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April 23, 2025

Re: Comments of the States of West Virginia, North Dakota, Georgia, Iowa, Alabama, Arkansas, Florida, Indiana, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, Ohio, Oklahoma, South Carolina, Virginia, and the Arizona Legislature on *WOTUS Notice: The Final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations*, 90 Fed. Reg. 13428 [EPA-HQ-OW-2025-0093; FRL-12684-01-OW] (Mar. 24, 2025)

Dear Administrator Zeldin, Ms. Best-Wong, and Ms. Colosimo,

On March 24, 2025, the U.S. Department of the Army, Corps of Engineers and Environmental Protection Agency (the Agencies) published the *WOTUS Notice: The Final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations*, 90 Fed. Reg. 13428 [EPA-HQ-OW-2025-0093; FRL-12684-01-OW] (Mar. 24, 2025). The States of West Virginia, North Dakota,

Georgia, Iowa, Alabama, Arkansas, Florida, Indiana, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, Ohio, Oklahoma, South Carolina, Virginia, and the Arizona Legislature submit these comments in response to the Stakeholder Feedback Opportunities to help the Agencies in further clarifying the definition of "waters of the United States" (WOTUS).

I. The States' Interest in a Proper Definition of WOTUS

Courts and Congress are particularly careful before treading into areas of traditional state authority. *See, e.g., Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (requiring "exceedingly clear language" before construing a statute to alter the balance of federal and state power). The WOTUS Rule implicates the very heart of traditional state authority. "Regulation of land and water use lies at the core of traditional state authority." *Sackett v. Envtl. Protec. Agency*, 598 U.S. 651, 679 (2023) (citation omitted). The authority of the States to regulate rivers and other intrastate waters within their borders is "obvious, indisputable," and "omnipresent." *Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 349, 356 (1908). Indeed, the "Tenth Amendment … directs [the Agencies] to determine ... whether an incident of state sovereignty is protected by a limitation" on Congress' exercise of the Commerce Clause power. *New York v. United States*, 505 U.S. 144, 157 (1992).

Congress recognized these core principles when it passed the Clean Water Act in 1972. In that statute, it stressed that it is "the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use ... of land and water resources[.]" 33 U.S.C. § 1251(b); *see also Rapanos v. U.S.*, 547 U.S. 715, 738 (2006) (expressing skepticism that Congress "authorized the Corps to function as a *de facto* regulator of immense stretches of intrastate land"). Cooperative federalism thus constitutes an essential element of how rules implementing the Clean Water Act, including the rule defining WOTUS, must be understood. And the Supreme Court has repeatedly rebuked the Agencies' prior definitions of WOTUS specifically for "encroach[ing] upon a traditional state power." *Solid Waste Agency of N. Cook Cnty. v. Army Corps of Eng'rs*, 531 US. 159, 166, 171-72 (2001) (*SWANCC*). The Agencies should not continue making the same mistake.

The States take special pride in how they manage and protect water resources within their boundaries. In a multistate challenge to the 2023 WOTUS Rule, Georgia, North Dakota, West Virginia, Iowa, and twenty other States each outlined their regulatory authority to protect their waters. *See West Virginia, et al. v. EPA*, ECF 1, 3:23-cv-32 (D.N.D. Nov. 13, 2023) (24-State Complaint), ¶¶ 28–51. These state laws illustrate how the traditional authority to regulate local lands and waters "is perhaps *the* quintessential state activity." *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982) (emphasis added). Under previous administrations, the Agencies appear to have operated under a belief that intrastate waters would not be regulated at all absent federal regulation. Nothing could be further from the truth, nor more destructive to our national system of cooperative federalism.

Taking these principles together, it is imperative that, in revising the WOTUS Rule, the Agencies adopt a definition that recognizes state authority over intrastate waters and that presumes waters are not WOTUS unless it is affirmatively established that they are.

That recognition of state regulatory authority is not only required by the Constitution and by statute; it also makes sense. Traditional state primacy allows each of the States to address the water

features and uses that are particular to that State or region. The extensive prairie pothole regions of the Dakotas are different from the permafrost wetlands on the North Slope in Alaska, which are different from the mountain streams of West Virginia, which are in turn different from the swamplands and marshes of Florida. Each have unique ecological, geological, and hydrological differences that are not amenable to a one-size-fits-all national categorization and nationally crafted rules. Traditional state primacy over most water features is supposed to be a feature of our federalist system, not a bug to be creatively overcome by federal rulemaking.

