

January 5, 2025

The Honorable Lee Zeldin
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW, Suite 1101A
Washington, DC 20460

Lt. General William H. “Butch” Graham, Jr.
Chief of Engineers and Commanding General
U.S. Army Corps of Engineers
441 G Street NW
Washington, DC 20314-1000

Submitted Electronically via Regulations.gov

**Re: Prime Mover Institute’s Comment on the Proposed Rule Entitled:
Updated Definition of ‘Waters of the United States,’ 90 Fed. Reg.
52498 [Docket No. EPA-HQ-OW-2025-0322; FRL 11132.1-01-OW]
(Nov. 20, 2025)**

Dear Administrator Zeldin and General Graham:

Prime Mover appreciates the Agencies’ efforts to update and narrow the definition of “waters of the United States” (WOTUS) following *Sackett v. EPA*, 598 U.S. 651 (2023). See *Updated Definition of “Waters of the United States,”* 90 Fed. Reg. 52498 (Nov. 20, 2025) (Proposed Rule). We write in support of the Proposed Rule’s steps toward clarity and restraint, while urging further, targeted revisions to ensure the final rule adheres to the Clean Water Act’s text, respects constitutional boundaries, and provides fair notice through bright-line, field-verifiable criteria. In short: Congress authorized regulation of “navigable waters,” not all waters. The final rule should confine WOTUS to truly navigable waters and those wetlands adjacent to them.

The Prime Mover Institute is a new public interest organization dedicated to advancing energy dominance in America. We work with coalition partners to engage in rulemaking processes with technical information and legal arguments, calling attention to the impacts regulation has on citizens, the grid, and the rule of law.

America stands at a crossroads. A legacy of bad policy and worse ideas threatens the nation with blackouts and bill hikes, right as demand for energy rises. In order for America to scale up its energy production and avoid the worst-case scenarios, we cannot cling to the policies and procedures that got us here. Fortunately, both

policymakers and the private sector realize the need for dramatic change. And courts have begun to look more skeptically at accretions of arbitrary power, accretions that government officials used to thwart energy production and use. This points the way to a future of streamlined regulation, taxpayer savings, and cheaper, more abundant energy for all.

The main obstacle to energy dominance is what Robert Bryce calls the “anti-industry industry,” the non-profits and lawyers dedicated to defending the status quo. These groups have used litigation, regulatory comments, and intimidation to forestall change. They will no doubt keep at it. But, despite their vast funding, they will not be able to maintain a policy regime that’s so far out of touch with the American public and their elected representatives. So long, that is, that the advocates of energy dominance show up to defend their ideas.

In the words of Vaclav Smil, “prime movers are energy converters able to produce kinetic (mechanical) energy in forms suitable for human uses.” In the same way, Prime Mover Institute helps convert insight into action.

Thank you for the opportunity to comment.

Respectfully submitted,

/Russell Greene/
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Managing Director
Prime Mover Institute

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EXECUTIVE SUMMARY

Prime Mover is supportive of the Agencies' efforts to rein in the definition of "Waters of the United States." We write to respectfully argue that the Proposed Rule does not go far enough. As an organization that is dedicated to clear regulatory rules that enable growth and respect the balance of power prescribed by the Constitution, Prime Mover is committed to seeing waters of the United States defined so that a farmer with her own eyes can make a WOTUS determination almost as well as an EPA agent can with his satellite imagery, hydrological tables, and the rest of his high-tech toolkit.

Despite the Agencies' laudable efforts, the definition still tips the balance of power too much in favor of the federal government and against States who have the primary responsibility for protecting *their* waters and the American people who could face stark criminal penalties for merely negligent behavior. Retaining that immense power within the leviathan of the federal government also ignores the regional variations that make federal, one-size-fits-all rules ill-suited for the task at hand; one rule cannot capture the nuances of Alaskan permafrost and North Dakota prairie potholes.

Sackett restored the statute's focus: "navigable waters" are "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). After *Sackett*, jurisdiction extends to: (1) traditional navigable waters; (2) waters "relatively permanent, standing or continuously flowing"; and (3) only those wetlands "with a continuous surface connection" to such waters that make them "indistinguishable" from the waterbody. *Sackett*, 598 U.S. at 671, 678, 684 (quoting *Rapanos*, 547 U.S. 715, 739, 755 (2006) (plurality)). That test rejects "a boundless view [] inconsistent with the limiting terms Congress had used in the [Clean Water] Act." *Rapanos*, 547 U.S. at 757 (Roberts, C.J., concurring). Some of those bounds are that WOTUS excludes intermittent and ephemeral features, isolated wetlands, and man-made conveyances except in rare cases where they are indistinguishable from jurisdictional waters. *See e.g., Rapanos*, 547 U.S. at 733–34 ("exclud[ing] channels containing merely intermittent or ephemeral flow also accords with the commonsense understanding of the term."); *Sackett*, 598 U.S. at 671.

