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Via: [Regulations.gov](https://www.regulations.gov)

U.S. Environmental Protection Agency
EPA Docket Center, Water Docket
Docket ID No. EPA-HQ-OW-2025-0322

Re: Comments on Proposed Rule – Updated Definition of “Waters of the United States”

Dear Administrator Regan and Assistant Secretary Boyd:

Orange County Coastkeeper respectfully submits these comments on the U.S. Environmental Protection Agency’s and U.S. Army Corps of Engineers’ proposed rule revising the definition of “waters of the United States” under the Clean Water Act. Orange County Coastkeeper is a nonprofit environmental organization with a mission to protect swimmable, drinkable, fishable water and promote watershed resilience throughout our region. We work collaboratively with diverse groups in the public and private sectors to achieve healthy, accessible, and sustainable water resources for the region. We implement innovative, effective, programs in education, advocacy, restoration, research, enforcement, and conservation.

The agencies state that the proposed rule is intended to increase regulatory clarity, predictability, and consistency following the Supreme Court’s decision in *Sackett v. EPA*. In practice, however, the proposal introduces new uncertainty, produces arbitrary regulatory outcomes, and departs from both the Clean Water Act’s structure and the limited scope of the Court’s holding in *Sackett*. *Sackett v. EPA*, 598 U.S. 651 (2023). These concerns are particularly acute in regions such as Southern California, where seasonal hydrology dominates and where upstream pollution routinely affects downstream waters that remain unquestionably jurisdictional.

Congress enacted the Clean Water Act with the express objective of restoring and maintaining the chemical, physical, and biological integrity of the Nation’s waters. 33 U.S.C. § 1251(a). The statute reflects Congress’s judgment that pollution must be addressed at its source and that federal standards are necessary where state-by-state approaches have proven inadequate, particularly for watersheds that cross political boundaries.

I. Failure to Incorporate Hydrologic Reality Results in Arbitrary and Inequitable Regulatory Outcomes

At its core, the Clean Water Act is a pollution-control statute designed to prevent degradation of downstream waters by regulating pollutant discharges at their source. The proposed definition

departs from this principle by relying on surface-water permanence and categorical exclusions unrelated to the constitutional scope of federal authority while largely disregarding hydrologic connectivity and pollutant transport. In Southern California and throughout much of the western United States, waterways frequently flow seasonally or episodically, yet reliably convey pollutants to downstream rivers, lakes, estuaries, and coastal waters.

By declining to meaningfully incorporate hydrology into jurisdictional determinations, the proposed rule creates arbitrary distinctions between dischargers whose activities have similar downstream water quality impacts. Facilities discharging comparable pollutant loads into the same watershed may face dramatically different regulatory obligations based solely on the classification of the immediate conveyance without regard for the fate and transport of pollutants to a regulated water. Such distinctions lack a rational relationship to environmental impact and therefore risk being arbitrary and capricious under the Administrative Procedure Act. 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

For example, the proposed expansion of the definition of an exempt ditch would include ditches that carry water continuously during certain seasons. As a result, two nearby facilities with otherwise identical operations and pollutant discharges may be regulated entirely differently based solely on the character of the immediate drainage feature. A facility on one side of a street may discharge to a natural tributary and remain subject to Clean Water Act requirements, while its neighbor across the street discharges to a manmade flood control channel—classified as an exempt ditch under the proposed rule—and avoids federal regulation altogether. Yet both conveyances may perform the same hydrologic function and deliver pollutants to the same downstream receiving water.

There is no rational basis for this distinction, and none is provided in the proposal. The difference in regulatory treatment turns not on environmental impact, but on whether the conveyance is natural or engineered, even where the engineered channel is more effective at transporting pollutants.

The argument that an excluded ditch may instead be treated as a point source is unpersuasive. In urban areas such as Southern California, ditches are rarely owned or controlled by the polluting entity. Instead, they are typically municipally owned and operated as flood control channels. Under this framework, responsibility for pollution is shifted away from the entity generating the discharge and onto municipalities that neither caused the pollution nor exercise meaningful control over the upstream activity.

