



COMMENT ON: UPDATED DEFINITION OF “WATERS OF THE UNITED STATES”

DOCKET: EPA-HQ-OW-2025-0322

*Institute for Energy Research**

INTRODUCTION

The Institute for Energy Research strongly supports the improvements that the Environmental Protection Agency and the Army Corps of Engineers have proposed to the regulatory definition of the waters of the United States.¹ In the previous proposed rule, the proposed definition of waters of the United States was good but needed further improvements. The refinements that EPA and the Corps are suggesting in this supplemental rulemaking are further steps forward.

In particular, IER supports the proposed definition of “perennial,” the requirement of perennial surface water for a wetland’s continuous surface connection, and the express limitation of federal jurisdiction to the portion of a wetland that is indistinguishable from a covered water. We submit these comments to identify areas of agreement and to recommend additional improvements in the final rule so that it fully complies with constitutional limitations and *Sackett*’s requirements.

The agencies have asked commenters not to resubmit comments already provided on the November 2025 proposal.² IER’s January 5, 2026 comment explained at length the history of federal authority over navigable waters and why the agencies’ alternative approach, limiting jurisdiction to traditional navigable waters, tributaries that directly flow into these waters, and wetlands

* 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 Updated Definition of “Waters of the United States,” 91 Fed. Reg. 57,284 (Sept. 9, 2026) (supplemental notice of proposed rulemaking).

² 91 Fed. Reg. at 57,286.

with a continuous surface water connection to such waters, is superior.³ We do not repeat that discussion here. It remains IER's position, and we incorporate it by reference.

I. Constitutional limits on federal power must be considered in these definitions

For nearly the full life of the Clean Water Act, EPA and the Army Corps of Engineers have ignored the constitutional limits of federal power. For decades, the agencies essentially wrote "navigable"⁴ out of the statute, and they have written 33 U.S.C. § 1251(b) out of the statute as well. That provision states:

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 (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.⁵

The definition of the waters of the United States cannot be treated as a definition detached from "navigable waters." This is particularly true because the Constitution places limits on the federal government's regulatory authority, including the limits of the Commerce Clause. The best reading of the Clean Water Act is that waters that are neither navigable nor directly connected to navigable waters are not susceptible to use as highways of commerce, and are therefore beyond the federal government's authority under the Act.

Congress's authority to regulate navigable waters is derived from the Commerce Clause.⁶ In fact, one of the seminal Commerce Clause cases, *Gibbons v. Ogden*, involved the regulation of navigable waters. As the Court explained in *Gibbons*, "[t]he power over commerce, including navigation, was one of the primary objects for which the people of America adopted their

³ Institute for Energy Research, Comment on Proposed Rule: Updated Definition of "Waters of the United States," Docket No. EPA-HQ-OW-2025-0322-0486, at 5–19, 22 (Jan. 5, 2026).

⁴ 33 U.S.C. §§ 1311(a), 1362(7), (12).

⁵ 33 U.S.C. § 1251(b).

⁶ U.S. Const. art. I, § 8, cl. 3.

government.”⁷ In *The Daniel Ball*, the Court enunciated the traditional definition of “navigable waters.” Rivers “are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce.”⁸

As the Supreme Court explained in *SWANCC*, “[t]he term ‘navigable’ has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.”⁹ Furthermore, as the Court explained in *SWANCC*, “neither this, nor anything else in the legislative history to which respondents point, signifies that Congress intended to exert anything more than its commerce power over navigation.”¹⁰ The Court also reminded the Corps that “Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.”¹¹ Not only does the Clean Water Act lack a clear statement altering the federal-state balance, in the Clean Water Act “Congress chose to ‘recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources’”¹²

The Supreme Court repeated this point in *Sackett*: “Although we have acknowledged that the CWA extends to more than traditional navigable waters, we have refused to read ‘navigable’ out of the statute.”¹³ The agencies quote this same passage in the supplemental notice.¹⁴ The federal government is a limited government of enumerated powers, and “even under [the Court’s] modern, expansive interpretation of the Commerce Clause, Congress’ regulatory authority is not without effective bounds.”¹⁵ If Congress chooses to extend the agencies’ regulatory authority, it is always free to do so.

