supplemental Options, 91 Fed. Reg. at 57288.

[53] *Rapanos*, 547 U.S. at 732 n.5.

"perennial" waters would exclude the "seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months" that the *Rapanos* plurality said were *not* necessarily excluded by its "relatively permanent" standard.[54]

The Supplemental Options propose two exceptions to the requirement that the water body be "perennial" and flow "every day of the year." First, the Supplemental Options would allow the water body to dry up as the "result of anomalous events such as drought or dry spell" without losing protection.[55] Second, they would allow the water body to dry up "for no more than a single period of up to 30 consecutive days in any given year as a result of non-anomalous events . . . such as low tide or regularly occurring dry period."[56] *Rapanos* and *Sackett* do not require temporary interruptions to be "anomalous," and in fact specifically consider waters that are normally "seasonally dry" and contain no flow for one *or more* months in a normal year to remain covered by the Clean Water Act. Moreover, while the *Rapanos* plurality did not articulate a particular cutoff for the number of days that would render a water non-jurisdictional, it specifically contemplated that a 75-day interruption in flow would not be disqualifying, given its acknowledgment that a river that flowed for 290 days could still be jurisdictional under its "relatively permanent" standard. In contrast, the Agencies' exceedingly narrow standard under the Supplemental Options would exclude many seasonal rivers that "contain continuous flow during some months of the year but no flow during dry months."

Finally, because nothing in the Supplemental Options or original Proposed Rule prevents landowners from creating manmade barriers or other interruptions to sever instream flow, the Supplemental Options and original Proposed Rule ignore the *Sackett* Court's admonition that "a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier" to isolate wetlands that would otherwise be covered under the jurisdiction of the Clean Water Act.[57] They also ignore the Court's conclusion in *County of Maui v. Hawaii Wildlife Fund* that the Act does not permit manufactured interruptions in surface flow to operate as "a large and obvious loophole."[58]

By excluding from jurisdiction waters that *Rapanos* and *Sackett* include, the Agencies' proposed definitions are contrary to Supreme Court precedent.

2. The Supplemental Options' definition of "continuous surface connection" is contrary to Supreme Court precedent.

The Supplemental Options also introduce a definition of "continuous surface connection" that is not found in any Supreme Court opinion and that contradicts *Sackett*. For the same reasons described in Section II.C.1, above, the definition's use of the term "perennial" and its

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[54] *Id.*

[55] Supplemental Options, 91 Fed. Reg. at 57288.

[56] *Id.*

[57] *Sackett*, 598 U.S. at 678 n.16.

[58] *Cnty. of Maui,* 590 U.S. at 178, 183.

imposition of a jurisdictional limit involving flowing water every day of the year, with the same two limited exceptions, find no support in *Rapanos* or *Sackett*.

Moreover, neither the *Rapanos* plurality opinion nor the *Sackett* opinion held—or even suggested—that the wetland itself must have surface water every day of the year (with limited exceptions) to fall under the protective jurisdiction of the Clean Water Act. Yet that is what the Supplemental Options purport to do with their use of the phrase "perennial surface water in a wetland." There is no basis in either Supreme Court precedent or science for covering only those wetlands that are perpetually covered with surface water. Indeed, the generally accepted scientific definition of a wetland is "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."[59] Wetlands generally display three characteristics: presence of surface or groundwater at least periodically, hydric soils, and hydrophytic vegetation.[60]

In addition, neither the *Rapanos* plurality opinion nor the *Sackett* opinion held—or even suggested—that the connection between the wetland and the adjacent water must always contain water. Yet the Supplemental Options' use of the phrases "the surface water connection" and "perennial surface water in a wetland that is continuously connected with the surface water in the jurisdictional water" attempts to impose such a requirement. As the Agencies explained persuasively just three years ago, the surface connection required for adjacency is a physical connection—a connection that may be, but need not be, demonstrated by the continuous presence of surface water.[61] *Sackett* requires only a "continuous surface connection" and not a "continuous surface *water* connection."[62]

The Supplemental Options' requirement of an aqueous connection also defies prior Supreme Court opinions, none of which require that the connection between the wetland and other water body be filled with water at all times or even to be aqueous. The *Rapanos* plurality referred interchangeably to a "continuous surface connection" and a "continuous physical connection," but never a "surface water connection."[63] Similarly, in the 1985 decision *United States v. Riverside Bayview Homes, Inc.*, the Court held that a wetland could have a continuous surface connection with a navigable water even it was not inundated or flooded by the adjacent navigable water.[64]

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[59] Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41206, 41251 (Nov. 13, 1986); 40 C.F.R. § 120.2(c)(1).

[60] *See* U.S. Army Corps of Eng'rs, Wetlands Rsch. Program Tech. Rep. Y-87-1: Corps of Engineers Wetlands Delineation Manual 6 (1987).

[61] 2023 Rule, 88 Fed. Reg. at 3095–96.

[62] *Sackett*, 598 U.S. at 678.

[63] *Rapanos*, 547 U.S. at 742, 747, 751 n.13, 757.

[64] *Riverside Bayview*, 474 U.S. at 134–35.

Finally, the Agencies' focus on the temporal sense of "continuous" instead of the spatial sense of the word misreads Supreme Court precedent. The most reasonable reading of *Sackett* and the *Rapanos* plurality opinion is that they used "continuous" in "continuous surface connection" primarily in a spatial, *not* temporal, sense. This is evident in the Court's use of phrases such as "no clear demarcation between" and "unimpaired connection" when explaining its use of the term "continuous surface connection" in those two cases.[65] The *Sackett* majority also interpreted the *Rapanos* plurality opinion as holding that the Clean Water Act covers "wetlands with such a *close physical connection* to [other covered] waters that they were 'as a practical matter indistinguishable from waters of the United States.'"[66] And Justice Kavanaugh's concurrence characterized (and critiqued) the majority's "continuous surface connection" test as narrowing the Act's coverage of adjacent wetlands to only "adjoining," or "contiguous," wetlands—again, relying on a spatial concept, not a temporal one.[67] Yet the Supplemental Options focus nearly exclusively on the temporal sense of the word, defining "continuous surface connection" based on the presence of "perennial" surface water, the absence of "temporary interruptions," and the number of days those interruptions last.[68] This contradicts Supreme Court precedent.

