



DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 328

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 120

[EPA-HQ-OW-2025-0322; FRL 11132.1-04-OW]

RIN 2040-AG44

Updated Definition of “Waters of the United States”

AGENCY: Department of Defense, Department of the Army, Corps of Engineers; U.S.

Environmental Protection Agency (EPA).

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: The purpose of this supplemental notice of proposed rulemaking is for the U.S. Environmental Protection Agency (EPA) and the Department of the Army (“the agencies”) to supplement and seek additional comment on certain aspects of an earlier proposal, published on November 20, 2025, to revise the regulations defining the scope of waters federally covered under the Clean Water Act in light of the U.S. Supreme Court’s 2023 decision in *Sackett v. Environmental Protection Agency*. As stated in the agencies’ November 20, 2025 Notice of Proposed Rulemaking (NPRM), the agencies intend for this rulemaking to provide greater regulatory certainty and increase Clean Water Act program predictability and consistency by clarifying the definition of “waters of the United States.” After consideration of the public comments received on the NPRM, the agencies are issuing this notice to supplement the NPRM with additional regulatory options on certain aspects of the proposed rule.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may send comments, identified by Docket ID No. EPA-HQ-OW-2025-0322, by any of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov/> (our preferred method).

Follow the online instructions for submitting comments.

- *Email:* OW-Docket@epa.gov. Include Docket ID No. EPA-HQ-OW-2025-0322 in the subject line of the message.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, Water Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand Delivery or Courier:* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a.m. to 4:30 p.m., Monday through Friday (except Federal Holidays).

Instructions: All submissions received must include the Docket ID No. for this rulemaking.

Comments received may be posted without change to <https://www.regulations.gov/>, including personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the "Written Public Comments" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Stacey Jensen, Office of Wetlands, Oceans, and Watersheds, Office of Water (4504-T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: (202) 566-0657; email address: CWAwotus@epa.gov, and Milton Boyd, Office of the Assistant Secretary of the Army for Civil Works, Department of the Army, 108 Army Pentagon, Washington, DC 20310-0104; telephone number: (703) 693-3655; email address: usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@army.mil.

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I. Written Public Comments

Submit your comments, identified by Docket ID No. EPA-HQ-OW-2025-0322, at <https://www.regulations.gov> (our preferred method), or the other methods identified in the **ADDRESSES** section of this document. Once submitted, comments cannot be edited or removed from the docket. EPA may publish any comment received to its public docket. Do not submit to EPA's docket at <https://www.regulations.gov> any information you consider to be Confidential

Business Information (CBI), Proprietary Business Information (PBI), or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the web, cloud, or other file sharing system). Please visit <https://www.epa.gov/dockets/commenting-epa-dockets> for additional submission methods; the full EPA public comment policy; information about CBI, PBI, or multimedia submissions; and general guidance on making effective comments.

II. General Information

A. What action are the agencies taking?

In this action, the agencies are publishing a supplemental notice of proposed rulemaking (SNPRM) to revise the definition of “waters of the United States” in 33 CFR 328.3 and 40 CFR 120.2. This SNPRM supplements the proposed regulatory text in the NPRM, published on November 20, 2025 (90 FR 52498), for certain components of the proposal and seeks public input on these additional regulatory alternatives. The agencies are not proposing to supplement other portions of the initial proposed rule and continue to review and consider public comments received on the November 2025 NPRM.

B. What is the agencies’ authority for taking this action?

The authority for this action is the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, including sections 301, 304, 311, 401, 402, 404, and 501.

III. Background and Purpose of this Supplemental Notice

On November 20, 2025 (90 FR 52498), the agencies proposed a rule that would revise key aspects of the definition of “waters of the United States” to clarify the scope of Federal jurisdiction under the Federal Water Pollution Control Act, as amended, also known as the Clean Water Act, in light of the U.S. Supreme Court’s May 25, 2023 decision in *Sackett v.*

Environmental Protection Agency, 598 U.S. 651 (2023). This document supplements the proposed rule. The agencies refer the public to the November 2025 NPRM for more information on the background for this action, including the history of the Clean Water Act, relevant case law, current and prior regulatory regimes, and the need for a revised definition of “waters of the United States.”

Since publishing the proposed rule, the agencies received approximately 220,000 public comments on the NPRM and heard from a wide number and variety of States and Tribal governments, industry groups, agricultural producers, non-profit advocacy groups, interagency partners, and other stakeholders regarding the proposed revised definition of “waters of the United States.” Many of these commenters requested additional clarification regarding the agencies’ proposed rule and the alternative approaches for which the agencies solicited comment. In addition, some commenters recommended the agencies consider other approaches not explicitly articulated in the NPRM. The agencies have summarized some key points from public comments in section V of this preamble. With this SNPRM, the agencies are supplementing certain components of the proposed rule by soliciting comment on new regulatory text options for specific definitions in paragraph (c) of the regulations. The supplemental regulatory options were developed based on the agencies’ analysis of the public comments and stakeholder input received on the proposed rule in the agencies’ NPRM. The agencies solicit public comments regarding the information and issues presented in this SNPRM. The agencies continue to review and consider public comments received in response to all components of the NPRM, including those that are not supplemented by this SNPRM. The agencies will consider and address those previously submitted comments on the proposed rule, in addition to new comments submitted in response to this SNPRM, in taking final action on this rulemaking. As such, commenters should not resubmit comments already provided in response to the agencies’ NPRM.

IV. Initial Notice of Proposed Rulemaking

A. Summary of the Initial Notice of Proposed Rulemaking

In the NPRM, the agencies proposed to revise the following categories of “waters of the United States” under 33 CFR 328.3 and 40 CFR 120.2 paragraph (a) by deleting the interstate waters category under paragraph (a)(1)(iii) and deleting “intrastate” from the paragraph (a)(5) category for lakes and ponds. Ministerial changes were proposed to add in one place and delete in another place an “or” from paragraph (a)(1) to conform to the proposed deletion of the interstate waters category. In addition, the agencies proposed to revise the following exclusions: the (b)(1) waste treatment system exclusion, the (b)(2) prior converted cropland exclusion, and the (b)(3) ditch exclusion. The agencies also proposed adding an exclusion for groundwater at (b)(9). The agencies further proposed to add definitions of “continuous surface connection,” “ditch,” “prior converted cropland,” “relatively permanent,” “tributary,” and “waste treatment system” in paragraph (c) of their regulations. The NPRM also contained additional requisite conforming edits in light of the aforementioned proposed changes.

B. Comments on the Initial Notice of Proposed Rulemaking

The agencies accepted comments on the NPRM from November 20, 2025, through January 5, 2026. The agencies received approximately 220,000 comments on the NPRM from a broad spectrum of interested parties. Some commenters expressed support for the agencies’ proposal, stating, among other things, that the proposed rule is consistent with *Sackett*. Other commenters opposed the proposal, stating, among other things, that the proposed rule would increase regulatory uncertainty and adversely impact water quality.

Based on the agencies’ careful and ongoing review of the comments submitted in response to the NPRM, the agencies believe that it is in the public interest to provide further explanation and allow interested parties an opportunity to comment on these supplemental options for targeted definitions of certain regulatory terms and implementation of those terms.

V. Supplements to Proposed Rule in this Supplemental Notice and Requests for Comment

A. Summary of the Supplements to the Regulatory Options for the Proposed Rule

In this SNPRM, the agencies are seeking comment on supplemental regulatory options for the revised definitions of “relatively permanent” and “continuous surface connection,” and adding a definition of the term “perennial,” which, if finalized, would result in a renumbering of the existing and previously proposed definitions in paragraph (c) of the regulatory text, along with other conforming edits. The agencies continue to consider the regulatory options proposed in the NPRM in tandem with the consideration of these supplemental regulatory options and any comments received in response to this SNPRM pertaining to these supplemental regulatory options.

In this SNPRM, the agencies are not proposing new regulatory options to the initial proposed removal of “interstate waters” at paragraph (a)(1)(iii) or the initial proposed removal of the word “intrastate” from paragraph (a)(5). 90 FR 52498, 52516 and 52517 (proposed removal of “interstate waters”), 52533 (proposed removal of the word “intrastate”) (November 20, 2025). Consistent with the NPRM, this SNPRM also does not suggest additional options for changes to the remaining portions of paragraph (a)(1) or to paragraphs (a)(2), (3), or (4), other than conforming edits in light of the aforementioned proposed changes unless as expressly stated otherwise in this preamble.

Additionally, this SNPRM does not supplement the regulatory options for the previously proposed exclusions for waste treatment systems at paragraph (b)(1), prior converted cropland at paragraph (b)(2), certain ditches at paragraph (b)(3), and groundwater at (b)(9) from the initial notice of proposed rulemaking. 90 FR 52533 through 52541 (November 20, 2025). Consistent with the discussion in the NPRM, this SNPRM also would make no changes to the existing exclusions in paragraphs (b)(4) through (8) other than conforming edits in light the proposed exclusion at paragraph (b)(9).

Additionally, this SNPRM makes no further changes to the initial proposed definitions for “ditch,” “prior converted cropland,” “tributary,” or “waste treatment system.” 90 FR 52521 through 23, 52533 through 52541 (November 20, 2025).

B. “Relatively Permanent” Waters

1. Summary of Initial Proposed Definition and Relevant Comments Received on “Relatively Permanent”

In *Sackett*, the Supreme Court interpreted the jurisdictional extent of “navigable waters” under the Clean Water Act. 598 U.S. at 671-74. Part III.A of the Court’s opinion sets out the test for determining which “waters” constitute “waters of the United States.” *Id.* In Part III.A, the Court held that the 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.”’” *Id.* at 671 (quoting *Rapanos v. United States*, 547 U.S. 715, 739 (2006) (plurality op.)).

In the NPRM, the agencies proposed to define “relatively permanent” to mean “standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season.” *See* 90 FR 52545 (November 20, 2025). The agencies solicited comment on the proposed definition of “relatively permanent,” including implementation of the definition and regional implications of the proposed approach. The agencies also solicited comment on a number of alternative approaches, such as defining “relatively permanent” to mean only perennial; a minimum flow volume threshold; a minimum flow duration metric (*e.g.*, 30, 90, or 270 days) or bright lines applicable by region; physical indicators of flow; or waters that typically have standing or flowing water year-round or continuously at least seasonally.

The agencies received a wide range of comments on the previous proposed definition of “relatively permanent,” with some commenters supporting the proposed definition and other commenters objecting to the proposed definition or supporting an alternative definition. Many of those commenters supporting the proposed definition of “relatively permanent” stated that the proposed definition was consistent with *Sackett* and the *Rapanos* plurality. Many of those opposed to the proposed definition stated that the proposed rule went beyond what *Sackett* and

Rapanos require, while another commenter stated that the agencies failed to provide a rational basis for revising the current practice for the implementation of “relatively permanent.” Certain commenters requested that intermittent waters continue to be subject to Federal jurisdiction under the Clean Water Act, and some advocated for Federal jurisdiction of ephemeral streams due to the many functions such streams serve.

Some commenters supported the agencies’ concept of “wet season” incorporated into the proposed definition in the NPRM, while other commenters expressed various concerns with the concept or the potential challenges associated with its implementation. Some commenters opposing the proposed rule’s definition of “relatively permanent” stated that the Supreme Court intended for jurisdictional waters to flow continuously for a duration longer than the wet season and thus claimed that the proposal did not go far enough in implementing the *Sackett* decision. Other commenters stated that the “wet season” approach in the proposed rule appropriately incorporated “seasonal” waters and accounted for extraordinary circumstances such as droughts. Additionally, some commenters stated that the “wet season” approach in the proposed rule allowed for geographic variability across the United States.

