PACIFIC LEGAL FOUNDATION

March 27, 2025

VIA ELECTRONIC DELIVERY

Federal eRulemaking Portal
Docket ID No. EPA-HQ-OW-2025-0093

The Honorable Lee Zeldin
Administrator
Office of the Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Ms. Benita Best-Wong
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Ms. Robyn S. Colosimo
Senior Official Performing the Duties of
The Assistant Secretary of the Army
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Department of the Army
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Washington, DC 20310-0108

Re: WOTUS Notice: The Final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations (Docket ID No. EPA-HQ-OW-2025-0093)

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

PLF submits the enclosed written recommendations in response to the public notice entitled "WOTUS Notice: The Final Response to SCOTUS," 90 Fed. Reg. 13,428 (Mar. 24, 2025) (the "Notice"), issued by the United States Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Corps).

The Clean Water Act (CWA) regulates discharges of "pollutants" from "point sources" into "navigable waters," 33 U.S.C. §§ 1311(a), 1362(12)—defined to include "the waters of the United States," *id*. §1362(7). This definition functions as an absolute limitation on the authority exercised by EPA and the Corps under the CWA. EPA and the Corps may regulate discharges of pollutants to "navigable waters," but no further. For over fifty

years, however, EPA and the Corps have expanded their claimed authority by broadly interpreting the term "navigable waters" to reach minor drainage ditches, isolated wetlands, and all other manner of otherwise dry-land features. This is no small matter. Because the CWA "can sweep broadly enough to criminalize mundane activities like moving dirt, [an] unchecked definition of 'the waters of the United States' means that a staggering array of landowners are at risk of criminal prosecution or onerous civil penalties." *Sackett v. U.S. Env't Prot. Agency*, 598 U.S. 651, 669-70 (2023).

In 2023, that expansion of authority was definitively brought to a halt by the United States Supreme Court. In *Sackett*, the Supreme Court unanimously rejected EPA and the Corps' historically broad approach. And a majority set forth a clear and substantially narrowed standard for federal CWA authority. This resounding defeat necessitated a dramatic break from EPA and the Corps' historical practices. Yet none has occurred. Instead, since *Sackett*, EPA and the Corps have continued to assert staggeringly broad authority over private land in every corner of the nation.

EPA and the Corps must take the opportunity presented by the Notice to once and for all define "navigable waters" to properly conform their conduct to the CWA. In the enclosed written recommendations, PLF proposes that any future regulatory definition of "the waters of the United States" must incorporate the following:

(1) With respect to "'relatively permanent' waters," 90 Fed. Reg. at 13,430, any future regulatory definition of "the waters of the United States" must: (A) limit agency regulation to conventionally defined "geographical features" that in ordinary parlance can be described as "streams, oceans, rivers, and lakes," *Sackett*, 598 U.S. at 671 (cleaned up); and (B) set forth minimum flow volume and duration requirements to limit agency regulation to such features which *contain continuously flowing or standing water for a majority of the year.*

(2) With respect to "continuous surface connection," 90 Fed. Reg. at 13,430-31, any future regulatory definition of "the waters of the United States" must: (A) expressly incorporate *Sackett*'s central indistinguishability requirement for wetlands authority; (B) categorically exclude from regulation those wetlands separated from covered waters by *any* natural or artificial physical barrier; and (C) explicitly state that only those wetlands with a continuous *aquatic* surface connection to covered waters may be regulated under the CWA—making clear that physical "abutment" alone is never sufficient for CWA authority.

(3) To ensure lawful regulation in all instances, PLF also recommends that EPA and the Corps address the meaning of the statutory phrases "navigable" and "of the United States," 33 U.S.C. §1362(7). PLF further recommends that the EPA and the Corps do so with reference to Justice Thomas's well-reasoned conclusion that the CWA implements only Congress's "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *See Sackett*, 598 U.S. at 703-04 (Thomas, J., concurring) (quotation omitted).

These recommendations are essential to conforming EPA and the Corps' conduct to the mandatory limitations imposed upon their authority under the CWA. These recommendations are also vital to ending the decades of unlawful and overreaching CWA regulation that private property owners across the United States have suffered.

Sincerely,

Charles T. Yates
Attorney

Enclosure: Recommendations of Pacific Legal Foundation

EPA-HQ-OW-2025-0093

BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY AND THE UNITED STATES DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS

Re: WOTUS Notice: The Final Response to SCOTUS;
Establishment of a Public Docket; Request for Recommendations

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RECOMMENDATIONS OF PACIFIC LEGAL FOUNDATION

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TABLE OF AUTHORITIES

Cases

Borden Ranch P'ship v. U.S. Army Corps of Eng'rs,
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Borden Ranch P'ship v. U.S. Army Corps of Eng'rs,
537 U.S. 99 (2002) 11

Costle v. Pac. Legal Found.,
445 U.S. 198 (1980) 8

Hawkes Co. v. U.S. Army Corps of Eng'rs,
782 F.3d 994 (8th Cir. 2015) 10-11

Lewis v. United States,
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McDonnell v. United States,
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Rapanos v. United States,
547 U.S. 715 (2006) ..... *passim*

Sackett v. U.S. Env't Prot. Agency,
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Sackett v. U.S. Env't Prot. Agency,
566 U.S. 120 (2012) 8

Sackett v. U.S. Env't Prot. Agency,
598 U.S. 651 (2023) ..... *passim*

Simsbury-Avon Pres. Soc'y, LLC v. Metacon Gun Club, Inc.,
472 F. Supp. 2d 219 (D. Conn. 2007) 41

Simsbury-Avon Pres. Soc'y, LLC v. Metacon Gun Club, Inc.,
575 F.3d 199 (2d Cir. 2009) 41

Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs,
531 U.S. 159 (2001) 3, 6, 13, 19, 43

Texas v. U.S. Env't Prot. Agency,
662 F. Supp. 3d 739 (S.D. Tex. 2023) 18

Tri-Realty Co. v. Ursinus Coll.,
124 F. Supp. 3d 418 (E.D. Pa. 2015) 41

U.S. Army Corps of Eng'rs v. Hawkes Co.,
578 U.S. 590 (2016) 8-9

United States v. Ace Black Ranches, LLP, No. 1:24-cv-00113,
2024 WL 4008545 (D. Idaho Aug. 29, 2024) 5-6, 35, 39

United States v. Chameleon, LLC, No. 3:23-cv-00763,
2024 WL 3835077 (E.D. Va. Aug. 15, 2024) 6

United States v. Cundiff,
555 F.3d 200 (6th Cir. 2009) 41

United States v. Riverside Bayview Homes, Inc.,
474 U.S. 121 (1985) 13-14, 29

United States v. Sharfi, No. 2:21-cv-14205,
2024 WL 4483354 (S.D. Fla. Sept. 21, 2024) 34-35, 39

United States v. Sharfi, No. 2:21-cv-14205,
2024 WL 5244351 (S.D. Fla. Dec. 30, 2024) 5, 34, 39

West Virginia v. U.S. Env't Prot. Agency,
669 F. Supp. 3d 781 (D.N.D. 2023) 17-18

Statutes

28 U.S.C. § 2461 11

33 U.S.C. § 1311(a) 3, 9

33 U.S.C. § 1319(c) 11

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33 U.S.C. § 1342(a) 9

33 U.S.C. § 1344(a) 9

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33 C.F.R. § 323.2(a)(2)-(5) (1978) 12
33 C.F.R. § 323.2(d) (1978) 12
33 C.F.R. § 328.3(a)(3) 20
33 C.F.R. § 328.3(a)(4) 20
33 C.F.R. § 328.3(a)(4)(ii) 29
33 C.F.R. § 328.3(a)(5) 20
33 C.F.R. § 328.3(c)(2) 20
40 C.F.R. § 120.2(a)(3) 20
40 C.F.R. § 120.2(a)(4) 20
40 C.F.R. § 120.2(a)(4)(ii) 29
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40 C.F.R. § 120.2(c)(2) 20