The term "navigable waters" must be read within the context of the original meaning of "commerce" and the navigable-in-fact test reflected early cases that elucidated those words' meaning, as recognized by *The Daniel Ball* and its progeny. *See The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870); *Sackett*, 598 U.S. at 696–708 (Thomas, J., concurring). The Agencies should adopt that approach, or at minimum implement bright-line rules that follow *Sackett*'s core holdings in a manner that ensures fair notice and minimizes subjective, technical, and litigation-inviting judgment calls by the Agencies.

To that end, Prime Mover recommends:

1. Adopting a navigability anchor, which confines federal regulation to waters used or capable of being used as highways of commerce and to wetlands indistinguishable from such waters. *Sackett*, 598 U.S. at 700–03 (Thomas, J., concurring); *Daniel Ball*, 77 U.S. at 563.
2. Implementing a perennial-only “relatively permanent” test. “Relatively permanent” must mean continuous, year-round flow or standing water observable by landowners under ordinary conditions. Intermittent and seasonal flows are out. *Rapanos*, 547 U.S. at 732–39 (plurality); *Sackett*, 598 U.S. at 678–81. Field-verifiable indicators must control; technical tools (e.g., SDAMs, desktop remote sensing) cannot substitute for on-the-ground evidence. The burden must be on the Agencies, not landowners, to establish jurisdiction with clear, observable proof. *See Sackett*, 598 U.S. at 681; *see also Rapanos*, 547 U.S. at 758–59 (Roberts, C.J., concurring) (urging clear rules and administrable lines rather than “feel[ing] their way on a case-by-case basis”).
3. Limiting adjacency to wetlands with year-round continuous surface connection that renders them “indistinguishable” from jurisdictional waters under normal conditions. More than one natural or artificial barrier severs adjacency as a bright-line rule. *Sackett*, 598 U.S. at 681–82.
4. Restricting tributaries to direct, perennial surface connections to a traditional navigable water. Any non-perennial reach downstream breaks jurisdiction.
5. Constitutional guardrails: Center navigability, cabin Commerce Clause power to channels/instrumentalities and activities with substantial relation to interstate commerce; heed the major questions doctrine; and avoid vagueness.

**THE AGENCIES SHOULD STRENGTHEN THE PROPOSED DEFINITION
OF “WATERS OF THE UNITED STATES”**

- 1. The WOTUS definition should be returned to the original understanding of Congress’s Commerce Power, which turns on navigability of waters as highways of commerce.**

The right way to read “waters of the United States” starts with the words Congress chose to enact in the Clean Water Act. The CWA regulates “navigable waters,” which the statute defines as “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7). Those two qualifiers—“navigable” and “of the United States”—carry a well-settled, historically narrow meaning tied to the channels of interstate and foreign commerce. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189–90 (1824) (Marshall, C.J.) (“Commerce, undoubtedly, is traffic, but it is something more[.] ... All America understands, and has uniformly understood, the word ‘commerce,’ to comprehend navigation.”); *United States v. Coombs*, 37 U.S. (12 Pet.) 72, 78 (1838) (“The power to regulate commerce, includes the power to regulate navigation, as connected with the commerce with foreign nations, and among the states.”). Those words confine federal authority to waters used, or reasonably capable of being used, as the Nation’s commercial highways, and to features so closely connected to those waters as to be part of the channel itself—not to all hydrologic features that might influence water quality in some attenuated way. *See Daniel Ball*, 77 U.S. at 563.

That original, navigation-anchored understanding is the best reading as a matter of text, structure, history, and precedent.

First, text. Congress did not say “all waters” or “all waters affecting interstate commerce.” Congress said “navigable waters,” adopting terms that for more than a century had been used to describe the limited set of waters over which the federal government traditionally exercised authority as guardian of the Nation’s commercial highways. *See Daniel Ball*, 77 U.S. at 563 (waters are navigable in the constitutional sense when “used, or are susceptible of being used, in their ordinary condition, as highways for commerce”); *Sackett*, 598 U.S. at 685, 699–704 (Thomas, J., concurring) (tracing the historical usage of “navigable” and “of the United States”). Those words do real work: they limit the geographic scope of federal power and preclude converting the CWA into a general watershed or land-use program.

Second, structure and federalism. The CWA’s design presumes state primacy over land and water use and cabins the federal role to defined channels and features indistinguishable from them. *See* 33 U.S.C. § 1251(b); *Sackett*, 598 U.S. at 679. Reading “waters of the United States” to sweep in isolated ponds, ephemeral swales, or intrastate wetlands on the theory that they affect downstream water

quality would upend that balance and effectively confer a federal police power over local land use—something the Constitution does not allow. *See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs (SWANCC)*, 531 U.S. 159, 172–74 (2001) (rejecting interpretations that raise serious constitutional and federalism concerns).