Rather than acknowledge these concepts, the federal government's recent, mind-bogglingly expansive re-interpretations of WOTUS directly infringe upon that traditional state authority. Even after the Supreme Court's decision in *Sackett v. EPA,* 598 U.S. 651 (2023), which rejected EPA's expansive interpretations, the Biden Administration promulgated a "conforming" rule—without going through the notice-and-comment— that continued to reflect a philosophy of maximizing federal jurisdiction however and whenever possible. *See* Revised Definition of "Waters of the United States"; Conforming, 88 Fed. Reg. 61964 (Sept. 8, 2023). Because the Supreme Court specifically required it, the oft-abused "significant-nexus" test was removed from the rule, along with a per se category of interstate wetlands. *Id*. at 61965-66. But it was made manifestly clear that unless the Supreme Court specifically rebuked the Agencies on a line-by-line basis, the Agencies were going to continue trampling over cooperative federalism to the greatest extent they could get away with. *See id*. at 61966 ("The agencies will continue to interpret the remainder of the definition of 'waters of the United States'" as the "2023 Rule" says.). So the definition of "WOTUS" remains a problem notwithstanding repeated and direct repudiations from courts all around the country, from the Supreme Court on down.

But with the Supreme Court's *Sackett* decision to guide the way, this Administration has an opportunity to end nearly twenty-five-years of disrespect to the States, the Clean Water Act, and our federalist system. *Cf. Rapanos*, 547 U.S. at 758 (Roberts, C.J., concurring) ("Rather than refining its view of its authority in light of our decision in *SWANCC*, and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency.").

The States applaud the Administration for seeking input on how the WOTUS definition can be revised to a proper scope, and they encourage the Agencies to recognize the boundaries of federal jurisdiction established by the Constitution and the plain language of the Clean Water Act.

II. Key Legal Principles

Before responding to the Agencies' specific questions, the States note several key legal principles that should inform the Agencies' jurisdictional analysis after *Sackett*.

A. *WOTUS Must Be Defined with Clear and Bright-Line Rules*

Recent years have seen the Agencies engage in a "flurry of rulemaking," *Sackett*, 598 U.S. at 668 to define, and then re-define, what water features constitute WOTUS and are thus subject to federal jurisdiction. But none of these efforts have resulted in rules that were clear or precise. In 2015, the Agencies promulgated what the Supreme Court characterized as a "muscular approach that would subject 'the vast majority of the nation's water features' to a case-by-case jurisdictional

analysis." *Sackett*, 598 U.S. at 668. The Agencies in 2020 tried to reverse course, but after a change in administration, the Agencies promulgated an even more expansive—and even more vague—definition of WOTUS. And even after *Sackett* decision again slapped down the attempt to dramatically expand federal jurisdiction through the use of hopelessly vague language, the Agencies ignored the Court's call for clear lines when it issued the 2023 Conforming Rule.

Because of the criminal penalties at stake, the Agencies must adopt a WOTUS definition that provides clear, bright-line rules. *See Sackett*, 598 U.S. at 680-81 (2023). Farmers and landowners should be able to understand the rule just as well as a team of hydrologists in the U.S. Army Corps of Engineers. People who are potentially subject to federal criminal law based upon the WOTUS definition should be able to understand as much without being required to hire lawyers. And if they do need to hire lawyers to understand whether their property contains or affects WOTUS, they should at least be able to have some certainty that different lawyers aren't going to reasonably give them different and conflicting opinions. In this respect, the Agencies' attempts to expand federal authorities by broadly defining, and then re-defining, WOTUS have been utter failures, and have worked to the disservice of the States, their citizens, and the nation. *Cf. Sackett,* 598 U.S. at 669–70 (because "the CWA can sweep broadly enough to criminalize mundane activities like moving dirt, ... a staggering array of landowners are at risk of criminal prosecution or onerous civil penalties.").