Other Authorities

42 Fed. Reg. 37,122 (July 19, 1977) 12
80 Fed. Reg. 37,054 (June 29, 2015) 16
85 Fed. Reg. 22,250 (Apr. 21, 2020) 16
88 Fed. Reg. 3004 (Jan. 18, 2023) 5, 12, 17-18, 37
88 Fed. Reg. 61,964 (Sept. 8, 2023) 5, 19-20
90 Fed. Reg. 13,428 (Mar. 24, 2025) 1-2, 7, 36
Amended Complaint, *West Virginia v. U.S. Env't Prot. Agency*, No. 3:23-cv-00032 (D.N.D. Nov. 13, 2023), ECF No. 176 5
Black's Law Dictionary (12th ed. 2024) 25

Broderick, Gregory T., *From Migratory Birds to Migratory Molecules: The Continuing Battle Over the Scope of Federal Jurisdiction under the Clean Water Act*, 30 Colum. J. Env't L. 473 (2005) 8-9

Burling, James S., *Final Agency Actions and Judicial Review:* United States Army Corps of Engineers v. Hawkes Co., 17 Federalist Soc'y Rev. 28 (2016) 8

Complaint for Declaratory and Injunctive Relief, *White v. U.S. Env't Prot. Agency*, No. 2:24-cv-00013 (E.D.N.C. Mar. 14, 2024), ECF No. 1 5

Defendants' Combined Memorandum in Support of Cross Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment, *White v. U.S. Env't Prot. Agency*, No. 2:24-cv-00013 (E.D.N.C. Sept. 23, 2024), ECF No. 62 ..... 30, 37

Federal Defendants' Combined Memorandum in Support of Their Motion for Summary Judgment and Opposition to Plaintiffs' and Business Intervenors' Motions for Summary Judgment, *West Virginia v. U.S. Env't Prot. Agency*, No. 3:23-cv-00032 (D.N.D. Apr. 26, 2024), ECF No. 210 ..... 30, 37-38

Federal Defendants' Combined Motion for Summary Judgment and Opposition to Plaintiffs' Motions for Summary Judgment, *Texas v. U.S. Env't Prot. Agency*, No. 3:23-cv-00017 (S.D. Tex. Apr. 2, 2024), ECF No. 108 ..... 30, 37-38

François, Tony, *"Same As It Ever Was"—An Application of a 1980s Classic to EPA and Army Regulations "Conforming" to* Sackett v. EPA, CF004 ALI-CLE 627 (Feb. 1, 2024) 35

Frequently Asked Questions regarding the U.S. Supreme Court's ruling in Sackett v. EPA, California State Water Resources Control Board (Oct. 23, 2023), https://www.waterboards.ca.gov/water_issues/programs/cwa401/docs/sackett-faq-external.pdf 40

Gardner, Royal C., *Waters of the United States: POTUS, SCOTUS, WOTUS, and the Politics of a National Resource* (2024) 28, 35

Joint Coordination Memorandum to the Field Between the U.S. Department of the Army, U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) (Sept. 27, 2023), https://www.epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-amended-2023-rule_508c.pdf 20-21

Kihslinger, Rebecca L., et al., *Unpacking the Revised WOTUS Rule, Panel Before the Environmental Law Institute* (Aug. 29, 2023), 53 Env't L. Rep. 10887 (2023) 31, 35

Lazarus, Richard J., *Judicial Destruction of the Clean Water Act*: Sackett v. EPA, U. Chi. L. Rev. Online (Aug. 11, 2023), https://lawreview.uchicago.edu/judicial-destruction-clean-water-act-sackett-v-epa 40

Mandelker, Daniel R., *Practicable Alternatives for Wetlands Development Under the Clean Water Act*, 48 Env't L. Rep. News & Analysis 10894 (2018) 10

Memorandum in Support of Plaintiff United States of America's Motion for Summary Judgment as to Liability, *United States v. White*, No. 2:23-cv-00001 (E.D.N.C. July 29, 2024), ECF No. 71 38

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 (Mar. 12, 2025), https://www.epa.gov/system/files/documents/2025-03/2025cscguidance.pdf 21

Merriam-Webster Dictionary (online ed.) 32, 42

Order, *Kentucky v. U.S. Env't Prot. Agency*, Nos. 23-5343 and 23-5345 (6th Cir. May 10, 2023), ECF No. 24 18

Oxford Dictionary of English (3d ed. 2010) 32

Plaintiff United States of America's Opposition to Defendants' Motion for Judgment on the Pleadings, *United States v. Valentine*, No. 5:22-cv-00512 (E.D.N.C. Jan. 26, 2024), ECF No. 48 38

Response Brief of Federal Appellees, *White v. U.S. Env't Prot. Agency*, No. 24-1635 (4th Cir. Dec. 20, 2024), ECF No. 36 30

Schiff, Damien M. & Roper, Glenn E., *The Hallmarks of a Good Test: A Proposal for Applying the "Functional Equivalent" Rule from* County of Maui v. Hawaii Wildlife Fund, 38 Pace Env't L. Rev. 1 (2020) 8

Schiff, Damien M., Sackett v. EPA: *Compliance Orders and the Right of Judicial Review*, 2012 Cato Sup. Ct. Rev. 113 8

Schiff, Damien M., Sackett v. EPA II*: Ascertaining the Scope of Wetlands Jurisdiction under the Clean Water Act*, 2023 Cato S. Ct. Rev. 243 8

Second Amended Complaint and Petition for Review, *Texas v. U.S. Env't Prot. Agency*, No. 3:23-cv-00017 (S.D. Tex. Nov. 13, 2023), ECF No. 90 5

U.S. Env't Prot. Agency and U.S. Army Corps of Eng'rs, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States* (2008), https://perma.cc/JNN9-HKEG 16

Webster's New International Dictionary (2d ed.) 14

EXECUTIVE SUMMARY

PLF submits the following written recommendations in response to the public notice entitled "WOTUS Notice: The Final Response to SCOTUS," 90 Fed. Reg. 13,428 (Mar. 24, 2025) (the "Notice"), issued by the United States Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Corps) (together, the "Agencies").

For over five decades the Agencies have interpreted the term "the waters of the United States," for purposes of the Clean Water Act (CWA), 33 U.S.C. § 1362(7), in an egregiously overbroad manner. In so doing, the Agencies have brought under their direct control all manner of dry-land features, subjecting landowners in every corner of the country to an arduous permitting process and the risk of draconian penalties, merely for engaging in ordinary and productive land-use activities. Worse still, the Agencies have pursued this course of conduct notwithstanding multiple rebukes from the United States Supreme Court—most recently in *Sackett v. United States Environmental Protection Agency*, 598 U.S. 651 (2023). The Agencies must cease this pattern of conduct. To ensure compliance with the mandatory conditions imposed upon the Agencies'

authority by the CWA, any future regulatory definition of "the waters of the United States" must incorporate the following recommendations.

First, with respect to "[t]he scope of 'relatively permanent' waters," 90 Fed. Reg. at 13,430, any future regulatory definition of "the waters of the United States" must: (1) limit agency regulation to conventionally defined "geographic[al] features" that in ordinary parlance can be described as "streams, oceans, rivers, and lakes," *Sackett*, 598 U.S. at 671 (quoting *Rapanos v. United States*, 547 U.S. 715, 739 (2006) (plurality opinion)); and (2) set forth minimum flow volume and duration requirements to limit agency regulation to such features which *contain continuously flowing or standing water for a majority of the year.*

Second, with respect to "[t]he scope of 'continuous surface connection,'" 90 Fed. Reg. at 13,430-31, any future regulatory definition of "the waters of the United States" must: (1) expressly incorporate—and credit the independent significance of—*Sackett*'s central indistinguishability requirement for wetlands authority; (2) categorically exclude from regulation those wetlands separated from covered waters by *any* natural or artificial physical barrier; and (3) explicitly state that only those wetlands with a continuous *aquatic* surface connection to

covered waters may be regulated under the CWA—making clear that physical "abutment" alone is never sufficient for CWA authority.

Third, to ensure lawful regulation in all instances, PLF also recommends that the Agencies address the meaning of the statutory phrases "navigable" and "of the United States," 33 U.S.C. § 1362(7). PLF further recommends that the Agencies do so with reference to Justice Thomas's well-reasoned conclusion that the CWA implements only Congress's "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *See Sackett*, 598 U.S. at 703-04 (Thomas, J., concurring) (quoting *Solid Waste Agency of N. Cook Cnty. (SWANCC) v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001)).