One alternative approach the agencies solicited comment on was whether to limit the definition of “relatively permanent” to include only “perennial” waters. The agencies evaluated this interpretation because “perennial” streams are most obviously “permanent,” consistent with the *Sackett* decision and the *Rapanos* plurality. Some commenters supported this approach, while many other commenters opposed this approach.

The agencies also solicited comment on whether they should adopt a minimum flow duration metric (*e.g.*, 30, 90, or 270 days) or bright lines set by region, *e.g.*, by requiring flow a minimum of 270 days east of the Mississippi River and a minimum of 30 or 60 days west of the Mississippi, for “relatively permanent” waters. Some commenters expressed support for these alternative approaches, with some supporting a minimum flow duration or flow volume metric (*e.g.*, at least 30 days, at least 90 consecutive days, at least 270 days, or at least 95% of the year).

Some commenters expressed support for a more regionalized threshold approach, with a few such commenters supporting a 90-day threshold for the western States and another commenter opposing a nationwide threshold and instead stating that minimum flow duration thresholds should be carefully tailored to the region where the metric is applied. One commenter said that 270 days is generally aligned with the *Rapanos* example of a 290-day continuously flowing stream being considered “relatively permanent.” Other commenters opposed minimum flow durations or flow volume metrics, stating that such thresholds are not scientifically grounded.

A few commenters opposing these alternative approaches stated that it is natural for flow to fluctuate, while another commenter stated that time-based thresholds are artificial and do not account for regional variability. Some commenters said that a bright-line rule would be arbitrary and capricious under the Administrative Procedure Act without an adequate basis in the Clean Water Act or Supreme Court interpretations and alleged such a rule would undermine the goals of the Clean Water Act by harming downstream water quality. Another commenter asserted that a rigid minimum flow duration is inconsistent with the Clean Water Act objective at section 101(a). A few commenters expressed implementation concerns with bright lines, such as a minimum number of days of flow, with some commenters stating that such an approach would require repeated site visits or continuous daily monitoring to determine, for example, whether a stream flows 289 days or 290 days.

The agencies also solicited comment on an alternative approach to defining “relatively permanent” using only physical indicators of flow, such as evidence of an ordinary high water mark and bed and banks. Some commenters supported such an approach, stating that such an approach is familiar to the agencies. One such commenter stated that physical indicators represent long-term recorded response to typical flow conditions and therefore are more reliable indications of relatively permanent waters than a single year observation of flow presence or absence. Other commenters, however, opposed such an approach, noting that even ephemeral streams have physical indicators of flow. A few commenters stated that such indicators can result

from a single high-water event and do not, by themselves, establish a relatively permanent body of water. One commenter stated reliance on physical characteristics is inconsistent with the directives of the Supreme Court in *Sackett*.

The agencies also solicited comment on whether “relatively permanent” should be defined consistent with the pre-2015 regulatory regime, as articulated in the *Rapanos* Guidance, such that “relatively permanent” waters are those that typically have standing or flowing water year-round or that have standing or continuously flowing water at least seasonally (*e.g.*, typically three months).¹ The agencies also solicited comment on if they should implement seasonal flow to mean continuous surface flow except during dry months. The agencies also welcomed comments generally on the concept of a “seasonal” flow duration and what that term may include, as well as implementation tools that could be used to identify such flow duration. Many commenters supported the pre-2015 regulatory regime, as articulated in the *Rapanos* Guidance, stating that they believe that it explicitly incorporates the “seasonal” term used in the *Rapanos* plurality opinion. Some commenters in support of this *Rapanos* Guidance alternative approach stated that it reflects the approach taken by the agencies since the *Rapanos* Guidance has been in effect, meaning that practitioners would have experience implementing it, whereas the proposed approach would be more difficult to implement. Some commenters supportive of this alternative approach also stated that it properly accounts for regional variation. Other commenters, however, opposed this alternative approach, stating that the *Rapanos* Guidance’s seasonal approach (“*e.g.*, typically three months”) is inconsistent with *Rapanos* and *Sackett*. One commenter recommended that “wet season” be defined as “continuous surface flow except during dry months,” while a different commenter stated that the *Rapanos* plurality acknowledged that

¹ Three months was provided as an example of seasonal flow in the *Rapanos* Guidance, but under the pre-2015 regulatory regime the agencies have flexibility to determine what seasonally means in a specific case. See *Rapanos* Guidance at 6-7; U.S. Environmental Protection Agency & U.S. Army Corps of Engineers “Memorandum to Assert Jurisdiction for NWP-2007-945” available at <https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll5/id/1437> (finding that two months of continuous flow was considered seasonal flow for site-specific tributaries in a semi-arid region).

“seasonal rivers” may qualify as relatively permanent, but limited that discussion to rivers that maintain continuous flow for extended periods and then dry up during dry months. Another commenter did not recommend limiting “relatively permanent” to continuous flow except during dry months, stating that such an alternate approach is inviable, inefficient, and unimplementable in the field.

2. Supplemental Option for the Definition of “Relatively Permanent”

Having already received comment on the options set out in the initial proposal, the agencies are now seeking comment on a supplemental option to define “relatively permanent” that would generally deem a water to be jurisdictional only if it is perennial (*i.e.*, has standing or continuously flowing water every day of the year during ordinary conditions),² with certain exceptions affecting year-round flow, such as the occurrence of certain non-anomalous events resulting in a temporary interruption (*e.g.*, low tide or a regularly occurring dry spell) or anomalous events resulting in extraordinary circumstances (*e.g.*, drought) that disrupt a perennial water’s year-round flow. “Relatively permanent” would therefore only include perennial waters, but perennial waters with flow that dries up due to anomalous events such as drought or due to non-anomalous events such as low tide or a regularly occurring dry spell would still be jurisdictional. Under this supplemental option, “relatively permanent” would be defined to mean “perennial bodies of water.” The definition would also state that “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 non-anomalous events resulting in a temporary interruption such as low tide or a regularly occurring dry spell.” The agencies note that the qualifier “a single period” is intended to convey that the interruption

² This definition is informed by the common meaning of “perennial” used in hydrology (*see, e.g.*, the U.S. Geological Survey’s Water Basics Glossary, defining “Perennial stream” as “A stream that normally has water in its channel at all times,” *available at* https://water.usgs.gov/water-basics_glossary.html#P).

of flow can only occur once in any given year, up to 30 consecutive days, under this concept. When flow is interrupted for more than a single period in any given year, and the interruptions are non-anomalous and ordinary for that water body, the agencies would consider this to be an ephemeral or intermittent feature even if each period of interruption does not amount to 30 consecutive days. For instance, if flow is interrupted for two periods in any given year, and each period consists of 10 consecutive days of no flow, the water body would not be jurisdictional when these interruptions are non-anomalous.

Under this supplemental option, the agencies are also proposing to define “perennial.” The agencies seek comment on defining perennial as “having standing or continuously flowing water every day of the year during ordinary conditions.” This definition is consistent with the common hydrologic understanding of the term “perennial.” The agencies also solicit comment on whether they should define “perennial” consistent with the 2020 Navigable Waters Protection Rule to mean “surface water flowing continuously year-round.” *See* 85 FR 22250, 22339 (April 21, 2020). The agencies are looking to the dictionary definition of “extraordinary” to inform anomalous events, as “something that is unusual or caused by unforeseen circumstances or conditions.”³ Such anomalous events are extraordinary departures from ordinary conditions. For example, droughts are often very difficult to forecast and are caused by a complex number of factors. Droughts are also an extraordinary departure from the ordinary climatic conditions. There also may be scenarios whereby a dry spell – not necessarily rising to the level of categorical drought – happens in an anomalous way that may be an extraordinary departure from ordinary conditions. In contrast, non-anomalous events would be a temporary interruption that occurs ordinarily such as low tide or a regularly occurring dry spell that is generally predictable

³ “Anomalous” is generally defined as “inconsistent with or deviating from what is usual, normal, or expected: irregular, unusual.” *Anomalous*, Merriam-Webster (2026); *see Anomalous*, Black’s Law Dictionary (2nd ed.) (“Irregular; exceptional; unusual”). “Extraordinary” is generally defined as “going beyond what is usual, regular, or customary.” *Extraordinary*, Merriam-Webster (2026); *see Extraordinary expense*, Black’s Law Dictionary 723 (11th ed. 2019) (“unusual or infrequent,” caused “by an unforeseen condition such as a natural disaster”).

and expected. For example, consistent with the agencies' definition of "tidal waters" at paragraph (c)(5), a low tide is predictable and measurable due to the gravitational pulls of the moon and sun. 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. For example, if a stream ordinarily dries up for 30 consecutive days in August due to normal climatic conditions, such a stream would maintain its perennial status under this proposed definition of "perennial." A temporary interruption in standing or continuously flowing water lasting no more than a single period of up to 30 consecutive days in any given year as a result of such non-anomalous events under ordinary conditions would not prevent a water from being perennial and thus relatively permanent. Ordinary conditions here would mean the climatic conditions that ordinarily prevail at a particular place and time of year. However, under this proposed definition, any non-anomalous temporary interruption exceeding a single period of up to 30 consecutive days in any given year would preclude a waterbody from being considered "relatively permanent." The agencies note that they are choosing to propose a temporal qualifier of 30 *consecutive* days because it most closely aligns with the regular and predictable nature of a "non-anomalous" dry spell event that, for example, may occur over the course of a month in any given year. The proposed concept would allow for the temporary interruption to span over the course of two calendar months, as long as the interruption does not exceed 30 consecutive days. This concept also aligns with the agencies' intent to propose a rule that provides certainty and clarity for landowners and is easily administrable for the implementing agencies. However, the agencies are seeking additional input on whether a different numerical threshold is more consistent with *Sackett* and the *Rapanos* plurality.

As noted by some commenters, waters that are perennial are most obviously "permanent," and thus meet any "relatively permanent" threshold consistent with the *Sackett* decision. In addition, because the term "relatively" in *Sackett* and the *Rapanos* plurality suggests that Clean Water Act jurisdiction is not limited to waters that are always standing or

continuously flowing, this supplemental option explicitly clarifies that such waters can still be “*relatively permanent*” even if they dry up due to a temporary interruption (*i.e.*, non-anomalous events) and extraordinary circumstances (*i.e.*, anomalous events) identified in *Sackett* and the *Rapanos* plurality: low tides, dry spells (both regularly and non-regularly occurring), and drought.

The agencies solicit comment on these definitions of “relatively permanent” and “perennial” or other alternative definitions to these terms. The agencies also solicit comment on the applicability of the definitions to both anomalous and non-anomalous events. This supplemental option reflects the agencies’ consideration of public and stakeholder input on the NPRM as summarized in section V.B.1 of this preamble above, and a thorough review of the language in *Sackett* and the *Rapanos* plurality. The agencies considered public comments addressing, among other issues, challenges with implementing the concept of “wet season” within the proposed definition of “relatively permanent.”

This supplemental option would provide transparency and regulatory certainty for landowners, is easy to understand, and responds to comments that requested a bright line approach. The previously proposed definition considered streamflow duration in the flow classification definitions generally (*e.g.*, “flowing continuously year-round,” “flowing continuously during the wet season”), but without setting a minimum duration of flow. As many commenters noted, establishing a minimum duration of flow could ultimately enhance national consistency per the regulatory text, and is consistent with the *Sackett* decision.

