WESTERN ENERGY ALLIANCE

January 5, 2026

Submitted via Regulations.gov

Lee Zeldin
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Docket ID No. [EPA–HQ– OW–2025–0322] RIN 2040–AG44
Comments on Proposed Rule for Updated Definition of "Waters of the United States"

Dear Administrator Zeldin:

The Western Energy Alliance (Alliance) is a leader and champion for independent oil and natural gas companies in the western United States. Working with a vibrant membership base for over 50 years, the Alliance stands as a credible leader, advocate, and champion of the industry. Alliance members engage in all aspects of environmentally responsible exploration and development of oil and natural gas. Our expert staff, active committees, and committed board members form a collaborative and welcoming community that is dedicated to a high quality of life, and abundant, affordable energy.

I. The Definition of "Relatively Permanent" Is the Central Legal Defect in the Proposed Rule

The Alliance's comments focus primarily on the proposed definition of "relatively permanent," as that definition drives the remainder of the rule, including whether tributaries and adjacent wetlands are regulated as waters of the United States. If the definition of "relatively permanent" is inconsistent with Supreme Court precedent or unworkable in practice, the remainder of the regulatory framework necessarily fails as well.

The agencies' proposed reliance on a "wet season" concept to define "relatively permanent" waters is not consistent with *Rapanos v. United States*, and is even further removed from *Sackett v. EPA*, which is now the controlling interpretation of the Clean Water Act.

II. The Proposed "Wet Season" Definition Conflicts with Rapanos

In *Rapanos*, the plurality drew a clear distinction between waters that are "relatively permanent" and channels that convey water only occasionally, intermittently, or ephemerally. The plurality consistently described "relatively permanent" waters as those that flow

continuously except during extraordinary circumstances such as drought or dry months—not features that flow only during a wet season.

The plurality explicitly excluded channels through which water flows intermittently or ephemerally and rejected federal jurisdiction over features that merely provide drainage for rainfall. While *Rapanos* acknowledged that "seasonal rivers" may qualify as relatively permanent, that discussion was limited to rivers that maintain continuous flow for extended periods and then dry during dry months. The decision did not endorse regulating streams or tributaries that flow only during a wet season, nor did it suggest that a wet season-based test should define jurisdiction.

The proposed rule departs from this framework by redefining "relatively permanent" to include waters that have standing or flowing water only "at least during the wet season." That approach flips the *Rapanos* analysis on its head by sweeping in features that flow only episodically, rather than focusing on waters that are ordinarily present.

III. Sackett Adopted Rapanos Without Endorsing a Seasonal or Wet Season Expansion

In *Sackett*, the Supreme Court expressly adopted the *Rapanos* plurality's interpretation of "relatively permanent" waters. Notably, however, the Court did not include or rely upon the *Rapanos* discussion of "seasonal rivers," nor did it suggest that waters flowing only seasonally—or during a wet season—should be jurisdictional.

The agencies acknowledge this omission in the proposed rule yet nevertheless rely on the *Rapanos* footnote discussing seasonal rivers to justify a broad wet season-based approach. That reliance is misplaced. The absence of any reference to seasonal waters in *Sackett* can reasonably be read to mean that the Court intentionally declined to extend federal jurisdiction to such features.

More importantly, *Sackett* repeatedly emphasized that the Clean Water Act must be interpreted in a manner that provides clear notice to ordinary landowners, given the statute's severe civil and criminal penalties. The Court warned against interpretations that leave property owners unable to determine whether the Act applies to their land without hiring expert consultants or attorneys.

IV. The Proposed Wet Season Approach Fails Sackett's "Ordinary Landowner" Test

The agencies' proposed approach to identifying "relatively permanent" waters does not meet the clarity and predictability standards articulated in *Sackett*. Determining whether water is present "at least during the wet season" may require remote sensing tools, hydrologic data,

field indicators, or professional judgment. That level of analysis is precisely what *Sackett* sought to move away from.

Although the preamble suggests that landowners may often rely on visual observations to determine whether a feature is relatively permanent, the broader discussion makes clear that such observations are frequently insufficient under the proposed framework. This internal inconsistency undermines the agencies' claim that the rule provides regulatory certainty.

By contrast, EPA itself acknowledges that if members of the public observe that waters dry up on a regular basis outside of drought conditions, they would know those waters are not jurisdictional. The Alliance agrees that this observation-based approach reflects common sense and aligns with *Sackett*. Unfortunately, the proposed wet season framework moves away from that standard rather than embracing it.

V. EPA Should Adopt a Perennial-Only Definition of "Relatively Permanent"

The Alliance strongly supports the alternative approach discussed in the proposed rule that would define "relatively permanent" waters as **perennial waters only**. This approach is the most consistent with *Sackett*, the plain meaning of "waters," and the *Rapanos* plurality's focus on continuously present geographic features.

Limiting "relatively permanent" waters to perennial features would allow landowners to determine jurisdiction largely through direct observation and ordinary experience, without reliance on consultants or technical tools. While perennial streams are less common in the arid West, that reality reflects hydrology—not a flaw in the statute—and cannot justify expanding federal jurisdiction beyond its lawful bounds.

VI. Flow Duration as a Secondary Alternative—Without Regional Arbitrary Lines

As a secondary alternative, the Alliance supports defining "relatively permanent" using a clear flow-duration threshold, as discussed in the proposed rule. However, the Alliance opposes dividing the country into eastern and western regions with different flow-duration thresholds. Waters of the United States should be defined consistently nationwide. The fact that fewer waters meet the definition in the West does not justify altering the definition itself.

In Rapanos, a 290-day, continuously flowing stream is described as being representative of relatively permanent that is flowing except during drought. A bright-line approach based on a minimum duration of flow would provide transparency and regulatory certainty. As considered in the proposed rule, relatively permanent should be defined as perennial or

flowing at least 270 days/year, which is generally aligned with the Rapanos example of a 290-day continuously flowing stream being considered relatively permanent.

VII. The Wet Season Concept Compounds Complexity for Wetlands and Tributaries

Because the definition of "relatively permanent" drives jurisdiction over tributaries and adjacent wetlands, the flaws in the wet season concept extend throughout the rule. Applying the wet season standard to continuous surface connection determinations introduces further uncertainty and moves away from *Sackett*'s requirement that jurisdictional waters and wetlands be readily identifiable.

The agencies' reliance on modified National Wetlands Inventory concepts and extended hydrologic analysis underscores that the proposed framework remains complex, subjective, and difficult for ordinary landowners to apply.

Conclusion

For these reasons, the Alliance urges EPA to revise the proposed rule to define "waters of the United States" as **perennial waters**, consistent with *Sackett*, *Rapanos*, due process principles, and the need for clear, administrable standards.

Sincerely,

Melissa Simpson
President
Western Energy Alliance