INTRODUCTION

The CWA regulates discharges of "pollutants" from "point sources" into "navigable waters," 33 U.S.C. §§ 1311(a), 1362(12)—defined to include "the waters of the United States," *id.* § 1362(7). This definition functions as an absolute limitation on the Agencies' authority—they may regulate discharges of pollutants to "navigable waters," but no further. For over fifty years, however, the Agencies have expanded their claimed

authority by broadly interpreting the term "navigable waters" to reach minor drainage ditches, isolated wetlands, and all other manner of otherwise dry-land features. *See infra* 11-18. This is no small matter. Because the CWA "can sweep broadly enough to criminalize mundane activities like moving dirt, [an] unchecked definition of 'the waters of the United States' means that a staggering array of landowners are at risk of criminal prosecution or onerous civil penalties." *Sackett*, 598 U.S. at 669-70.

In 2023, that expansion of authority was definitively ended by the United States Supreme Court. In *Sackett*, the Supreme Court unanimously rejected the Agencies' historically broad approach. And a majority set forth a clear and substantially narrowed standard for federal CWA authority. Under *Sackett*, the Agencies may only regulate (1) "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,'" *Sackett*, 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739 (plurality opinion)); and (2) "wetlands" (i) with a "continuous surface connection" to such waters and (ii) that are "'as a practical matter indistinguishable from waters of the United States,'

such that it is 'difficult to determine where the "water" ends and the "wetland" begins,'" *id.* at 678 (quoting *Rapanos*, 547 U.S. at 742 (plurality opinion)).

This resounding defeat necessitated a dramatic break from the Agencies' historical practices. Yet none has occurred. Instead, the Agencies issued a so-called "conforming" rule purporting—but failing—to conform their 2023 regulatory definition of "navigable waters," *see* 88 Fed. Reg. 3004 (Jan. 18, 2023) (the "2023 Rule"), to *Sackett*, *see* 88 Fed. Reg. 61,964 (Sept. 8, 2023) (the "Amended 2023 Rule").[1] The Agencies have also continued to attempt to enforce the CWA in such a manner as to reach much of what had been regulated before *Sackett* clarified the CWA's scope.[2]

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[1] *See* Complaint for Declaratory and Injunctive Relief, *White v. U.S. Env't Prot. Agency*, No. 2:24-cv-00013 (E.D.N.C. Mar. 14, 2024), ECF No. 1 (identifying substantive flaws in the Amended 2023 Rule); Amended Complaint, *West Virginia v. U.S. Env't Prot. Agency*, No. 3:23-cv-00032 (D.N.D. Nov. 13, 2023), ECF No. 176 (same); Second Amended Complaint and Petition for Review, *Texas v. U.S. Env't Prot. Agency*, No. 3:23-cv-00017 (S.D. Tex. Nov. 13, 2023), ECF No. 90 (same).

[2] *See United States v. Sharfi*, No. 2:21-cv-14205, 2024 WL 5244351, at *1 (S.D. Fla. Dec. 30, 2024) (entering final judgment against the United States in enforcement action alleging illegal discharges into intermittently flowing ditches and isolated wetlands); *United States v. Ace Black Ranches, LLP*, No. 1:24-cv-00113, 2024 WL 4008545, at *4 (D.

This response demonstrates the lamentable continuation of a familiar pattern of agency insubordination. As the Supreme Court has observed, after every past loss, the Agencies have intransigently sought to maintain an overly broad view of their own authority and, when challenged, have sought to relitigate issues definitively resolved against them. *See Sackett*, 598 U.S. at 667 ("In the decade following *Rapanos*, the EPA and the Corps issued guidance documents that 'recognized larger grey areas and called for more fact-intensive individualized determinations in those grey areas.'" (citation omitted)); *Rapanos*, 547 U.S. at 756 n.15 (plurality opinion) ("[A]gency whose disregard for the statutory language has been so long manifested."); *id.* at 758 (Roberts, C.J., concurring) ("Rather than refining its view of its authority in light of our decision in *SWANCC*, and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power." (citing *SWANCC*, 531 U.S. 159)). One court has already observed this familiar pattern of conduct, post-*Sackett*. *See Lewis v. United States*, 88 F.4th 1073, 1080 n.7

Idaho Aug. 29, 2024) (dismissing CWA enforcement for failure to state a claim under *Sackett*); *United States v. Chameleon, LLC*, No. 3:23-cv-00763, 2024 WL 3835077, at *7 (E.D. Va. Aug. 15, 2024) (same).

(5th Cir. 2023) (lamenting the Corps' "utter unwillingness to concede its lack of regulatory jurisdiction in this case following *Sackett*").

This now customary disregard for the mandatory limitations placed upon the Agencies' authority must cease. And the Agencies must take the opportunity presented by the Notice to once and for all define "navigable waters" in such a manner as to properly conform their conduct to *Sackett* and the CWA.

This document contains two parts. *First*, it summarizes the pertinent legal and regulatory background leading up to the issuance of the Notice, 90 Fed. Reg. 13,428, and discusses the Agencies' long history of unlawful CWA regulation, *see infra* 9-21. *Second*, it sets forth specific recommendations for how the Agencies must conform their conduct to *Sackett* and the CWA with respect to (1) the scope of "relatively permanent" waters, *see infra* 22-26; (2) the scope of "continuous surface connection," *see infra* 27-42; and (3) the meaning of the CWA's phrases "navigable" and "of the "United States," *see infra* 42-43.

PACIFIC LEGAL FOUNDATION

Pacific Legal Foundation is the nation's oldest nonprofit legal organization that fights for the protection of private property rights and

other constitutional liberties in courts throughout the country. PLF attorneys served as counsel of record in both *Sackett* and *Rapanos*. *See Sackett*, 598 U.S. 651; *Rapanos*, 547 U.S. 715. PLF attorneys have also served as counsel of record in many of the Supreme Court's other Clean Water Act decisions, *see U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590 (2016); *Sackett v. U.S. Env't Prot. Agency*, 566 U.S. 120 (2012); *Costle v. Pac. Legal Found.*, 445 U.S. 198 (1980), and have written widely on the threat to property rights and other freedoms posed by the Agencies' misinterpretation and maladministration of the CWA, *see*, *e.g.*, Damien M. Schiff, Sackett v. EPA II*: Ascertaining the Scope of Wetlands Jurisdiction under the Clean Water Act*, 2023 Cato S. Ct. Rev. 243; Damien M. Schiff & Glenn E. Roper, *The Hallmarks of a Good Test: A Proposal for Applying the "Functional Equivalent" Rule from* County of Maui v. Hawaii Wildlife Fund, 38 Pace Env't L. Rev. 1 (2020); James S. Burling, *Final Agency Actions and Judicial Review:* United States Army Corps of Engineers v. Hawkes Co., 17 Federalist Soc'y Rev. 28 (2016); Damien M. Schiff, Sackett v. EPA: *Compliance Orders and the Right of Judicial Review*, 2012 Cato Sup. Ct. Rev. 113; Gregory T. Broderick, *From Migratory Birds to Migratory Molecules: The Continuing Battle*

Over the Scope of Federal Jurisdiction under the Clean Water Act, 30 Colum. J. Env't L. 473 (2005).

LEGAL AND REGULATORY BACKGROUND

I. The Clean Water Act

By its express terms, the CWA only regulates nonexempt[3] discharges of "pollutants" from "point sources" to "navigable waters." 33 U.S.C. §§ 1311(a), 1362(12). The CWA defines "navigable waters" as "the waters of the United States, including the territorial seas." *Id.* § 1362(7). Although the CWA defines "territorial seas," *id.* § 1362(8), it does not define "waters of the United States," *see id.* Nonexempt point-source discharges of pollutants into "navigable waters" require a permit from either EPA (called a National Pollutant Discharge Elimination System (NPDES) permit) or, if the discharge involves "dredged or fill material," from the Corps (commonly called a Section 404 permit). *See id.* §§ 1342(a), 1344(a).

The CWA's permitting regime is a time-consuming, uncertain, and expensive process. *See Hawkes Co.*, 578 U.S. at 594-95 (observing that a

[3] *See, e.g.*, 33 U.S.C. § 1344(f) (exempting various types of discharges of dredged or fill material).