In many cases, municipalities lack clear legal authority to prohibit or substantially constrain the polluting activity. Where such authority does exist, the municipality may be forced to consider restricting or excluding lawful businesses from operating within its jurisdiction in order to comply with its own NPDES permitting obligations. This outcome is neither practical nor consistent with the structure or purpose of the Clean Water Act.

The more rational and equitable approach is to regulate pollutants at their source, particularly where the downstream conveyance—whether natural or engineered—functions hydrologically in the same manner as a relatively permanent tributary. The proposed rule’s failure to do so underscores the arbitrary nature of the expanded ditch exclusion.

Entities that invest in compliance and pollution controls may remain subject to federal permitting and enforcement, while competitors with comparable impacts may fall outside federal oversight entirely for the sole reason that the Administrator seeks to reduce the scope of the Clean Water Act. This uneven treatment distorts competition and incentivizes regulatory avoidance rather than pollution prevention, contrary to the Clean Water Act’s objectives.

II. Failure to Define “Wet Season” Reintroduces Regulatory Uncertainty

The proposed rule repeatedly references waters that flow continuously during certain seasons, yet provides no definition of “wet season” and no guidance regarding how such a season should be identified. In Mediterranean climates such as California’s, where precipitation is highly seasonal, this omission guarantees renewed case-by-case jurisdictional determinations.

Absent clear parameters, regulated entities and permitting agencies will be forced to rely on discretionary, site-specific judgments, increasing cost, delay, and inconsistency. The lack of a defined wet season also raises fair-notice concerns, as regulated parties cannot reasonably conform their conduct to an undefined standard. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

III. The Proposed Definition Exceeds the Limited Mandate of *Sackett v. EPA*

Sackett v. EPA addressed the outer limits of federal jurisdiction over wetlands and sought to prevent regulation of areas that most people would reasonably regard as dry land. The decision did not mandate a wholesale retreat from regulating hydrologically connected waters, nor did it require the sweeping expansion of exemptions reflected in the proposed rule. Nothing in *Sackett* suggests that federal jurisdiction should turn on generalized seasonal labels or assumptions about when waters carry flow.

In elevating concepts such as seasonal flow and “wet season” while simultaneously declining to define or contextualize them, the proposed rule departs from both the Court’s reasoning and basic hydrologic reality. In much of the western United States, precipitation patterns are highly variable and shaped by large-scale climatic cycles such as El Niño and La Niña, resulting in dramatic year-to-year differences in the timing and duration of surface flows. These patterns are further complicated by prolonged drought conditions that may persist for years or decades, followed by episodic but hydrologically significant precipitation events. Under these conditions, the presence or absence of flow during any particular season is not a reliable indicator of whether a feature functions as part of a watershed or serves as a conduit for pollution to downstream waters.

Hydrologic function varies widely across regions. Some watersheds experience meaningful flows in both summer and winter, others receive the vast majority of precipitation during winter months, and still others rely on snowpack accumulation that generates sustained summer flows through snowmelt. These diverse regimes underscore that seasonality itself is not determinative of hydrologic significance. Waters that predictably transport pollutants to downstream receiving waters may do so during winter storms, summer snowmelt, or episodic rainfall following extended dry periods.

By eliminating categories of waters and expanding exclusions not addressed by the Court, the agencies have transformed a narrow wetlands decision into a broad deregulatory policy choice. Nothing in *Sackett* requires EPA to disregard hydrology or to narrow jurisdiction over waters that function as conduits for pollution simply because their flow is seasonal or episodic. The proposed rule's reliance on seasonality, rather than hydrologic role, extends far beyond the Court's mandate and undermines the Clean Water Act's source-control framework.