Practically speaking, then, a proper definition of WOTUS must not rely on complicated mapping, modelling, or a "geomorphic indicator[]" assessment to determine relative permanence. *Cf.* 88 Fed. Reg. at 3,087-88. The Agencies must provide common sense rules for ascertaining whether a body of water constitutes WOTUS. And if a water feature's status as WOTUS cannot be easily discerned without the use of complicated surveys, modeling, or algorithms unavailable to the common person, the rule should expressly provide that doubts should be resolved in favor of the water feature *not* being subject to federal jurisdiction.

B. *Navigability Must Be Central to Any WOTUS Determination*

The starting point for determining the bounds of federal jurisdiction for WOTUS, by both the Constitution and the CWA, must be "navigable waters." And while, in certain circumstances, "the CWA extends to more than traditional navigable waters," the Supreme Court has repeatedly "refused to read 'navigable' out of the statute, …[as it] shows that Congress was focused on 'its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.'" *Sackett*, 598 U.S. at 672 (quoting *SWANCC*, 531 U.S. at 172).

The Agencies must therefore reject a definition of WOTUS that would assert federal jurisdiction over bodies of water and water features that are disconnected from the Supreme Court's recognition "that 'the waters of the United States' principally refers to traditional navigable waters." *Sackett*, 598 U.S. at 673 (citing *SWANCC*, 531 U.S. at 168-69).

Interstate waters are not presumptively "navigable waters." A puddle or the equivalent of a koi pond that crosses state lines must not be designated as WOTUS simply due to the fact that it crosses state lines. In order for interstate waters to be subject to federal jurisdiction under the WOTUS rule, they must be sufficiently connected to traditionally navigable waterways. Multiple federal courts have recognized as much, and the Agencies should as well. *See, e.g.*, *Texas v. EPA*, 662 F.

Supp. 3d 739, 755 (S.D. Tex. 2023); *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1360 (S.D. Ga. 2019).

The States also encourage the Agencies to understand the limitations on federal authority imposed by the navigability element by looking to Justice Thomas's concurring opinion in *Sackett*. In that concurrence, Justice Thomas explained that Congress intended in the CWA to provide only "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *See Sackett*, 598 U.S. at 703-04 (Thomas, J., concurring) (providing the historical evidence of these limits on the federal government's power to regulate waters). The CWA came into law against the "key backdrop" that these "navigable waters of the United States" were "understood as invoking *only* Congress' authority over waters that are, were, or could be used as highways of interstate or foreign commerce." *Id.* at 685. That's because the federal government's "authority" over certain navigable waters is granted and limited by the Commerce Clause." *Id.* at 686; *see also United States v. Coombs*, 12 Pet. 72, 78, 9 L.Ed. 1004 (1838) ("The power to regulate commerce, includes the power to regulate navigation."). For instance, wetlands were generally not considered to be navigable waters even if used by fishermen unless it could be shown that commerce was being shipped on that water across state lines. *Sackett*, 598 U.S. at 695 (Thomas, J., concurring). So "navigable" indicates that the waters must be used as a "highway over which commerce is or may be carried," and "of the United States" indicates that this commerce "be carried on with other States or foreign countries." *Id.* at 699 (cleaned up). Thus the federal government's authority under WOTUS cannot include purely intrastate waters or waters without a substantial relationship to interstate commerce.

Restoring the centrality of navigability to WOTUS determinations is therefore critical, and it would ensure adherence to the limits that the Commerce Clause imposes on the federal government.

C. *Jurisdictional Waters Must Be "Indistinguishable" from WOTUS*

In *Sackett*, the Supreme Court was clear that a water feature that is not itself a traditionally navigable water must be "indistinguishable" from the water that constitutes WOTUS to be subject to federal jurisdiction. *See Sackett*, 598 U.S. at 684 ("CWA extends to only those "wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right," so that they are indistinguishable" from those waters.") (quoting *Rapanos*, 547 U.S. at 742, 755).

The concept of being "indistinguishable"—at the heart of *Sackett*'s holding—must require a direct hydrological surface connection in a typical year regardless of the flow classification. If the waters are truly "indistinguishable"—"no clear demarcation"—they should appear to be so in a typical year, absent "temporary interruptions … because of phenomena like low tides or dry spells." *See Sackett*, 598 U.S. at 678. That concept of indistinguishability from *Sackett* traces its provenance to *Rapanos*, which grounded itself in the text of the Clean Water Act.