Section 404 permit typically takes more than two years and $270,000—in 2002 dollars—in consulting costs to secure). Even if obtained, a permit can result in significant changes to the applicant's intended operations and substantially limit the use of the property. *See* Daniel R. Mandelker, *Practicable Alternatives for Wetlands Development Under the Clean Water Act*, 48 Env't L. Rep. News & Analysis 10894, 10913 (2018) ("The [Clean Water Act's] practicable alternatives requirement functions . . . as a conditioned permit that requires project modifications to reduce a development's effect on wetlands resources."). *Cf. also Rapanos*, 547 U.S. at 721 (plurality opinion) ("In deciding whether to grant or deny a permit, the [Corps] exercises the discretion of an enlightened despot[.]"). And a landowner merely wishing to establish the extent of agency authority over his property is faced with significant costs. Although Corps regulations provide a process for landowners to seek a determination as to the regulable status of their property—a so-called "approved jurisdictional determination" (AJD), *see* 33 C.F.R. § 320.1(a)(6)—the AJD process is itself extraordinarily cumbersome and expensive, with no guarantee of success, *see Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 1003 (8th Cir. 2015) (Kelly, J., concurring) ("This is a unique

aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply to you or your property.").

Worse still, there are draconian consequences for those who fail—even inadvertently—to run this regulatory gauntlet. *See Sackett*, 598 U.S. at 660. "Property owners who negligently discharge 'pollutants' into covered waters may face severe criminal penalties including imprisonment." *Id.* (citing 33 U.S.C. § 1319(c)). On the civil side, the CWA "imposes over $60,000 in fines per day for each violation." *Id.* (citing Note following 28 U.S.C. § 2461; 33 U.S.C. § 1319(d)). Such penalties can easily accrue to hundreds of thousands, if not millions, of dollars. *See id.* at 660-61 (referencing Ninth Circuit's upholding of EPA's decision "to count each of 348 passes of a plow by a farmer through 'jurisdictional' soil on his farm as a separate violation" (citing *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 813, 818 (9th Cir. 2001), *aff'd by an equally divided Court*, 537 U.S. 99 (2002) (per curiam))).

II. Decades of unlawful Clean Water Act regulation

The significant costs and liabilities that the CWA can impose underscore the vital importance of clearly demarcating its geographic reach—that is, the meaning of the term "navigable waters." *See Sackett*,

598 U.S. at 661 ("Due to the CWA's capacious definition of 'pollutant,' its low *mens rea*, and its severe penalties, regulated parties have focused particular attention on the Act's geographic scope."). Unfortunately, since the early days of the CWA's implementation, the Agencies have construed their own authority in the broadest and most vaguely opaque terms possible.

A. The Agencies' historically expansive view of their own authority

In a series of rulemakings culminating in a set of revised regulations commonly known as the "1986 Regulations," *see* 88 Fed. Reg. at 3005 & nn.3-4, the Agencies extended the scope of their claimed authority to regulate "navigable waters" to the outer limits of Congress's power to regulate interstate commerce, *see Rapanos*, 547 U.S. at 724 (plurality opinion) (citing 42 Fed. Reg. 37,122, 37,144 n.2 (July 19, 1977)). Federal authority was asserted not just over interstate waters, but also intrastate waters with various asserted relationships to interstate or foreign commerce, as well as all tributaries of such waters, and all "wetlands" that are "adjacent" to, *i.e.*, bordering, contiguous, or neighboring, any regulated water. 33 C.F.R. § 323.2(a)(2)-(5), (d) (1978). *See also Rapanos*, 547 U.S. at 724 (plurality opinion). Between 1985 and

2001, the Supreme Court addressed the geographic scope of the Agencies' authority twice. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 & n.8, 134 (1985) (finding the Agencies may regulate wetlands "inseparably bound up with the 'waters' of the United States" but cautioning that such authority is limited to "inseparably bound up" wetlands); *SWANCC*, 531 U.S. at 166-69 (rebuffing Agencies' attempt to regulate "nonnavigable, isolated, intrastate waters"). Rather than adhering to the Court's holdings in these cases, the Agencies responded by dramatically expanding their assertions of authority. *See Sackett*, 598 U.S. at 665-66.

B. The Supreme Court cabins the Agencies' authority in *Rapanos v. United States*

In 2006, in *Rapanos v. United States*, 547 U.S. 715, five members of the Supreme Court held the Agencies' 1986 Regulations to be invalid insofar as they sought to regulate all tributaries of traditionally navigable waters and all "adjacent" wetlands. *Id.* at 728 (plurality opinion); *id.* at 759 (Kennedy, J., concurring in the judgment). But no opinion garnered a majority of the Court.

Justice Scalia (writing for a four-justice plurality) noted that the scope of the Agencies' authority can extend no further than "waters," *id.*

at 731 (plurality opinion), and that the ordinary meaning of "waters" includes "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes,'" *id.* at 739 (quoting *Waters*, Webster's New International Dictionary 2882 (2d ed.)). The plurality thus made clear that the Agencies cannot regulate "channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id.* "Wetlands" likewise would not normally fall under the plurality's definition. *See Riverside Bayview*, 474 U.S. at 132 ("On a purely linguistic level, it may appear unreasonable to classify 'lands,' wet or otherwise, as 'waters.'"). The plurality reasoned, however, that there was a difference between considering a wetland on its own to be a "water," and concluding that some wetlands may be regulated as "waters," given the "ambiguity in drawing the boundaries of any 'waters.'" *Rapanos*, 547 U.S. at 740 (plurality opinion). But even with this latter concession, "*only* those wetlands with 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, are 'adjacent to' such waters and covered by the Act." *Id.* at 742.[4]

Although Justice Kennedy provided the fifth vote to support the Court's judgment rejecting the 1986 regulations' improper scope, he disagreed with the plurality's rationale. *Id.* at 759 (Kennedy, J., concurring). Justice Kennedy concluded that the CWA's use of the term "waters" does not necessarily foreclose the regulation of intermittent or occasionally flowing tributaries. *Id.* at 770-72, 781-82. And he rejected the surface-water connection requirement for wetlands authority, instead proposing a broad "significant nexus" standard. *Id.* at 759. According to this standard, a wetland may be regulated if it, either alone or in combination with other "similarly situated" wetlands in the "region," significantly affects the physical, chemical, and biological integrity of a traditional navigable water. *Id.* at 779-80.

[4] The plurality's analysis concerned only the meaning of the CWA's use of the term "waters," while reserving the broader question of when a "water" might be deemed to be "of the United States." *See Rapanos*, 547 U.S. at 731 ("We need not decide the precise extent to which the qualifiers 'navigable' and 'of the United States' restrict the coverage of the Act.").

C. Undeterred, the Agencies continue to regulate broadly

During the seventeen years following *Rapanos*, the Agencies—with limited exception, *see* 85 Fed. Reg. 22,250 (Apr. 21, 2020) (the "2020 Rule")—relied on a series of broadly formulated versions of the "significant nexus test" to continue ratcheting up their own authority. Shortly after *Rapanos*, the Agencies issued guidance purporting to explain how their authority was to be established. *See* U.S. Env't Prot. Agency and U.S. Army Corps of Eng'rs, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States* (2008) (the "Post-*Rapanos* Guidance").[5] This guidance combined aspects of both Justice Scalia's plurality and Justice Kennedy's concurrence. *See id.* The Agencies then engaged in two further rulemakings to define "navigable waters." *See* 80 Fed. Reg. 37,054, 37,056 (June 29, 2015) (the "2015 Rule"); 85 Fed. Reg. 22,250. The 2015 Rule used the significant nexus test as a starting point to assert "sweeping[ly]" broad authority over all manner of features, wet or otherwise—"a muscular approach that would subject 'the vast majority of the nation's water features' to a case-by-case jurisdictional analysis." *Sackett*, 598

[5] *Available at* https://perma.cc/JNN9-HKEG.

U.S. at 668. The 2020 Rule, on the other hand, was more circumscribed. *See id.* Yet both rules ultimately were invalidated. *See West Virginia v. U.S. Env't Prot. Agency*, 669 F. Supp. 3d 781, 792 (D.N.D. 2023) (recounting history of preliminary injunctions and final judgments entered against these rules).