In sum, neither *Rapanos* nor *Sackett* nor *Riverside Bayview,* nor any other Supreme Court decision, demands that either the wetland—or its connection to an adjacent water—perpetually have surface water (whether 365 or 335 days a year or otherwise) in order to be deemed jurisdictional. The Supplemental Options' adoption of such a requirement flies in the face of decades of Supreme Court precedent.

3. The Supplemental Options' alternative proposal to eliminate the terms "adjacent" and "abutting" contravenes Supreme Court precedent.

The Agencies also solicit comments on whether they should remove the term "adjacent" and "abutting" from the regulations defining "waters of the United States."[69] They should not.

The text of the Clean Water Act makes this clear. Section 404(g)(1) authorizes states and tribes to administer the Section 404 permitting program to regulate discharges into certain waters of the United States "*including* wetlands adjacent thereto."[70] Based on the statutory text, all nine Justices in *Sackett* agreed that "adjacent" wetlands are "waters of the United States." The majority acknowledged that the Act "tells us that at least some wetlands must qualify as 'waters

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[65] *Sackett*, 598 U.S. at 678 (quoting *Rapanos*, 547 U.S. at 742).

[66] *Id.* at 667 (quoting *Rapanos*, 547 U.S. at 742) (emphasis added).

[67] *Id.* at 716 (Kavanaugh, J., concurring).

[68] Supplemental Options, 91 Fed. Reg. at 57301.

[69] *Id.* at 57295.

[70] 33 U.S.C. § 1344(g)(1) (emphasis added).

of the United States,'"[71] and then identified what those are: wetlands that are "adjacent."[72] So, too, did the concurring Justices confirm that "the statutory term 'waters of the United States' covers wetlands 'adjacent' to waters of the United States."[73] While the majority opinion offers the Court's view as to *which* wetlands constitute "adjacent" wetlands and, thus, "waters of the United States," it never casts doubt on the Clean Water Act's coverage of adjacent wetlands as waters of the United States in the first place.

Indeed, the Court has consistently held that the Clean Water Act covers adjacent wetlands, from *Riverside Bayview* through *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*[74] to *Rapanos*.[75] Just as in *Sackett,* while the Court in these cases discussed the *scope* of "adjacent" wetlands, none of its decisions suggested the *elimination* of the term. And over the past 50 years, the Agencies have consistently followed suit. "[I]n the years since 1977, no one has seriously disputed that the Act covers adjacent wetlands. And in light of the text of the Act, eight consecutive Presidential administrations have recognized that the Act covers adjacent wetlands."[76] Removing the term "adjacent" from the regulations defining "waters of the United States" would further unmoor the Agencies' proposed definition from the statutory text that they are purporting to interpret. The Agencies have identified no reason to do so.

The term "abutting" does not appear in the current version of the Agencies' regulations defining "waters of the United States," but the Proposed Rule includes the term in its definition of "continuous surface connection."[77] The Agencies should take no action that contravenes the established understanding that wetlands that "abut," or touch, other waters of the United States are themselves waters of the United States. The Agencies, across administrations, have issued rules explaining that wetlands that abut otherwise covered waters are jurisdictional. Even the NWPR covered abutting wetlands, among other wetlands.[78] And just last year, the Agencies under the current administration announced in guidance that they were interpreting "waters of the United States" to include "wetlands that have a continuous surface connection *because they directly abut* the [requisite jurisdictional water]."[79]

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[71] *Sackett*, 598 U.S. at 675.

[72] *See id.* at 677 ("§ 1344(g)(1)'s use of the term 'including' . . . reflects Congress's assumption that certain 'adjacent' wetlands are *part of* "waters of the United States.").

[73] *Id.* at 717 (Kavanaugh, J., concurring).

[74] 531 U.S. 159 (2001).

[75] *Sackett*, 598 U.S. at 717 (Kavanaugh, J., concurring).

[76] *Id.* at 724 (Kavanaugh, J., concurring).

[77] Proposed Rule, 90 Fed. Reg. at 52546.

[78] *See* NWPR, 85 Fed. Reg. at 22307.

[79] U.S. Dep't of the Army & EPA, Memorandum to the Field Between the U.S. Department of the Army, U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency Concerning the Proper Implementation of "Continuous Surface Connection" Under the Definition of "Waters of the United States" Under the Clean Water Act

Over the decades, the Supreme Court has consistently recognized that wetlands abutting otherwise covered waters are themselves covered under the Clean Water Act. The Court in *Riverside Bayview* unanimously upheld the Corps' assertion of jurisdiction over adjacent wetlands and held that the "waters of the United States" include "wetland[s] that actually abut[] on a navigable waterway."[80] Twenty-one years later, in describing the Court's *Riverside Bayview* opinion, the *Rapanos* plurality did not disturb this conclusion. The plurality characterized *Riverside Bayview* as deferring to the Corps' inclusion of wetlands "actually abut[ting]" traditional navigable waters, as holding that the Corps "could reasonably conclude that a wetland that 'adjoin[ed]' waters of the United States is itself a part of those waters," and as resolving an ambiguity "in favor of treating all abutting wetlands as waters."[81] The *Sackett* Court, too, favorably cited *Riverside Bayview*'s holding that wetlands "actually abutting a navigable waterway" are jurisdictional, as it affirmed that "waters of the United States" include wetlands "contiguous" to navigable waters.[82]

In sum, the Agencies should retain the term "adjacent" and reaffirm that wetlands that "abut" other waters of the United States are themselves waters of the United States.

D. The Agencies offer no reasoned basis—scientific or otherwise—for the Supplemental Options' novel definitions.

Not only are the Supplemental Options' proposed definitions inconsistent with controlling case law, but they also lack support in science or any other reasoned basis.