Third, history. From the founding onward, Congress's commerce power over waters focused on keeping the channels of trade open and free from obstruction; it did not extend to regulating every land feature that might affect those channels. *See Coombs*, 37 U.S. at 78; *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 724–25 (1866) (connecting commerce power to navigability). And when courts spoke of “waters of the United States,” they were referring to navigable waters in fact or those reasonably made so, almost always in relation to vessels. *See Sackett*, 598 U.S. at 673 (quoting *Gibbons*); *id.* at 696–705 (Thomas, J., concurring). That is why *The Daniel Ball* test became the touchstone: navigability in fact (or susceptibility to navigation in ordinary conditions) marks the outer boundary of federal power. 77 U.S. at 563.

Fourth, precedent. *SWANCC* rejected an attempt to reach isolated, intrastate ponds based on migratory-bird use because it departed from the traditional navigability baseline and raised serious constitutional questions. 531 U.S. at 172–74. *Rapanos* rejected agency efforts to treat non-perennial and ephemeral channels as “waters” and confirmed that wetlands come within the Act only if they are “as a practical matter indistinguishable from” a jurisdictional water by virtue of a “continuous surface connection.” 547 U.S. at 739, 742. *Sackett* reaffirmed those core limits, holding that the Act reaches only “relatively permanent, standing or continuously flowing bodies of water” and adjacent wetlands that share a continuous surface connection such that there is no clear demarcation between the water and the wetland. 598 U.S. at 671, 679–82. And Justice Thomas's analysis shows why these holdings fit the Constitution as originally understood: because Congress tethered the CWA to “navigable waters,” the statute can extend no further than the channels of interstate or foreign commerce and features indistinguishable from them. *Id.* at 699–705 (Thomas, J., concurring) (analyzing *Daniel Ball*'s rule). Returning to a navigability-focused framework would not require reconsidering precedent; it is in-line with the core holdings.

Objections rooted in broader environmental purposes cannot overcome these constitutional and textual limits. “No law pursues its purpose at all costs,” and the CWA's goals operate within the bounds Congress set. *Rapanos*, 547 U.S. at 752. Nor do cases like *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940), or *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941), suggest otherwise. Those decisions recognized federal authority to preserve or improve navigation—including, in limited circumstances, actions affecting

non-navigable reaches—precisely because navigability was the lodestar. *Appalachian Elec.*, 311 U.S. at 407–08, 426. They did not bless a general federal power to regulate non-navigable, intrastate waters untethered to commerce.

Putting these points together, the correct—and most durable—understanding of WOTUS is: federal jurisdiction extends to (1) traditional navigable waters, meaning waters used or susceptible of use, in their ordinary condition, as highways of interstate or foreign commerce, and (2) only those adjacent wetlands that, under normal conditions, share a continuous surface connection with such waters that renders them “indistinguishable” in the field. *See Daniel Ball*, 77 U.S. at 563; *Sackett*, 598 U.S. at 678–82 (majority op.) (quoting *Rapanos*, 547 U.S. at 742, 759 (plurality)); *id.* at 699–705 (Thomas, J., concurring). This reading is faithful to text, structure, history, and precedent, and so should inform the analysis for the definitions of “relatively permanent,” “continuous surface connections,” and other aspects of the WOTUS definition.

2. “Relatively Permanent” should mean a perennial-only standard as measured by field-observable information—not fancy instruments.

EPA seeks comment on limiting “relatively permanent” to perennial waters and on bright-line duration alternatives (e.g., 90- or 270-day thresholds), as well as whether to define or drop the “wet season” concept. 90 Fed. Reg. 52517–21. For this, the Clean Water Act’s jurisdictional line must be drawn where the Supreme Court has repeatedly placed it: around “relatively permanent” waters in the ordinary sense, and wetlands that share a continuous surface connection rendering them indistinguishable from those waters, with clear rules that the regulated public can apply without hydrologists or satellite imagery.

Currently, the proposed Rule would treat waters as “relatively permanent” if they stand or flow year-round “or at least during the wet season”—using technical hydrological tools like WebWIMP/APT. 90 Fed. Reg. at 52517, 52519. EPA defines the wet season as where “average monthly precipitation exceeds average monthly evapotranspiration,” noting that surface hydrology must be “continuous throughout the entirety of the wet season” and that in places with two wet seasons, a feature “would need to have continuous surface hydrology at least during both wet seasons.” *Id.* at 52518, 52524.

This approach is far too complicated and creeps back into the overly expansive significant-nexus gobbledygook that the Court in *SWANCC*, *Rapanos*, and *Sackett* struck down for contradicting the CWA’s plain meaning. Relatively permanent should have a plain meaning—year-round.

Start with text and ordinary usage. Focusing on the text of the CWA’s key definitional provision, 33 U.S.C. § 1362(7), *Rapanos* explained that “the waters of the United States” can mean “only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] ... oceans, rivers, [and] lakes.’” 547 U.S. at 732–33, 739. That ordinary-language anchor excludes “channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.” *Id.* at 739; *see id.* at 732–34 (rejecting the Agencies’ “Land Is Waters” approach that stretched the statute “beyond parody”). In *Sackett*, the Court adopted that reading, concluding that the CWA’s use of “waters” encompasses only those “relatively permanent, standing or continuously flowing bodies of water ... described in ordinary parlance as ‘streams, oceans, rivers, and lakes.’” 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739). That holding, grounded in text and common usage, resolved decades of uncertainty created by ever-broader agency interpretations.