As EPA and the Corps consider these revised definitions, it is critical that the definitions take into account the constitutional limits on the regulatory authority of the federal government and the statutory limits as well. The

⁷ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824).

⁸ *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871).

⁹ *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs (SWANCC)*, 531 U.S. 159, 172 (2001).

¹⁰ *Id.* at 168 n.3.

¹¹ *Id.* at 172–73.

¹² *Id.* at 174 (quoting 33 U.S.C. § 1251(b)).

¹³ *Sackett v. EPA*, 598 U.S. 651, 672 (2023).

¹⁴ 91 Fed. Reg. at 57,289.

¹⁵ *United States v. Morrison*, 529 U.S. 598, 608 (2000).

agencies ask whether the supplemental option “appropriately aligns with the statutory text, *Sackett*, and other relevant case law.”¹⁶ In large part it does. But it aligns with the statute only if the agencies treat permanence as a limit on federal jurisdiction and not as its source. Permanence alone does not make a pond, stream, or wetland a water of the United States.

II. Definition of perennial waters

We support EPA and the Corps’ definition of “perennial.” However, there should not be an allowance for regularly occurring annual dry periods in the definition of “relatively permanent.”

EPA and the Corps propose defining “perennial” as:

Perennial means having standing or continuously flowing water every day of the year during ordinary conditions.¹⁷

This is a good definition, in part because it is compatible with navigable waters and with the States’ primary authority over waters beyond the scope of federal authority under the Commerce Clause. It follows the Supreme Court’s instruction 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.’”¹⁸ It is consistent with *The Daniel Ball*’s focus on waters “in their ordinary condition.”¹⁹ 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.

The agencies propose the following definition for “relatively permanent”:

Relatively permanent means perennial bodies of water. A body of water does not lose its relatively permanent status if it dries up as a result of anomalous events such as drought or dry spell. A body of water also does not lose its relatively permanent status if it dries up for no more than a single period of up to 30 consecutive days in any given year as a result of

¹⁶ 91 Fed. Reg. at 57,289.

¹⁷ 91 Fed. Reg. at 57,301 (proposed 33 C.F.R. § 328.3(c)(6)).

¹⁸ *Sackett*, 598 U.S. at 671 (quoting *Rapanos v. United States*, 547 U.S. 715, 739 (2006) (plurality opinion)).

¹⁹ *The Daniel Ball*, 77 U.S. at 563.

non-anomalous events resulting in a temporary interruption such as low tide or a regularly occurring dry spell.²⁰

The best reading of the statute and of the constitutional provisions is that requiring year-round water under ordinary conditions best implements the Clean Water Act. There also has to be an objectively limited exception for extraordinary drought, which we discuss in Section III. Practice has shown that EPA and the Corps will go beyond anything that is not objectively limited and violate the rights of the States and the rights of private property owners. The migratory bird rule rejected in *SWANCC* and the significant nexus test rejected in *Sackett* are two examples.²¹ Arguably this definition is already too expansive given the federal government's Commerce Clause limitation. A channel that goes dry in its ordinary condition cannot form "a continued highway over which commerce is or may be carried on."²² Without the permanence of water there is no Commerce Clause hook, and therefore no federal regulatory hook.

The problem with the proposal is the final sentence of the definition of "relatively permanent." That sentence allows a water 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." The agencies explain that a non-anomalous dry spell "is meant to encompass a regular, predictable period of dry weather that typically happens around the same time every year."²³ A stream that goes dry every August does not have water "every day of the year during ordinary conditions." A dry period that happens every year is the ordinary condition of that water. The exception contradicts the very definition it qualifies.

The 30-day line is arbitrary. The agencies acknowledge that "there are no precise, scientifically-grounded, nationally consistent time limits" for these interruptions, and they chose a 30-day limit, "which is roughly the length of a month."²⁴ Under the proposal, a stream that dries up once for 30 days every year remains a water of the United States, while a stream that dries up twice for 10 days each is not.²⁵ That result has nothing to do with navigation, commerce, or the text of the statute. The solution is not to make the allowance

²⁰ 91 Fed. Reg. at 57,301 (proposed 33 C.F.R. § 328.3(c)(7)).