Consistent with the jurisdictional test advanced by *Sackett*, this supplemental option focuses on waters that are perennial with limited exceptions during anomalous events (*i.e.*, extraordinary circumstances) or non-anomalous events resulting in a temporary interruption in continuously flowing or standing water. Waters that are perennial are most obviously “permanent,” and thus qualify as “relatively permanent.” Additionally, the agencies’ proposal of this supplemental option recognizes that “relatively permanent” may also describe the flow of

otherwise “permanent” waters that may be interrupted by extraordinary circumstances (*i.e.*, anomalous events) such as drought. Furthermore, the *Sackett* decision stated, “We also acknowledge that temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells.” *Sackett*, 598 U.S. at 678. Thus, such non-anomalous events would also not disqualify a water from being “relatively permanent” so long as the temporary interruption in standing or continuously flowing water lasts no more than a single period of up to 30 consecutive days in any given year. Though this language was specific to “continuous surface connection,” the agencies are also considering whether it informs the definition of “relatively permanent,” because both inquiries require determining at what point a feature has the requisite connection with a jurisdictional water to itself be considered “waters of the United States.” *See id.* at 672 (“Although we have acknowledged that the CWA extends to more than traditional navigable waters, we have refused to read ‘navigable’ out of the statute, holding that it at least shows that Congress was focused on ‘its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.’”); *id.* at 673 (“*SWANCC* went even further, repeatedly describing the ‘waters’ covered by the Act as ‘open water’ and suggesting that ‘the waters of the United States’ principally refers to traditional navigable waters.”); *id.* at 678 (“[T]he adjacent [body of water constitutes] ... ‘water[s] of the United States,’ (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters)”) (alteration in original). Thus, under this supplemental option, the agencies’ view the temporary drying up of waters as the result of low tide or a dry spell to also reflect circumstances whereby *otherwise* “permanent” waters are defined as “relatively permanent.” The agencies solicit comment on whether this supplemental option appropriately aligns with the statutory text, *Sackett*, and other relevant case law.

Requiring perennial flowing or standing water (with the exception of a temporary interruption due to certain non-anomalous events or as a result of anomalous events) may also align with the *Rapanos* plurality’s statement that dictionary definitions make clear that the use of

“the waters” in the statutory term “the waters of the United States” narrowly refers to “continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows” and that “[e]ven the least substantial of the definition’s terms, namely ‘streams,’ connotes a continuous flow of water in a permanent channel” and that “[n]one of these terms encompasses transitory puddles or ephemeral flows of water.” 547 U.S. at 732-33; *see also id.* (“The use of the definite article (‘the’) and the plural number (‘waters’) shows plainly that § 1362(7) does not refer to water in general. In this form, ‘the waters’ refers more narrowly to water ‘[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes[.]’”) (alteration in original).

The agencies are thus considering whether perennial most closely reflects the text of the Clean Water Act as interpreted in *Sackett*. Additionally, use of the perennial standard may also closely comport with *Sackett*’s two background presumptions. First, this interpretation “‘preserve[s]’ the States’ ‘primary’ authority over land and water use[,]” ensuring the Federal Government’s jurisdiction is limited to that which they have “clear evidence that it is authorized to regulate,” and is focused principally on “navigable water like rivers, lakes, and oceans.” *Sackett*, 598 U.S. at 672, 679-80. Second, this interpretation limits jurisdiction to those cases in which landowners have clear notice of their obligations under the Clean Water Act. *Id.* at 680. As discussed below, the concept of perennial water, temporarily broken only by certain anomalous or non-anomalous events, is understandable to landowners and does not leave property owners “to feel their way on a case-by-case basis.” *Id.* at 681.

The modifier “relatively” qualifies the term “permanent,” but it cannot cancel it out altogether. In other words, “relatively” cannot stretch the meaning of “permanent” to the point that “permanent” would encompass flow for significantly less than the majority of the time. Indeed, such an interpretation would be in tension with the Supreme Court’s interpretation in *Sackett* that “the CWA’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.”” 598 U.S. at 671 (citing *Rapanos*, 547 U.S. at 739) (quoting Webster’s New International Dictionary 2882 (2nd ed. 1954); (original alterations omitted)). This description does not appear to encompass waters that would flow significantly less than the majority of the time.

The agencies are considering whether this supplemental option best reflects the plain meaning of “relatively permanent.” Additionally, under this supplemental option, the agencies would define the term “perennial” in the regulatory text at paragraph (c) to provide clarity for implementation. In this supplemental option, drought⁴ would be one type of anomalous event that would allow a normally jurisdictional water to remain jurisdictional in the absence of year-round flow. Such anomalous events are an extraordinary departure from ordinary conditions. The U.S. Drought Monitor uses four levels of drought: moderate (D1), severe (D2), extreme (D3) and exceptional (D4).⁵ The agencies are considering implementing drought under this supplemental option such that only extreme (D3) and exceptional (D4) droughts would qualify as anomalous drought conditions that can temporarily interrupt perennial flow, and can extend continuously across no more than a five-year timeframe, after which the drought condition would be nullified for purposes of identifying “relatively permanent” waters, and that water would no longer be jurisdictional under its ordinary conditions as the interruption has ceased to be ‘anomalous.’ A five-year timeframe is consistent with the five-year expiration date of an approved jurisdictional determination under existing Army Corps of Engineers (Corps) guidance. *See* Regulatory Guidance Letter (RGL) 05-02 (June 14, 2005). The agencies believe that by aligning the duration of the temporary interruption with the effective period of an approved jurisdictional determination, the concept would be easily administrable by the agencies and understood by those persons or entities seeking the determinations. The agencies solicit comment on the appropriateness of using a five-year timeframe for interpreting “drought.”

⁴ “Drought” is generally defined as “a period of dryness especially when prolonged.” *Drought*, Merriam-Webster (2026).

⁵ *See* <https://droughtmonitor.unl.edu/About/WhatistheUSDM.aspx>.

In addition, a temporary interruption in ordinary conditions, such as low tide or a regularly occurring dry spell,⁶ would be another type of circumstance by which a water can remain “relatively permanent,” so long as these conditions do not last more than a single period of up to 30 consecutive days in any given year. The agencies acknowledge that waters that may experience low tides likely also fall under paragraph (a)(1) waters where they are subject to the ebb and flow of the tide.

The agencies are considering whether this supplemental option would also align with the policy of Congress in Clean Water Act section 101(b) recognizing and respecting the primary responsibilities and rights of States to regulate their land and water resources. With this supplemental option for the definition of “relatively permanent,” the agencies seek to avoid “impairing or in any manner affecting any right or jurisdiction of the States with respect to waters (including boundary waters) of such States.” *See* 33 U.S.C. 1370. States and Tribes would be free to address rivers, lakes, streams, ponds, and other features that do not meet the supplemental option for the definition of “relatively permanent” and that otherwise do not meet the definition of “waters of the United States” as “waters of the State” or “waters of the Tribe” under their own laws to the extent they deem appropriate, as envisioned under section 101(b) of the Clean Water Act.

The supplemental proposal for “relatively permanent” would require that a water maintain standing or continuously flowing water for every day of the year, except under anomalous events such as a drought or dry spell or non-anomalous events such as low tide or a regularly occurring dry spell. This approach is generally consistent with one of the alternative approaches included in the NPRM, *see* 90 FR 52519, though the agencies have modified this approach to allow for two exceptions from year-round flow. 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

⁶ “Dry spell” is generally defined as “a period of dry weather.” *Dry spell*, Merriam-Webster (2026).

spell, or as a result of non-anomalous events such as low tide and a regularly occurring dry spell that do not last more than a single period of up to 30 consecutive days in any given year. This temporal component is not tied specifically to the same calendar year, so, for example, the year could span from September of one calendar year to August of the following calendar year.

Tributaries without standing or continuously flowing water every day of the year, except for under certain anomalous or non-anomalous events, would thus not be considered “relatively” permanent. Under this supplemental option, a temporary interruption in standing or continuously flowing water due to non-anomalous events such as low tides and a regularly occurring dry spell would need to be of a duration of no more than a single period of up to 30 consecutive days or shorter in any given year for a water to meet the definition of “relatively permanent.” While there are no precise, scientifically-grounded, nationally consistent time limits for the durations of the temporary interruption due to non-anomalous events like low tide or a regularly occurring dry spell, a 30-day limit, which is roughly the length of a month, would establish a bright line duration that would be predictable, transparent, and easy to administer. In consideration of the length of a year, a 30-day limit is a reasonable approach to identifying something “temporary” in nature. Moreover, such a limit addresses concerns about administrability raised by the *Sackett* opinion, which sought a solution that would obviate the need for property owners “to retain an expensive expert consultant” to assess Clean Water Act jurisdiction. *See* 598 U.S. at 670. A waterbody that does not meet this proposed interpretation of “relatively permanent,” would be the type of “intermittent” or “ephemeral” feature that does not meet the definition of “waters” under the Clean Water Act. *See Sackett*, 598 U.S. at 672 (“[T]he use of ‘navigable’ signals that the definition principally refers to bodies of navigable water like rivers, lakes, and oceans.”); *Rapanos*, 547 U.S. at 733 (“All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows. Even the least substantial of the definition’s terms, namely ‘streams,’ connotes a continuous flow of water in a permanent channel—especially when used in company with other

terms such as ‘rivers,’ ‘lakes,’ and ‘oceans.’”); *Rapanos*, 547 U.S. at 733 n.6 (“The principal definition of ‘stream’ likewise includes reference to such permanent, geographically fixed bodies of water The other definitions of ‘stream’ repeatedly emphasize the requirement of *continuous* flow Justice KENNEDY apparently concedes that ‘an intermittent flow can constitute a stream’ only ‘*while it is flowing*,’ *post*, at 2243 (emphasis added)—which would mean that the channel is a ‘water’ covered by the Act only during those times when water flow actually occurs. But no one contends that Federal jurisdiction appears and evaporates along with the water in such regularly dry channels.”). The agencies solicit comment on whether any other time frame would be more appropriate to sever jurisdiction as the result of the occurrence of a temporary interruption due to a non-anomalous event such as a low tide or regularly occurring dry spell.

a. Implementation

The agencies assert that this supplemental option to defining “relatively permanent” could further simplify implementation of the rule. If members of the public see that waters dry up in circumstances other than during anomalous events (*e.g.*, drought and non-regularly occurring dry spells) or non-anomalous events (*e.g.*, low tides, regularly occurring dry spells), they would know those waters would not be jurisdictional under this supplemental option simply by observation, without the need for any further analysis or professional consultation. To illustrate how this supplemental option would work in practice, a body of water would remain jurisdictional even if it lacked flow for a single period of up to 30 consecutive days in any given year during a dry spell. For example, if a water temporarily ceases to have standing or continuously flowing water for 30 consecutive days during a dry spell every June, it would meet the definition of “relatively permanent” under this supplemental option. Similarly, a perennial water under ordinary conditions would remain jurisdictional during a drought lasting no more than five years that disrupts its otherwise perennial flow and results in a temporary cessation of flow during an abnormally dry summer. Because this temporary interpretation in flow is due to

an anomalous event, the duration of flow is not limited. Meanwhile, under this approach a water that lacks standing or continuously flowing water from June through August (approximately 90 days) every year, *i.e.*, under ordinary conditions, would not be relatively permanent. The agencies seek comment on whether this supplemental regulatory approach could lead to greater transparency and clarity in implementation while remaining consistent with the *Rapanos* plurality and *Sackett* decisions.

The NPRM contained a number of implementation tools and methods that can be used for “relatively permanent” determinations, and the agencies believe that they can also be used to implement this supplemental option to the definition of “relatively permanent.” The agencies refer to that portion of the NRPM and thus will not be restating every tool and method in this section. *See* 90 FR 52523-24 (November 20, 2025). The agencies will continue to use multiple tools, including remote and field-based indicators to inform decisions.