1. "Perennial"

The Supplemental Options' proposed definition of "perennial" is antithetical to how the term "perennial" is used in scientific study and industry parlance. The definition that the Agencies claim informed their proposed definition, from the U.S. Geological Survey, defines "perennial stream" as one that "*normally* has water in its channel at all times."[83] Yet the Agencies have proposed to define "perennial" as "having standing or continuously flowing water *every day of the year* during ordinary conditions."[84] The Agencies' leap from "normally" to "every day of the year during ordinary conditions" is unexplained, and unsupportable.

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5 (Mar. 12, 2025), https://perma.cc/7K9V-QKRK (emphasis added) (quoting EPA & U.S. Army Corps of Eng'rs, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States* 7 n.29 (Dec. 2, 2008), https://perma.cc/VBR7-LBPW).

[80] *Riverside Bayview*, 474 U.S. at 135.

[81] *Rapanos*, 547 U.S. at 740–42 (quoting *Riverside Bayview*, 474 U.S. at 135 n.9).

[82] *Sackett*, 598 U.S. at 677–78.

[83] Supplemental Options, 91 Fed. Reg. at 57288 n.2 (citing USGS, *Water Basics Glossary*, https://perma.cc/3KVV-X6AD) (emphasis added).

[84] *Id.* at 57288 (emphasis added).

Merriam-Webster defines "normally" as "in a normal manner," and further defines "normal" as "characterized by that which is considered usual, typical, or routine," "occurring naturally," or "approximating the statistical average or norm."[85] None of these meanings connotes the absoluteness of the Supplemental Options' definition. Indeed, some scientific sources indicate that a water body is deemed perennial if the channel has flow *most* of the year during regular rainfall events.[86] Other scientific sources suggest that a perennial stream is one that has "measurable surface discharge" more than "80 percent of the time,"[87] or one that flows in a well-defined channel "throughout a majority of the year (or greater than 90% of the time)."[88] Although what constitutes "normal" flow is subject to some variance, it is generally accepted that the term does not mean the rigid "every day of the year" rule (with limited exceptions) proposed by the Agencies. For these same reasons, the Agencies' alternative proposal to define "perennial" to mean "surface water flowing continuously year-round," consistent with the twice-vacated NWPR,[89] is not well-grounded and would be arbitrary and capricious for the Agencies to adopt.

The Agencies also act contrary to established scientific practice by applying the term "perennial" to wetlands when they define "continuous surface connection" to mean "*perennial* surface water in a wetland . . . ."[90] "Perennial" is a term used to describe streamflow permanence, or the extent to which rivers and streams maintain surface flow.[91] It is distinct from the accepted terms used to classify wetland hydrologic regimes remotely and in the field: temporary, seasonal, semipermanent, intermittent, permanent, and saturated.[92]

2. Exceptions

The Supplemental Options' exceptions to the "every day of the year" rule—what the Agencies identify as periods where a body of water dries up as a result of "anomalous" or "non-anomalous" events—are similarly arbitrary and devoid of a reasoned basis.

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[85] *Normally*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/normally (last visited Oct. 7, 2026); *Normal*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/normal (last visited Oct. 7, 2026).

[86] *See, e.g.*, Seoyoung Kim, Sun-Kwon Yoon, & Namjeong Choi, *The Definition of Perennial Streams Based on a Wet Channel Network Extracted from LiDAR Data*, 12 Applied Sci. 704 (2023).

[87] E.R. Hedman & W.R. Osterkamp, *Streamflow Characteristics Related to Channel Geometry of Streams in Western United States*, U.S. Geological Survey Water Supply Paper 2193 at 6 (1982).

[88] 4 Tex. Admin. Code § 215.1(6).

[89] Supplemental Options, 91 Fed. Reg. at 57288.

[90] *Id.* at 57301 (emphasis added).

[91] USGS, *Streamflow Permanence*, https://perma.cc/X9Q9-YTM4.

[92] *See* Lewis M. Cowardin et al., FWS/OBS-79/31, *Classification of Wetlands and Deep-Water Habitats of the United States* 1–2 (1979), https://perma.cc/9QME-4PHE.

a. Drought

While the text of the Supplemental Options sets no parameters on the exception for "anomalous events such as drought," the preamble states that the Agencies are considering imposing two limitations on what constitutes "anomalous drought conditions" that can temporarily interrupt perennial flow without eliminating jurisdiction. First, the Agencies would consider only those droughts that register as "extreme (D3)" or "exceptional (D4)" on the weekly U.S. Drought Monitor map—and not "moderate (D1)" or "severe (D2)"—to be anomalous drought conditions.[93] Second, the Agencies would consider only those droughts that last for less than five years to be anomalous drought conditions.[94]

The Agencies offer no scientific support for the second limitation (citing only the administrative convenience of aligning the five-year timeframe with the five-year duration of an approved jurisdictional determination under current Corps guidance)[95] and no support of any kind for the first limitation. Further, the U.S. Drought Monitor was developed to provide a weekly snapshot of the location and intensity of drought conditions, not to estimate streamflow or wetland permanence. Its authors expressly "don't recommend using it to infer specifics about local conditions."[96] Finally, in crafting these limitations, the Agencies give no indication that they have considered an important aspect of the problem. Climate change is steadily increasing the duration and intensity of droughts throughout the country,[97] making droughts less and less "anomalous." Indeed, by making virtually all wetlands subject to destruction without a Clean Water Act permit, the Supplemental Options will exacerbate the effects of droughts; wetlands that are lost no longer protect communities by, among other things, preventing stormwater runoff and recharging groundwater.

b. "Non-anomalous events" resulting in temporary interruption for no more than a single period of up to 30 consecutive days

The exception for waters that dry up "for no more than a single period of up to 30 consecutive days in a given year as a result of non-anomalous events" appears to have been pulled out of thin air. The Agencies confess to having no scientific basis for choosing "30 consecutive days" as their cutoff, conceding that they found no "scientifically-grounded" or "nationally consistent" time frame and citing only the need for a "bright line duration."[98] Yet adopting "a more absolute position" that "may be easier to administer" cannot justify adopting a

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[93] Supplemental Options, 91 Fed. Reg. at 57290, 57291.