²¹ *SWANCC*, 531 U.S. at 174; *Sackett*, 598 U.S. at 679.

²² *The Daniel Ball*, 77 U.S. at 563.

²³ 91 Fed. Reg. at 57,288.

²⁴ 91 Fed. Reg. at 57,290.

²⁵ *Id.* at 57,288.

more flexible. The solution is to delete it.

We recognize that the *Rapanos* plurality did “not necessarily exclude seasonal rivers.”²⁶ But the plurality had “no occasion in this litigation to decide exactly when the drying-up of a streambed is continuous and frequent enough to disqualify the channel as a ‘wate[r] of the United States.’”²⁷ That question is left to the agencies. The answer that best fits the statute is water every day of the year under ordinary conditions, with no exception for a dry season that arrives on schedule. Tidal waters do not need the 30-day allowance either. As the agencies acknowledge, waters that experience low tides likely already fall under paragraph (a)(1) as waters subject to the ebb and flow of the tide.²⁸

The same principle applies to wetlands. The proposed definition of “continuous surface connection” requires “perennial surface water in a wetland that is continuously connected with the surface water in the jurisdictional water,” but it contains the same 30-day allowance for “a regularly occurring dry spell.”²⁹ Under *Sackett*, a wetland is covered only when its continuous surface connection makes it “difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”³⁰ When the surface water between a wetland and a covered water disappears for a month every year, it is not difficult to determine where the water ends and the wetland begins. For that month, every year, anyone can see where the water ends and the wetland begins. The 30-day allowance should be deleted from both definitions.

III. Enforceable drought limits

IER supports an exception for extraordinary drought. A river does not stop being a river because of a historic drought. But the exception must be objectively limited, or it will swallow the rule. As noted above, practice has shown that EPA and the Corps will go beyond anything that is not objectively limited.

As proposed, the regulatory text provides that a body of water “does not lose its relatively permanent status if it dries up as a result of anomalous

²⁶ *Rapanos*, 547 U.S. at 732 n.5 (plurality opinion).

²⁷ *Id.*

²⁸ 91 Fed. Reg. at 57,290.

²⁹ 91 Fed. Reg. at 57,301 (proposed 33 C.F.R. § 328.3(c)(3)).

³⁰ *Sackett*, 598 U.S. at 678 (quoting *Rapanos*, 547 U.S. at 742, 755 (plurality opinion)).

events such as drought or dry spell.”³¹ The text contains no definition of drought, no threshold, no geographic area, and no time limit. The preamble states that the agencies are considering limiting qualifying droughts to the U.S. Drought Monitor’s extreme (D3) and exceptional (D4) categories, and treating a drought that lasts more than five years as the new normal.³² None of those limits appears in the proposed rule. Limits that appear only in a preamble are easily set aside.

IER asks the agencies to make four changes. First, the rule itself should identify the qualifying drought categories, the geographic area used to measure drought, the relevant time period, and the maximum duration of the exception. IER supports limiting the exception to extreme (D3) and exceptional (D4) drought. Second, the rule should require evidence that drought actually caused the water to dry up. The party asserting jurisdiction should have to show, with a record of conditions before the drought, that the water was perennial under ordinary conditions and that the drought, not the water’s ordinary condition, explains the interruption.

Third, the agencies should delete the separate exception for an anomalous dry spell, or limit it with an objective standard. The preamble contemplates a dry spell “not necessarily rising to the level of categorical drought” that “may be an extraordinary departure from ordinary conditions.”³³ Without a measurable threshold, any ordinary dry period can be relabeled as anomalous, and the drought limits will not bind anyone.

Fourth, the agencies should substantiate the proposed five-year period. The only reason the agencies give for five years is that it “is consistent with the five-year expiration date of an approved jurisdictional determination under existing Army Corps of Engineers (Corps) guidance.”³⁴ The agencies should justify the period on its own terms or adopt a period that is supported by evidence. The rule should also explain how “ordinary conditions” and “any given year” will be determined.