D. Certiorari is granted in *Sackett*, but the Agencies persist with yet another broad rule

On January 24, 2022, the Supreme Court granted certiorari in *Sackett* to determine the "proper test for determining whether wetlands [are] 'waters of the United States' under the Clean Water Act, 33 U.S.C. § 1362(7)." *Sackett v. U.S. Env't Prot. Agency*, 142 S. Ct. 896, 896 (2022). Notwithstanding their dismal post-*Rapanos* track record and *Sackett*'s promise of much-needed guidance, on January 18, 2023, the Agencies again attempted to expansively define "navigable waters." *See* 88 Fed. Reg. 3004. Predictably, that 2023 Rule sought to enlarge the Agencies' authority even further. *See Sackett*, 598 U.S. at 668-69. With respect to non-navigable waters such as tributaries and wetlands, the 2023 Rule allowed for CWA regulation pursuant to a test purportedly inspired by Justice Scalia's *Rapanos* plurality—the so-called "relatively permanent standard." 88 Fed. Reg. at 3004-07. But it primarily relied on a broadly

defined "significant nexus standard"—purportedly inspired by Justice Kennedy's concurrence. *Id.* The 2023 Rule quickly met the same fate as its predecessors. *See Texas v. U.S. Env't Prot. Agency*, 662 F. Supp. 3d 739, 745 (S.D. Tex. 2023) (preliminarily enjoining 2023 Rule in Texas and Idaho); *West Virginia*, 669 F. Supp. 3d 781 (preliminarily enjoining 2023 Rule in twenty-four additional states); Order, *Kentucky v. U.S. Env't Prot. Agency*, Nos. 23-5343 and 23-5345 (6th Cir. May 10, 2023), ECF No. 24 (enjoining pending appeal the 2023 Rule in Kentucky and nationwide as to members of several trade associations).

III. The Supreme Court rebukes the Agencies in *Sackett*

On May 25, 2023, the Supreme Court issued its decision in *Sackett*. *See* 598 U.S. 651. In *Sackett*, the Supreme Court unanimously rejected the significant nexus test and the Agencies' claim of authority over the petitioners' property. *See id.* at 684; *id.* at 715-16 (Kavanaugh, J., concurring). The Court further concluded, in a majority opinion written by Justice Alito, "that the *Rapanos* plurality was correct: 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.'"" *Id*. at 671 (quoting *Rapanos*, 547 U.S. at 739 (plurality opinion)). As for wetlands, the majority concluded that "wetlands must qualify as 'waters of the United States' in their own right." *Id*. at 676. Thus, the Agencies may regulate only those wetlands (i) with a "continuous surface connection" to covered waters and (ii) that are "'as a practical matter indistinguishable from waters of the United States,' such that it is 'difficult to determine where the "water" ends and the "wetland" begins,'" *id*. at 678 (quoting *Rapanos*, 547 U.S. at 742 (plurality opinion)).[6]

IV. The Amended 2023 Rule and subsequent guidance

On September 8, 2023, the Agencies issued an amended version of the 2023 Rule, purporting to bring it into compliance with *Sackett*. *See* 88 Fed. Reg. at 61,964-65. This amended rule deletes provisions of the 2023 Rule codifying the significant nexus test but leaves intact the

[6] Like the plurality in *Rapanos*, *see* 547 U.S. at 731, the *Sackett* majority did not reach the question of when a "water" can be deemed to be "of the United States," *Sackett*, 598 U.S. at 685 (Thomas, J., concurring). This question was taken up in a concurring opinion written by Justice Thomas and joined by Justice Gorsuch. Justice Thomas would have held that the CWA implements only Congress's "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id*. at 703-04 (quoting *SWANCC*, 531 U.S. at 172). Accordingly, the statutory terms "navigable waters" and "waters of the United States" invoke "only Congress' authority over waters that are, were, or could be used as highways of interstate or foreign commerce." *Id*. at 685.

remainder of the rule. *See id.* at 61,968-69. The Amended 2023 Rule authorizes regulation of "relatively permanent, standing or continuously flowing bodies of water," 33 C.F.R. § 328.3(a)(3), (5); 40 C.F.R. § 120.2(a)(3), (5), but omits *Sackett*'s stipulation that the test for covered waters is one of "ordinary parlance," *Sackett*, 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739 (plurality opinion)). It further fails to articulate any requirements for this "relatively permanent" test. *See* 88 Fed. Reg. at 61,968-69. As for wetlands, the Amended 2023 Rule authorizes regulation of wetlands "adjacent to" other covered waters. 33 C.F.R. § 328.3(a)(4); 40 C.F.R. § 120.2(a)(4). It defines "adjacent" as "having a continuous surface connection." 33 C.F.R. § 328.3(c)(2); 40 C.F.R. § 120.2(c)(2).

Those portions of the unamended 2023 Rule's preamble explaining the Agencies' approach to the so-called "relatively permanent" test have generally governed post-*Sackett*. *See* Joint Coordination Memorandum to the Field Between the U.S. Department of the Army, U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA)

1 (Sept. 27, 2023)[7] ("[T]he implementation guidance and tools in the 2023 rule preamble that address the regulatory text that was not amended by the conforming rule, including the preamble relevant to the *Rapanos* plurality standard . . . generally remain relevant to implementing the 2023 rule, as amended."). On March 12, 2025, the Agencies issued additional guidance to clarify their implementation of *Sackett*'s test for wetlands authority. *See* 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 (Mar. 12, 2025).[8] This guidance departs from some—but not all—aspects of the unamended 2023 Rule's approach to the so-called "relatively permanent" test. *See id.* at 5-6.

[7] *Available at* https://www.epa.gov/system/files/documents/2023-10/2023-joint-coordination-memo-amended-2023-rule_508c.pdf.

[8] *Available at* https://www.epa.gov/system/files/documents/2025-03/2025cscguidance.pdf.

RECOMMENDATIONS

I. The scope of "relatively permanent" waters and to what features this phrase applies

A. Any regulation defining "relatively permanent" waters must credit *Sackett*'s emphasis on "ordinary parlance" and its enumeration of the specific "geographical features" subject to CWA authority

Sackett made clear that the Agencies' authority over "waters" may extend no further than "'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.'" *Sackett*, 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739 (plurality opinion)). At its core, this test—and that of the *Rapanos* plurality which it largely adopted—is one of "common sense and common usage." *Rapanos*, 547 U.S. at 732 n.5 (plurality). The relevant inquiry is thus whether a reasonable person would—taking into account visual observation of the relatively permanent presence of standing or continuously flowing water—describe the feature in question as a "'geographic[al] feature[],'" such as a "'stream[], ocean[], river[], [or] lake[].'" *Sackett*, 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739 (plurality opinion)).

This emphasis on common usage is underscored by *Sackett*'s pre-eminent concern with the due process implications of any test for CWA regulation, and its insistence that the regulated public must be able to discern the scope of the Agencies' authority—without having to hire an expert. *See id.* at 680-81 ("Due process requires Congress to define penal statutes 'with sufficient definiteness that ordinary people can understand what conduct is prohibited' and 'in a manner that does not encourage arbitrary and discriminatory enforcement.'" (quoting *McDonnell v. United States*, 579 U.S. 550, 576 (2016))).

* * *

PLF recommends that any regulation defining the scope of *Sackett*'s "relatively permanent" test must emphasize *Sackett*'s core stipulation that the test for covered waters is one of "ordinary parlance," *Sackett*, 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739 (plurality opinion)), or as the *Rapanos* plurality put it, one of "common sense and common usage," *Rapanos*, 547 U.S. at 732 n.5 (plurality). Any such regulation must also explicitly reference the conventionally defined "'geographic[al] features'"—that form "'streams, oceans, rivers, and lakes,'" *Sackett*, 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739 (plurality opinion))—set

forth in *Sackett*. In setting the parameters of the Agencies' authority, reference to these enumerated geographical features is essential to lawful regulation.