The agencies also solicit comment on tools that can be used to determine if drought conditions are occurring that may result in a temporary interruption in standing or continuously flowing water that is perennial under normal conditions. As discussed previously, the agencies would interpret drought to extend continuously across no more than a five-year timeframe, after which the drought condition would be nullified for purposes of identifying “relatively permanent” waters. After five years, such conditions would be considered the new normal. The agencies could use precipitation-driven tools like the U.S. Drought Monitor,⁷ which relies on NOAA’s Standardized Precipitation Index⁸ computed for timescales ranging from 1 to 72 months and features an updated map released every Thursday that shows the location and severity of precipitation deficits across the United States and U.S. Territories, and is developed

⁷ The U.S. Drought Monitor is a produced through a partnership between the National Drought Mitigation Center at the University of Nebraska-Lincoln, the U.S. Department of Agriculture, the National Oceanic and Atmospheric Administration, and the National Aeronautics and Space Administration. *Available at* <https://www.drought.gov/data-maps-tools/us-drought-monitor>.

⁸ *See* <https://www.ncei.noaa.gov/access/monitoring/nadm/indices/spi/div>.

in partnership with several U.S. government agencies.⁹ This collaborative effort has produced a weekly assessment of drought conditions since 1999, and also includes categorization of “short-term drought” impacts (less than six months) and “long-term drought” impacts (six months or more). The U.S. Drought Monitor uses four levels of drought: moderate (D1), severe (D2), extreme (D3) and exceptional (D4).¹⁰ The agencies are considering implementing drought under this supplemental option such that only extreme (D3) and exceptional (D4) droughts would qualify as anomalous drought conditions that can temporarily interrupt perennial flow. The agencies solicit comment on this implementation approach to drought.

The agencies also have routinely used the Corps’ Antecedent Precipitation Tool (APT)¹¹ to assess if observations made during a site visit or through interpretation of aerial photography are made under normal, wetter than normal, or drier than normal climatic conditions for a given location. For example, the WebWIMP¹² outputs reported by APT can be used to assess the presence of drought conditions. The APT also displays monthly values from NOAA’s Climate Division Scale Palmer Drought Severity Index (PDSI)¹³ dataset. The PDSI integrates precipitation, evapotranspiration, and soil moisture data into the monthly drought index. The PDSI Divisional Time Series may be used to observe PDSI across States and ecoregion divisions on a monthly scale from a start year of 1895 to 2026.¹⁴

⁹ See <https://droughtmonitor.unl.edu/CurrentMap.aspx>.

¹⁰ See <https://droughtmonitor.unl.edu/About/WhatistheUSDM.aspx>.

¹¹ Available at <https://github.com/erdc/Antecedent-Precipitation-Tool/releases>.

¹² The Web-based Water-Budget Interactive Modeling Program (WebWIMP) is a water-budget model that uses interpolated average monthly air temperature and precipitation data to calculate a climatically-averaged, monthly water-balance for a given location. Available at http://cyclops.deos.udel.edu/wimp/public_html/index.html). See also “Additional Information on the Antecedent Precipitation Tool,” available at <https://www.epa.gov/system/files/documents/2022-12/Additional%20Information%20on%20the%20APT.pdf>.

¹³ See <https://www.ncei.noaa.gov/access/monitoring/climate-at-a-glance/divisional/mapping/110/pdsi/202607/1/value>.

¹⁴ Available at <https://www.ncei.noaa.gov/access/monitoring/climate-at-a-glance/divisional/time-series>.

The agencies also solicit comment on tools that could be used to determine if a dry spell is occurring that may result in a temporary interruption in standing or continuously flowing water. The APT and associated metrics could also be used to help determine if a dry spell is occurring. One of the classifications in the U.S. Drought Monitor is “normal conditions”¹⁵ and could potentially be used to help determine if a non-anomalous dry spell is occurring, as such dry weather should be classified as normal conditions. Under a dry spell, dry weather would be the normal climatic condition for a set time of the year at a given location. However, a temporary interruption in standing or continuously flowing water due to a dry spell could only last for no more than a single period of up to 30 consecutive days in any given year under this supplemental option for a water to be considered “perennial” and thus “relatively permanent.”

Similarly, the agencies solicit comment on tools that can be used to determine if low tides are occurring that may result in a temporary interruption in standing or continuously flowing water. For example, NOAA provides the official tidal predictions for the nation and maintains a website called “Tides and Currents”¹⁶ that can be used to access local tidal conditions to help determine if a water temporarily lacks flowing or standing water because of low tides. The website allows users to generate past, present, and future tide predictions at over 3,000 locations along the coastal United States. Because tides are caused by the gravitational pull of the moon and the sun, they appear as the regular rise and fall of the sea surface and can be predicted with strong confidence; however, certain extraordinary weather events like hurricanes or sustained directional winds can exacerbate low tides beyond seasonal expectations. However, even under such circumstances, the low tides would not impede a determination that a water is relatively permanent under this supplemental proposal.

The agencies do not believe that this supplemental option would require continuous monitoring. The agencies have extensive experience with assessing flow duration, regardless of

¹⁵ See *supra* note 10.

¹⁶ See <https://tidesandcurrents.noaa.gov/>.

the threshold, under all regulatory regimes since *Rapanos*, such as at least seasonal flow (e.g., 90 days) under the pre-2015 regulatory regime, perennial and intermittent flow under the 2020 Navigable Waters Protection Rule, and continuous flow during certain times of the year but more than for a short duration in direct response to precipitation under the Amended 2023 Rule. *See* Navigable Waters Protection Rule: Definition of “Waters of the United States,” 85 FR 22250 (April 21, 2020); Revised Definition of “Waters of the United States,” 88 FR 3004 (January 18, 2023) (as amended by Revised Definition of “Waters of the United States”; Conforming, 88 FR 61964 (September 8, 2023)). These regulatory regimes have all required an element of continuous flow for a duration, and the agencies have not required continuous monitoring under any of these prior or current approaches. The agencies seek comment on implementation of this supplemental option, including tools and methods that could be used.

b. Potential Reliance Interests

The Supreme Court recognizes that an agency must “provide a more detailed justification that would suffice for a new policy . . . when . . . its prior policy has engendered serious reliance interest that must be taken into account.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). However, the agencies understand that reliance interests alone cannot justify retaining a regulation that is in conflict with the Supreme Court’s ruling in *Sackett*. Despite this, the agencies have agreed to review and consider certain reliance interests raised by stakeholders in the interest of transparency and public engagement, and how the agencies may consider those interests in light of *Sackett*. This discussion is not and should not be understood as a concession that such consideration is legally required. The agencies believe this supplemental option would have certain practical impacts but that its rationale would be sufficient to justify those impacts. As discussed above, interpreting the scope of a continuous surface connection to be a continuous surface water connection, except in the case of a dry spell, low tide, or drought, could be read as the most consistent interpretation of the *Sackett* decision. Specifically, it would potentially reflect the language in *Sackett* interpreting a continuous surface connection to encompass wetlands

where it is “difficult to determine where the ‘water’ ends and the ‘wetland’ begins,” albeit acknowledging that “temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells.” *Sackett*, 598 U.S. at 678. The agencies are proposing this supplemental option to conform the regulatory definition of “waters of the United States” with the text of the Clean Water Act and *Sackett*, and they may not utilize reliance interests as a way to skirt *Sackett’s* ruling.

The agencies received comments on the NPRM indicating that States were both prepared and well-equipped to regulate non-jurisdictional waters within their boundaries. Commenters likewise pointed to instances in several State constitutions that preserve this power, as well as the provision of certain State legislative grants of authority for specific jurisdictional waters within State boundaries. Alternatively, the agencies recognize that some States and Tribes may need to expend considerable resources to effectuate a State or Tribal program to regulate these non-jurisdictional waters and that other States currently have laws restricting their ability to be more stringent than Federal regulations. The agencies further note that the definition of “waters of the United States” has been in significant flux: the past eleven years have included five rule revisions, a major Supreme Court decision, a memorandum to the field, and a constant stream of lower court rulings, injunctions and vacatur—each modifying the agencies’ interpretation of “waters of the United States.” The agencies seek to now put an end to such uncertainty, but in the meantime States and Tribes may have had difficulty relying on a consistent prior interpretation of “waters of the United States.”

Regardless, the agencies seek comment on any reliance interests that may be affected by this supplemental option and how the agencies may consider those interests while still adhering to the text of the Clean Water Act and *Sackett* decision.

C. “Continuous Surface Connection” Waters

1. Summary of Initial Proposed Definition and Relevant Comments Received on “Continuous Surface Connection”

In *Sackett*, the Supreme Court interpreted the jurisdictional extent of “navigable waters” under the Clean Water Act. Part III.B of the Court’s opinion sets out the test for determining when wetlands are “waters.” In Part III.B, the Court held that wetlands are jurisdictional when they are “as a practical matter indistinguishable from waters of the United States.” 598 U.S. at 678 (quoting *Rapanos*, 547 U.S. at 742 (plurality op.)). Wetlands are “indistinguishable” when (1) “the adjacent [body of water constitutes]. . . ‘water[s] of the United States’” and (2) “the wetland has a continuous surface connection with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.” *Id.* at 678-79 (quoting *Rapanos*, 547 U.S. at 742, 755).

The agencies previously proposed to define “continuous surface connection” to mean having surface water at least during the wet season and abutting (*i.e.*, touching) a jurisdictional water. Under the NPRM, “wet season” for continuous surface connection was intended to be implemented as it was for the proposed definition of “relatively permanent.” The agencies sought comment on the proposed definition, implementation, and several alternative approaches to continuous surface connection.

Some commenters generally supported the applicability of the “wet season” concept to defining jurisdictional adjacent wetlands. The agencies also received a number of comments expressing concern about the proposed wet season approach, with some commenters disagreeing with the proposed approach. As a legal matter, many commenters argued that nothing in the Clean Water Act, *Sackett*, or in the *Rapanos* plurality sets forth a “wet season” threshold for adjacency. As a practical matter, some commenters expressed concern that the “wet season” requirement did not account for the lag time between when precipitation occurs and when wetlands are inundated. Therefore, these commenters pointed out that a season-based threshold should take into account inundation in wetlands that occurs as a *result* of the wet season, even if not *during* the wet season. The agencies also received comment that it is unclear how the use of National Wetlands Inventory (NWI) water regime modifiers for assessing surface inundation “at

least during the wet season” will be applied when implementing the “wet season” concept in the definition of “relatively permanent waters” as proposed.

Other commenters supported the proposed approach to continuous surface connection, stating that it would both set bright lines while allowing for flexibility based on region. Many commenters expressed support for the definition of “continuous surface connection,” as proposed, stating that it aligns with, and is even required by, the ordinary meaning of “adjacent” and satisfies the test in *Sackett*, derived from the *Rapanos* plurality. Specifically, these commenters stated that the proposed definition satisfies the requirement in *Sackett* requiring adjacent water features to be “as a practical matter indistinguishable” from “waters of the United States,” citing *Sackett*, 598 U.S. at 678, and the *Sackett* decision’s directive that the agencies must not regulate waters “that are separate from traditional navigable waters . . . even if they are located nearby.” *Sackett*, 598 U.S. at 676.