[94] *Id.* at 57290.

[95] *Id.*

[96] *Drought Classification*, Nat'l Drought Mitigation Ctr., https://perma.cc/F829-CCRZ (last visited Oct. 5, 2026).

[97] U.S. Global Change Rsch. Program, Fourth National Climate Assessment, Vol. II: Impacts, Risks, and Adaptation in the United States 137–38, 140 (2018), https://perma.cc/XDB6-KXQB.

[98] Supplemental Options, 91 Fed. Reg. at 57290.

policy that is "inconsistent with major congressional objectives, as revealed by the statute's language, structure, and purposes."[99]

The rigid "single period of up to 30 consecutive days" standard also fails to account for regional variation that results in dry periods of far greater frequency and duration in certain parts of the country than others—a disparity that will only increase due to climate change. As the Agencies themselves admit, "the greatest impact would be in regions where intermittent streams drive much of the hydrology, particularly in the arid West."[100]

Examples further illustrate the arbitrary nature of the Agencies' approach. A stream that flows for all but 30 consecutive days in a year would be protected. Yet a stream that flows for all but 31 consecutive days would not, nor would a stream that flows for all but two non-consecutive periods of 15 days each. Rulemaking is arbitrary and capricious where—as here—it fails to treat similar cases in a similar manner without a legitimate reason.[101] Defying logic even further, the Supplemental Options would protect a stream that flows for 325 days a year, with a month-long interruption in June, but would exclude from protection a stream that flows for 363 days a year, with a one-day interruption in June and a one-day interruption in August—even though the second stream would seem to have more "permanence" than the first.

c. "Dry spell"

The Supplemental Options also propose to exempt from their "every day of the year" rule (and thus include in their definition of "waters of the United States") bodies of water that dry up as a result of "anomalous events such as . . . dry spell" or "non-anomalous events . . . such as . . . a regularly occurring dry spell."[102] Yet the text of the Supplemental Options does not define "dry spell"; the preamble merely notes that "'dry spell' is generally defined as 'a period of dry weather.'"[103] And neither the proposed regulatory text nor the preamble provides any metric for determining whether a dry spell is "regularly occurring," further reflecting the exception's arbitrary nature. These terms suffer from many of the same flaws that doomed the use of "wet season" in the original Proposed Rule.

3. "Continuous surface connection"

The Supplemental Options' proposed definition of "continuous surface connection" would be nonsensical when used in 33 C.F.R. § 328.3(a)(5) and 40 C.F.R. § 120.3(a)(5); those provisions contain the term "continuous surface connection" in both the existing regulations and the Proposed Rule. Under the Proposed Rule, those provisions define "waters of the United

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[99] *Cnty. of Maui*, 590 U.S. 165, 186 (2020); *see also Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 134–35 (1990).

[100] Supplemental Options, 91 Fed. Reg. at 57297.

[101] *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996).

[102] Supplemental Options, 91 Fed. Reg. at 57301.

[103] *Id.* at 57290 n.6 (quoting Merriam-Webster (2026)).

States" to include "[l]akes and ponds . . . 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."[104] Substituting this new proposed definition of "continuous surface connection" would mean defining "waters of the United States" to include "[l]akes and ponds . . . that are relatively permanent, standing or continuously flowing bodies of water with perennial surface water in a wetland that is continuously connected with the surface water in the jurisdictional water such that it is difficult to determine where the jurisdictional water ends and the wetland begins." This resulting definition makes no sense, further illustrating the convoluted nature of the Supplemental Options' proposed definitions.

E. The Supplemental Options fail to remedy the problem the Agencies purport to address and would be difficult to implement.

Many comments critiquing the Proposed Rule focused on the difficulty in implementing the "wet season" concept. In response, the Agencies have proposed these Supplemental Options with the asserted goal of providing "certainty and clarity for landowners and is easily administrable for the implementing agencies."[105] However, the Supplemental Options do quite the opposite. Rather than addressing the problem raised by countless commenters—the difficulty of implementation—the Supplemental Options add even more uncertainty to an already ill-fitting, unscientific Proposed Rule. In addition, the Supplemental Options would be highly challenging to implement for landowners and regulators alike, providing yet another reason not to promulgate them.

First, the Supplemental Options do not remedy the problem the Agencies purport to address. For the reasons explained in the January 2026 SELC Comments, the Proposed Rule is anything but clear, certain, or predictable, with its reliance on an undefined "wet season" concept and the need to rely on a dizzying array of ill-fitting technical data, methods, and tools. The Supplemental Options only confound the problem. Instead of providing "transparency and regulatory certainty" through "a "bright line approach" for landowners, the Supplemental Options further muddle the test for what waters are jurisdictional.[106] In the portion of the Supplemental Options centered on the standard for anomalous and non-anomalous events, for example, the language of the text is inherently vague and creates uncertainty for landowners and regulators alike. The Agencies state that "anomalous events *such as* drought or dry spell" and "non-anomalous events resulting in a temporary interruption *such as* low tide or a regularly occurring dry spell" qualify.[107] The phrase "such as" broadens what could be considered anomalous or non-anomalous beyond the circumstances listed in the published Supplemental Options. However, the Agencies provide no indication as to what other temporary interruptions might qualify as anomalous or non-anomalous, a crucial element in determining whether waters

[104] Proposed Rule, 90 Fed. Reg. at 52533, 52545.

[105] Supplemental Options, 91 Fed. Reg. at 57288.

[106] *Id.* at 57289.

[107] *Id.* at 57290 (emphasis added).

are "relatively permanent" and therefore jurisdictional. The Supplemental Options are therefore unclear and uncertain, and do not resolve the problem the rulemaking is intended to address.

