NFIB

555 12th St. NW, Ste. 1001
Washington, D.C. 20004

Via www.regulations.gov
and U.S. First Class Mail

April 18, 2025

Hon. Lee M. Zeldin, Administrator, EPA
EPA Docket Center, Water Docket
1200 Pennsylvania Ave. NW, MC 28221T
Washington, DC 20460

Hon. Daniel P. Driscoll
Secretary of the Army
101 Army Pentagon
Washington, DC 20310-0101

Dear Mr. Administrator and Mr. Secretary:

RE: EPA and Army Notice Titled "WOTUS Notice: The Final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations," EPA-HQ-OW-2025-0093, 90 *Fed. Reg.* 13428 (March 24, 2025)

The National Federation of Independent Business (NFIB)[1] submits these comments in response to the Environmental Protection Agency (EPA) and Department of the Army (Army) notice titled "WOTUS Notice: The Final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations" and published in the *Federal Register* of March 24, 2025. The Clean Water Act (CWA), prohibits the "discharge of a pollutant" except as permitted by the Act and defines the phrase to mean "(A) any addition of any pollutant to navigable waters from any point source, [sic: or] (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft."[2] The statute then defines "navigable waters" to mean "the waters of the United States, including the territorial seas."[3] And there the Act stops, leaving agencies, courts, and landowners to fight over the meaning of "waters of the United States," the phrase that determines how far the government can go under the Act in limiting the freedom of landowners. EPA and Army need to end that fight now, properly incorporate into their regulations the U.S. Supreme Court's decision in *Sackett v. EPA* that limits EPA and Army authority to regulate land, and respect the property rights of landowners, including America's small and independent businesses. NFIB recommendations appear below in bold typeface for reader convenience.

---

[1] NFIB is an incorporated nonprofit association representing small and independent businesses. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and ensures that governments of the United States and the fifty States hear the voice of small business as they formulate public policies. NFIB's membership includes landowners affected by implementation of the Clean Water Act.

[2] 33 U.S.C. 1311(a) (prohibition of "discharge of a pollutant"); 33 U.S.C. 1362(12). The Act defines "pollutant" to include not only items commonly thought of as pollution, such as sewage, garbage, and chemical wastes, but also items not commonly thought of as pollution, such as rock, sand, and even heat. 33 U.S.C. 1362(6).

[3] 33 U.S.C. 1362(7). "Navigable waters" appears in various CWA sections. 90 *Fed. Reg.* at 13429, col. 1.

1. *Sackett v. EPA*: Supreme Court Put the "Water" Back in the Clean Water Act

The decades-long feud between landowners seeking to protect their freedom and the value of their land, and EPA and Army seeking for environmental purposes to control use of the land, has ill-served the American people. The meaning of the key CWA term -- "waters of the United States" -- has expanded under Presidents who place high priority on government land regulation and shrunk back under Presidents who place high priority on the freedom of landowners, even though the statutory phrase has remained the same throughout. The radical flip-flopping of the Executive Branch in construing an unchanged statutory phrase as Presidential administrations come and go creates uncertainty for landowners about the applicability to their land of burdensome regulations that slow down and increase the costs of land development, or even stop such development, reducing the economic value of the land. As the U.S. Supreme Court said 160 years ago: "Vacillation is a serious evil."[4]

Most Americans would think that the term "waters of the United States" as used to define the meaning of "navigable waters" must refer to water in some form or another, but surely not to land. But when Mr. and Mrs. Michael and Chantell Sackett of Bonner County, Idaho, sought to put rocks and dirt where needed on their small lot so that they could build a modest home, they found out that the government thought "waters of the United States" included their lot. The Supreme Court described the Government's position as follows:

> According to the EPA, the "wetlands" on the Sacketts' lot are "adjacent to" (in the sense that they are in the same neighborhood as) what it described as an "unnamed tributary" on the other side of a 30-foot road. That tributary feeds into a non-navigable creek, which, in turn, feeds into Priest Lake, an intrastate body of water that the EPA designated as traditionally navigable. To establish a significant nexus, the EPA lumped the Sacketts' lot together with the Kalispell Bay Fen, a large nearby wetland complex that the Agency regarded as "similarly situated." According to the EPA, these properties, taken together, "significantly affect" the ecology of Priest Lake. Therefore, the EPA concluded, the Sacketts had illegally dumped soil and gravel onto "the waters of the United States."[5]