Some commenters disagreed with the proposed definition of “continuous surface connection” on the grounds that “indistinguishable” must be an independent part of the adjacency test. Commenters emphasized that two features may have a continuous surface connection while still being distinguishable. In their view, indistinguishability is not merely an outcome of a continuous surface connection but is an express qualification upon that test. These commenters cited lower court holdings as confirming the centrality of *Sackett*’s indistinguishability requirement. *See, e.g., United States v. Sharfi*, No. 2:21-cv-14205, 2024 WL 4483354, at *13 (S.D. Fla. Sep. 21, 2024), report and recommendation adopted, 2024 WL 5244351 (S.D. Fla. Dec. 30, 2024) (finding that the government’s interpretation ignored the requirement that the continuous surface connection be one which “makes it difficult to determine where the ‘water’ ends and the ‘wetland’ begins” (quoting *Sackett*, 598 U.S. at 678-79)); *United States v. Ace Black Ranches, LLP*, No. 1:24-cv-00113, 2024 WL 4008545, at *3 (D. Idaho Aug. 29, 2024) (finding that the government failed to “successfully allege[] that Ace Black Ranches

discharged pollutants into wetlands that are indistinguishable from, *and* have a continuous connection with, the River, satisfying the adjacency test” (emphasis added)).

Some commenters cited the *White v. U.S. EPA* decision as interpreting *Sackett* to mean that the continuous surface connection test implements the concept of indistinguishability. *White v. U.S. Env’t Prot. Agency*, 737 F. Supp. 3d 310 (E.D.N.C. 2024). In *White*, the court cites *Sackett*’s statement that the Clean Water Act “extends to only those ‘wetlands with a continuous surface connection to bodies that are “waters of the United States” in their own right,’ so that they are ‘indistinguishable’ from those waters,” *Sackett*, 598 U.S. at 684, and concludes: “the use of ‘so’ as a conjunction says it all.” *Id.* at 327 (citing *So*, American Heritage Dictionary 1660 (5th ed. 2011) (meaning “[f]or that reason; therefore”); *so*, Merriam-Webster’s Collegiate Dictionary 1182 (11th ed. 2003) (meaning “with the result that” or “for that reason”)). According to the commenters, the *White* court’s interpretation of *Sackett* is consistent with the *Rapanos* test’s formulation: “‘waters’ may fairly be read to include only those wetlands that are as a practical matter indistinguishable from waters of the United States,” which “occurs when wetlands 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.” *Sackett*, 598 U.S. at 678 (quoting *Rapanos*, 547 U.S. at 742, 755) (internal citation and quotation marks omitted). In other words, according to the commenters, the phrasing in both the *Rapanos* plurality and *Sackett* indicates that the *consequence* of a “continuous surface connection” with a covered water is indistinguishability with that water. *See White*, 737 F. Supp. 3d at 326-27.

Commenters further cite the *White* court as pointing out that no lower court has read *Sackett* to mandate that a wetland have both a continuous surface connection to a jurisdictional water *and* be practically indistinguishable in order to be “adjacent.” The *White* court noted that in *Lewis v. United States*, the Fifth Circuit acknowledged that *Sackett* requires the wetland be indistinguishable from a water of the United States to be jurisdictional and then recognized that a continuous surface connection to a jurisdictional water “represents the *Sackett* ‘adjacency test.’”

White, 737 F. Supp. 3d at 327 (citing *Lewis v. United States*, 88 F.4th 1073, 1078 (5th Cir. 2023)). Similarly, the *White* court noted that in *Glynn Environmental Coal, Inc. v. Sea Island Acquisition, LLC*, the United States District Court for the Southern District of Georgia acknowledged that a wetland must be “practically indistinguishable” and then held that the property did not meet that definition because it lacked a continuous surface connection. *Id.* (citing 2024 U.S. Dist. LEXIS 45704, at *11-16 (S.D. Ga. Mar. 1, 2024)).

Some commenters argued that, while the agencies stated in the proposed rule that they were not changing the longstanding definition of “wetlands,” the definition of “continuous surface connection” effectively renders that provision inoperative. According to those commenters, the agencies are making significant changes to the meaning of “wetlands” without providing the public with notice and an opportunity for comment.

The agencies also received comments stating that to the extent seasonality generally is relevant to the scope of Clean Water Act jurisdiction, it is limited to the scope of “relatively permanent waters,” not adjacent wetlands. Some commenters also asserted that, as a general matter, the “wet season” concept is broader than the standard that *Sackett* laid out.

The agencies requested comment on an alternative that would require a jurisdictional wetland to have a continuous surface water connection to an otherwise jurisdictional water, requiring the perennial presence of surface water (*i.e.*, year-round) in the wetland, lake, or pond, for example, in a permanently flooded wetland. Some commenters supported this alternative, stating that this approach best implements the “indistinguishable” standard articulated in *Sackett*, *see* 598 U.S. at 678, and is consistent with the text of the Act and the Supreme Court’s decision in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985). They emphasized that this approach would be consistent with the way some courts have interpreted the *Rapanos* plurality and *Sackett*, which is that “‘continuous surface connection’ means a surface water connection,” citing *United States v. Sharfi*, No. 21-14205, 2024 WL 5244351, at *3 (S.D. Fla. Dec. 30, 2024); and *United States v. Ace Black Ranches, LLP*, No. 1:24-cv-00113, 2024 WL 4008545, at *10 n.2

(D. Idaho Aug. 29, 2024) (dismissing the government’s complaint for failure to “connect any wetlands” it alleged to be “waters of the United States” with a traditional navigable water “via a sufficient surface-water connection”). In addition, they stated that nothing in *Sackett*, *Rapanos*, or *Riverside Bayview* mentions a wet season in the context of its discussions of indistinguishability.

Other commenters did not agree with this proposed alternative, emphasizing that in their view *Sackett* does not require a “continuous surface *water* connection,” only a physical continuous surface connection. Some of those commenters noted that in the *Rapanos* plurality opinion, Justice Scalia twice suggests that the “continuous surface connection” requirement contemplated a “physical connection” rather than solely a hydrological one, citing *Rapanos*, 547 U.S. at 737, 747. One commenter pointed out that a “continuous surface water connection” requirement would cover only a small fraction of non-tidal wetlands. The commenter argued that Congress did not undertake the significant effort to modify the Clean Water Act in 1977 in order to provide States with authority to assume administration of the 404 program under section 404(g) for a subset of “waters of the United States,” explicitly citing adjacent wetlands in the text, to address what they deemed to be a *de minimis* fraction of non-tidal wetlands.

In the NPRM, the agencies also requested comment on whether “continuous surface connection” is best interpreted to mean simply abutting, *i.e.*, touching, consistent with the approach under the March 2025 Continuous Surface Connection Guidance. *See* 90 FR 52530 (November 20, 2025). This alternative approach would categorically cover all wetlands that abut a jurisdictional water, under paragraph (a)(4) of the rule, regardless of whether they are characterized by surface water at least seasonally. Some commenters stated that none of the Supreme Court decisions addressing “waters of the United States,” from *Riverside Bayview* through *Sackett*, demanded that a wetland be continuously filled with water, during a wet season or otherwise, in order to be deemed jurisdictional. Rather, the commenters stated, the Supreme Court has consistently recognized that wetlands abutting, or touching, otherwise covered waters

are covered under the Clean Water Act. They noted that the *Sackett* decision favorably cited *Riverside Bayview*'s holding that wetlands "actually abutting a navigable waterway" are jurisdictional, as it affirmed that "waters of the United States" include wetlands "contiguous" to navigable waters.

The agencies also solicited comment on an alternative approach to define "continuous surface connection" to be consistent with the NWI's semipermanently flooded water regime and require surface water at least during the growing season. Under such an alternative approach, the agencies solicited comment on whether growing season should be implemented consistent with EPA and the Corps' wetland delineation practices. A few commenters supported the agencies' proposed use of NWI water regime modifiers for assessing surface inundation when assessing if a wetland has a continuous surface connection. One such commenter recommended the agencies use the NWI water regime categories of "semipermanently flooded" and "permanently flooded" to be more procedurally succinct when assessing continuous surface connection rather than expending effort to define "wet season." Another commenter asserted that any wetlands classified with water regime modifiers of "permanently flooded," "intermittently exposed," "semipermanently flooded," or "seasonally flooded" could be determined to satisfy continuous surface connection, so long as they are also abutting a covered water.

A few commenters opposed the adjusted calculation of "wet season" rather than the original "growing season" variable modeled in NWI water regime modifiers. These commenters highlighted that "growing season" is dependent on temperature and budding vegetation while "wet season" is precipitation and evapotranspiration driven and asserted the use of NWI modifiers is inapplicable for assessing surface inundation "at least during the wet season." Another of these commenters opposed the use of the "semipermanently flooded" water regime and asserted that this regime is defined as "having surface water for most of the growing season" and stated this duration "goes well beyond the proposed wet season" period.

2. Supplemental Option for the Definition of "Continuous Surface Connection"

Unlike in the NPRM, which proposed to define continuous surface connection as “having surface water at least during the wet season and abutting (*i.e.*, touching) a jurisdictional water,” the agencies are requesting comment in this supplemental notice on an alternative definition of “continuous surface connection.” In this supplemental notice, the agencies are requesting comment on an alternative definition of “continuous surface connection” as meaning “perennial surface water in a wetland that is continuously connected with the surface water in the jurisdictional water such that it is difficult to determine where the jurisdictional water ends and the wetland begins. A temporary interruption in the surface water connection may occur as the result of anomalous events such as drought or a dry spell. A temporary interruption in the surface water connection lasting for no more than a single period of up to 30 consecutive days in any given year may also occur as a result of non-anomalous events such as low tide or a regularly occurring dry spell.” Only the portion of the wetland that is indistinguishably part of the jurisdictional water would be itself jurisdictional. This supplemental option would also respond to comments expressing concerns about the “wet season” approach (*i.e.*, the period of time when precipitation exceeds evaporation) and address the concerns of commenters that requiring flow inundation during the “wet season” would not account for climates where streamflow wetland hydrology is temporally offset from the wet season.¹⁷ The agencies seek comment on whether any other numeric threshold may be more consistent with *Sackett* and the *Rapanos* plurality.

Under this supplemental option, the agencies’ proposed definition of “continuous surface connection” utilizes the term “perennial” for the sake of consistency with the supplemental proposed definition of “relatively permanent.” As discussed in section V.B.2 of this preamble, this supplemental option would define “perennial” as “having standing or continuously flowing

¹⁷ As discussed in the NPRM, surface hydrology may not always exactly overlap with the wet season, for example in regions exhibiting a time lag or delay in demonstration of surface hydrology due to various factors. The latter may occur, for example, as a result of snowpack melt occurring several months after repeated snowfall creates a snowpack. In another example, some streams experience delayed (*i.e.*, lagged) surface hydrology during the transition from the dry season to the wet season, as it may take some time for the water table to rise due to seasonal precipitation patterns. 90 FR 52518 (November 20, 2025).

water every day of the year during ordinary conditions.” Consistent with the jurisdictional test advanced by the *Sackett* majority, this supplemental option focuses on wetlands with perennial surface water that are connected to the surface water in the jurisdictional water with limited exceptions due to either anomalous events or a non-anomalous temporary interruption. These anomalous and non-anomalous events are the types of circumstances identified in *Sackett* and the *Rapanos* plurality: low tides, dry spells, and drought.

Although the phrase “extraordinary circumstances, such as drought” in the *Rapanos* plurality opinion, 547 U.S. at 796, n.5, refers to relatively permanent waters, this type of anomalous event does not prevent a wetland from having a continuous surface connection if it would otherwise satisfy the supplemental proposed definition. This is because it would make no sense for an extraordinary departure from the wetland’s ordinary condition due to a natural and uncontrollable weather event to remove the jurisdictional status from an otherwise adjacent wetland. The agencies would implement drought as described above in the supplemental option for “relatively permanent,” including considering a drought lasting continuously for more than five years as the new normal conditions. Under this approach, if a drought lasts for more than five years, wetlands that have previously been considered to have had a continuous surface connection despite temporary interruptions resulting from drought would no longer be jurisdictional.