Similarly, the Supplemental Options would be difficult to implement. To begin with, the terms "perennial" and "relatively permanent" as defined by the Agencies—requiring a water body to flow *every* day of the year except during the two narrow exceptions—would require extensive monitoring to be accurate, even in the case of a simple stream or creek. The Agencies admitted as much in the Proposed Rule, "recogniz[ing] that a single visual observation may not always be sufficient to accurately determine relatively permanent flow, and visual observations should generally be combined with precipitation and other climate data and expected flow seasonality to accurately determine flow duration."[108] Elsewhere in the Proposed Rule, the Agencies acknowledged that identifying whether a stream "flows year-round or a few days less than year-round" "may require repeated or continuous monitoring over the course of a year or longer to ensure water is standing or flowing year-round."[109]

If these definitions were adopted, landowners would be required to monitor a water body every day of the year to ensure that there is continuous flow or whether "dry spells" last more than thirty days without any interruption of even one day. In cases where landowners observe a "no-flow" event, they would have to track how many days of consecutive no-flow has been observed. Even once they know how many days of no-flow have occurred, they must also know whether a dry period is deemed anomalous or non-anomalous to determine whether the water body remains jurisdictional. This involved analysis would not stop at a landowner's property line. Rather, a landowner would also be required to make the same determination for *all* waters that connect that water body to downstream traditional navigable waters or the territorial seas, because the Proposed Rule requires all portions of that tributary system to be "relatively permanent."[110] Some of those waters may traverse other private or restricted-access property, making the determination even more difficult. Although the Agencies insist that the concepts of "perennial" and "relatively permanent" would be easy for "members of the public" to observe "without the need for any further analysis or professional consultation,"[111] the reality is quite the opposite—and contrary to what the Agencies acknowledged in issuing the Proposed Rule.

Determining whether a stream is "perennial" also requires more than mere visual observation of flow over time and space: it calls for evaluating a range of biological, hydrological, and physical characteristics commonly associated with the continuous conveyance of water. The North Carolina Division of Water Quality's *Methodology for Identification of Intermittent and Perennial Streams and Their Origins* (cited by the Agencies in the Proposed

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[108] Proposed Rule, 90 Fed. Reg. at 52525.

[109] *Id.* at 52519.

[110] *See* Proposed Rule, 90 Fed. Reg. at 52523 ("Bodies of surface water that are ''standing'' are meant to encompass lakes, ponds, and similar features that have standing water year-round or at least during the wet season and that are part of the tributary system, as such waters that outlet to the tributary network and contribute relatively permanent flow downstream at the outlet point.").

[111] Supplemental Options, 91 Fed. Reg. at 57290.

Rule)[112] uses a scoring system based on 26 biological, hydrological, and geomorphological indicators of flow permanence, with no single variable leading to a determination of flow permanence.[113] And in *United States v. Donovan*, the government's expert established that a stream was perennial "based on its flow characteristics and physical features," including soil saturation and surface ponding in abutting wetlands during the summer months; morphological conditions of the vegetation along the stream; the presence and density of plant species adapted to saturated soil conditions; and the presence of a bed, bank, ordinary high water mark, and flowing water in the stream channel. The court relied on the expert's finding to conclude that the stream was "relatively permanent."[114] Many landowners will not possess the required knowledge in biology, hydrology, and geomorphology to make these complex determinations.

If determining whether a small stream or creek is "relatively permanent" is challenging, the truth is even harsher for determining whether a wetland has a "continuous surface connection" and is therefore jurisdictional under the Supplemental Options. A wetland would only be jurisdictional when "surface water in a wetland is continuously connected with the surface water in the jurisdictional water such that it is difficult to determine where the jurisdictional water ends and the wetland begins."[115] Moreover, only "the portion of the wetland that is indistinguishably part of the jurisdictional water" would be deemed jurisdictional under this proposal.[116] Landowners or regulators seeking to apply the proposed test could need to monitor each area that meets the Clean Water Act's definition of wetland[117] every day of the year to determine whether the surface water *on* the wetland and in the wetland's connection to another water body remained all year long and, if it dried up, whether it dried up only once during the year and for no more than 30 days. The landowners or regulators would also need to monitor the boundaries of the area of the wetland covered by surface water, and whether that area expanded or contracted from day to day. Moreover, they would need to monitor any streams or other waters connecting the wetlands on the property to jurisdictional waters. Visual observation would be insufficient; landowners would need to have training and properly calibrated field instruments to make accurate determinations as to whether water bodies share a "continuous surface connection." The same challenges for determining whether a stream qualifies as "waters of the United States"—including monitoring every day of the year and knowing about current drought conditions—apply to jurisdictional determinations for wetlands as well. For all of these

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[112] Proposed Rule, 90 Fed. Reg. at 52526 n.74.

[113] N.C. Div. of Water Quality, *Methodology for Identification of Intermittent and Perennial Streams and Their Origins* 9–37, 41 (version 4.11) (2010), https://perma.cc/EW4M-M5HT.

[114] *United States v. Donovan*, No. 96-484-JJF (MPT), 2010 WL 3000058, at *4 (D. Del. July 23, 2010), *report and recommendation adopted,* No. 96-484-LPS, 2010 WL 3614647 (D. Del. Sept. 10, 2010), *aff'd,* 661 F.3d 174 (3d Cir. 2011).

[115] Supplemental Options, 91 Fed. Reg. at 57295.

[116] *Id.*

[117] "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." 33 C.F.R. § 328.3(c)(1).

reasons, the Supplemental Options fail to address the problem they are intended to solve and are difficult to implement.

F. The Agencies have failed to consider reliance interests that would be adversely affected by the Supplemental Options' elimination of water quality protections.

In the Supplemental Options, the Agencies request specific comment on "any reliance interests that may be affected by this supplemental option and how the agencies may consider those interests while still adhering to the text of the Clean Water Act and *Sackett* decision."[118] We refer to Section II.E of the January 2026 SELC Comments for a more in-depth discussion of reliance interests at stake. Adoption of the Proposed Rule including the Supplemental Options would adversely impact the reliance interests that states, tribes, and numerous stakeholders have in continued national uniformity of water quality requirements. The Supreme Court has recognized that an agency must "provide a more detailed justification than would suffice for a new policy . . . when . . . its prior policy has engendered serious reliance interest that must be taken into account."[119] Here, the interests of several categories of stakeholders warrant a close look, including the restoration industry, states, and tribes.

