COMMENT ON PROPOSED RULE: UPDATED DEFINITION OF "WATERS OF THE UNITED STATES"

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Institute for Energy Research[*]

INTRODUCTION

The Institute for Energy Research strongly supports the Agencies' effort to correct course following decades of regulatory overreach. The Proposed Rule represents a meaningful step toward conforming agency practice to the statutory text of the Clean Water Act (CWA) and the Supreme Court's decision in *Sackett v. U.S. Environmental Protection Agency*, 598 U.S. 651 (2023).

On February 18, 2025, the Institute for Energy Research filed a petition requesting that the Agencies initiate notice-and-comment rulemaking to address serious deficiencies in the post-*Sackett* conforming rule.[1] We are pleased that the Agencies have undertaken this rulemaking and commend the Agencies for proposing revisions that address many of the concerns raised in our

[*] The Institute for Energy Research (IER) is a not-for-profit organization that conducts intensive research and analysis on the functions, operations, and government regulation of global energy markets. IER maintains that freely-functioning energy markets provide the most efficient and effective solutions to today's global energy and environmental challenges and, as such, are critical to the well-being of individuals and society.

[1] Institute for Energy Research, *Petition Seeking Amendment Of 40 C.F.R. § 120.2, 33 C.F.R. § 328.3 Defining "Waters Of The United States"*, https://www.instituteforenergyresearch.org/wp-content/uploads/2025/02/WOTUS-Petition-IER.pdf.

petition. We submit these comments to identify areas of agreement, to support the Agencies' alternative approach to defining "waters of the United States," and to recommend additional improvements in the Final Rule to fully comply with constitutional limitations and *Sackett*'s requirements.

I. Areas of Agreement

The Institute for Energy Research commends the Agencies for proposing revisions that address several of the principal deficiencies identified in our February 2025 petition. The proposed rule represents substantial progress toward a definition of "waters of the United States" that comports with *Sackett* and respects the Clean Water Act's careful balance between federal authority and state sovereignty over land and water use.

A. Elimination of Interstate Waters as an Independent Basis for Jurisdiction

IER strongly supports the Agencies' proposal to eliminate interstate waters as an independent category of jurisdictional waters. As we argued in our petition, the 2023 rule's categorical inclusion of all interstate waters—regardless of navigability—could not be squared with *Sackett*'s instruction that "waters of the United States" must be defined by reference to traditional navigable waters. The proposed rule correctly recognizes that when Congress amended the Federal Water Pollution Control Act in 1972, it deliberately chose "navigable waters" as the operative

term, thereby rejecting the inclusion of interstate waters as an independent category.

The Agencies' reliance on *Georgia v. Wheeler*, 418 F. Supp. 3d 1336 (S.D. Ga. 2019), is well-placed. As that court recognized, asserting jurisdiction over "a mere trickle, an isolated pond, or some other small, non-navigable body of water" simply because it crosses a state line exceeds the Agencies' authority under the Clean Water Act. The proposed rule's approach ensures that the term "navigable" in "navigable waters" retains meaning, as *Sackett* and *SWANCC* require.

B. Definition of "Relatively Permanent"

IER commends the Agencies for proposing, for the first time, an actual definition of "relatively permanent." Our petition criticized the 2023 rule for offering no guideposts for applying the relatively permanent standard, leaving regulated parties to guess at its meaning. The proposed definition—"standing or continuously flowing year-round or at least during the wet season"—provides meaningful guidance that was previously absent.

The proposed rule's clear exclusion of ephemeral waters is particularly welcome. As the *Rapanos* plurality explained, the term "waters" does not encompass "transitory puddles or ephemeral flows of water." 547 U.S. at 733. By defining relatively permanent waters as those with flow "year-round or at least during the wet season," the proposed rule appropriately excludes features that flow only in direct response to precipitation events.

C. Definition of "Continuous Surface Connection"

IER supports the Agencies' proposal to define "continuous surface connection" for the first time. Our petition argued that the 2023 rule improperly allowed jurisdiction based on minimal hydrologic connections inconsistent with *Sackett*'s requirement that wetlands be "indistinguishable" from covered waters. The proposed two-prong test—requiring both (1) abutment of a jurisdictional water and (2) surface water at least during the wet season—represents a substantial improvement.

The requirement that wetlands must "abut" or "touch" a jurisdictional water is consistent with the *Rapanos* plurality's interpretation that "adjacent" means "physically abutting." 547 U.S. at 748. The additional requirement for surface water presence helps ensure that covered wetlands are truly "indistinguishable" from jurisdictional waters, as *Sackett* demands.