Consistent with *Sackett* under this supplemental option, a temporary interruption in surface water connection that may occur because of non-anomalous phenomena like low tide or a regularly occurring dry spell would not break jurisdiction. *See Sackett*, 598 U.S. at 678. The supplemental option, if finalized, would clarify in the regulatory text that a temporary interruption in flow due to such non-anomalous events cannot occur for more than a single period of up to 30 consecutive days in any given year. The agencies would implement low tides and regularly occurring dry spells as described above in the supplemental option for “relatively permanent.” The agencies are also seeking comment on an additional alternative approach

whereby *Sackett*'s concept of "indistinguishability" would remove the applicability and, therefore, the relevance of the terms "adjacent" and "abutting." The agencies would follow the *Sackett* Court's directive that interpreting 33 U.S.C. § 1344(g)(1), such that "adjacent wetlands . . . are 'includ[ed]' within 'the waters of the United States,' . . . [and therefore] [adjacent wetlands] must qualify as 'waters of the United States' in their own right." 598 U.S. at 676. Under this alternative approach, the *Sackett* Court would be viewed as not considering "adjacency" as a separate concept requiring its own independent analysis, but rather incorporated into the broader concept of "the waters of the United States" such that "certain 'adjacent' wetlands are *part of* 'waters of the United States.'" *Id.* at 677 (emphasis in original).

As such, the agencies are also soliciting supplemental comments on whether the terms "adjacent" or "abutting" are operative in the definition of "continuous surface connection," or should be removed from the definition entirely. Under such an interpretation of *Sackett*, the agencies would delete the term "adjacent" from the definition in paragraph (c)(2) and revise paragraph (a)(4) of their regulations to read: "Wetlands that are indistinguishably part of a body of water that itself is jurisdictional under (a)(1) through (3) of this section. This occurs when surface water in a wetland is continuously connected with the surface water in the jurisdictional water such that it is difficult to determine where the jurisdictional water ends and the wetland begins. Only the portion of the wetland that is indistinguishably part of the jurisdictional water, due to the presence of surface water, is itself jurisdictional. The requisite surface water connection is not broken by a temporary interruption in surface connection that may sometimes occur because of phenomena like low tide or a regularly occurring dry spell."

Sackett held that "the CWA extends to only those wetlands that are 'as a practical matter indistinguishable from waters of the United States.'" *Id.* at 678. The Court stated that this test "requires the party asserting jurisdiction over adjacent wetlands to establish 'first, that the adjacent [body of water constitutes] . . . 'water[s] of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that

the wetland has a continuous surface connection with that water, making it difficult to determine where the “water” ends and the “wetland” begins.” *Id.* at 678-79. The *Sackett* decision recognized that temporary interruptions in surface connection may occur, such as during dry spells or low tide. *Id.* at 678. *See also Rapanos*, 547 U.S. at 796 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.”) (Scalia, J., plurality opinion.)

While the agencies acknowledge commenters have argued and lower courts have held that a surface *water* connection is not required under *Sackett*, this supplemental option to “continuous surface connection” relies on a reading of *Sackett* whereby a wetland can be indistinguishably part of a jurisdictional water only when the wetland and the jurisdictional water share a surface water connection. Under this option, where that continuous surface water connection runs out, the wetland and the water become distinguishable and Federal jurisdiction ends. As Justice Scalia observed in *Rapanos*, “[t]he plain language of the statute simply does not authorize [a] ‘Land Is Waters’ approach to federal jurisdiction.” 547 U.S. at 734; *see also Sackett*, 598 U.S. at 672 (“This meaning is hard to reconcile with classifying ‘lands,’ wet or otherwise, as ‘waters.’”). Rather, to be jurisdictional, “wetlands must qualify as ‘waters of the United States’ in their own right,” which means “they must be indistinguishably *part of a body of water that itself constitutes ‘waters’ under the CWA.*” *Sackett*, 598 U.S. at 676 (emphasis added).

This proposed interpretation—that the only type of continuous surface connection that could make “it difficult to determine where the ‘water’ ends and the ‘wetland’ begins” is a continuous surface water connection—comports with the text of the Clean Water Act, *Sackett*’s interpretation of that text, and the overarching presumptions *Sackett* sets out. Under this reading of *Sackett*, it follows then that if mere abutment between a wetland and a water was sufficient, it would not be difficult to draw the line between the water and the wetland, and *Sackett* would not be satisfied—particularly given the requirement that “EPA must provide clear evidence that it is authorized to regulate in the manner it proposes.” 598 U.S. at 679. This supplemental option

would thus implement *Sackett*'s clear instruction that "wetlands that are not indistinguishably part of otherwise covered" "waters of the United States" are not jurisdictional. *Id.* at 667.

As noted above, the agencies are seeking comment on several supplemental regulatory options defining "continuous surface connection" that would require continuous surface water except as a result of a temporary interruption such as a regularly occurring dry spell or low tide or anomalous events such as drought or dry spell. The agencies would implement these terms in the context of "continuous surface connection" in the same manner as discussed above in this SNPRM in conjunction with the supplemental option for the definition of "relatively permanent." This approach would be in keeping with the *Sackett* decision, which stated that "temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells." 598 U.S. at 678; *see also Rapanos*, 547 U.S. at 796 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.") (Scalia, J., plurality opinion.). The agencies also solicit comment on the definition of perennial or other alternative definitions to the term in the context of "continuous surface connection."

This supplemental option for the proposed definition of "continuous surface connection" seeks to introduce greater clarity than the initial proposed definition would have provided. The agencies seek comment on this supplemental option to the proposed definition of "continuous surface connection," which was based on public comments.

a. Implementation

The agencies assert that this supplemental option to defining "continuous surface connection" could further simplify implementation of the rule. If members of the public see that a wetland does not share a continuous surface water connection with a jurisdictional water (*i.e.*, the perennial surface water in the wetland is continuously connected to the surface water in the jurisdictional water), except for during a temporary interruption due to low tide or a regularly occurring dry spell or as the result of anomalous events such as drought or dry spell, they would

know that wetland would not be jurisdictional under this supplemental option simply by observation, without the need for any further analysis or professional consultation. Furthermore, while any standard will present line drawing issues, the agencies believe that under this supplemental option it will be relatively simple for landowners to understand whether a portion of a wetland is continuously covered by perennial surface water that is connected with surface water in a jurisdictional water. Such a determination can be made by the naked eye. Additionally, a temporary interruption like a regularly occurring dry spell and low tide are readily observable phenomena that do not require expert consultants to determine. Similarly, drought information is readily available. The agencies seek comment on whether this supplemental option could lead to greater transparency and clarity in implementation while remaining consistent with Supreme Court precedent.

As highlighted under section V.C.3.a, the NPRM contained a number of implementation tools and methods that can be used for “continuous surface connection” determinations, and the agencies believe that they can also be used to implement this supplemental option to the definition of “continuous surface connection.”¹⁸ The agencies refer to that portion of the NRPM, and thus will not restate every tool and method in this section. *See* 90 FR 52523 and 52524 (November 20, 2025). The agencies also refer to section V.B.2.a of this preamble for a discussion of tools that can be used for determining drought, low tides, and dry spells and solicit comment on the appropriateness of these tools for implementation of the supplemental option for “continuous surface connection.” The agencies will continue to use multiple tools, including remote and field-based indicators, to inform decisions.

¹⁸ *See also* “Memorandum to the Field between the U.S. Department of the Army, U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency Concerning the Proper Implementation of ‘Continuous Surface Connection’ under the Definition of ‘Waters of the United States’ under the Clean Water Act.” (March 12, 2025), *available at* <https://www.epa.gov/system/files/documents/2025-03/>.

Similarly, the agencies do not believe that this supplemental option would require continuous monitoring. The agencies seek comment on implementation of this supplemental option, including tools and methods that could be used.

b. Potential Reliance Interests

The Supreme Court recognizes that an agency must “provide a more detailed justification that would suffice for a new policy . . . when . . . its prior policy has engendered serious reliance interest that must be taken into account.” *FCC*, 556 U.S. at 515. However, the agencies understand that reliance interests alone cannot justify retaining a regulation that is in conflict with the Supreme Court’s ruling in *Sackett*. Despite this, the agencies have agreed to review and consider certain reliance interests raised by stakeholders in the interest of transparency and public engagement, and how the agencies may consider those interests in light of *Sackett*. This discussion is not and should not be understood as a concession that such consideration is legally required.

The agencies believe this supplemental option would have certain practical impacts but that it would be sufficient to justify those impacts. As discussed above, interpreting the scope of a continuous surface connection to require perennial surface water in a wetland to be continuously connected with the surface water in the jurisdictional water, except in the case of a dry spell, low tide, or drought, could be read as the most consistent interpretation of the *Sackett* decision. Specifically, it would potentially reflect the language in *Sackett* interpreting a continuous surface connection to encompass wetlands where it is “difficult to determine where the ‘water’ ends and the ‘wetland’ begins,” albeit acknowledging that “temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells.” *Sackett*, 598 U.S. at 678. The agencies are proposing this supplemental option to conform the regulatory definition of “waters of the United States” with the text of the Clean Water Act and *Sackett*, and they may not utilize reliance interests as a way to skirt *Sackett*’s ruling.

The agencies received comment on the NPRM indicating that States were both prepared and well-equipped to regulate non-jurisdictional waters within their boundaries. Commenters likewise pointed to instances in several State constitutions that preserve this power, as well as the provision of certain State legislative grants of authority for specific jurisdictional waters within State boundaries. Alternatively, the agencies recognize that some States and Tribes may need to expend considerable resources to effectuate a State or Tribal program to regulate these non-jurisdictional waters and that other States currently have laws restricting their ability to be more stringent than Federal regulations. The agencies further note that the definition of “waters of the United States” has been in significant flux: the past eleven years have included five rule revisions, a major Supreme Court decision, a memorandum to the field, and a constant stream of lower court rulings, injunctions and vacatur—each modifying the agencies’ interpretation of “waters of the United States.” The agencies seek to now put an end to such uncertainty, but in the meantime States and Tribes may have had difficulty relying on a consistent prior interpretation of “waters of the United States.” Regardless, the agencies seek comment on any reliance interests that may be affected by this supplemental option and how the agencies may consider those interests while still adhering to the text of the Clean Water Act and *Sackett* decision.

VI. Supporting Information

A. Economic Analysis

The Regulatory Impact Analysis (RIA) for the proposed rule (U.S. Environmental Protection Agency and U.S. Department of the Army, 2025, Docket Document ID No. EPA-HQ-OW-0120) continues to be part of the agencies’ economic analysis after this notice. Just as the options added in this SNPRM are supplementary to the proposed rule, the economic analysis conducted here of the supplemental options is supplementary to the economic analysis for the proposed rule. Thus, although this supplemental notice only addresses the supplemental options and analyses thereof, the totality of the analysis of the proposal and supplemental options consists of the proposal economic analysis and this supplemental analysis. *See* section 1.2 in the

Regulatory Impact Analysis for the proposed action for a description of the current baseline and section 1.5 for a summary of the economic analysis of the proposed rule.

The lack of national data sources that allow for a reliable depiction of the baseline limits the agencies' ability to estimate the economic impacts of the proposed action (proposed rule RIA section 1.4). This is also the case for the supplemental action. Without a quantitative baseline, the agencies struggle to provide quantitative estimates of potential avoided costs and forgone benefits of the supplemental options to an appropriate degree of accuracy.