The precedents’ treatment of wetlands follows the same logic. The *Rapanos* plurality held that wetlands fall within the Act only when they are “as a practical matter indistinguishable from waters of the United States,” which occurs when they have “a continuous surface connection to bodies that are ‘waters of the United States’ in their own right, so that there is no clear demarcation between ‘waters’ and wetlands.” 547 U.S. at 742, 755. *Sackett* “agree[d] with [that] formulation,” holding that the CWA extends “only” to wetlands meeting the continuous-surface-connection/indistinguishability standard. 598 U.S. at 678–79. Although the Court acknowledged that “temporary interruptions” in the surface connection can occur due to low tides or dry spells, *id.* at 678 n.16, it made clear that proximity, subsurface flow, or occasional overland flow is insufficient and that “[w]etlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby.” *Id.* at 676.

These decisions reject the boundless “significant nexus” regime. *Rapanos* criticized the Agencies’ effort to convert an aside in *SWANCC* into a sweeping test that would treat as “waters” whatever “affects” waters of the United States—an approach that “bears no easily recognizable relation” to the statute’s text. 547 U.S. at 751–56; *see SWANCC*, 531 U.S. at 167–74. *Sackett* then unanimously repudiated “significant nexus” as “inconsistent with the text and structure” of the CWA and emphasized that the Act’s jurisdiction cannot turn on evolving hydrologic or ecological assessments untethered to the statutory terms. 598 U.S. at 679–83. The Court underscored that the CWA “does not define the EPA’s jurisdiction based on ecological importance,” but instead draws a careful balance that preserves states’ “primary authority” over land and water use. *Id.* at 683; *see also* 33 U.S.C. § 1251(b).

Rapanos and *Sackett* also provide the administrability and fair-notice guardrails the statute requires. Chief Justice Roberts, concurring in *Rapanos*, urged the Agencies to adopt clarifying regulations with administrable lines, rather than ad hoc case-by-case assertions of power. 547 U.S. at 758–59 (Roberts, C.J., concurring). The need is acute because the CWA imposes “crushing” civil and criminal penalties, even for negligent violations, *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 578 U.S. 590, 602 (2016) (Kennedy, J., concurring), which can lead to \$25,000-a-day fines and up to a year in prison, 33 U.S.C. § 1319(c)(1)(B). This point was central to *Sackett*, noting that “a staggering array of landowners are at risk of criminal prosecution” “mundane activities like moving dirt.” 598 U.S. at 669–70. Given the Act’s penal consequences and sweep, due process demands rules defined with “sufficient definiteness that ordinary people can understand what conduct is prohibited” and “in a manner that does not encourage arbitrary and discriminatory enforcement.” *Id.* at 680–81 (quoting *McDonnell v. United States*, 579 U.S. 550, 576 (2016)).

The text of the CWA, the precedents interpreting it, and due-process constraints give rise to three features that the “relatively permanent” feature of the WOTUS definition should have.

2.1. “Relatively permanent” must mean perennial waters under ordinary conditions.

First, “relatively permanent” must mean perennial waters—continuous, year-round flow or standing water, observable by a reasonable landowner under ordinary conditions. That is simply what “relatively permanent ... standing or continuously flowing” waters are in ordinary parlance, as *Rapanos* and *Sackett* both stress. *Rapanos*, 547 U.S. at 739; *Sackett*, 598 U.S. at 671. Intermittent or seasonal streams, desert washes, rills, swales, or storm-dependent conveyances are not “waters” in common usage and cannot be brought within the statute through modeling or watershed-scale abstractions. *See Rapanos*, 547 U.S. at 722, 732–34 (rejecting jurisdiction over “storm drains, roadside ditches, [and] ripples of sand in the desert that may contain water once a year”). And a non-perennial segment anywhere between an upstream feature and a traditional navigable water breaks the chain: the statute regulates “waters,” not hydrologic influence conducted by episodic flow. That means the Agencies should make a categorical exclusion of ephemeral and intermittent features. *See Rapanos*, 547 U.S. at 733–34 (“exclud[ing] channels containing merely intermittent or ephemeral flow also accords with the commonsense understanding of the term.”); *Sackett*, 598 U.S. at 671.

Both *Sackett* and *Rapanos* recognized that extraordinary conditions may occur. Of course, jurisdictional status does not evaporate during a dry spell. *Rapanos*, 547 U.S. at 732 n.5. (“By describing ‘waters’ as ‘relatively permanent,’ we do not

necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought.”); *Sackett*, 598 U.S. at 678 (“We also acknowledge that temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells.”). A focus on ordinary conditions is just the flipside of those recognitions in *Sackett* and *Rapanos*, and it has roots going all the way back to *Daniel Ball*. 77 U.S. at 563 (waters “are navigable in fact when they are used, or are susceptible of being used, in *their ordinary condition*”) (emphasis added).