Previously, the Biden Administration tried to strip "indistinguishability" from having any meaningful application. For example, the Agencies have argued in their litigation filings that indistinguishability is not core to *Sackett*'s holding but instead only "nonessential information"; in other words, the Agencies said that indistinguishability merely served as a way to understand how the "continuous surface connection" requirement can be met in some cases. *See, e.g.*, Defendants'

Combined Memorandum in Support of Cross Motion for Summary Judgment and In Opposition to Plaintiff's Motion for Summary Judgment at 21, *White v. U.S. Env't Prot. Agency*, No. 2:24-cv-00013 (E.D.N.C. Sept. 23, 2024), ECF No. 62 ("[T]hat wetlands are 'as a practical matter indistinguishable' from adjacent 'waters of the United States' is a conclusion that the continuous-surface-connection requirement produces. It is not a separate, standalone requirement."). That position was, and is, dead wrong.

Impoundments, for example, do not always have a hydrological connection to navigable waters. In such situations, they lack the necessary connection to navigable waters, and thus would not be subject to federal jurisdiction. The *Sackett* decision impliedly addresses impoundments by explaining that a wetland can be removed from federal jurisdiction when a barrier is erected that severs its connection to a jurisdictional water, just as an impounded river could be separated from jurisdictional waters by an artificial barrier. *See id.* at 678 n.16. So impoundments lacking a hydrological connection to traditionally navigable waters are not jurisdictional—even if they were once considered "waters of the United States." *Cf. Carr v. United States*, 598 U.S. 438, 448 (2010) (noting that statutes written in the present tense don't automatically embrace past definitions).

Likewise, for wetlands to be included, they must satisfy the high standard of indistinguishability. Only "[w]etlands that are "as a practical matter indistinguishable from waters of the United States" are WOTUS (and jurisdictional), which is to say, again, "it is difficult to determine where the water ends and the wetland begins." *Sackett*, 598 U.S. at 678. Indeed, in *Sackett*, the Sacketts' property was not jurisdictional because they could be "distinguish[ed] from any possible covered waters." *Id.* at 684. So being "located nearby" traditional navigable waters is not enough for wetlands to be jurisdictional. And only "temporary interruptions" such as "low tides" can allow for such wetlands to remain jurisdictional. *Id.* Wetlands thus generally should be presumed to be non-jurisdictional unless they can qualify as "waters" on their own, and tributaries need to be directly connected to a navigable water. *Id.* at 676.

Recognizing the importance of "indistinguishability" for any jurisdictional determination also serves the necessary requirement for clarity noted earlier; an ordinary person would be able to observe such a distinction between land and water. Any other explanation needlessly befuddles what could be a relatively simple and understandable analysis.

Indeed, courts have already begun to recognize the importance of "indistinguishability" for asserting federal jurisdiction over waters that are not themselves navigable.. *See, e.g.*, *United States v. Sharfi*, No. 2:21-cv-14205, 2024 WL 4483354, at *13 (S.D. Fla. Sept. 21, 2024), *report and recommendation adopted*, 2024 WL 5244351 ("Plaintiff ignores this indistinguishability requirement, which becomes meaningless if abutment alone establishes a 'continuous surface connection.'"); *Glynn Env't Coal., Inc. v. Sea Island Acquisition, LLC*, No. CV 219-050, 2024 WL 1088585, at *4 (S.D. Ga. Mar. 1, 2024) ("The CWA only extends to wetlands that are indistinguishable from 'waters of the United States' as a practical matter."); *but see* ROYAL C. GARDNER, WATERS OF THE UNITED STATES: POTUS, SCOTUS, WOTUS, AND THE POLITICS OF A NATIONAL RESOURCE 213 (2024) ("Most of the post-*Sackett* analysis of its impact on wetland jurisdiction focused solely on the continuous surface requirement and neglected to consider the 'indistinguishable' requirement.").

The States encourage the Agencies to pay special attention to this principle when defining what waters or water features are subject to federal jurisdiction, and to abandon the Biden Administration arguments that gave this principle incredibly short shrift.

III. Responses to the Agencies' Specific Questions

The Agencies posed three categories of questions in their notice and request for comment: (1) the scope of "relatively permanent waters"; (2) the meaning of "continuous surface connection"; (3) whether to have a category for jurisdictional ditches.