First, the Agencies have still failed to take into account the interests and economic contributions of the restoration and mitigation industry, several members of which submitted significant comments during the Proposed Rule's comment period.[120] The industry itself has grown substantially since the 2008 adoption of the Clean Water Act rule requiring compensatory mitigation for loss of wetlands and other aquatic resources.[121] Although the Regulatory Impact Analysis for the Proposed Rule focused on the cost savings for property owners who would no longer have to obtain permits and fund mitigation, the Analysis only mentioned the lost ecosystem services provided by mitigation and the reduction in demand for restoration and

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[118] Supplemental Options, 91 Fed. Reg. at 57292.

[119] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

[120] *See, e.g.*, Letter from August Currier, Plains Redevelopment Corps, to Docket ID No. EPA-HQ-OW-2025-0322 (Jan. 5, 2026), https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-0852; Letter from Chip Tokar & Reagan Roberts, Nat. Res. Mgmt., to Lee Zeldin, EPA (Jan. 5, 2026), https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-0693; Letter from N.C. Env't Restoration Ass'n, to Lee Zeldin, EPA (Jan. 5, 2026), https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-0770; Letter from Tara Disy Allden, S.C. Mitigation Ass'n, to Stacey Jensen, EPA, & Milton Boyd, Dep't of the Army (Jan. 5, 2026), https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-0778; Letter from Chad Butler, Delta Land Services, to Lee Zeldin, EPA, & Adam Telle, Dep't of the Army (Jan. 5, 2026), https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-0669; Letter from Tenn. Ecological Restoration Ass'n, to Lee Zeldin, EPA, & Adam Telle, Dep't of the Army (Jan. 5, 2026), https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-0999; Letter from Jeff Oyen, Nat. Env't Banking Ass'n, to Lee Zeldin, EPA, & Adam Telle, Dep't of the Army (Dec. 17, 2025), https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-0329.

[121] 33 C.F.R. § 332 (*Compensatory Mitigation for Losses of Aquatic Resources,* 73 Fed. Reg. 19670 (Apr. 10, 2008)).

mitigation services. The Analysis did so without attempting to quantify the value of those losses, or of the lost jobs, income, and other economic contributions of the restoration industry.[122]

In the Supplemental Options, the Agencies merely note that the shifting line for federal jurisdiction would likely result in "projected reductions in the number of permits and required mitigation relative to the baseline."[123] When discussing the impacts to the mitigation and restoration services industry as a whole, the Agencies diminish the loss of the need for—and benefits from—those services by stating that any impacts to the sector would be the "indirect result of other entities no longer being required to mitigate," and that this loss may be lessened by needs in state programs.[124] Losses to these industries would be a direct result of shrinking federal jurisdiction. In addition, the Agencies cannot assume that the state-level programs will have the same demand and need for mitigation services under such a narrow conception of jurisdictional waters. Likewise, the Agencies cannot assume that states will be able to fill the gap and adequately regulate non-jurisdictional waters.

Relatedly, the Agencies must consider how the impact of such dramatic regulatory rollback will impact states and tribes. Currently, states and tribes rely on a uniform set of national standards to protect both intra- and interstate waters. With a loss of federal protections, the regulatory scheme for the nation's waters would be a patchwork and a state or tribe would have to depend on its neighbors not to pollute shared waters before they cross boundaries. In addition, despite the Agencies' claim that shrinking federal protections will result in greater control for states and tribes, many of these governments have neither the capacity nor the resources to implement their own regulatory program. In fact, during the Proposed Rule's comment period, numerous states and tribes raised these exact concerns about implementing their own permitting program in the absence of federal protections,[125] in direct contradiction to

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[122] Regulatory Impact Analysis at 55 ("[T]he agencies anticipate that the impacts of the proposed rule would be most significant for the section 404 program, reducing the number of 404 permits issued and acres of wetland impacts mitigated, relative to the baseline. The agencies expect the changes in turn to produce cost savings to project proponents from avoided permitting and mitigation activities, as well as forgone benefits from the avoided impact minimization and mitigation."), 80 ("At this stage, the agencies cannot reliably estimate whether the CWA section 404-related cost savings from avoided permit applications and mitigation may exceed forgone benefits of wetlands, and if so, the extent to which they may exceed.").

[123] Supplemental Options, 91 Fed. Reg. at 57298.

[124] *Id.* at 57299.

[125] *See, e.g.*, Letter from Charles A. Hobert, Rhode Island Dep't of Env't Mgmt., to Stacey Jensen, EPA, & Milton Boyd, Dep't of the Army (Jan. 5, 2026), https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-2600; Letter from Danilo Dragoni & Jamey McClinton, Nevada Div. Env't Prot., to Stacey Jensen, EPA, & Milton Boyd, Dep't of the Army (Jan. 5, 2026), https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-0176; Letter from Hunter Roberts, S.D. Dep't of Agric. & Nat. Res., to Water Docket, EPA (Jan. 5, 2026), https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-0879; Letter from Kentucky Dep't for Env't Prot., Div. of Water, to Kevin J. McOmber, EPA Reg. 4 Admin. (Dec. 30, 2025), https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-0340; Letter from Nicole Rowan, Colorado Dep't of Pub. Health & Env't, to Stacey Jensen, EPA, & Milton Boyd, Dep't of the Army (Jan. 5, 2026), https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-1035; Letter from Charlton Bonham, California

the Agencies' assertion that comments suggested that "States were both prepared and well-equipped to regulate non-jurisdictional waters within their boundaries."[126] And, tellingly, when the Agencies promulgated the Navigable Waters Protection Rule in 2020,[127] numerous states and tribes challenged that rule on the grounds that the rollback of federal protections would force them to incur unsustainable financial burdens in trying to fill the gap.[128] As one complaint (filed in federal court by 17 states, the District of Columbia, and the City of New York) explained,

> The immediate withdrawal of federal protections under the 2020 Rule forces the States and Cities either to incur the financial and administrative burdens associated with instituting or expanding their own water protection programs or to allow their waters to degrade. Filling the regulatory gap created by the 2020 Rule will require