B. Any regulation defining "relatively permanent" waters must be limited to features containing continuously flowing or standing water for a majority of the year

The *Rapanos* plurality (and thus *Sackett*) is clear that *under no circumstances* may the Agencies regulate intermittently or ephemerally flowing features. *See Rapanos*, 547 U.S. at 732-33 (plurality opinion) ("All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows."). Indeed, both *Rapanos* and *Sackett* clarify that the ordinary presence of water is a necessary, *see id.* at 734 (noting that the "*bare minimum*" necessary for regulation is "the ordinary presence of water" (emphasis added)), though not sufficient, *see Sackett*, 598 U.S. at 674 ("Consider puddles, which are also defined by the ordinary presence of water even though few would describe them as 'waters.'"), condition for agency regulation. The bottom line is therefore that, for a feature to be regulable, it must be more likely than not that the feature will have water within it throughout most of the year. *See Rapanos,* 547 U.S. at 733

("Even the least substantial of the definition's terms, namely, 'streams,' connotes a continuous flow of water in a permanent channel[.]"). *See also Ordinary*, Black's Law Dictionary (12th ed. 2024) ("Occurring in the regular course of events; normal, customary, and usual; of common everyday occurrence.").

To be sure, the *Rapanos* plurality did not definitively foreclose the regulation of certain "streams, rivers, or lakes that might dry up *in extraordinary circumstances*, such as drought," and "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months—such as [a] 290-day, continuously flowing stream," *Rapanos*, 547 U.S. at 732 n.5 (plurality opinion) (some emphasis added). But in referencing "extraordinary circumstances, such as drought" and providing an example of a river flowing for 290 days out of the year, the *Rapanos* plurality expressly forecloses the regulation of features that do not continuously contain water for *most of the year*.

* * *

PLF recommends that the Agencies adopt minimum flow volume and duration requirements, to ensure the Agencies are only regulating conventionally defined "geographic[al] features" that in ordinary

parlance can be described as "streams, oceans, rivers, and lakes," *Sackett*, 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739 (plurality opinion)), and which *contain continuously flowing or standing water for a majority of the year*. In establishing these minimum flow volume and duration requirements, the Agencies should rely on: (1) *Rapanos* and *Sackett*'s direction that the ordinary presence of water is a necessary—though not sufficient—precondition for regulation, *see Rapanos*, 547 U.S. at 734; *Sackett*, 598 U.S. at 674; (2) *Sackett*'s preeminent concern with the due process implications of any test for CWA regulation, and its insistence that that the regulated public must be able to discern the scope of the Agencies' authority—without having to hire an expert, *see id.* at 680-81; and (3) the *Rapanos* plurality's emphasis on "*extraordinary* circumstances, such as drought" and provision of an example of a river flowing for 290 days out of the year, when discussing so-called "*seasonal* rivers," *Rapanos*, 547 U.S. at 732 n.5 (plurality opinion) (some emphases added).

II. The scope of "continuous surface connection" and to which features this phrase applies

A. Any regulation defining "adjacent wetlands" must incorporate *Sackett*'s central indistinguishability requirement

1. Indistinguishability is central to *Sackett*'s test for federal wetlands authority

Central to *Sackett*'s test is that regulable wetlands "must be indistinguishably part of a body of water that itself constitutes 'waters' under the CWA." 598 U.S. at 676. "Wetlands that are separate from traditional navigable waters[,]" on the other hand, "cannot be considered part of those waters, even if they are located nearby." *Id. Sackett* phrases this indistinguishability requirement in various ways. *See id.* at 678 (requiring "'that there is no clear demarcation between "waters" and wetlands[]'" (quoting *Rapanos*, 547 U.S. at 742 (plurality opinion))); *id.* at 678-79 ("This requires the party asserting jurisdiction over adjacent wetlands to establish . . . 'that the wetland has a continuous surface connection with that water, making it difficult to determine where the "water" ends and the "wetland" begins.'" (quoting *Rapanos*, 547 U.S. at 742 (plurality opinion))). But the essential point is clear: "the CWA extends to only those wetlands that are 'as a practical matter indistinguishable from waters of the United States.'" *Id.* at 678 (quoting

Rapanos, 547 U.S. at 755 (plurality opinion)). Indeed, so central is *Sackett*'s indistinguishability requirement that the word "indistinguishable" is used more often than the phrase "continuous surface connection" in the Court's recitation of the test—including in its ultimate conclusion that the Sacketts' property was not subject to federal authority. *See id.* at 684 ("The wetlands on the Sacketts' property are distinguishable from any possibly covered waters.").

Sackett placed this emphasis on "indistinguishability" because the CWA seeks to protect "waters"—rivers, lakes, and streams—so that features like wetlands that are typically regarded as non-waters, *see id.* at 674, *are presumptively outside the scope of the statute*, and can be regulated only in those rare instances when they "qualify as 'waters of the United States' in their own right," *id.* at 676. *Cf. also* Royal C. Gardner, *Waters of the United States: POTUS, SCOTUS, WOTUS, and the Politics of a National Resource* 95 (2024) ("But wetlands fell outside Justice Scalia's constricted view of 'the waters': Wetlands generally were not 'waters of the United States.'"). That the CWA contains an oblique reference to "adjacent" wetlands in a provision concerning permitting, 33 U.S.C. § 1344(g)(1), does not counsel otherwise. Rather, the Supreme

Court in *Sackett* held that this reference to "adjacent wetlands" must be "harmonize[d]" with the "operative" term "waters." *Sackett*, 598 U.S. at 676. *Cf. Riverside Bayview*, 474 U.S. at 138 n.11 ("To be sure, § 404(g)(1) does not conclusively determine the construction to be placed on the use of the term 'waters' elsewhere in the Act (particularly in § 502(7), which contains the relevant definition of 'navigable waters')[.]"). Thus, to be regulated, an "adjacent wetland" must be "indistinguishably part of a body of water." *Sackett*, 598 U.S. at 676. In other words, regulation of "indistinguishable" adjacent wetlands is permissible—but only incidentally to the CWA's regulation of "waters." *Cf. id.*

2. The Agencies' post-*Sackett* disregard for *Sackett*'s indistinguishability requirement is unlawful

Regrettably, in the time since *Sackett* was decided, the Agencies have vigorously resisted *Sackett*'s indistinguishability requirement. The Amended 2023 Rule, for example, omits any mention of indistinguishability, and instead asserts authority over any wetland "adjacent" to a relatively permanent body of water, so long as the wetland has "a continuous surface connection" to that covered water. *See* 40 C.F.R. § 120.2(a)(4)(ii); 33 C.F.R. § 328.3(a)(4)(ii). Likewise, in litigation

against the Amended 2023 Rule, the Agencies have argued that indistinguishability is not a central component of *Sackett*'s test but is merely an outcome of a continuous surface connection.[9] This reading cannot be sustained. To construe "indistinguishability" as merely the logical outcome of the operative test—as opposed to an integral component of it—makes a wash of *Sackett*'s central holding: that the CWA only regulates "waters," *Sackett*, 598 U.S. at 671, so that features like wetlands that are typically regarded as non-waters, *see id.* at 674,

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[9] *See*, *e.g.*, Response Brief of Federal Appellees, *White v. U.S. Env't Prot. Agency*, No. 24-1635 (4th Cir. Dec. 20, 2024), ECF No. 36 at 23-24 (characterizing *Sackett*'s "indistinguishability" language as "nonessential information," merely restating the "continuous surface connection" requirement); Defendants' Combined Memorandum in Support of Cross Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment, *White v. U.S. Env't Prot. Agency*, No. 2:24-cv-00013 (E.D.N.C. Sept. 23, 2024), ECF No. 62 at 21 ("[T]hat wetlands are 'as a practical matter indistinguishable' from adjacent 'waters of the United States' is a conclusion that the continuous-surface-connection requirement produces. It is not a separate, standalone requirement."); Federal Defendants' Combined Memorandum in Support of Their Motion for Summary Judgment and Opposition to Plaintiffs' and Business Intervenors' Motions for Summary Judgment, *West Virginia v. U.S. Env't Prot. Agency*, No. 3:23-cv-00032 (D.N.D. Apr. 26, 2024), ECF No. 210 at 59-60 (same); Federal Defendants' Combined Motion for Summary Judgment and Opposition to Plaintiffs' Motions for Summary Judgment, *Texas v. U.S. Env't Prot. Agency*, No. 3:23-cv-00017 (S.D. Tex. Apr. 2, 2024), ECF No. 108 at 59-60 (same).

can be regulated only when they "qualify as 'waters of the United States' in their own right," *id.* at 676. *Accord* Rebecca L. Kihslinger, et al., *Unpacking the Revised WOTUS Rule, Panel Before the Environmental Law Institute* (Aug. 29, 2023), 53 Env't L. Rep. 10887, 10892 (2023) (comments of Royal C. Gardner) (emphasizing that the word "indistinguishable" in *Sackett* is "not a mere rhetorical flourish").