But extraordinary conditions should not happen every year; otherwise permanency becomes toothless. The Agencies’ 270-day or 120-day rules should be rejected for a 365-day standard, absent the extraordinary circumstances discussed in *Rapanos* and *Sackett*. For one, a seasonal or number-of-days rule is disconnected from the core ideas of navigability and indistinguishability. Someone walking up the river and coming up to a dry riverbed in the summer would not say that dry riverbed is navigable or indistinguishable from the navigable water it flows to. Relatedly, a number-of-days rule is arbitrary and difficult to administer. An ordinary citizen cannot be expected to count the days that there is water just in case the Agencies want to claim their water is jurisdictional. Meanwhile, the Agencies can use extensive tools and specialized resources to establish jurisdiction, creating a significant imbalance that an ordinary citizen cannot meaningfully contest.

Rather, a more workable rule is that the water flows year-round absent “extraordinary circumstances.” The Agencies could connect “extraordinary circumstances” to federal drought designations, such as the D2 or D3 drought category for severe and extreme droughts. *See* National Oceanic and Atmospheric Administration, Drought Classifications.¹ Most people would know water flows year-round in a particular riverbed and are aware of significant droughts in their area, putting them on notice that something is unusual. The Agencies would have the burden to show that (1) the water flows year-round, (2) subject to objective drought conditions. Pointing to drought conditions provides an objective framework for what is “ordinary” and “relatively permanent,” and what are “extraordinary circumstances.” The drought framework is used for other federal purposes and is unlikely to be gamed by the Agencies to gain jurisdiction over a stream. And the D2 standard is not a particularly stringent one; it is about a 10-year drought. About 11.4% of the country is currently in a D2 drought (1.9% is in a D3 extreme drought). So the drought-focused exceptions would not cripple the ability for the Agencies to regulate truly relatively permanent waters currently dry due to extraordinary conditions.

¹ https://www.weather.gov/riw/drought_index#:~:text=D2.

2.2. Jurisdictional determinations must rest on clear field indicators, observable to an ordinary citizen.

Second, fair notice requires that jurisdiction rest on clear, observable field indicators, not desktop tools or expert-only protocols that then inform a “weight of the evidence” approach. *See* 90 Fed. Reg. at 52515. The Court warned in *Sackett* that vague, multi-factor tests—compounded by “similarly situated” aggregation and evolving science—provide “little notice” to landowners and invite arbitrary enforcement. 598 U.S. at 680–82. That is why the Court embraced ordinary usage and categorical rules, so landowners can tell, on the ground, whether a channel contains relatively permanent water and whether a wetland is indistinguishable from an adjacent jurisdictional water. *See id.* at 671, 678–79; *Rapanos*, 547 U.S. at 739, 742.

In practice, this means the Agencies should document and rely on direct, replicable field observations (e.g., photographed perennial flow conditions; continuous aquatic surface connection), not SDAM scorecards, remote sensing, or model-based inferences as substitutes for evidence. Otherwise, the Proposed Rule risks returning to the regime criticized in *Sackett* which required “call[ing] out your local friendly agent and he’ll tell you, yes or no[.]” Transcript of Oral Argument at *98, *Sackett v. EPA*, 598 U.S. 651 (2023) (No. 21-454), 2022 WL 22297224 (Gorsuch, J.).

2.3. The Agencies should have the burden of establishing WOTUS jurisdiction—and removing a water from State jurisdiction.

Three, the burden should rest with the Agencies to establish jurisdiction. The background principle that “[r]egulation of land and water use lies at the core of traditional state authority,” *Sackett*, 598 U.S. at 679, CWA’s severe penalties, coupled with *Sackett*’s fair-notice warning, counsel that the federal government—not landowners—must come forward with clear, field-verifiable proof of perennial flow/standing water and continuous surface connection/indistinguishability. *See Hawkes*, 578 U.S. at 600–02 (recognizing the stakes and the need for meaningful, reliable determinations).

Accordingly, the Agencies should consider the following changes:

33 C.F.R. § 328.3(c); 40 C.F.R. § 120.2(c) (new definition): “*Relatively permanent* means standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round ~~or at least during the wet season~~ during ordinary conditions, excluding intermittent, ephemeral, and seasonal waters. Agencies carry the burden to show extraordinary conditions exist for interrupting year-round flow. Extraordinary circumstances based on drought

conditions must be established by a drought rated by the U.S. Drought Monitor as having a D2 (moderate drought) or higher level of drought intensity in a majority of the watershed for that surface water.”

33 C.F.R. § 328.4(c); 40 C.F.R. § 120.2(d) (new provisions): “Waters are presumed non-jurisdictional unless the agencies establish jurisdiction by clear and convincing evidence.”