D. New Preamble Explanation

IER appreciates that the Agencies have provided an entirely new preamble grounded in *Sackett* rather than the rejected significant nexus test. Our petition argued that the 2023 rule's preamble was unintelligible after the conforming rule excised the significant nexus test, leaving regulated parties unable to discern the Agencies' intent. The proposed rule's new preamble provides the coherent explanation that was previously lacking.

E. Tributary Definition

IER supports the proposed definition of "tributary," which requires relatively permanent flow, a bed and banks, and connection to a downstream traditional navigable water. The provision that non-relatively permanent features sever upstream jurisdiction addresses the cascading errors we identified in our petition, where the 2023 rule improperly extended jurisdiction to tributaries of non-jurisdictional waters.

II. The Agencies' Alternative Approach to Defining "Waters of the United States" Is Superior

The agencies have solicited comment on "an alternative approach to the proposed rule, whereby 'waters of the United States' would encompass traditional navigable waters, tributaries that directly flow into these waters, and wetlands with a continuous surface water connection to such waters," with all other waters excluded. This alternative is informed by Justice Thomas's concurring opinion in *Sackett v. EPA*. The agencies seek comment on "whether the statute and the relevant history of Federal authority over navigable waters support this approach."

This comment responds to that solicitation. As demonstrated below, the text and structure of the Clean Water Act, the relevant history of federal authority over navigable waters, and the constitutional principles that inform their interpretation all support the alternative approach. The terms "navigable waters" and "waters of the United States" have carried a consistent

meaning since *The Daniel Ball* was decided in 1870: they refer to waters that form a continued highway for interstate or foreign commerce. Congress used terms in the Clean Water Act precisely because they carried this well-understood meaning. The Supreme Court has repeatedly confirmed this interpretation, from *SWANCC* through *Sackett*, and the Corps' own 1974 regulations—promulgated immediately after the CWA's enactment—reflect it.

The alternative approach would align federal regulatory jurisdiction with these constitutional and statutory boundaries. It would limit "waters of the United States" to traditional navigable waters that actually function as channels of interstate commerce, tributaries with direct connections to such waters, and wetlands with continuous surface connections to covered waters. This framework respects the primary authority of States and Tribes over their land and water resources, ensures clarity and predictability in jurisdictional determinations, and avoids the constitutional concerns that have plagued broader interpretations of federal authority.

A. Congressional Regulation of Navigable Waters

Congress's authority to regulate navigable waters is derived from the Commerce Clause.[2] In fact, one of the seminal Commerce Clause cases, *Gibbons v. Ogden*,[3] involved the regulation of navigable waters. In *Gibbons,* the Supreme Court held that the Commerce Clause gave the federal government, and not an

[2] U.S. CONST. art. I, § 8, cl. 3.
[3] 22 U.S. (9 Wheat) 1, (1824).

individual state, the authority to regulate maritime commerce between states.[4] As the Court explained in *Gibbons*:

> America understands, and has uniformly understood, the word "commerce" to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government. . . . .[5]

A more difficult question than whether the Commerce Clause gives Congress the authority to regulate interstate commerce over navigable waters is the scope of the term "navigable waters." In the 1870 admiralty case, *The Daniel Ball*, [6] the Supreme Court enunciated the traditional definition "navigable waters." The Court explained:

> [R]ivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.[7]

Critically, *The Daniel Ball* defined not only what makes waters "navigable," but also what makes them waters "of the United States." The Court further explained:

> And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is

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[4] *Id*. at 189–90.
[5] *Id.*
[6] 77 U.S. (10 Wall.) 557, 563 (1870).
[7] *Id*. at 563.

conducted by water.[8]

It is this "junction" of waters to form "a continued highway for commerce, both with other States and with foreign countries," that brings the water "under the direct control of Congress in the exercise of its commercial power."[9]

B. The Purpose Limitation on Traditional Federal Authority over Navigable Waters

Congress's traditional authority over navigable waters was limited not only to *which* waters could be regulated, but also *for what purpose*. As the Court explained in *Gilman v. Philadelphia*, federal authority "comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie."[10] This authority encompassed only "the power to keep them open and free from any obstruction to their navigation" and "to remove such obstructions when they exist."[11]