Indeed, the bare "continuous surface connection" test the Agencies have advanced post-*Sackett* cannot be squared with *Sackett*'s language—no matter how one reads the opinion. It is true that the word "indistinguishable" occurs in a separate sentence from the phrase "continuous surface connection." *See Sackett*, 598 U.S. at 678. It is also true that *Sackett* states "[t]hat [indistinguishability] 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.'" *Id*. (quoting *Rapanos*, 547 U.S. at 742). This might excuse the omission of the specific word "indistinguishable" from the Agencies' test. But it does not justify similar omission of the phrase "no clear demarcation." And the phrase "no clear demarcation" bears the same meaning as "indistinguishable." *See*

Demarcate, Oxford Dictionary of English 464 (3d ed. 2010) ("separate or distinguish from"); *Demarcate*, Merriam-Webster Dictionary (online ed.) ("to set apart" or "distinguish"). Hence, no matter how the Agencies contort *Sackett*'s language, omission of *Sackett*'s central "indistinguishability" (or, alternatively, "no clear demarcation") requirement is unlawful.

The Agencies' post-*Sackett* position that the "indistinguishability" requirement is merely coextensive with the "continuous surface connection" requirement also defies common sense. It is possible for two features to have a continuous surface connection—which, the Agencies contend, can include a terrestrial or other physical *though non-aquatic* connection, *see infra* notes 11-12—while still being distinguishable. For example, a wetland abutting a road is clearly distinguishable from the road—even if there is a continuous *physical* connection between wetland and road. *Cf. Sackett*, 598 U.S. at 662 ("'[W]etlands' . . . on the other side of a 30-foot road."). Likewise, when placing one's palm on a table, there is a continuous surface connection between palm and table. Yet nobody would dispute that palm and table are clearly distinguishable. Hence, *Sackett*'s phrase "making it difficult to determine where the 'water' ends

and the 'wetland' begins," *id.* at 678-79 (quoting *Rapanos*, 547 U.S. at 742 (plurality opinion)), must be a specification of a particular *type* of "continuous surface connection"—namely, one where it is "difficult to determine where the '*water*' ends and the 'wetland' begins." *Id.* (emphasis added). The Agencies' post-*Sackett* failure to qualify the "continuous surface connection" concept, as *Sackett* expressly qualified it, is unlawful.

3. Lower courts have confirmed the unlawfulness of the Agencies' post-*Sackett* disregard for the indistinguishability requirement

Underscoring the illegality of the Agencies' post-*Sackett* approach to indistinguishability, is that numerous lower courts have confirmed the centrality—and independent relevance—of *Sackett*'s indistinguishability requirement.

For example, in *Lewis*, the Fifth Circuit rejected the Corps' claim of authority over an alleged wetland, and emphasized in its ultimate conclusion that "it is not difficult to determine where the 'water' ends and any 'wetlands' on Lewis's property begin . . . ." *Lewis*, 88 F.4th at 1078. That the Fifth Circuit saw fit to note, *additionally*, that "there is simply no connection whatsoever," *id.*, further demonstrates that it did not view

these two requirements (indistinguishability and a surface connection) as co-extensive.

Similarly, in *Sharfi*, the Southern District of Florida entered summary judgment against the United States, and in favor of the defendant, in an enforcement action alleging the illegal discharge of dredged and fill material into ditches and wetlands allegedly subject to CWA authority. *See Sharfi*, 2024 WL 5244351, at *1. In relevant part, the district court determined that the United States' proffered formulation of the "continuous surface connection" requirement "ignores the latter half of the second part of the *Sackett* test, which requires that the continuous surface connection be one which *makes it difficult to determine where the 'water' ends and the 'wetland' begins*." *See United States v. Sharfi*, No. 2:21-cv-14205, 2024 WL 4483354, at *13 (S.D. Fla. Sept. 21, 2024), *report and recommendation adopted*, 2024 WL 5244351 (quoting *Sackett*, 598 U.S. at 678-79) (emphasis in original). *See also id.* ("Plaintiff ignores this indistinguishability requirement, which becomes meaningless if abutment alone establishes a 'continuous surface connection.'"). By emphasizing "the latter half of the second part of the *Sackett* test," *id.*, and expressing concern over *Sackett*'s

"indistinguishability requirement" being rendered "meaningless," *id.*, *Sharfi* expressly rejected the Agencies' position that indistinguishability is merely the outcome of a continuous surface connection, *see id.*

Finally, in *Ace Black Ranches*, the District of Idaho dismissed, for failure to state a claim, a CWA enforcement action alleging illegal discharges into wetlands. *See Ace Black Ranches*, 2024 WL 4008545, at *1. In doing so, the district court emphasized the independent significance of *Sackett*'s indistinguishability requirement. *See id.* at *3 (dismissing United States' complaint for failing 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)).[10]

[10] The centrality—and independent significance—of *Sackett*'s indistinguishability requirement is also widely understood among commentators. *See*, *e.g.*, Gardner, *supra*, at 213 ("Most of the post-*Sackett* analysis of its impact on wetland jurisdiction focused solely on the continuous surface requirement and neglected to consider the 'indistinguishable' requirement[.]"); Tony François, *"Same As It Ever Was"—An Application of a 1980s Classic to EPA and Army Regulations "Conforming" to* Sackett v. EPA, CF004 ALI-CLE 627 (Feb. 1, 2024) (describing the Agencies' post-*Sackett* approach as "substantially broader than the indistinguishability test adopted in the [*Sackett*] decision"); Kihslinger, *supra*, at 10892 (emphasizing that the word "indistinguishable" in *Sackett* is "not a mere rhetorical flourish").

* * *

PLF recommends that any regulatory definition of "adjacent wetlands" must expressly incorporate *Sackett*'s central indistinguishability requirement, ensuring that the Agencies are only regulating those "wetlands" (i) with a "continuous surface connection" to such waters and (ii) that are "'as a practical matter indistinguishable from waters of the United States,' such that it is 'difficult to determine where the "water" ends and the "wetland" begins.'" *Sackett*, 598 U.S. at 678 (quoting *Rapanos*, 547 U.S. at 742 (plurality opinion)).

B. *Sackett* demands that any regulatory definition of "adjacent wetlands" must categorically exclude from regulation those wetlands separated from a covered water by a natural or artificial barrier

Sackett's central indistinguishability requirement forecloses any regulation of "wetlands behind a natural berm or similar natural landforms," or wetlands separated from a covered water by "flood or tide gates, pumps, or similar artificial features," 90 Fed. Reg. at 13,430. No reasonable person would have any difficulty "demarcat[ing]," *Sackett*, 598 U.S. at 678, or distinguishing wetlands that are separated from covered waters by a natural or artificial barrier. Indeed, *Sackett* expressly held that, unless constructed illegally, "a barrier separating a

wetland from a water of the United States would ordinarily remove that wetland from federal jurisdiction . . . ." *Id.* at 678 n.16.

* * *

PLF recommends that any regulatory definition of "adjacent wetlands" must categorically exclude from regulation those wetlands separated from covered waters by *any* natural or artificial physical barrier.

C. Any regulatory definition of "adjacent wetlands" must limit the Agencies' authority to only those wetlands with continuous surface *water* connection to covered waters; physical abutment is insufficient

Since *Sackett* was decided, the Agencies have continued to assert authority even over wetlands lacking a continuous *water* connection to a regulable water. *See* 88 Fed. Reg. at 3096 ("A continuous surface connection is not the same as a continuous surface water connection[.]").[11]

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[11] *See also* Defendants' Combined Memorandum in Support of Cross Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment, *White*, No. 2:24-cv-00013, ECF No. 62 at 26-28 (confirming that this remains the Agencies' position, post-*Sackett*); Federal Defendants' Combined Memorandum in Support of Their Motion for Summary Judgment and Opposition to Plaintiffs' and Business Intervenors' Motions for Summary Judgment, *West Virginia*, No. 3:23-cv-00032, ECF No. 210 at 60-62 (same); Federal Defendants' Combined Motion for Summary Judgment and Opposition to Plaintiffs' Motions for

In doing so, the Agencies have taken the position that mere physical "abutment" is sufficient to establish a "continuous surface connection."[12]

This position conflicts with *Sackett*, which expressly contemplates that any surface connection between water and wetland must be aquatic. *Sackett*, 598 U.S. at 678 (contemplating that surface water must be continuously present, absent "temporary interruptions . . . because of

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Summary Judgment, *Texas*, No. 3:23-cv-00017, ECF No. 108 at 60-62 (same).