33 C.F.R. § 331.2 (amended definition): “*Basis of jurisdictional determination* is a summary of the indicators that support the Corps approved JD. Indicators supporting the Corps approved JD are limited to only objective, field-observable surface indicators under ordinary conditions, such as ~~can include, but are not limited to: indicators of wetland hydrology, hydric soils, and hydrophytic plant communities; indicators of ordinary high water marks, high tide lines, or mean high water marks, or most commonly the year-round presence of flowing water.~~ indicators of adjacency to navigable or interstate waters; indicators that the wetland or waterbody is of part of a tributary system; or indicators of linkages between isolated water bodies and interstate or foreign commerce.”

• • •

In short, a perennial-only “relatively permanent” test, grounded in field evidence with the burden on the Agencies is the only way to harmonize the text of the CWA, the precedents interpreting it, and comply with Due Process, on top of being prudent policy.

3. A “continuous surface connection” should be year-round, be “adjacent” rather than “abut,” and follow *Sackett’s* and *Rapanos’s* approach to barriers.

The Agencies propose to define “continuous surface connection” to mean “having surface water at least during the wet season and abutting (i.e., touching) a jurisdictional water,” and to apply the same wet-season framework that it proposes to use for “relatively permanent,” discussed above. 90 Fed. Reg. at 52527.

All the same arguments against using a wet-season in the relatively permanent section apply equally to using the same concept in the continuous surface connection definition.

Next, the final rule should drop the atextual emphasis on “abut” and return to Congress’s word “adjacent” in 33 U.S.C. § 1344(g)(1). “Abut” is not a statutory term, but apparated in *Riverside Bayview’s* case-specific description, which itself reflected an analysis that became bogged down in a morass of legislative history and atextual analysis, and should not be treated as if Congress enacted it. *See*

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 135 (1985); *Goldman Sachs Grp., Inc. v. Arkansas Tchr. Ret. Sys.*, 594 U.S. 113, 135 (2021) (Gorsuch, J., concurring in part) (The Court has “often said it is a mistake to parse terms in a judicial opinion with the kind of punctilious exactitude due statutory language.”).

Rather than injecting words like “abut,”² *Sackett* and the *Rapanos* plurality drew a simple line for wetlands and other water features: jurisdiction turns on whether a water feature and a covered water are, in the field, indistinguishable because they share a continuous surface water connection under normal conditions—not on proximity, hydrologic influence, or ecological relatedness. *See Rapanos*, 547 U.S. at 742, 755 (wetlands must be “as a practical matter indistinguishable” from covered waters through a “continuous surface connection” that leaves “no clear demarcation”); *Sackett*, 598 U.S. at 678–79 (adopting that standard).

Sackett’s and *Rapanos*’s analysis should also inform the Agencies’ approach to barriers like culverts. *See* 90 Fed. Reg. at 52530–31 (requesting comment on barriers). Barriers ordinarily sever adjacency because they create the very demarcation the Court treats as dispositive. Natural berms, dunes, levees, roadbeds, and similar upland features mark a visual and physical break in surface water exchange. For that reason, *Sackett* explains that “a barrier separating a wetland from a water of the United States would ordinarily remove that wetland from federal jurisdiction,” except where the barrier was unlawfully constructed to manipulate jurisdiction. *Id.* at 678 & n.16.

That principle applies to man-made connectors: using a non-jurisdictional ditch, culvert, swale, or pipe. Intermittent or ephemeral flows through these connectors should be treated like intermittent flows through any other water feature. The Proposed Rule gets this right in its definition of tributary, limiting flows through these connectors as it would tributaries. *See* 90 Fed. Reg. at 52521. Otherwise, the result is devices like culverts being culprits in some of the most absurd jurisdictional determinations, including a “wetland” thirty-two miles from a navigable water that started its journey as runoff through a culvert under the road.

² Prime Mover understands that this may be the Agencies attempting to narrow with the use “abut.” Even so, without *Chevron*, the Agencies’ rule would be on better ground using the text of the statute. If the Agencies attempt to narrow the rule on the basis of replacing the word “adjacent” with the word “abut,” even those in the *Sackett* majority could become skeptical. In response to the advocate equating adjacency with touching, Chief Justice Roberts replied, “I’m not sure that’s right. I don’t know whether they’re topographical features or not, but you would readily say that a train station is adjacent to the tracks even though it’s not touching the tracks?” Transcript of Oral Argument at *9, *Sackett v. EPA*, 598 U.S. 651 (2023) (No. 21-454), 2022 WL 22297224.

United States v. Deaton, 332 F.3d 698, 702 (4th Cir. 2003) (“At the northwest edge of the Deatons’ property, the roadside ditch drains into a culvert under Morris Leonard Road.”) (cited by *Sackett*, 598 U.S. at 666, as an absurd example).