Activities that merely "affect" water-based commerce, rather than directly obstructing navigation, remained within state authority. As the Court explained in *Gibbons*, "[i]nspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State" are not within Congress's channels-of-commerce authority, even though they may

[8] *Id.*
[9] *Id*. at 564.
[10] *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 724–25 (1866).
[11] *Id*. at 725.

affect interstate commerce.[12] This distinction was critical: the federal navigation power was narrow but deep—it applied only to a discrete set of navigable waters and could only be used to keep those waters open for interstate commerce.[13]

Courts carefully enforced these limits. In *United States v. Rio Grande Dam & Irrigation Co.*, the Court held that any "act sought to be enjoined" under the Rivers and Harbors Act must be "one which fairly and directly tends to obstruct (that is, interfere with or diminish) the navigable capacity of a stream."[14] Similarly, in *Wisconsin v. Illinois*, the Court interpreted the Rivers and Harbors Act in light of the constitutional prohibition on Congress "arbitrarily destroy[ing] or impair[ing] the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end."[15]

C. The Historical Exclusion of Wetlands

Wetlands were historically excluded from federal jurisdiction under the traditional navigability definition. In *Leovy v. United States*, the Court applied *The Daniel Ball* test and held that "navigable waters of the United States," as used in the Rivers and Harbors Act of 1890, did not extend to prevent Louisiana from reclaiming "swamp and overflowed lands by regulating and controlling the current of small streams not used habitually as

[12] *Gibbons*, 22 U.S. at 203.
[13] *See Sackett v. EPA*, 598 U.S. 651, 690 (2023) (Thomas, J., concurring).
[14] *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 709 (1899).
[15] *Wisconsin v. Illinois*, 278 U.S. 367, 415 (1929).

arteries of interstate commerce."[16] The Court observed that applying the Act to wetlands reclamation "would extend the paramount jurisdiction of the United States over all the flowing waters in the States."[17]

The Court declined to adopt such an expansive interpretation, emphasizing the constitutional foundation for federal authority:

> When it is remembered that the source of the power of the general government to act at all in this matter arises out of its power to regulate commerce with foreign countries and among the States, it is obvious that what the Constitution and the acts of Congress have in view is the promotion and protection of commerce in its international and interstate aspect, and a practical construction must be put on these enactments as intended for such large and important purposes.[18]

The Court held that the mere use of a wetland by fishermen was insufficient to establish navigability. Rather, "it was not shown that passengers were ever carried through it, or that freight destined to any other State than Louisiana, or, indeed, destined for any market in Louisiana, was ever, much less habitually, carried through it."[19]

D. The Rivers and Harbors Act of 1899

Thirty years after *The Daniel Ball*, Congress passed the most significant exercise of its authority to regulate navigable waters with the Rivers and Harbors Act of 1899 (RHA).[20] In § 13 of the

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[16] *Leovy v. United States*, 177 U.S. 621, 632 (1900).
[17] *Id*. at 633.
[18] *Id*.
[19] *Id*. at 627.
[20] *See* Act of March 3, 1899, ch. 425, §§ 9–10, 30 Stat. 1151.

RHA, Congress charged the Corps with the responsibility to regulate the discharge of "refuse" into any "navigable waters" without a permit.[21]

Three aspects of the RHA are particularly relevant to understanding the traditional scope of federal authority over navigable waters. First, the statute used the "navigable waters of the United States" and "waters of the United States" interchangeably.[22] Courts interpreting the Rivers and Harbors Acts did the same.[23] Second, Congress asserted its authority only to the extent that obstructions or refuse matter could impede navigation or navigable capacity.[24] Third, § 13's prohibition on depositing refuse into "any tributary of any navigable water from which the same shall float or be washed into such navigable water" required a direct surface water connection between tributaries and traditionally navigable waters.[25]

With increasing concern about pollution during the 1960s and early 1970s, Congress, commentators, and courts[26] started to view § 13 as a tool to help reduce pollution in the nation's waters.[27] As a result, Congress passed the 1972 amendments to the Federal

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[21] 33 U.S.C. § 407 (2018).

[22] *See* Virginia S. Albrecht & Stephen M. Nickelsburg, *Could SWANCC Be Right? A New Look at the Legislative History of the Clean Water Act*, 32 Envtl. L. Rep. 11042, 11044 (2002).

[23] *See, e.g., United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 608–09 (3d Cir. 1974).

[24] *See Rio Grande Dam & Irrigation Co.*, 174 U.S. at 709.