Rejecting the Government's position, the Supreme Court concluded:

> **In sum, we hold that the CWA extends to only those wetlands that are "as a practical matter indistinguishable from waters of the United States." This requires the party asserting jurisdiction over adjacent wetlands to establish "first, that the adjacent [body of water constitutes] . . . 'water[s] of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."[6]**

---

[4] *Gilman v. City of Philadelphia*, 70 U.S. 713, 724 (1865).

[5] *Sackett v. EPA*, 598 U.S. 651, 662-63 (2023) (citation to record omitted).

[6] *Sackett v. EPA*, 598 U.S. 651, 678-79 (2023) (citations omitted).

NFIB recommends that any regulation EPA and Army adopt to define the extent to which any lands (*i.e.*, wetlands) constitute "waters of the United States" incorporate this Supreme Court construction of the CWA in *Sackett v. EPA*. The *Sackett v. EPA* definition of wetlands for purposes of the CWA binds the EPA and Army. Incorporating the Supreme Court's construction will provide a measure of certainty to landowners about when the CWA will apply to their land and will protect landowners from some of the excessive government claims about how far the CWA will stretch to allow EPA and Army to regulate land instead of water under the CWA.

2. National Policy to Take Account of Small Business Needs in Rulemaking

As EPA and Army go forward with rulemaking to incorporate effectively in their rules the decision in *Sackett v. EPA*, they should take special account of the needs of small and independent businesses with respect to their private property. As Congress has declared in statute, "the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity" and "the practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems, and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental and economic welfare legislation[.]"[7]

Small businesses often engage in do-it-yourself compliance by business owners who work hard to keep up with ever-changing regulations and guidance, as small businesses cannot afford the lawyers, scientists, and clerks that larger companies use to decipher complex regulations and implement costly business systems necessary to comply with the regulations. In some cases, a small business owner first hears of a regulation when a government enforcement official knocks on the door or mails a violation notice. **NFIB recommends that EPA and Army revise their CWA rules to (a) give small business owners acting in good faith an opportunity to correct a violation and come into compliance, without fines or enforcement actions, and (b) state that fines or enforcement action against small businesses will occur only in cases of willful, repeated violations.**

3. Legislation to Restore the Historical, Common Sense Meaning of "Navigable Waters"

While conforming EPA and Army regulations to the decision in *Sackett v. EPA* will provide a measure of relief to landowners, the Administration should, to protect the freedom of landowners to make effective economic use of their land, seek to limit the term "navigable waters" as used in the Act its historical, common sense meaning. **The Supreme Court identified as the common meaning of "navigable waters" those waters "navigable in fact," that is, "susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary**

---

[7] Paragraphs 2(a)(4) and (6) of the Regulatory Flexibility Act (Public Law 96-354, September 19, 1980), 5 U.S.C. 601 note.

modes of trade and travel on water."[8] NFIB recommends that, to protect the freedom and property rights of landowners, EPA and Army submit for the consideration of Congress proposed legislation the President judges necessary and expedient to amend the CWA to incorporate that historical, common sense definition of the term "navigable waters."[9]

4. Bright Line Rules Serve Best

The decision in *Sackett v. EPA* makes clear that "the CWA's use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water . . . described in ordinary parlance as 'streams, oceans, rivers, and lakes.'"[10] That "ordinary parlance" provides the bright line rule on the meaning of "waters" under the CWA. In addition, the decision in *Sackett v. EPA* makes clear that, before the EPA and Army can declare a piece of land to be a "wetland" subject to CWA regulation, they bear the burden to establish that there is (1) "adjacent" to the piece of land a "relatively permanent body of water connected to traditional interstate navigable waters" and (2) a "continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins."