Applying the continuous surface connection principle to cut out attenuated man-made connectors does not hamper enforcing water quality. The Clean Water Act makes it unlawful to discharge any pollutant from a “point source” to WOTUS without a permit, primarily through the NPDES program under section 402, which imposes technology-based and water-quality-based limits, monitoring, and enforcement as a nationwide backstop. “Point source” is defined broadly to include pipes, ditches, channels, tunnels, and similar discrete conveyances carved out from this WOTUS definition. *See* 33 U.S.C. § 1362(14). Severing WOTUS jurisdictional status when the water features do not have continuous surface flow will not leave the Nation’s waters unprotected. *See, e.g., Cnty. of Maui, Hawaii v. Hawaii Wildlife Fund*, 590 U.S. 165, 184 (2020) (“Where a pipe ends a few feet from navigable waters and the pipe emits pollutants that travel those few feet through groundwater (or over the beach), the permitting requirement clearly applies.”).

Accordingly, the Agencies should make the following revisions:

40 C.F.R. § 120.2(a)(4) / 33 C.F.R. § 328.3(a)(4)

Wetlands adjacent as to be indistinguishable as a practical matter, leaving no clear demarcation, from the following waters:

- Waters identified in paragraph (a)(1) of this section: or
- Relatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2) or (a)(3) of this section and with a continuous surface connection to those waters.

40 C.F.R. § 120.2(c)(3) / 33 C.F.R. § 328.3(c)(3):

Continuous surface connection means having surface water ~~at least during the wet season and~~ continuously adjacent abutting (i.e., touching) as to be indistinguishable from a jurisdictional water under ordinary conditions.

4. Tributaries cannot be exceptions to the “relatively permanent” and “continuous surface connection” rules.

The Agencies are right to require “relatively permanent” flow in its tributary definition. *See* 90 Fed. Reg. 52522–23. Tributaries are not separately defined as waters under the CWA, *see* 33 U.S.C. § 1362, so they must qualify as navigable waters of the United States themselves under § 1362(7). That means they should meet all the requirements that are indicia of navigable waters and territorial seas must meet. *See Rapanos*, 547 U.S. at 730–33. And even the weakest tributaries,

such as “streams,” “connotes a continuous flow of water in a permanent channel” *Id.* at 733. That definition also fits with tradition, which for tributaries has required “some form of surface connection between a tributary and traditionally navigable waters.” *Sackett*, 598 U.S., at 689–90 (Thomas, J., concurring) (investigating the understanding of “tributary” under the influential River and Harbor Acts). The requirements for tributaries should explicitly meet the definitional requirements outlined above:

33 C.F.R. § 328.3(c); 40 C.F.R § 120.2(c) (new definition): “*Tributary* means a body of water with relatively permanent flow, with a bed and banks and an ordinary high-water mark, that connects, through a continuous surface connection and not groundwater or other subsurface connections, to a downstream traditional navigable water or the territorial seas, either directly or through one or more waters or features that convey relatively permanent surface flow. Ephemeral and intermittent channels are not tributaries. A tributary does not include a body of water that contributes surface water flow to a downstream jurisdictional water through a feature such as a channelized non-jurisdictional surface water feature, subterranean river, groundwater (including subsurface hydrologic exchange), culvert, dam, tunnel, pipe, pump, tide gate, spillway, or similar artificial feature, or through a debris pile, boulder field, wetland, or similar natural feature, if such feature does not convey relatively permanent flow. When a tributary is part of a water transfer (as that term is applied under 40 CFR 122.3), and the transfer is currently in operation and demonstrably conveys relatively permanent surface flow, the tributary does not lose its jurisdictional status solely due to conveyance through the transfer infrastructure.”

5. Tightening the definition of “waters of the United States” avoids significant constitutional problems.

Tightening the definitions of WOTUS is good policy. But more importantly it restores the Agencies’ power to constitutional balance. The Clean Water Act is not a general land-use or watershed statute, nor could it be. It regulates discharges to “navigable waters,” defined as “the waters of the United States,” and it does so against a constitutional backdrop that preserves the States’ primary authority over land and intrastate waters.

Federalism. First, federal power must remain anchored to navigability and the channels of interstate commerce to avoid major federalism problems. Congress chose the phrase “navigable waters,” not “all waters,” and the Court has read that choice to avoid transforming the CWA into a plenary police power over intrastate features. *See SWANCC*, 531 U.S. at 172–74 (rejecting interpretations that “raise[] significant constitutional questions”). *Sackett* reinforces that point: waters outside the *Sackett/Rapanos* limits fall to the States. 598 U.S. at 679, 683. That understanding is consistent with long-standing recognition of state primacy over

intrastate waters. “Regulation of land and water use lies at the core of traditional state authority.” *Sackett*, 598 U.S. at 679; *see also Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 349, 356 (1908) (States’ authority over intrastate waters is “obvious, indisputable,” and “omnipresent”); *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982) (water and land regulation is “perhaps the quintessential state activity”).