[25] 33 U.S.C. § 407.

[26] *See, e.g., United States v. Republic Steel Corp.*, 362 U.S. 482, 490–92 (1960) (noting that "refuse" in RHA § 13 was a broad enough term to include industrial waste).

[27] Albrecht & Nickelsburg, *supra* note 21, at 259.

Water Pollution Control Act.[28] These amendments are now called the Clean Water Act (CWA).[29] Congress explained that it passed the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[30]

To implement these goals, part of the CWA effectively superseded RHA § 13.[31] In a similar fashion to RHA § 13, the CWA prohibits the "discharge of any pollutant by any person" into "navigable waters" without a permit.[32] In the CWA, Congress defined "navigable waters" as "waters of the United States, including the territorial seas."[33]

E. The Corps' 1974 Regulations on Navigable Waters

In response to the enactment of the CWA, in 1974 the Corps promulgated a rule to define "navigable waters" and "waters of the United States."[34] The 1974 rule defined "waters of the United States" as "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce."[35] The Corps further explained that the determinative factor for defining navigable waters "is the water body's capability of use by the public for purposes of

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[28] Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816.
[29] *See* Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566.
[30] 33 U.S.C. § 1251(a).
[31] *See id.* § 1342.
[32] *Id.* §§ 1311(a), 1362(12).
[33] *Id.* § 1362(7).
[34] 33 C.F.R. § 209.120 (1974).
[35] 33 C.F.R. § 209.120(d)(1) (1974).

transportation or commerce."[36]

The Corps anchored its jurisdiction in the expanded *Daniel Ball* test, requiring "[p]ast, present, or potential presence of interstate or foreign commerce," "[p]hysical capabilities for use by commerce," and "[d]efined geographic limits of the water body."[37] In essence, the Corps' 1974 regulatory definition of "navigable waters" was the traditional definition of navigable waters—tied directly to the limits of Congress's navigation authority under the Commerce Clause.

F. SWANCC's Restoration of Traditional Navigability Principles

In 1977, the Corps redefined "waters of the United States" to include the traditional definition of navigable waters and "isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce."[38] Over the next 20 years, the Corps refined its definition of navigable waters. That definition stood until the Supreme Court case, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*).

In *SWANCC*,[39] the Supreme Court rejected the Corps' assertion of jurisdiction over nonnavigable, isolated, intrastate ponds based

[36] 33 C.F.R. § 209.260(e)(1) (1974).
[37] 33 C.F.R. §§ 209.260(d)(1)–(3) (1974).
[38] 33 C.F.R. § 323.2(a)(5) (1978).
[39] 531 U.S. 159 (2001).

on the "Migratory Bird Rule," which had extended CWA jurisdiction to waters used as habitat by migratory birds.[40] The Court held that the CWA does not "exten[d] to ponds that are not adjacent to open water."[41]

SWANCC expressly rejected the argument that Congress's "use of the phrase 'waters of the United States'" in the CWA provides "a basis for reading the term 'navigable waters' out of the statute."[42] The Court also validated the Corps' original 1974 regulations, under which "'the determinative factor'" for jurisdiction was the "'water body's capability of use by the public for purposes of transportation or commerce.'"[43] As Justice Thomas emphasized in *Sackett*, the Corps "did not 'mist[ake] Congress' intent'" when it promulgated its 1974 regulations tying jurisdiction to traditional navigability.[44]

SWANCC thus interpreted the CWA as implementing Congress's "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."[45] The Court made clear that Congress did not intend "to exert anything more than its commerce power over navigation,"[46] and expressly rejected reliance on the CWA's "ambiguous" legislative history to "expand the definition of 'navigable waters'" to the outer limit of

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[40] *Id*. at 164.
[41] *Id*. at 168.
[42] *Id*. at 172.
[43] *Id.* at 168 (quoting 33 C.F.R. § 209.260(e)(1)).
[44] *Sackett*, 598 U.S. at 702 (Thomas, J., concurring) (quoting *SWANCC*, 531 U.S. at 168).
[45] *SWANCC*, 531 U.S. at 172.
[46] *Id.* at 168 n.3.

the commerce authority as interpreted during the New Deal.[47]

The Court also articulated two background principles of interpretation that apply when determining the scope of "the waters of the United States." First, where an administrative interpretation of a statute "presses against the outer limits of Congress' constitutional authority," the Court expects "a clear statement from Congress that it intended that result."[48]Second, this expectation is heightened "when the broad interpretation authorizes Federal encroachment upon a traditional State power."[49] The CWA contains no such clear statement extending federal jurisdiction beyond traditional navigability principles.[50]