IV. Burden of establishing federal jurisdiction

The burden of establishing federal jurisdiction belongs to the agencies, and the rule should say so expressly. The federal government is a limited

³¹ 91 Fed. Reg. at 57,301 (proposed 33 C.F.R. § 328.3(c)(7)).

³² *Id.* at 57,290–91.

³³ 91 Fed. Reg. at 57,288.

³⁴ *Id.* at 57,290.

government of enumerated powers. Its authority over water comes from the Commerce Clause and its traditional power over navigation. As Justice Thomas explained in *Sackett*, “[t]he baseline under the Constitution, the CWA, and the Court’s precedents is state control of waters.”³⁵ Federal jurisdiction is the exception to that baseline, and the party claiming the exception must prove it.

Sackett already places that burden on the government for wetlands. The Court held that “the party asserting jurisdiction over adjacent wetlands” must establish both that the adjacent body of water is “a relatively permanent body of water connected to traditional interstate navigable waters” and that “the wetland has a continuous surface connection with that water.”³⁶ The same principle should apply to every category of covered water, not only wetlands.

For each jurisdictional determination, the agencies should identify and document every required element with evidence the landowner can inspect and contest. At a minimum, that means identifying the traditional navigable water at the end of the chain and its susceptibility to commerce, the connection to that water through features that carry perennial flow, the evidence that the water is perennial under ordinary conditions, any exception the agencies rely on and the evidence for it, and, for wetlands, the surface connection and the boundary of the covered portion. A landowner should not have to prove that federal jurisdiction is absent.

Models and indices should not substitute for proof of the physical conditions that the definition requires. The agencies state that they “will continue to use multiple tools, including remote and field-based indicators,” and they identify tools such as the Antecedent Precipitation Tool and the U.S. Drought Monitor.³⁷ Those tools can help the agencies decide whether conditions on a given day were wetter or drier than normal. They cannot prove that water was physically present every day of an ordinary year, or that a surface connection existed. The rule should state that modeled outputs cannot substitute for evidence of the required physical conditions.

The stakes are high for landowners. A person who discharges into a covered water without a permit can face severe civil and criminal penalties.³⁸ Placing the burden on the agencies also respects 33 U.S.C. § 1251(b). When

³⁵ *Sackett*, 598 U.S. at 706 (Thomas, J., concurring).

³⁶ *Sackett*, 598 U.S. at 678–79 (quoting *Rapanos*, 547 U.S. at 742 (plurality opinion)).

³⁷ 91 Fed. Reg. at 57,290–91.

³⁸ 33 U.S.C. § 1319(c), (d).

the agencies cannot prove federal jurisdiction, the water does not go unregulated. It remains with the States, where Congress placed the primary responsibility.

V. Barriers and connecting features

Under the traditional understanding, waters are navigable waters of the United 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.”³⁹ It is the connection to that highway that brings a water within the federal government’s authority over navigation and interstate commerce. That is why connecting features matter so much in this rulemaking.

For tributaries, the November proposal defines a tributary as a body of water that connects to a downstream traditional navigable water “either directly or through one or more waters or features that convey relatively permanent flow.” A tributary does not include a body of water that contributes flow through “a channelized non-jurisdictional surface water feature, subterranean river, culvert, dam, tunnel, or similar artificial feature” if that feature “does not convey relatively permanent flow.”⁴⁰ IER supports this limitation. If the agencies adopt the supplemental definition, “relatively permanent” will mean perennial. The agencies should confirm that every connecting feature must itself carry perennial flow under ordinary conditions, subject to the same limited exceptions as the water itself.

The rule or preamble should also make clear that occasional flow through an ordinarily dry ditch, culvert, or tunnel does not provide the required connection. This is consistent with the history of federal authority over navigable waters. Section 13 of the Rivers and Harbors Act of 1899 prohibited depositing refuse into “any tributary of any navigable water from which the same shall float or be washed into such navigable water,” which required a direct surface water connection between tributaries and traditionally navigable waters.⁴¹ Occasional flow through a dry ditch does not create a continued highway for commerce, and it should not create federal jurisdiction.

³⁹ *The Daniel Ball*, 77 U.S. at 563.