And because it is traditionally state authority, the absence of federal authority does not leave waters unprotected. States set and enforce water quality standards for their waters, including those beyond federal jurisdiction. Section 303 directs States to establish designated uses, water quality criteria, and antidegradation policies, and to identify and restore impaired waters through TMDLs. 33 U.S.C. § 1313. Those standards apply across a State’s hydrologic landscape, informing point- and nonpoint-source controls. They are at the heart of state water programs and continue to function irrespective of federal jurisdictional lines. Many States maintain standards that reach every water of the State, not merely WOTUS, and several have adopted definitions of “waters of the State” that are broader than federal law. *See, e.g.,* California’s Porter-Cologne Water Quality Control Act, Cal. Water Code. § 13000 et seq., (state law governing “waters of the state” more broadly than the CWA).

Also, the CWA’s savings clauses preserve—and invite—independent state regulation. Section 510 provides that nothing in the Act “shall (1) preclude or deny the right of any State ... to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution,” so long as they are at least as stringent as federal requirements. 33 U.S.C. § 1370. That provision confirms States may regulate activities and waters beyond the scope of federal jurisdiction—such as isolated wetlands, ephemeral features, and intrastate non-perennial channels—through state permitting, best-management practices, and land-use tools. States regularly do so via wetlands protection statutes, stormwater ordinances, riparian buffer requirements, floodplain management, and watershed-based planning. In North Dakota’s challenge to the 2023 Amended WOTUS Rule, joined by twenty-three other States, each outlined their regulatory authority to protect the Nation’s waters. *See* Exhibit A, *North Dakota v. EPA*, Dkt. 176, 3:23-cv-32 (D.N.D. Nov. 13, 2023) (North Dakota’s 2023 Complaint), ¶¶ 28–51.

In addition to expansive state authority, States already administer core CWA permitting programs and related state-law analogs. Forty-seven States have assumed the NPDES program under § 402, administering permits for discharges to waters consistent with federally approved state programs. 33 U.S.C. § 1342(b). States also issue § 401 water quality certifications for federally licensed or permitted activities, ensuring that federal actions comply with state water quality

standards and conditions. *Id.* § 1341. And § 404(g) authorizes States to assume the dredge-and-fill permitting program over “navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce...)” *Id.* § 1344(g)-(h). These cooperative programs reflect Congress’s expectation that States would implement the lion’s share of permitting and enforcement in a manner tailored to local conditions.

Even if Congress could use its Commerce power to upset the States’ primacy in this domain, it would have to do so clearly. See *United States Forest Serv. v. Compasture River Pres. Ass’n*, 590 U.S. 604, 621–22 (2020) (“Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.”); see also *Ala. Ass’n of Realtors v. HHS*, 594 U.S. 758, 764 (2021) (per curiam) (requiring “exceedingly clear language” before construing a statute to alter the federal-state balance). But, instead, Congress “recognize[d], preserve[d], and protect[ed] the primary responsibilities and rights of States” to manage land and water resources, 33 U.S.C. § 1251(b), and enacted a savings clause to preserve that authority, 33 U.S.C. § 1370.

Major questions. Second, the major questions doctrine requires a clear statement from Congress before an agency may “reshape” a statutory scheme in ways of “vast economic and political significance” or intrude on traditional state domains. *West Virginia v. EPA*, 597 U.S. 697, 723–24, 732–33 (2022). Almost as a precursor to *West Virginia*,³ the Supreme Court in *SWANCC* noted “Where an administrative interpretation of a statute invokes the outer limits of Congress’ power,” there must be a “clear indication that Congress intended that result.” 531 U.S. at 172. There can be no question that an expansive definition of waters of the United States raises major questions. Previous definitions of waters of the United States, “cover[ed] 270–to–300 million acres of swampy lands in the United States—including half of Alaska and an area the size of California in the lower 48 States.” *Rapanos*, 547 U.S. at 722. Congress likely did not mean to cover an acre of *land* for every man, woman, and child in the United States when it sought to cover navigable waters and territorial seas. See 33 U.S.C. 1362(7). As a matter of constitutional avoidance, the Agencies should err on the side of narrowing jurisdiction. See *SWANCC*, 531 U.S. at 174. Especially since, as discussed above,

³ That is likely no accident. *West Virginia* relied heavily on *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000), when announcing the major-questions doctrine. See *West Virginia*, 597 U.S. at 724. And *Brown & Williamson* was likely on the Court’s mind in *SWANCC*.

honoring the Constitution does not leave the United States's non-navigable waters unprotected.

These guardrails are not obstacles to water quality; they are the constitutional and statutory boundaries within which the Agencies must operate. A final rule that respects them—by centering navigability, applying major-questions canon, and honoring cooperative federalism—will be durable in court and workable on the ground.

CONCLUSION

Prime Mover Institute thanks the Agencies for their efforts to rein in the scope of the WOTUS definition. The Proposed Rule is in many ways a very strong stride in that direction, but is still far too expansive despite the Agencies' laudable goals. Prime Mover Institute urges the Agencies to consider finalizing a rule that even more closely follows the Constitution and the Clean Water Act's text.