A. *The Scope of "Relatively Permanent Waters"*

The Agencies requested comment on "the scope of 'relatively permanent waters' and to what features this phrase applies." 90 Fed. Reg. 13,430. The Agencies also sought comment on "whether certain characteristics, such as flow regime, flow duration, or seasonality" should inform the definition of "relatively permanent." *Id.* And the Agencies noted that they are "particularly interested in feedback on how to identify 'relatively permanent' tributaries in the field to assist with transparent, efficient, and predictable implementation." *Id.*

The States encourage the Agencies to establish a clear, bright line rule that a water feature—particularly a tributary—must have a naturally occurring continuous flow of water year-round (not dependent on a recent precipitation event) to be jurisdictional. The Agencies should look to useful benchmarks such as minimum flow volume that can be observed on a daily basis year after year. Small streams and tributaries should be presumed not to be subject to federal jurisdiction, and instead subject to state jurisdiction, unless and until established otherwise. This approach contrasts with broader understandings of federal jurisdiction that "allow[] for regulation of any area that has a trace amount of water so long as the physical indicators of a bed and banks and an ordinary high water mark exist." *North Dakota v. EPA*, 127 F. Supp. 3d 1047, 1056 (D.N.D. 2015) (cleaned up).

This approach to understanding "relatively permanent waters" follows from the definition of "waters" as laid out by the *Rapanos* plurality, which was later endorsed by the Court in *Sackett*. As Justice Scalia explained for the plurality in *Rapanos*, "the use of the definite article ("the") and the plural number ("waters") shows plainly that § 1362(7) ["the waters of the United States")] does not refer to water in general." 547 U.S., at 732. Rather, "the 'waters' refers more narrowly to water as found in streams and bodies forming geographical features such as oceans, rivers, and lakes, or the flowing or moving masses, as of waves or floods, making up such streams or bodies." *Id.* (quotes omitted). Understanding "relatively permanent" to require a naturally occurring, continuous flow of water would also be capable of accounting for any unnatural discontinuation of the water flow, such as may be caused by human conduct, as well as accounting for "temporary interruptions in surface connection [that] may sometimes occur because of phenomena like low tides or dry spells." *Sackett*, 598 U.S. at 678.

This simple definition also has the salutary effect of being understandable by reasonable landowners. Landowners will know their land and water features and where they typically flow. So long as the area is not experiencing an exceptional "dry spell," a landowner can walk along the water feature and see the water flow with their own eyes to see where the water feature on their property

terminates. Reasonable landowners, and reasonable juries, will generally be able to understand and apply this definition and understand when waters are subject to federal jurisdiction.

In contrast, the Agencies' "significant nexus" test gave the Agencies wide discretion to put whatever gestalt they liked on the phrase. As the *Sackett* decision noted, the Agencies came up with an amorphous test—"'*significantly affect* the chemical, physical, and biological integrity'"—shortly after *Rapanos*. 598 U.S. at 662 (quoting 2007 Guidance). And in the 2023 Rule, the Agencies adopted the similarly vexing phrase "material influence." *See* 88 Fed. Reg. at 3067. These tests are not understandable to the average reasonable landowner. In revising the Rule, the Agencies must avoid definitions that require "call[ing] out your local friendly agent and he'll tell you, yes or no[.]" *Sackett v. EPA*, 2022 WL 22297224, at *98 (U.S. Oct. 3, 2022) (Oral. Arg. Tr.). The federal government should not be permitted to assert jurisdiction based on an "I-know-it-when-I-undertake-several-expensive-jurisdictional-studies-and-then-wrestle-the-agency-staff-member-down" standard.

In previous attempts to define WOTUS, the Agencies have explored the use of stream categories such as perennial, intermittent, and ephemeral. For instance, the 2020 Rule categorically excluded "ephemeral" streams from federal jurisdiction and defined the term as "surface water flowing or pooling only in direct response to precipitation (e.g., rain or snow fall)." 85 Fed. Reg. at 22,340. The Rule defined a "perennial" stream as "surface water flowing continuously year-round," *id.* at 22,341, and perennial tributaries that contribute surface water to a jurisdictional water were classified as jurisdictional under the rule. *Id.* The States believe those ephemeral and perennial classifications were reasonably understandable.