⁴⁰ Updated Definition of “Waters of the United States,” 90 Fed. Reg. 52,498, 52,546 (Nov. 20, 2025) (proposed 40 C.F.R. § 120.2(c)(10)).

⁴¹ 33 U.S.C. § 407.

The November proposal also provides that when a tributary “is part of a water transfer . . . currently in operation, the tributary would retain jurisdictional status.”⁴² The agencies should explain which features this reaches and why an operating water transfer preserves federal jurisdiction when the connecting feature would not otherwise carry relatively permanent flow.

For wetlands, the agencies should clarify how roads, berms, levees, dikes, and similar barriers affect the required continuous surface connection. *Sackett* explained that “a barrier separating a wetland from a water of the United States would ordinarily remove that wetland from federal jurisdiction,” although “a landowner cannot carve out wetlands from federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the CWA.”⁴³ The rule should say that a lawful barrier breaks the connection. It should also address whether a culvert through that barrier can preserve the connection. IER’s view is that it cannot. A wetland connected to a covered water only through a culvert under a road is not indistinguishable from that water. Anyone standing on the road can tell where the water ends, and the wetland begins.

VI. The covered portion of a wetland

IER supports the alternative’s express limitation of federal jurisdiction to the portion of a wetland that satisfies the required surface-water connection test. Under the alternative, “[o]nly the portion of the wetland that is indistinguishably part of the jurisdictional water, due to the presence of surface water, is itself jurisdictional.”⁴⁴ The agencies already took this position in the preamble to the November proposal.⁴⁵ It belongs in the regulatory text.

Identifying an area as a wetland based on its soils, vegetation, and hydrology is a scientific exercise. It should not automatically establish federal jurisdiction over the entire area. Federal jurisdiction over a wetland exists only because the wetland is, as a practical matter, part of a water of the United States, and that water is in turn connected to traditional navigable waters that serve as highways of interstate commerce. As the Court explained in

⁴² 90 Fed. Reg. at 52,546.

⁴³ *Sackett*, 598 U.S. at 678 n.16.

⁴⁴ 91 Fed. Reg. at 57,295.

⁴⁵ 90 Fed. Reg. at 52,527; *see also* 91 Fed. Reg. at 57,294.

Riverside Bayview, the justification for covering adjacent wetlands is that they are “inseparably bound up with the ‘waters’ of the United States.”⁴⁶ The portion of a wetland that is separable from those waters does not share that justification and has no connection to navigation.

A single delineated wetland may include both a portion connected to a covered water and a portion that lacks that connection. The agencies should explain how they will identify and map that boundary in practice, and they should revise any guidance that treats the whole wetland as jurisdictional merely because one portion qualifies. The rest of the wetland is not left unprotected. It remains subject to the authority of the States, whose primary responsibilities and rights over land and water resources Congress chose to “recognize, preserve, and protect.”⁴⁷

CONCLUSION

The Institute for Energy Research appreciates the diligent work by EPA and the Corps to improve their regulatory definition under the Clean Water Act. We need a definition of “waters of the United States” that faithfully implements *Sackett* and provides regulatory certainty. The definition of “perennial,” the stricter test for a wetland’s continuous surface connection, and the limitation of jurisdiction to the covered portion of a wetland are all significant improvements over the November proposal.

IER urges the agencies to strengthen the final rule by adopting the definition of “perennial” without the 30-day allowance for regularly occurring dry periods, for both waters and wetlands; writing objective drought limits, a causation requirement, and a substantiated time period into the rule text; expressly placing the burden of establishing jurisdiction on the agencies and requiring evidence of physical conditions rather than modeled outputs; requiring connecting features to carry perennial flow and clarifying the effect of barriers and culverts; and placing the limitation to the covered portion of a wetland in the regulatory text.

Each of these requests rests on the same foundation. The Clean Water Act regulates “navigable waters.” Congress’s authority over those waters comes from its power over navigation and interstate commerce, and in 33 U.S.C. § 1251(b), Congress chose to preserve the primary responsibilities and rights

⁴⁶ *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985).

⁴⁷ 33 U.S.C. § 1251(b).

of the States over their land and water resources. Until Congress says otherwise, the definition of “waters of the United States” should stay within the limits that Congress wrote.