Furthermore, the agencies believe that including the economic analysis of the supplemental options directly into the preamble will help the public understand the economic impact of the supplemental options. Where the economic analysis in this SNPRM relies on aspects of the proposal economic analysis, the agencies refer to those sections, rather than repeat them in this section.

1. "Relatively Permanent"

The agencies are seeking comment on a supplemental option to define "relatively permanent" that would deem a water to be jurisdictional if it is perennial (*i.e.*, has standing or continuously flowing water every day of the year during ordinary conditions). In addition, a body of water would not lose its relatively permanent status if it dries up as a result of certain non-anomalous or anomalous events that disrupt standing or continuously flowing water on a temporary basis (*e.g.*, low tides, dry spells, or drought). Under this supplemental option, "relatively permanent" would be defined to mean "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 non-anomalous events resulting in a temporary interruption such as low tide or a regularly occurring dry spell." This would be a change from the current regulatory regimes in place that do not require "relatively permanent" waters to contain flowing or standing

water year-round except for certain anomalous or non-anomalous events (*i.e.*, the baseline). Specifically, more bodies of water would be captured as relatively permanent under the baseline. For example, a stream would need to be perennial, except as a result of anomalous events such as drought or dry spell, and certain non-anomalous events such as low tide or a regularly occurring dry spell, to be considered relatively permanent under the supplemental proposal, whereas under the Amended 2023 Rule, streams that flow continuously during certain times of the year would meet the relatively permanent standard, without any minimum flow duration criteria.

The agencies anticipate that most intermittent streams would not satisfy the requirements in the supplemental option for the proposed definition of “relatively permanent,” while under the baseline, many intermittent streams are considered to be relatively permanent. Though the supplemental option for defining “relatively permanent” would have impacts throughout the country, the agencies expect the greatest impact would be in regions where intermittent streams drive much of the hydrology, particularly in the arid West.

Existing national datasets provide some insight into the impact of the options in this supplemental notice. The National Hydrography Dataset (NHD) represents the most comprehensive national dataset of the potential location and extent of streams, rivers, lakes, and ponds. However, even where streams are identified in the NHD, the dataset does not depict the scope of waters regulated under the Clean Water Act. In addition, the definitions and implementation practices in the supplemental option cannot be exactly represented in the NHD dataset. Any estimates of waters in NHD would not correspond to the scope of Clean Water Act jurisdiction under the baseline. Specifically, under the Amended 2023 Rule, “relatively permanent” means having flowing or standing water year-round or continuously during certain times of the year but more than for a short duration in direct response to precipitation. Under the pre-2015 regulatory regime, consistent with the *Rapanos* Guidance, “relatively permanent” means typically having flowing or standing water year-round or continuously at least seasonally (*e.g.*, typically three months). These definitions do not equate to intermittent waters but are rather

an unidentifiable portion of the intermittent category identified in NHD. In addition, the NHD does not accurately distinguish between intermittent and ephemeral streams in certain parts of the country where ephemeral streams are not mapped. In these areas, the ephemeral streams are either included as intermittent reaches or excluded from the NHD. This creates complications for estimating waters that would be jurisdictional under the baseline and the impacts of the supplemental proposal. Therefore, the agencies cannot reliably quantify the baseline for the current regimes to assess changes in the scope of jurisdiction. Although the NHD does not correspond to the scope of Clean Water Act jurisdiction nor does it depict every body of water in the county, the agencies recognize that NHD provides context to the extent of the supplemental option. In the contiguous United States, the NHD high resolution shows about 1.3 million miles of perennial streams and 3.5 million miles of intermittent streams (roughly 21 percent and 55 percent of NHD-mapped stream miles respectively).

There are similar limitations of the Corps' Operation and Maintenance Business Information Link, Regulatory Module (ORM2) database and current practice for discussing "relatively permanent" in approved jurisdictional determinations, as compared to the supplemental option for "relatively permanent," which would pose challenges to using the ORM data for quantitative analysis.

The agencies evaluated some comments that acknowledged the technical limitations of using datasets such as the ORM2 database, National Hydrography Dataset (NHD), and National Wetlands Inventory (NWI), given that these datasets could not accurately portray jurisdictional waters under the Clean Water Act. Some commenters recommended the agencies not rely on NHD, NWI, or any versions of these datasets to quantify and monetize the impacts of the final rule for the above reasons and because both datasets have errors of omission and commission. The agencies continue to assert that the limitations of these datasets complicate efforts to quantify the impacts of the agencies' supplemental regulatory options at this time.

2. "Continuous Surface Connection"

The agencies are requesting comment on an alternative approach that would define “continuous surface connection” to mean “perennial surface water in a wetland that is continuously connected with the surface water in the jurisdictional water such that it is thus difficult to determine where the jurisdictional water ends and the wetland begins. A temporary interruption in the surface water connection may occur as the result of anomalous events such as drought or dry spell. A temporary interruption in the surface water connection lasting no more than a single period of up to 30 consecutive days in any given year may also occur as a result of non-anomalous events such as low tide or a regularly occurring dry spell.” Only the portion of the wetland that is indistinguishably part of the jurisdictional water would be itself jurisdictional.

The supplemental options in this notice for continuous surface connection would result in a narrower definition of “waters of the United States” compared to the baseline of the Amended 2023 Rule. One of the biggest changes from the baseline is the requirement that perennial surface water must be present continuously in the wetland, except during certain temporary interruptions caused by anomalous and non-anomalous events, for wetlands to have a “continuous surface connection.” The supplemental option in the SNPRM would require an assessment of whether a wetland has perennial surface water continuously, which differs from current practice which does not require adjacent wetlands to express their hydrology at the surface, nor does it require wetlands to express their hydrology year-round. For example, wetlands that have less than continuous surface water connection to a jurisdictional water, except during a temporary interruption caused by anomalous events such as drought or dry spell, or a temporary interruption of no more than a single period of up to 30 consecutive days in any given year caused by non-anomalous events such as low tides or regularly occurring dry spell, would not be considered jurisdictional under this SNPRM, though such wetlands would be jurisdictional under the baseline where they abut a jurisdictional water. The agencies anticipate that the majority of wetlands that are jurisdictional as adjacent wetlands under current regimes would not satisfy the

supplemental definition of “continuous surface connection,” as most wetlands do not contain perennial surface water.¹⁹

Data limitations and other factors make it challenging to estimate the change in the scope of “waters of the United States” at this time should the agencies finalize the SNPRM’s option for defining “continuous surface connection.” The agencies acknowledge that several spatial connectivity efforts have been conducted recently in an effort to assist the assessment of policy options related to the degree of connection between wetlands and “relatively permanent” waters for the contiguous United States in response to *Sackett*, (e.g., Lane *et al.*, 2025; Simmons *et al.*, 2024; Gold, 2024). Those documents have been considered in section 3.3.1 of the proposed rule RIA and can be found in the docket for the proposed rule (Docket ID EPA-HQ-OW-2025-0322). However, the agencies also acknowledge that such efforts may not mirror the statutory constraints by which EPA and the Army must comply, consistent with the *Sackett* decision.

Although the agencies were unable to conduct a quantitative analysis for the SNPRM, these publications provide a range of rough estimates of wetland impacts that differ due to the methodology employed in each analysis. These methodologies are likely still insufficient or inconsistent in their capture of wetlands subject to Federal jurisdiction under the definition of “continuous surface connection.” In the proposed rule RIA, the agencies proposed a methodology to estimate the change in Clean Water Act jurisdiction of wetlands due to the definition of “continuous surface connection” for the final rulemaking analysis, to the extent practicable. The proposed methodology is described in more detail in section 3.3 of the proposed rule RIA.

3. Programmatic Impacts

¹⁹ See section 3.3.1 and table 3-1 in the proposed rule RIA (Docket ID EPA-HQ-OW-2025-0322, available at https://www.epa.gov/system/files/documents/2025-11/11132.1-01-ow_wotus_nprm_ria_20251110_508.pdf). The table depicts the total wetland acres of the National Wetlands Inventory and the acreage of wetlands in the NWI that may have surface water as least during the wet season.

The agencies qualitatively analyzed the potential effects of the supplemental regulatory options in the SNPRM and anticipate that the potential impacts of the definitions of “continuous surface connection” and “relatively permanent” would be significant for Clean Water Act jurisdiction of streams and wetlands relative to the baseline. The agencies also anticipate that the arid West in particular will see a significant reduction in federally jurisdictional waters due to the definition of “continuous surface connection” and “relatively permanent” in these supplemental approaches as compared to the baseline.

The agencies anticipate that the Clean Water Act section 404 program would likely see the most programmatic changes under the options in the SNPRM, with projected reductions in the number of permits and required mitigation relative to the baseline. This would result in associated cost savings from the avoided section 404 permits and associated minimization and mitigation actions or forgone benefits from compensatory mitigation and avoidance and minimization of impacts.

The agencies also acknowledge that a reduced scope of jurisdiction under the supplemental options for “relatively permanent” and “continuous surface connection” would result in impacts to other Clean Water Act programs which are captured in the executive summary and section 4 of the proposed rule RIA.

The agencies do not expect the definitions of “continuous surface connection” and “relatively permanent” in these supplemental options to change the analysis conducted for impacted sectors or Clean Water Act programs for the proposed rule RIA. Based on the above analysis, the agencies have concluded that, in magnitude, both the cost savings and the forgone benefits are larger for the package of options presented in this SNPRM than for the package of options presented in the NPRM (see RIA).

B. Children’s Health

This proposed action as supplemented by this notice is not subject to the EPA’s Children’s Health Policy (<https://www.epa.gov/children/childrens-health-policy-and-plan>)

because the proposed revised definition of “waters of the United States” is relevant to implementation of the Clean Water Act but does not itself concern human health because it is simply a definitional rule, and as such, does not directly authorize discharges into “waters of the United States.”

VII. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at

<https://www.epa.gov/laws-regulations/laws-and-executive-orders>.

A. Executive Order 12866: Regulatory Planning and Review; Executive Order 13563: Improving Regulation and Regulatory Review

This proposed action, as supplemented by this notice, is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review prior to issuance of both the NPRM and again prior to issuance of the SNPRM. The EPA and the Army prepared an economic analysis of the potential cost savings and forgone benefits associated with this action. This analysis is contained in section VI.A of this preamble. *See also* the Regulatory Impact Analysis for the Proposed Rule, which is available in the docket (Document ID EPA-HQ-OW-2025-0322-0120).

While the economic analysis is informative in the rulemaking context, the agencies are not relying on the economic analysis performed pursuant to Executive Orders 12866 and 13563 and related procedural requirements as a basis for this supplemental notice to the proposed rule. *See, e.g., Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1023, 1039-40 (D.C. Cir. 2012) (citing *FCC*, 556 US. at 514-15) (noting that the quality of an agency’s economic analysis can be tested under the APA if the “agency decides to rely on a cost-benefit analysis as part of its rulemaking”). The information in the supplemental economic analysis was not used to establish this supplemental proposal for the definition of “waters of the United States.” *See also* the Regulatory Impact Analysis for the Proposed Rule, which is available in the docket (Document ID EPA-HQ-OW-2025-0322-0120). Instead, the basis for this proposed rulemaking is the text of

the Clean Water Act, as informed by Supreme Court precedent, taking into account agency policy choices and other relevant factors.

B. Executive Order 14192: Unleashing Prosperity through Deregulation

This proposed action, as supplemented by this notice, is expected to be an Executive Order 14192 deregulatory action. The supplemental notice to the proposed rulemaking is expected to provide burden reduction by narrowing the scope of waters that are jurisdictional under the Clean Water Act in response to the *Sackett* decision. Thus, the agencies anticipate that fewer Clean Water Act permits will be required, which will result in cost savings and reduced regulatory burden. Details on the avoided costs associated with this proposed rule can be found in the supplemental economic analysis in section VI.A of this preamble. *See also* the Regulatory Impact Analysis for the Proposed Rule, which is available in the docket (Document ID EPA-HQ-OW-2025-0322-0120).