However, the problem with that previous approach was reflected in its attempt to define an "intermittent" classification of streams that fall between perennial and ephemeral streams. The 2020 Rule defined "intermittent" as "surface water flowing continuously during certain times of the year and more than in direct response to precipitation (*e.g.*, seasonally when the groundwater table is elevated or when snowpack melts)." *Id.* at 22,340. Any definition of WOTUS that classifies such "intermittent" streams as constituting WOTUS is too vague to be workable, not capable of being understood by a reasonable landowner, and should be rejected by the Agencies.

The word "permanent" requires a continuous, year-round presence of water—what the Agencies defined as a "perennial" stream in the 2020 Rule. *See* 85 Fed. Reg. 22,341. Thus, the Agencies should not define WOTUS to include ephemeral waters or those that flow only intermittently. "All of [the statute's] terms connote fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows." *Rapanos*, 547 at 733. "Even the least substantial of the definition's terms, namely, 'streams,' connotes a continuous flow of water in a permanent channel." *Id.*

In short, "relatively permanent waters" means what it says. Permanent does not mean intermittent. Permanent means permanent. And a relatively permanent water feature is one that has a naturally occurring, flow of water year-round, excepting only for "temporary interruptions in surface connection [that] may sometimes occur because of phenomena like low tides or dry spells." *Sackett*, 598 U.S. at 678.

B. *The Meaning of "Continuous Surface Connection"*

The Agencies requested comment on how to define a ''continuous surface connection,'' including what it means to ''abut'' a jurisdictional water. 90 Fed. Reg. 13,430.

The States encourage the Agencies to understand "continuous surface connection" as meaning that water flows from one feature to the other, so that they are "indistinguishable" under normal conditions. *See Sackett*, 598 U.S. at 684 (quoting *Rapanos*, 547 U.S. at 742, 755).

A continuous surface connection can still include wetlands behind a natural berm or similar natural landforms if the natural landforms evidence a continuous surface connection. Berms are not hydrological seals. As the 2020 Rule recognized, a natural river berm can be created by repeated flooding and sedimentation events. 85 Fed. Reg. at 22,311. But the 2020 Rule also rightly recognized that once waters are separated by more than one of these features, the connection becomes too remote. *See* 85 Fed. Reg. 22,312. This single-feature rule adheres to the ordinary meaning of the word "adjacent" and fits the *Sackett-Rapanos* paradigm that adjacent water features must be "as a practical matter indistinguishable" from WOTUS. *Sackett*, 598 U.S. at 678. This rule is also grounded in *Sackett*'s warning that the Agencies must avoid regulating waters "that are separate from traditional navigable waters ... even if they are located nearby." *Sackett*, 598 U.S. at 676.

The States also encourage the Agencies to abandon the atextual focus on the term "abut," and return to Congress's use of the term "adjacent." *See* 33 U.S.C. § 1344(g)(1). The focus on "abut" did not come from statute but is instead a single word that was plucked from the holding in *United States v. Riverside Bayview Homes,* 474 U.S. 121, 135 (1985), which itself reflected an analysis that became bogged down in a morass of legislative history and atextual analysis. In *Bayview*, the final holding was: "Because respondent's property is part of a wetland that *actually abuts* on a navigable waterway, respondent was required to have a permit in this case." *Id.* (emphasis added). That is how the term "abut" found its way into subsequent WOTUS determinations. Yet the Supreme Court has "often said it is a mistake to parse terms in a judicial opinion with the kind of punctilious exactitude due statutory language." *Goldman Sach Grp. v. Ark. Teacher Ret. Sys*., 594 U.S. 113, 135 (2021) (Gorsuch, J., concurring in part).

Indeed, the *Rapanos* plurality appears to have tried to get the train back on the proper textual tracks—Congress's statutory use of the term "adjacent" in § 1344(g)(1)—by using a parenthetical to equate the two terms: "*Riverside Bayview* rested upon the inherent ambiguity in defining where water ends and abutting ("adjacent")." 547 U.S. at 741; *see also id.* 741 n.10. And in *Sackett*, the word "abut" is absent except to describe *Riverside Bayview*. *E.g.*, 598 U.S. at 677-78.

As such, the Agencies should disregard the term "abut," which does not appear in statute. Instead, the Agencies should look to the term "adjacent," and construe that term as meaning separated by no more than one geologic feature, such as a naturally occurring berm, which still leaves the features, "as a practical matter[,] indistinguishable" from one another. *Sackett*, 598 U.S. at 678; *See Sharfi*, 2024 WL 4483354, at *13 (holding that a "continuous surface connection" does not "only" "require[] … that the adjacent regulated body of water 'abut' the wetlands.").