G. The Sackett Decision and the Thomas Concurrence

In Sackett v. EPA, the Supreme Court limited the scope of the Clean Water Act (CWA) to include only "relatively permanent" bodies of water and wetlands with a "continuous surface connection" to them, effectively eliminating federal jurisdiction over land with no clear demarcation from covered waters. Justice Thomas, joined by Justice Gorsuch, concurred with the majority but argued for an even narrower jurisdictional reach based on the historical and constitutional definition of "navigable waters" as functional highways of interstate commerce. Thomas explained that the federal government's authority should be restricted to waters used for maritime trade, asserting that the Sacketts'

[47] *Id.*
[48] *Id.* at 172.
[49] *Id.* at 173.
[50] *Id.* at 174.

property was exempt not only due to the lack of a surface connection but also because the nearby roadside ditch and Priest Lake failed to meet traditional commerce-based standards for navigability or federal oversight.

H. Implications for Tributaries Under the Traditional Navigability Framework

Under the traditional navigability framework endorsed by Justice Thomas, tributaries must share in the character of forming "a continued highway" for interstate commerce. Section 13 of the Rivers and Harbors Act, for example, prohibited depositing refuse "into any tributary of any navigable water from which the same shall float or be washed into such navigable water"—requiring a direct surface water connection.[51] This prohibition reflected Congress's authority to regulate activities that directly impair the navigability of traditionally navigable waters,[52] not a general police power over all waters with some eventual hydrological connection to navigable waters.

The alternative approach solicited by the agencies—limiting jurisdiction to "traditional navigable waters, tributaries that directly flow into these waters, and wetlands with a continuous surface water connection to such waters"—is consistent with this framework. Under this approach, a tributary would need a direct connection to a traditionally navigable water that actually serves as a commercial highway, rather than merely an attenuated

[51] 33 U.S.C. § 407.
[52] *See Rio Grande Dam & Irrigation Co.*, 174 U.S. at 708.

hydrological connection through intermediate waters.

I. Implications for Traditional Navigable Waters Determinations

Justice Thomas's concurrence also raises questions about current designations of traditional navigable waters. He notes that "the agencies have not attempted to establish that Priest Lake is a navigable water under the expanded *Daniel Ball* test," despite being "purely intrastate."[53] Reliance upon interstate tourism or "attenuated connection to navigable waters" may be "insufficient under the traditional navigability tests to which the CWA pegs jurisdiction."[54]

This analysis suggests that the agencies should reconsider traditional navigable water determinations based primarily on recreational use by interstate travelers, as such use does not establish the water as a "highway over which commerce is or may be carried."[55] The agencies' solicitation of comment on "what it means for a water to be 'susceptible to use in interstate or foreign commerce'" is well-founded, and the traditional navigability framework provides clear guidance: the water must be capable of functioning as a commercial navigation route, not merely a destination for interstate recreation.

J. The Constitutional Necessity of the Traditional Navigability Framework

[53] *Sackett*, 598 U.S. at 707 (Thomas, J., concurring).
[54] *Id.*
[55] *The Daniel Ball*, 77 U.S. at 563.

Justice Thomas frames these limitations as constitutionally required, not merely a policy choice available to the agencies. Where a federal interpretation "presses against the outer limits of Congress' constitutional authority," the Court "expects a clear statement from Congress that it intended that result."[56] The CWA's use of the historically-freighted terms "navigable waters" and "waters of the United States" cannot be read as such a clear statement, precisely because those terms had been "in use to describe the traditional scope of that jurisdiction for well over a century, and that carried a well-understood meaning."[57]

As Justice Thomas explained:

> It would be strange indeed if Congress sought to effect a fundamental transformation of federal jurisdiction over water through phrases that had been in use to describe the traditional scope of that jurisdiction for well over a century and that carried a well-understood meaning.[58]

The alternative approach solicited by the agencies—limiting "waters of the United States" to traditional navigable waters, tributaries that directly flow into these waters, and wetlands with continuous surface connections to such waters—respects these constitutional boundaries. It recognizes that the baseline under the Constitution and the CWA is state control of waters, with federal authority as the narrow exception.[59] This framework preserves "the States' traditional and primary power over land and water

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[56] *SWANCC*, 531 U.S. at 172.
[57] *Sackett*, 598 U.S. at 699 (Thomas, J., concurring).
[58] *Id.*
[59] *See Id.* at 706 ("The baseline under the Constitution, the CWA, and the Court's precedents is state control of waters.").

use"[60] while ensuring that federal regulatory programs apply where waters genuinely function as channels of interstate commerce.