IV. Major National Water Policy Decisions Are for Congress

The Clean Water Act reflects Congress's deliberate judgment about how to balance environmental protection, economic activity, and federal–state authority in addressing water pollution. Through the Act, Congress established a comprehensive national framework for controlling pollutant discharges to the Nation's waters, including a permitting system, enforcement mechanisms, and a cooperative federalism structure that preserves state authority while maintaining a uniform federal baseline. Decisions of this magnitude—setting the scope of national water protection and determining which waters are subject to federal oversight—are matters of legislative policy entrusted to Congress.

The Supreme Court's role in this framework is to interpret and apply the statute Congress enacted. In *Sackett v. EPA*, the Court exercised that role by clarifying the limits of federal jurisdiction in the specific context presented, focusing on how to distinguish wetlands from uplands and preventing regulation of areas that most people would reasonably regard as dry land. That decision warrants full respect and careful implementation. At the same time, *Sackett* did not purport to announce a broader national water policy, nor did it direct agencies to recalibrate the Clean Water Act's overall scope beyond the issues squarely before the Court.

Courts, including the Supreme Court, have consistently emphasized that major national policy choices must be grounded in clear congressional direction. More recently, the Court reiterated that questions of vast economic and political significance require explicit legislative authorization. *West Virginia v. EPA*, 597 U.S. 697, 723 (2022). These principles reinforce that neither administrative agencies nor courts should be understood to set national policy in the absence of clear congressional instruction.

The proposed rule risks extending *Sackett* beyond its interpretive function by translating a narrow judicial holding into a broad restructuring of federal water protection. By expanding exemptions and narrowing jurisdiction in ways not compelled by the statutory text or the Court’s decision, the rule effectively adopts policy judgments that Congress has not made and the Court has not required.

The agencies do not possess the authority to exclude waters that Congress intended to cover from the definition of “waters of the United States” to achieve their own independent and ever-shifting bureaucratic policy goals. *See Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 325, 328 (2014). If Congress determines that the Nation’s approach to protecting its waters should be substantially revised, it retains the authority to do so through legislation. Until such direction is provided, the appropriate course is to implement *Sackett* faithfully and narrowly, without transforming a case-specific interpretation into a sweeping change in national water policy.

V. Conclusion

The Supreme Court’s decision in *Sackett v. EPA* addressed a narrow and specific question: how to identify the boundary between wetlands and uplands in circumstances where that distinction is difficult to discern. The Court sought to prevent federal regulation of areas that most people would reasonably regard as dry land, particularly in the complex context of adjacent wetlands. The decision did not direct the agencies to rework the Clean Water Act’s broader jurisdictional framework, nor did it mandate a retreat from regulating waters that function as part of a connected hydrologic system.

The proposed rule extends far beyond this limited mandate. By eliminating categories of waters, expanding exemptions, and elevating formalistic distinctions over hydrologic function, the rule introduces regulatory outcomes that bear little relationship to the fate and transport of pollutants to traditionally navigable waters. Waters and conveyances that predictably and demonstrably convey pollutants downstream may now fall outside federal oversight, not because their impacts are negligible, but because they fail to satisfy categorical definitions untethered from environmental effect.

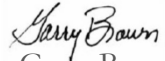
Rather than increasing regulatory certainty or reducing unnecessary burden, the proposed rule risks producing arbitrary and capricious decision-making. Similarly situated dischargers may be treated differently based on geography or infrastructure rather than on pollutant impacts, resulting in uneven regulatory obligations that favor certain private parties without a corresponding reduction in harm to traditionally navigable waters. Such outcomes are inconsistent with the Clean Water Act’s source-control framework and undermine the statute’s objective of protecting downstream waters.

For these reasons, Orange County Coastkeeper urges the agencies to reconsider the proposed definition and to align it more closely with the limited scope of *Sackett*, the hydrologic realities of the

Nation's waters, and the Clean Water Act's fundamental purpose of preventing pollution before it degrades traditionally navigable waters.

Thank you for the opportunity to submit these comments.

Sincerely,

A handwritten signature in black ink that reads "Garry Brown". The signature is written in a cursive, slightly slanted style.

Garry Brown

Founder, President