Whether other features—such as flood gates, pumps, or similar artificial constructs—remove a wetland from being considered ''adjacent'' to WOTUS should depend on whether there is a

hydrologic surface connection-in-fact under normal conditions. If the artificial feature is a barrier that blocks any surface connection to the nearby WOTUS, then the disconnected area should not be subject to federal jurisdiction due to its status as being "adjacent" to WOTUS. Adopting such a rule would fit with the facts of *Sackett*, wherein the Court determined that the Sacketts' property—being on the other side of a 30-foot road with a ditch on the other side, and no water flowing from the Sacketts' property to the ditch—did not make the Sacketts' property a wetland subject to federal jurisdiction. *See Sackett*, 598 U.S. at 662; *see also Sackett v. EPA.*, 2022 WL 22297224, at *35 (U.S. Oct. 3, 2022) (Oral. Arg. Tr.) ("The short answer, Justice Alito, is that the water doesn't get to the ditch. It doesn't get to the wetlands. It doesn't get to Priest Lake. There is no surface connection from the Sacketts' property to any plausible water.").

Similarly, a flood gate, pump, or similar artificial construct that only has a hydrological connection in response to irregular precipitation or unusually wet periods should not create federal jurisdiction, *see Rapanos*, 547 U.S. at 742, being merely the inverse of "temporary interruptions … [due to] phenomena like low tides or dry spells" that don't disqualify features from WOTUS status. *See Sackett*, 598 U.S. at 678. This formulation is also consistent with the *Sackett* Court's observation that "a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA." *Sackett*, 598 U.S. at 678 n. 16. While some vagueness will necessarily inure in distinguishing between precipitation and other events that are "regular" and "irregular," or "usual" and "unusual," they are presumptively terms that can be given meaning sufficient for a reasonable landowner or jury to understand them in most situations.

A revised WOTUS rule should also exclude the "catch-all" category included in the 2023 rule. This category unlawfully included purely intrastate waters deemed "relatively permanent" and alleged to have a "continuous surface connection" with a traditionally navigable water merely because they were nearby. *See* 88 Fed. Reg. at 61, 966 n.2. This category went so far as to expressly include "standing water" without "a flowing outlet to the tributary system." 88 Fed. Reg. at 3102. The Supreme Court has directly rejected such an approach, explaining that a rule which "allows for … assertions of jurisdiction … over a broad category of waters encompass[ing] intrastate, non-navigable features that were previously considered to be isolated" would be unlawful. *SWANCC*, 531 U.S. at 167, 171. The Agencies should not repeat that error.

In short, "continuous surface connection" should be understood as meaning that water flows from one feature to the other, so that they are "indistinguishable" under normal conditions. *See Sackett*, 598 U.S. at 684 (quoting *Rapanos*, 547 U.S. at 742, 755). And whether artificial constructs, such as flood gates or pumps, create or break a surface connection should turn on whether the artificial construct creates or breaks the surface connection in regular or usual conditions.

C. *The Category of "Jurisdictional Ditches"*

The Agencies further requested comment on whether jurisdictional ditches should be included as a category in the WOTUS rule, as was provided in the 2020 Rule. 90 Fed. Reg. 13,430.

The States encourage the Agencies to abandon the concept of "jurisdictional ditches" as a separate category for WOTUS and expressly clarify that artificial waterways and water features will be subject to jurisdictional determinations based on the same principles used to make jurisdictional determinations for naturally occurring waterways and water features. Alternatively, if the

Agencies retain "jurisdictional ditches" as a separate WOTUS category, the States encourage the Agencies to confirm that jurisdictional determinations for that category will be made the same way they are made for naturally occurring waterways and water features.

The 2020 Rule defined jurisdictional ditches in three ways: (1) ditches that are traditionally navigable (e.g., canals); (2) ditches that are constructed as tributaries or which alter and relocate tributaries; and (3) ditches constructed adjacent to wetlands that meet the tributary definition. But the States submit that creating a separate category with such definitions may be unnecessary, as, under a proper application of WOTUS, each of these categories would already be jurisdictional under a framework that properly asserts jurisdiction only over waters that are navigable-in-fact, relatively permanent tributaries to such waters, and water features that have a continuous surface connection.