[12] *See* Memorandum in Support of Plaintiff United States of America's Motion for Summary Judgment as to Liability, *United States v. White*, No. 2:23-cv-00001 (E.D.N.C. July 29, 2024), ECF No. 71 at 22 (arguing that the *Rapanos* plurality authorizes regulation of "abutting wetlands" (citing *Rapanos*, 547 U.S. at 740-42)); Federal Defendants' Combined Memorandum in Support of Their Motion for Summary Judgment and Opposition to Plaintiffs' and Business Intervenors' Motions for Summary Judgment, *West Virginia*, No. 3:23-cv-00032, ECF No. 210 at 60-61 ("The most common example of wetlands meeting the continuous surface connection requirement are wetlands that abut or touch covered waters. . . . This is so even though surface water need not be present for wetlands to exist." (citation omitted)); Federal Defendants' Combined Motion for Summary Judgment and Opposition to Plaintiffs' Motions for Summary Judgment, *Texas*, No. 3:23-cv-00017, ECF No. 108 at 61 (same); Plaintiff United States of America's Opposition to Defendants' Motion for Judgment on the Pleadings, *United States v. Valentine*, No. 5:22-cv-00512 (E.D.N.C. Jan. 26, 2024), ECF No. 48 at 22 ("The United States has alleged the requisite continuous surface connection between wetlands that are adjacent to, and abut, water bodies that are waters of the United States in their own right. . . . *Sackett* does not require the United States to plead specifically that wetlands are 'aquatic'[.]").

phenomena like low tides or dry spells"); *id.* (referencing a wetland that has an "unimpaired connection with the open sea up to the head of tidal influence" as an example of a covered wetland (quoting 33 U.S.C. § 2802(5))).

Since *Sackett* was decided, one lower court has expressly rejected the Agencies' position that mere physical "abutment" is sufficient for CWA authority. *See Sharfi*, 2024 WL 4483354, at *13 ("I disagree with Plaintiff's argument that that the 'continuous surface connection' required by *Sackett* does not require a continuous *water* surface connection and instead requires only that the adjacent regulated body of water 'abut' the wetlands."). *See also Sharfi*, 2024 WL 5244351, at *1 ("'[C]ontinuous surface connection' means a surface water connection."). And one additional court has confirmed that a *water* connection is required for federal wetlands authority. *See Ace Black Ranches*, 2024 WL 4008545, at *4 n.2 ("The Government still needs to connect any wetlands it believes Ace Black Ranches' has polluted with the River via a sufficient surface-water connection.").[13]

[13] As with the centrality of *Sackett*'s indistinguishability requirement, *Sackett*'s requirement of a continuous surface *water* connection is also

The Agencies' position is also inconsistent with the separate opinions in *Rapanos*—which each understood the *Rapanos* plurality as requiring a *water* connection. *See Rapanos*, 547 U.S. at 776 (Kennedy, J., concurring in the judgment) ("when a surface-water connection is lacking, the plurality forecloses jurisdiction over wetlands that abut navigable-in-fact waters"). *Cf. also id.* at 805 (Stevens, J., dissenting) ("Under this view, wetlands that border traditionally navigable waters or their tributaries and perform the essential function of soaking up overflow waters during hurricane season—thus reducing flooding downstream—can be filled in by developers with impunity, as long as the wetlands lack a surface connection with the adjacent waterway the rest of the year."). Numerous lower courts have also read the *Rapanos*

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widely understood among commentators. *See*, *e.g.*, Richard J. Lazarus, *Judicial Destruction of the Clean Water Act*: Sackett v. EPA, U. Chi. L. Rev. Online, at *5 (Aug. 11, 2023), https://lawreview.uchicago.edu/judicial-destruction-clean-water-act-sackett-v-epa (referencing "the Court's adoption of the *Rapanos* plurality's 'continuous flow' requirement for adjacency"); *Frequently Asked Questions regarding the U.S. Supreme Court's ruling in* Sackett v. EPA, California State Water Resources Control Board 3 (Oct. 23, 2023), https://www.waterboards.ca.gov/water_issues/programs/cwa401/docs/sackett-faq-external.pdf ("Vernal pools . . . generally would not be 'adjacent wetlands' as defined by the *Sackett* decision because vernal pools do not typically have a continuous surface water connection with a water of the United States.").

plurality's test as requiring a surface *water* connection. *See United States v. Cundiff*, 555 F.3d 200, 211-13 (6th Cir. 2009) ("the [*Rapanos*] plurality's test requires a topical flow of water"); *Tri-Realty Co. v. Ursinus Coll.*, 124 F. Supp. 3d 418, 467 (E.D. Pa. 2015) ("the *Rapanos* plurality derived the requirement for a surface water connection from the phrase 'adjacent to'"); *Simsbury-Avon Pres. Soc'y, LLC v. Metacon Gun Club, Inc.*, 472 F. Supp. 2d 219, 224 (D. Conn. 2007), *aff'd on other grounds*, 575 F.3d 199 (2d Cir. 2009) ("Plaintiffs do not dispute defendant's reading that *Rapanos* requires a continuous surface water connection between the wetland and an adjacent, relatively permanent water of the United States[.]").

The Agencies' post-*Sackett* position that the surface connection between water and wetland need not be aquatic—and that abutment alone suffices—likewise further demonstrates the logical flaw in their argument that indistinguishability is nonessential window-dressing for the continuous surface connection concept. *See supra* note 9. Even granting the Agencies' idiosyncratic position that a "continuous surface connection" is equivalent to "indistinguishability," *see id.*, the plain meaning of "continuous" remains "marked by uninterrupted extension in

space, time, or sequence," *Continuous*, Merriam-Webster Dictionary (online ed.). If a continuous surface connection can be established *without* a water connection, there must still be *some* "uninterrupted" surface connection. And if that uninterrupted surface connection is not aquatic, that only leaves "land." If a continuous terrestrial surface connection is all that is required to meet *Sackett*'s test, then that test does not impose any meaningful limitation on the Agencies' authority. All wetlands bear a terrestrial connection to neighboring waters.

* * *

PLF recommends that any regulatory definition of "adjacent wetlands" must explicitly state that only those wetlands with a continuous *aquatic* surface connection to covered waters may be regulated under the CWA. The Agencies must also make clear that mere physical "abutment" is never sufficient for CWA authority.

III. The Agencies should define when a water is "of the United States" in accordance with Justice Thomas's concurring opinion in *Sackett*

As noted above, *Sackett* only resolves the question of when a particular hydrogeographic feature may properly be considered a "water" within the meaning of the CWA. *See supra* note 6. It does not address the

broader question of how the CWA's use of the qualifiers "navigable" and "of the United States" might further restrict the Agencies' authority. *See Sackett*, 598 U.S. at 685 (Thomas, J., concurring). *See also Rapanos*, 547 U.S. at 731. *Sackett*'s two-part test therefore sets forth necessary, but not sufficient, preconditions for agency regulation—however one reads the CWA, its coverage can extend no further than the "waters" identified in *Sackett*'s test. To ensure lawful regulation in all instances, PLF recommends that the Agencies also address the meaning of the statutory phrases "navigable" and "of the United States." *See* 33 U.S.C. § 1362(7). PLF further recommends that the Agencies do so with reference to Justice Thomas's well-reasoned conclusion that the CWA implements only Congress's "traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *See Sackett*, 598 U.S. at 703-04 (Thomas, J., concurring) (quoting *SWANCC*, 531 U.S. at 172).

CONCLUSION

The Agencies must cease their familiar pattern of recalcitrance in furtherance of egregiously overbroad CWA regulation. To properly conform their conduct to the mandatory limitations imposed upon their

authority by *Sackett*, and to ensure lawful CWA regulation in all instances, any future regulatory definition of "the waters of the United States" must adopt the recommendations discussed above.

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Respectfully submitted,

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