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Dep't of Fish & Wildlife, to Stacey Jensen, EPA, & Milton Boyd, Dep't of the Army (Dec. 19, 2025), https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-0294; Letter from Leah Feldon et al., State of Oregon, to Stacey Jensen, EPA, & Milton Boyd, Dep't of the Army (Jan. 2, 2026), https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-0757; Letter from Kim Reynolds et al., State of Iowa, to Stacey Jensen, EPA, & Milton Boyd, Dep't of the Army (Jan. 4, 2026), https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-2618; Letter from Raymond E. Paddock III, EPA Reg. 10 Tribal Operations Coordinator, to Lee Zeldin, EPA (Jan. 5, 2026), https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-0284; Letter from Kathryn Wena Supernaw, Quapaw Nation, to Lee Zeldin, EPA (Jan. 5, 2026), https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-0966; Letter from James Williams, Jr., Lac Vieux Desert Band of Lake Superior Chippewa Tribal Gov., to Stacey Jensen, EPA, & Milton Boyd, Dep't of the Army (Jan. 5, 2026), https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-0821; Letter from Robert Deschampe, Grand Portage Band of Lake Superior Chippewa, to Lee Zeldin, EPA, & Adam Telle, Dep't of the Army (Dec. 29, 2025), https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-0330; Letter from Jeffrey A. Crawford, Forest County Potawatomi, to Stacey Jensen, EPA, & Milton Boyd, Dep't of the Army (Jan. 5, 2026), https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-2604; Letter from Tabitha Langston, Nat. Tribal Caucus, to Lee Zeldin, EPA, & Adam Telle, Dep't of the Army (Jan. 5, 2026), https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-3606; Letter from Douglas Craven, Little Traverse Bay Bands of Odawa Indians, to Lee Zeldin, EPA, & Adam Telle, Dep't of the Army (Jan. 5, 2026), https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-11196; Letter from Anthony Ortiz & James Tenorio, Pueblo of San Felipe, to Lee Zeldin, EPA, & Adam Telle, Dep't of the Army (Dec. 17, 2025), https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-0255; Letter from Clay Samford et al., Earthjustice, to Lee Zeldin, EPA, & Adam Telle, Dep't of the Army (Jan. 5, 2026), https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-1198; Letter from Melvin J. Baker, Southern Ute Indian Tribe, to Michael Regan, EPA, & William Graham, Dep't of the Army (Dec. 30, 2025), https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-0906; Letter from Fort Belknap Indian Community, to Lee Zeldin, EPA, & Adam Telle, Dep't of the Army (Jan. 5, 2026), https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-0786; Letter from Gary Harrison, Chickaloon Village Traditional Council, to EPA (Dec. 30, 2025), https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-0347; Letter from William B. Iyall, Cowlitz Indian Tribe, to Lee Zeldin, EPA, & Adam Telle, Dep't of the Army (Jan. 5, 2026), https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-0677.

[126] Supplemental Options, 91 Fed. Reg. at 57292.

[127] *See* NWPR, 85 Fed. Reg. 22250.

[128] *E.g., Colorado v. EPA*, 989 F.3d 874 (10th Cir. 2021) (claiming rule that removed federal protections from wetlands would unduly increase the state's burden to regulate and enforce clean water protections); *Navajo Nation v. Regan*, 563 F. Supp. 3d 1164, 1169 (D.N.M. 2021) (EPA acknowledging that "tribes lack the authority and the resources to independently regulate surface waters within and upstream of their reservations, and therefore cannot protect their scarce waters from upstream dischargers").

> difficult and time-consuming processes involving state program creation and expansion, state legislative and regulatory changes, and state appropriation and expenditure of additional funds necessary to do so.
>
> The 2020 Rule also puts the States and Cities at an unfair economic disadvantage vis-a-vis other states and cities that elect not to protect the waters that are no longer protected under the 2020 Rule. To mitigate out-of-state pollution that occurs as a result of the 2020 Rule the States and Cities face having to impose disproportionately strict controls on pollution generated within their borders, thereby raising the costs of doing business in the States and Cities.
>
> Increased pollution discharges under the 2020 Rule will also impair the States' and Cities' water recreation industries by making waters less desirable for fishing, boating, and swimming, and curtailing revenues associated with such activities.[129]

Six tribes brought a similar lawsuit in federal court, explaining the harm they would endure due to a rule change excluding many streams and wetlands akin to what the current Supplemental Options would do:

> Tribes will be required to promulgate and develop much more extensive regulatory programs within their boundaries if Clean Water Act protections are lost and Tribes are forced to fill that gap. This will cost Tribes significant resources in that some do not have well-staffed natural resources departments and even those that do will need to increase budgets and personnel in order to achieve the level of water protection necessary to meet what is currently in place with the Clean Water Act.[130]

Though the Agencies concede that states and tribes "may need to expend considerable resources to effectuate" a program to regulate non-jurisdictional waters, the Agencies do not identify solutions to this serious problem that they would create. The Agencies must consider and address the concerns raised by these reliance interests in rethinking the Proposed Rule and Supplemental Options.

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[129] Compl. ¶¶ 84–86, *California v. Wheeler*, No. 3:20-cv-03005, 2020 WL 2105890 (N.D. Cal. filed May 1, 2020) (action by 17 states, the District of Columbia, and the City of New York, plus 23 other states intervening, to challenge the 2020 NWPR).

[130] Compl. ¶ 22, *Pascua Yaqui Tribe v. EPA*, No. 4:20-cv-00266-RM, 2020 WL 3432586 (D. Ariz. filed June 22, 2020).

III. The Agencies have failed to meet the requirements of the Endangered Species Act.

The Endangered Species Act establishes a vital program for the conservation of both imperiled species and "the ecosystems upon which . . . [they] depend[.]"[131] Central to this program is the consultation requirements of section 7,[132] which the Agencies have ignored.