III. Additional Recommendations for Strengthening the Proposed Rule

While the proposed rule represents substantial progress, IER respectfully urges the Agencies to consider the following additional modifications to more faithfully implement *Sackett* and provide greater regulatory certainty.

A. The Agencies Should Require Perennial Flow for Tributaries

Our petition recommended that the Agencies establish a minimum flow duration of perennial flow as required to establish jurisdiction over tributaries. The proposed rule's "wet season" standard, while an improvement over the 2023 rule, still permits jurisdiction over waters that flow for substantially less than a full year.

The *Rapanos* plurality illustrated the relatively permanent standard by reference to "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." 547 U.S. at 732 fn.5. A 290-day flow is substantially longer than many "wet seasons," which in some regions may last only a few months. The Agencies should consider whether their proposed wet-

[60] *SWANCC*, 531 U.S. at 174.

season standard is consistent with this guidance.

Requiring perennial flow—or, at the very least, a longer duration threshold—would better ensure that covered tributaries are the "streams, oceans, rivers, and lakes" that *Sackett* identifies as the core of federal jurisdiction. It would also provide greater certainty for the regulated community by establishing a bright-line rule rather than the case-by-case determinations inherent in identifying "wet season" boundaries across diverse geographic regions.

B. The Agencies Should Eliminate the Abandonment Trigger for Prior Converted Cropland

Our petition recommended that the Agencies deem prior converted cropland non-jurisdictional even upon a change in use. The proposed rule retains an abandonment trigger, providing that prior converted cropland loses its exclusion when it "is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years." 90 Fed. Reg. at 52546.

This approach creates uncertainty for landowners who may wish to leave land fallow or transition to non-agricultural uses. A landowner who purchased prior converted cropland in reliance on its non-jurisdictional status faces the prospect of federal jurisdiction attaching merely because the land was not farmed for five years. Such a regime imposes a continuing obligation on landowners and undermines the certainty that exclusions are meant to provide.

The Agencies should consider eliminating the abandonment trigger entirely or, at a minimum, extending the time period substantially and clarifying that mere changes in land use (as opposed to affirmative restoration of wetland characteristics) do not trigger jurisdiction.

C. The Agencies Should Broaden the Ditch Exclusion

Our petition recommended removing limiting modifiers from the ditch exclusion. The proposed rule excludes "[d]itches (including roadside ditches) constructed or excavated entirely in dry land." 90 Fed. Reg. at 52545. While this language removes the "draining only" limitation from the 2023 rule, it retains the requirement that ditches be constructed "entirely in dry land."

Under *Sackett*, ditches should be excluded unless they independently qualify as relatively permanent waters—that is, unless they are "streams, rivers, and lakes" in ordinary parlance. 598 U.S. at 671. A ditch that does not carry relatively permanent flow is not a "water of the United States" regardless of whether it was constructed in dry land or wet land. The Agencies should revise the exclusion to provide that any ditch not carrying a relatively permanent flow is excluded from the definition of "waters of the United States."

CONCLUSION

The Institute for Energy Research appreciates the opportunity to comment on the proposed rule. The Agencies have made

substantial progress toward a definition of "waters of the United States" that faithfully implements *Sackett* and provides regulatory certainty. The elimination of interstate waters as an independent jurisdictional category, the new definitions for "relatively permanent" and "continuous surface connection," and the revised tributary definition all represent significant improvements over the 2023 conforming rule.

The Institute strongly urges the Agencies to adopt the alternative approach, limiting jurisdiction to traditional navigable waters, tributaries that directly flow into these waters, and wetlands with continuous surface water connections to such waters. As demonstrated above, this approach is supported by the text and structure of the Clean Water Act, over a century of judicial precedent, the constitutional limits on federal authority, and the CWA's express protection of state sovereignty over land and water use.

Should the Agencies retain the proposed approach rather than the alternative, the Institute respectfully urges strengthening the final rule by requiring perennial flow for tributaries, eliminating the abandonment trigger for prior converted cropland, and broadening the ditch exclusion. These modifications would further align the rule with *Sackett*'s holding and the Clean Water Act's careful balance of federal and state authority.