C. Paperwork Reduction Act (PRA)

The proposed action, as supplemented by this notice, does not impose an information collection burden under the PRA because this action does not contain any information collection activities. However, this action may change terms and concepts used by the EPA and the Army to implement certain programs under the Clean Water Act. The agencies thus may need to revise some of their collections of information under other regulations to be consistent with this action and will do so consistent with the PRA and implementing regulations. For example, under OMB Control Number 0710-0024 the Army sometimes collects information from project applicants to inform jurisdictional determinations conducted consistent with the Corps' regulations at 33 CFR 320.1(a)(6), 325.9, and 331, and rule changes may warrant changes to that collection.

D. Regulatory Flexibility Act (RFA)

The agencies certify that this proposed action, as supplemented by this notice, would not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the EPA and the Army conclude that the impact of concern for this

rule is any significant adverse economic impact on small entities and that the agencies are certifying that this rule will not have a significant economic impact on a substantial number of small entities because the rule would relieve regulatory burden on the small entities indirectly subject to the rule. In addition, this proposed action would not impose any direct requirements on small entities. The small entities that may be indirectly subject to this action are largely those entities whose activities are directly covered by the Clean Water Act sections 402, 404, and 311 programs. The proposed rule, as supplemented by this notice, is expected to result in fewer entities subject to these programs, and a reduced regulatory burden for many of the entities that will still be subject to these programs. In addition, as the proposed rule is a definitional rule and would not result in any small entities being directly regulated by the rule, all impacts would be indirect in nature. As a result, small entities subject to these regulatory programs are unlikely to suffer adverse impacts as a result of regulatory compliance.

As addressed in the Regulatory Impact Analysis for the Proposed Rule (Document ID EPA-HQ-OW-2025-0322-0120) and in the supplemental economic analysis in section VI.A of this preamble, the proposed rule's clarification of the scope of Clean Water Act regulatory jurisdiction over waters and wetlands in light of the *Sackett* decision may result in a reduction in the ecosystem services provided by some waters and wetlands, and as a result, some entities may be adversely impacted. Some business sectors that depend on habitat, such as those catering to hunters or anglers, or that require water treatment to meet production needs, could experience a greater impact relative to other sectors. The magnitude of potential changes in ecosystem services are likely to be dependent on how States and Tribe respond to the reduction if the scope of Federal jurisdiction under the Clean Water Act, which would impact the significance of these impacts on these business sectors. In addition, States and Tribes may already address waters potentially affected by a revised definition, thereby reducing forgone benefits. The sectors likely to be most impacted by the rule are mitigation banks and companies that provide aquatic resource restoration services. Because the agencies anticipate fewer waters would be subject to

the Clean Water Act regulation under the supplement to the proposed rule than are subject to regulation under the Amended 2023 Rule, there may be a reduction in demand for mitigation and restoration services under the section 404 permitting program. Assessing impacts to this sector is problematic, however, because this sector lacks a precise Small Business Administration small business definition, and many of the businesses that fall within this sector are also classified under various other North American Industry Classification System categories. Furthermore, impacts to this sector would not be the direct result of these businesses complying with the proposed rule, rather, they would be the indirect result of other entities no longer being required to mitigate for discharges of dredged or fill material into waters and wetlands that would no longer be jurisdictional under the final rule. In addition, potential impacts would be lessened when accounting for State and Tribal dredged and fill programs that would necessitate the purchase of mitigation credits or to take other actions under State or Tribal law to regulate discharges of dredged or fill material. While other sectors may be potentially impacted (*e.g.*, recreational sectors related to activities such as hunting, fishing, and bird watching), these sectors are likely not as directly impacted by a definitional change to jurisdiction under the Clean Water Act as mitigation banks and aquatic resource restoration services. The recreation sector, for example, would see more limited impacts if States protect waters that would be solely under State jurisdiction as a result of this supplemental option. For a more detailed discussion see the Sector Impact Assessment section of the Regulatory Impact Analysis for the Proposed Rule. As documented in the Regulatory Impact Analysis for the Proposed Rule located in the docket, the agencies do not expect the cost of the proposed rule, as supplemented by this notice, to result in adverse impacts to a significant number of small entities, since the proposed rule would be expected to result in net cost savings for many entities indirectly affected by this supplemental proposed rule.

E. Unfunded Mandates Reform Act (UMRA)

This proposed action, as supplemented by this notice, does not contain an unfunded mandate as described in UMRA, 2 U.S.C. 1531-1538, and would not significantly or uniquely affect small governments. The proposed action would impose no enforceable duty on any State, local, or Tribal governments or the private sector.

F. Executive Order 13132: Federalism

Under the technical requirements of Executive Order 13132 (64 FR 43255, August 10, 1999), the agencies have determined that this proposed rule, as supplemented by this notice, may have federalism implications but believe that the requirements of the Executive Order will be satisfied, in any event, as the agencies have conducted consultation with State and local government officials and their representative national organizations.

The agencies believe that a revised definition of “waters of the United States” may be of significant interest to State and local governments. Consistent with the agencies’ policies to promote communications between the Federal government and State and local governments, the EPA and the Army consulted with representatives of State and local governments early in the process of developing the proposed rule to permit them to have meaningful and timely input into its development.

Consulting with State and local government officials, or their representative national organizations, is an important step in the process prior to proposing regulations that may have federalism implications under the terms of Executive Order 13132. The agencies’ federalism consultation is summarized in the agencies’ November 20, 2025, notice (90 FR 52444). All letters received by the agencies during this consultation may be found in the docket (*see* attachments at Docket ID No. EPA-HQ-OW-2025-0322-0122) or in the pre-proposal recommendations docket (Docket ID No. EPA-HQ-OW-2025-0093). The agencies prepared a report summarizing their federalism consultation and additional outreach to State and local governments, which is available in the docket (Document ID No. EPA-HQ-OW-2025-0322-0122).

G. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This proposed action, as supplemented by this notice, may have Tribal implications. However, it will neither impose substantial direct compliance costs on federally recognized Tribal governments, nor preempt Tribal law. The EPA and the Army consulted with Tribal officials under the *EPA Policy on Consultation and Coordination with Indian Tribes* early in the process of developing this action to permit them to have meaningful and timely input into its development.

A summary of the agencies' Tribal consultation and coordination for this rulemaking effort can be found in the NPRM (90 FR 52544-52545 (November 20, 2025)) and in the Tribal Consultation Report for the Proposed Rule, which is available in the docket (Document ID No. EPA-HQ-OW-2025-0322-0123). All letters received by the agencies during this consultation may be found in the docket (*see* attachments at Docket ID No. EPA-HQ-OW-2025-0322-0123) for this rulemaking or in the pre-proposal recommendations docket (Docket ID No. EPA-HQ-OW-2025-0093).

The agencies invite Tribes to request government-to-government consultation during the comment period by emailing CWAwotus@epa.gov. All one-on-one meetings with Tribal governments must be held by the close of the comment period for this SNPRM.

The agencies acknowledge that because they generally implement Clean Water Act programs on Tribal lands, a reduced scope of Federal jurisdiction as a result of the *Sackett* decision will affect Tribes differently than it will affect States. Currently, of the Tribes that are eligible, most have not received treatment in a manner similar to a State (TAS) status to administer Clean Water Act regulatory programs. While some Tribes have established Tribal water programs under Tribal law or have the authority to establish Tribal programs under Tribal law, many Tribes are still building capacity and may lack resources to create a Tribal water program under Tribal law, to administer a program, or to expand programs that currently exist. Therefore, Tribes may disproportionately rely on the Federal Government for water program

implementation and enforcement of water quality violations. Tribes may also be affected by pollution from adjacent jurisdictions. Many Tribes are located in the arid West, where there are fewer waters that may meet the relatively permanent standard. Nonetheless, the proposed rule, as supplemented by this notice, preserves Tribal authority to choose whether to include waters that are not covered under the Clean Water Act under Tribal laws and regulations. Any decision by the Tribes to protect beyond the limits of the Clean Water Act is not compelled by the statute or by this proposed rule, as supplemented.

H. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risk

The EPA and the Army interpret Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the agencies have reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order.

Therefore, this proposed action, as supplemented by this notice, is not subject to Executive Order 13045 because this action does not concern an environmental health risk or safety risk. Since this action does not concern human health, EPA’s Policy on Children’s Health also does not apply.

I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This proposed action, as supplemented by this notice, is not a “significant energy action” because it is not likely to have a significant adverse effect on the supply, distribution or use of energy. This proposed action is a deregulatory action that would reduce regulatory burden, including to the energy sector, and thus is not anticipated to have an adverse effect on the supply, distribution or use of energy.

J. National Technology Transfer and Advancement Act

This proposed action, as supplemented by this notice, does not involve technical standards.

List of Subjects

33 CFR Part 328

Administrative practice and procedure, Environmental protection, Navigation (water), Water pollution control, Waterways.

40 CFR Part 120

Environmental protection, Water pollution control, Waterways.

Adam Telle,

Assistant Secretary of the Army (Civil Works),

Department of the Army.

Lee Zeldin,

Administrator,

Environmental Protection Agency.

Title 33—Navigation and Navigable Waters

For the reasons set forth in the preamble, the Corps of Engineers proposes to amend 33 CFR part 328 as follows:

PART 328—DEFINITION OF WATERS OF THE UNITED STATES

1. The authority citation for part 328 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

2. Section 328.3 is amended by:

- a. Redesignating paragraph (c)(3) as (c)(4);
- b. Redesignating paragraph (c)(4) as (c)(5);
- c. Redesignating paragraph (c)(5) as (c)(8); and
- d. Adding paragraphs (c)(3), (c)(6), and (c)(7).

The revisions and additions read as follows:

§ 328.3 Definitions.

* * * * *

(c) * * *

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

* * * * *

(6) *Perennial* means having standing or continuously flowing water every day of the year during ordinary conditions.

(7) *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 non-anomalous events resulting in a temporary interruption such as low tide or a regularly occurring dry spell.

* * * * *

Title 40—Protection of Environment

For the reasons set forth in the preamble, the Environmental Protection Agency proposes to amend 40 CFR part 120 as follows:

PART 120—DEFINITION OF WATERS OF THE UNITED STATES

1. The authority citation for part 120 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

2. Section 120.2 is amended by:

- a. Redesignating paragraph (c)(3) as (c)(4);
- b. Redesignating paragraph (c)(4) as (c)(5);
- c. Redesignating paragraph (c)(5) as (c)(8); and
- d. Adding paragraphs (c)(3), (c)(6), and (c)(7).

The revisions and additions read as follows:

§ 120.2 Definitions.

* * * * *

(c) * * *

(3) *Continuous surface connection* means perennial surface water in a wetland that is continuously connected with the surface water in the jurisdictional water such that it is difficult to determine where the jurisdictional water ends and the wetland begins. Temporary interruptions in the surface water connection may occur as the result of anomalous events such as drought or dry spell. A temporary interruption in the surface water connection lasting no more

than a single period of up to 30 consecutive days in any given year may also occur as a result of non-anomalous events such as low tide or a regularly occurring dry spell.

* * * * *

(6) *Perennial* means having standing or continuously flowing water every day of the year during ordinary conditions.

(7) *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 non-anomalous events resulting in a temporary interruption such as low tide or a regularly occurring dry spell.

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