To the maximum extent possible, EPA and Army should adopt without change, addition, or subtraction, the exact, clear language that the Supreme Court used rather than giving the Court's words any agency gloss. Agency reinterpretation of the Court's words may just result in decades of more interpretive flip-flopping in the Executive Branch on a new set of words with changes of Administration. In the rare cases in which the EPA and Army must explicate rather than simply use any of the Supreme Court terms in a rulemaking process, they should hew closely to the plain meanings of the words the Court used -- no games like rain puddles qualifying as "relatively permanent" -- and should use practical, bright line rules to explain the Court's words.

NFIB recommends that EPA and Army adopt an easy bright line rule to address the *Sackett v. EPA* "relatively permanent" standard. There are a finite number of relatively permanent bodies of water connected to traditional interstate navigable waters; EPA and Army (assisted by the U.S. Geological Survey) can provide bright-line clarity and certainty to landowners by publishing and keeping up to date a complete catalog of such bodies of water. Landowners would not need to guess about whether the EPA or Army thinks a given body of water is "relatively permanent;" they would need only to consult the official catalog to see if the list contains the body of water of interest to them.

---

[8] *The Daniel Ball*, 77 U.S. 557, 563 (1870).

[9] U.S. Constitution, article II, section 3 (authority of President with respect to Congress to "recommend to their Consideration such Measures as he shall judge necessary and expedient"); see Office of Management and Budget Circular A-19 (revised) (legislative coordination and clearance within Executive Branch).

[10] *Sackett v. EPA*, 598 U.S. 651, 671 (2023) (quoting *Rapanos v. United States*, 547 U.S. 715, 739 (2006) (plurality opinion)).

Ditches are not navigable. Ditches are not waters. Ditches are not navigable waters. **NFIB recommends that EPA and Army adopt another relatively easy bright line rule to exclude ditches from treatment as relatively permanent bodies of water connected to traditional interstate navigable waters and to make clear that the CWA does not regulate digging or filling ditches on land that is not, under the *Sackett v. EPA* standards, a wetland.**[11]

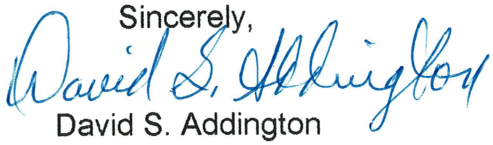
For the wetland requirement of a continuous surface connection, the Court's choice of words provides the bright line rule. "Continuous" means in existence at all times (all day and night, every day and night), and "surface" means "on top" (and not an underground aquifer or buried channel).

The serious penalties that accompany a CWA violation make it even more important to provide clear, easily understood bright-line rules.[12] No-one should face civil or criminal penalties unless the rule allegedly violated provides fair warning of the conduct required or prohibited.[13]

* * * * *

As EPA and Army modify their regulations and enforcement practices to conform to the Supreme Court's decision in *Sackett v. EPA*, they should focus on minimizing burdens on landowners and maximizing respect for the property rights of Americans. Americans can have the unalienable right to the pursuit of happiness that the Declaration of Independence recognized, can have the right to property that the Fifth Amendment to the U.S. Constitution guarantees, and still can have clean water.

Sincerely,



David S. Addington
Executive Vice President and General Counsel

---

[11] In some circumstances, a ditch can convey a pollutant to a water of the United States. But such a ditch is not itself one of the "waters of the United States" or "navigable waters" under the CWA; it is merely a "point source." 33 U.S.C. § 1362(14) ("The term 'point source' means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, ... from which pollutants are or may be discharged.").

[12] *See, e.g.*, 33 CFR § 326.6 (providing for administrative penalties, including accrued per-day penalties for violations) and § 326.5 (referral for civil or criminal enforcement). If the agencies fail to provide easily understood bright lines for conduct in the final rule, the existence of potentially draconian penalties may deter individuals and businesses (especially small businesses that cannot afford expert compliance advice) from exercising property rights that they have a perfect right to exercise but about which they are unsure because of a lack of clarity or precision.

[13] See *United States v. Pennsylvania Industrial Chemical Corporation*, 411 U.S. 655, 674-75 (1973).