Removing artificially created ditches as a separate category and treating them as water features that may or may not be subject to federal jurisdiction based on whether they are navigable-in-fact, relatively permanent tributaries, or have a continuous surface connection does not prevent the CWA from fulfilling its purpose. For example, shortly after *SWANCC*, the Ninth Circuit held that "irrigation canals in this case are not 'isolated waters' such as those that the Court concluded were outside the jurisdiction of the Clean Water Act." *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001). That court reasoned that because "the canals receive water from natural streams and lakes, and divert water to streams and creeks, they are connected as tributaries to other "waters of the United States."" *Id.* Consequently, the canals were considered tributaries because "the irrigation canals exchange water with a number of natural streams and at least one lake, which no one disputes are "waters of the United States."" *Id.* at 532.

Applying the standard WOTUS tests to artificially created ditches would also exclude from federal jurisdiction ditches that purely serve an irrigational or drainage purpose. Such irrigation or drainage ditches do not fit under any of the three definitions for jurisdictional ditches in the 2020 Rule, and they would not be understood as WOTUS under a traditional understanding of the term. Indeed, as the 2020 Rule rightly recognized, during the 1970s, the Corps interpreted its authorities under the CWA as excluding drainage and irrigation ditches from the definition of "waters of the United States." *See* 40 Fed. Reg. 31,320, 31,321 (Jul. 25, 1975) ("Drainage and irrigation ditches have been excluded."); *see also, e.g.,* 45 Fed. Reg. 62,732, 62,747 (Sep. 19, 1980) ("man-made, non-tidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States."); 48 Fed. Reg. 21466, 21474 (May 12, 1983) ("Waters of the United States do not include the following man-made waters: (1) Non-tidal drainage and irrigation ditches excavated on dry land, (2) Irrigated areas which would revert to upland if the irrigation ceased.").

In short, including a separate category for jurisdictional ditches may be unnecessary, and it could increase the potential for confusion over whether the considerations for an artificial ditch to be subject to federal jurisdiction are distinct from the considerations applied to naturally occurring water features. The Agencies should simply clarify that the same rules applied to natural waterways apply to artificially created waterways. Alternatively, if the Agencies retain "jurisdictional ditches" as a separate WOTUS category, the States encourage the Agencies to confirm that jurisdictional determinations for that category will be made the same way that they are made for naturally occurring waterways: looking to navigability, relative permanence, and continuous surface connections.

IV. Conclusion

The States commend the Agencies and the current Administration for seeking input on how to revise the WOTUS Rule. Federal misadventures in this space over the last several years have caused untold millions of dollars to be wasted in litigation and regulatory efforts that would have been entirely unnecessary if prior presidential administrations, and the agencies that worked for them, had been willing to recognize the constraints on federal authority and adopt regulations consistent with our Constitution and the Clean Water Act.

In undertaking efforts anew to fix the WOTUS Rule, the States encourage the Agencies to adopt clear definitions, understandable by the reasonable landowners who are going to be subject to them, and to ground those definitions in a firm understanding that federal jurisdiction only extends to traditional navigable waters and to water features that are "indistinguishable" from them due to a relatively permanent and continuous surface connection.

Sincerely,

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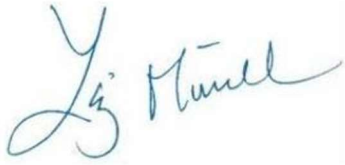

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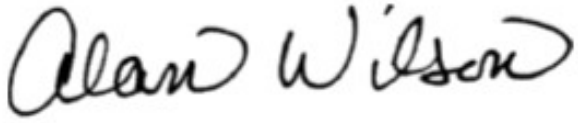

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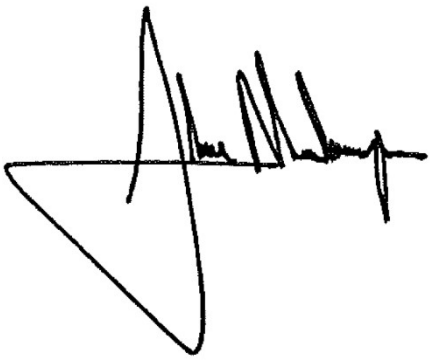

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