Under section 7(a)(2) of the Act, "[e]ach Federal agency" is required,

> in consultation with and with the assistance of the Secretary [of the Interior or the Secretary of Commerce], [to] insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat[.][133]

This language imposes both substantive and procedural obligations on federal agencies. Substantively, agencies must make certain their actions are "not likely" to leave an imperiled species in jeopardy or adversely modify its critical habitat.[134] Procedurally, agencies must evaluate the potential impact of their actions "in consultation with" federal wildlife experts.[135]

At least one third of all of the nation's threatened and endangered species depend on wetlands for their survival,[136] with many of them reliant on non-floodplain wetlands that the Supplemental Options' extremely restrictive definition of "continuous surface connection" would exclude from coverage.[137] In the Southeast, for example, species like the Hessel's hairstreak butterfly, pine barrens tree frog, specialized swallowtail, red-cockaded woodpecker, eastern diamondback rattlesnake, and American alligator can be found in pocosins, with many such species relying on pocosins for their habitat.[138] In the wake of the *Sackett* decision, which

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[131] 16 U.S.C. § 1531(b).

[132] *Id.* §§ 1536, 1538(a), (g).

[133] *Id*. § 1536(a)(2); *see also id.* § 1536(a)(1) (requiring federal agencies to "utilize their authorities in furtherance of the purposes of . . . [the Endangered Species Act] by carrying out programs for the conservation of endangered species and threatened species listed" under the statute).

[134] *Id.* § 1536(a)(2).

[135] *Id*.

[136] *Why Are Wetlands Important?*, Nat'l Park Serv. (May 16, 2025), https://perma.cc/WCQ5-2S67.

[137] *See, e.g.*, *What Is a Pocosin*?, NOAA (June 16, 2024), https://perma.cc/YY33-N4TV.

[138] Elizabeth Guinessey et al., A Literature Review: The Chemical, Physical and Biological Significance of Geographically Isolated Wetlands and Non-Perennial Streams in the Southeast 13 (2019), https://perma.cc/J485-MURK.

stripped Clean Water Act coverage from as much as 63% of the nation's wetlands by acreage,[139] wetland-dependent species are already at serious risk. We cannot afford to further imperil them.

The Agencies recently acknowledged that by removing essential water-quality protections from wetlands and streams across the United States, the Proposed Rule may diminish habitat and lead to a reduction in ecosystem services.[140] The effects are likely to be even more pronounced if the Agencies adopt the definitions proposed in the Supplemental Options. The loss of habitat for listed plants and animals would imperil sensitive species. Accordingly, just as for the Proposed Rule, the Agencies are obligated to consult with the United States Fish and Wildlife Service to ensure that the implementation of the Supplemental Options would not jeopardize threatened or endangered species. Their failure to do so violates the consultation requirements of the Endangered Species Act.

IV. The Agencies have again failed to provide a meaningful opportunity for public comment.

Despite proposing yet another revised definition of "waters of the United States" that relies on new technical concepts and discards the Agencies' longstanding interpretations of the Clean Water Act, Supreme Court case law, and sound science, the Agencies provided a mere 30 days for the public to review and comment on these dramatic proposed changes. The Agencies offered no justification for ignoring Executive Order 12866, which specifies that "each /agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of *not less than 60 days*."[141]

Moreover, the Agencies continue to deny members of the public the opportunity to comment on any analysis of the potential costs and benefits of the Proposed Rule and, now, the Supplemental Options. Under the APA, agencies must make the technical studies and data on which they rely in their rulemaking subject to notice and comment.[142] The Agencies indicated in the Proposed Rule and its accompanying Regulatory Impact Analysis that they would attempt to quantify the costs and benefits of the Proposed Rule before issuing a final rule.[143] In the Supplemental Options, however, the Agencies report that they have not quantified the cost savings or the value of forgone benefits expected to result from their proposed regulatory changes, despite the many months they spent developing the Proposed Rule and Supplemental

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[139] Allyson Chiu, *Biden Rule, Heeding Supreme Court, Could Strip Over Half of U.S. Wetlands' Protections*, Wash. Post (Aug. 29, 2023), https://www.washingtonpost.com/climate-environment/2023/08/29/epa-new-wetland-rule/.

[140] Regulatory Impact Analysis at 5, 90; Supplemental Options, 91 Fed. Reg. at 57299.

[141] Exec. Order No. 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993) (emphasis added).

[142] *See, e.g.*, *Am. Radio Relay League v. FCC*, 524 F.3d 227, 236–37 (D.C. Cir. 2008) ("It would appear to be a fairly obvious proposition that studies upon which an agency relies in promulgating a rule must be made available during the rulemaking in order to afford interested persons meaningful notice and an opportunity for comment."); *see* 5 U.S.C. § 553(b).

[143] *See, e.g.*, Proposed Rule, 90 Fed. Reg. at 52500, 52542; Regulatory Impact Analysis at 2, 22, 23, 26, 28, 31, 41, 42, 43, 44, 45, 46, 49, 50, 54, 58, 74, 80, 86.

Options.[144] To the extent the Agencies provide their analysis of the costs and benefits only with a final rule—*after* the comment period has closed—the Agencies would deny the public meaningful notice and opportunity for comment, in violation of the APA.

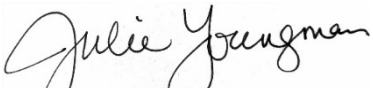
V. Conclusion

For all of these reasons, our 88 organizations, representing millions of members and supporters, urge the Agencies not to finalize the Supplemental Options or the Proposed Rule and instead to protect the nation's streams, rivers, lakes, estuaries, wetlands, and other waters to the maximum extent allowed under the Clean Water Act, for the benefit of all Americans and for the protection of their health, welfare, security, environmental interests, and economic interests.

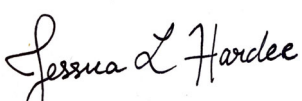
Sincerely,



Mark Sabath
Senior Attorney



Julia Furr Youngman
Senior Attorney



Jessica Hardee
Associate Attorney

[144] Supplemental Options, 91 Fed. Reg. at 57297–98.