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Americans for Smart Natural Catastrophe Policy

October 9, 2026

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Office of Wetlands, Oceans, and Watersheds
Office of Water (4504-T)
Environmental Protection Agency
1200 Pennsylvania Avenue NW
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Milton Boyd
Office of the Assistant Secretary of the Army for Civil Works
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Re: Comment on the Supplemental Notice of Proposed Rulemaking, Updated Definition of "Waters of the United States," Docket ID No. EPA-HQ-OW-2025-0322

Dear Ms. Jensen and Mr. Boyd:

On behalf of the SmarterSafer Coalition, thank you for the opportunity to comment on the supplemental notice of proposed rulemaking (SNPRM) regarding the definition of "waters of the United States" (WOTUS).[1] Our December 2025 comments described the role that wetlands, streams, and other natural systems play in reducing flood risk, protecting communities, and lowering long-term costs to taxpayers. Consistent with the agencies' request, we incorporate those comments by reference rather than restate them here.[2]

We share the stated goal of the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) of a clear and durable definition. We believe that goal is best achieved by a rule that follows the Clean Water Act and the Supreme Court's decision in *Sackett v. EPA* as written. Because several elements of the supplemental options extend beyond what *Sackett* requires and would be difficult to implement, we respectfully recommend that the agencies reevaluate them before issuing a final rule.

Following the Clean Water Act and *Sackett*

In *Sackett*, the Court held that the Act covers relatively permanent bodies of water connected to traditional navigable waters, along with wetlands that have a continuous surface connection to those waters.[3] The Court recognized that temporary interruptions in that connection may occur because of phenomena like low tides or dry spells, and it did not set a numerical limit on them.[4] The *Rapanos* plurality, on which *Sackett* relied, also declined to exclude seasonal rivers that flow continuously during some months of the year but not during dry months.[5]

[1] Updated Definition of "Waters of the United States," 91 Fed. Reg. 57,284 (proposed Sept. 9, 2026) (to be codified at 33 C.F.R. pt. 328 & 40 C.F.R. pt. 120).
[2] SmarterSafer Coalition, Comment on the 2025 Proposed "Waters of the United States" Rule, Docket ID No. EPA-HQ-OW-2025-0322 (Dec. 2025); *see* 91 Fed. Reg. at 57,286 (requesting that commenters not resubmit prior comments).
[3] *Sackett v. EPA*, 598 U.S. 651, 671, 678–79 (2023).
[4] *Id.* at 678.
[5] *Rapanos v. United States*, 547 U.S. 715, 732 n.5 (2006) (plurality opinion).

The supplemental options would go further. They would limit relatively permanent waters to perennial waters, allowing only a single dry period of up to 30 days a year. They would also require perennial surface water in a wetland before it could be considered connected, and would cover only the portion of a wetland where that water is present.[6] These requirements do not appear in *Sackett*. A rule that adds limits beyond the decision is likely to face legal challenge, which would work against the durability the agencies seek.

Implementation Challenges

The SNPRM states that the public could determine jurisdiction simply by observation, and for wetlands, "by the naked eye."[7] In practice, confirming that a stream flows every day of the year, or that a wetland holds surface water year-round, requires data across seasons and often across years. A single site visit cannot provide that. The options would also require landowners and field staff to distinguish ordinary from unusual dry periods, track whether a stream dried once or more than once in a year, apply drought severity categories and a five-year drought limit, and draw jurisdictional lines through individual wetlands as water levels change.[8] These determinations are likely to require more expert analysis, not less, and could produce inconsistent results across regions and over time. We recommend that the agencies reevaluate whether they can implement the options as intended.

Scope of the Change and Flood Risk

The agencies expect most intermittent streams and most wetlands now covered as adjacent wetlands would no longer be jurisdictional, with especially significant reductions in the arid West.[9] Many of these streams and wetlands store and slow floodwaters. Losing them could increase disaster damages borne by communities, insurers, and federal taxpayers through disaster assistance and the National Flood Insurance Program. Every dollar invested in pre-disaster mitigation can save up to thirteen dollars in federal spending.[10] We encourage the agencies to assess these flood- and disaster -related costs before finalizing the rule.

Conclusion

The SmarterSafer Coalition supports a clear and durable WOTUS definition that follows the Clean Water Act and *Sackett*. We respectfully urge the agencies to reevaluate the supplemental options in light of the concerns above and, within the bounds of the law, to protect the wetlands and streams that reduce flood and disaster risk for communities and taxpayers. Thank you for the opportunity to share our perspective.

Sincerely,
The SmarterSafer Coalition

[6] 91 Fed. Reg. at 57,288, 57,294, 57,301.
[7] 91 Fed. Reg. at 57,290–91, 57,296.
[8] *Id.* at 57,288, 57,290, 57,294.
[9] 91 Fed. Reg. at 57,297–98.
[10] Sydney Lewis, *Unpacking the ROI of Disaster Preparedness*, U.S. Chamber of Commerce Foundation (Sept. 27, 2024), https://www.uschamberfoundation.org/disasters/unpacking-the-roi-of-disaster-preparedness.

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