Texas Public POLICY FOUNDATION

January 5, 2026

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Administrator Lee Zeldin
Assistant Secretary of the Army Adam Telle
EPA Docket Center, Water Docket, Mail Code 28221T
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

RE: Docket Number EPA-HQ-OW-2025-0322

Dear Administrator Zeldin and Assistant Secretary Telle:

INTRODUCTION

The Texas Public Policy Foundation ("TPPF") submits the following comments on the Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers' ("Army Corps") proposed rule titled Updated Definition of "Waters of the United States," 90 Fed. Reg. 54,498 (Nov. 20, 2025) ("Proposed Rule"). In general, TPPF supports this Proposed Rule's measures that right-size federal jurisdiction over the nation's waters. The Proposed Rule correctly recognizes that federal jurisdiction over waters arises under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and on that basis must be limited to navigable waters that are capable of being used as a highway for interstate or foreign commerce. Accordingly, the Proposed Rule adopts the Supreme Court's requirement that jurisdictional waters be a navigable water or be a relatively permanent, standing or continuously flowing body of water with a continuous surface connection to waters of the United States. The Proposed Rule also provides clearer exemptions for prior converted cropland and ditches.

However, as described herein, the Proposed Rule's treatment of "wet season" waters unfortunately encompasses waters that cannot be used as a highway for interstate or foreign commerce. Including these geographic features as jurisdictional waters exceeds the federal government's Commerce Clause power and conflicts with the Supreme Court's decisions in *Rapanos v. United States*, 547 U.S. 715 (2006), and *Sackett v. EPA*, 598 U.S. 651 (2023). The Proposed Rule also adopts an improperly

broad "past, present, or future use" test that likewise exceeds the federal government's Commerce Clause powers. EPA and the Army Corps must narrow these two jurisdictional bases to comply with the Commerce Clause. Otherwise, the well-known problems that arise when the agencies assert overbroad Clean Water Act jurisdiction will recur.

INTEREST OF COMMENTER

TPPF is a 501(c)(3) nonprofit, non-partisan research institute headquartered in Austin, Texas. Our mission is to promote and defend liberty, personal responsibility, and free enterprise in Texas and the nation. Founded in 1989, TPPF shapes public policy debates by conducting and publishing academically sound research and providing outreach to policymakers. TPPF is a significant voice for conservative, free-market solutions on various issues, including environmental policy. TPPF also serves as a public-interest law firm, representing clients across the country in constitutional and other federal law cases. In that role, TPPF successfully litigated a Clean Water Act case against the Army Corps under the now-repudiated significant nexus test. *See Orchard Hill Bldg. Co. v. U.S. Army Corps of Eng'rs*, 893 F.3d 1017 (7th Cir. 2018). TPPF is funded exclusively by private donations, entirely eschewing government funding.

ARGUMENT

I. EPA and the Army Corps Correctly Recognize Federal Authority Over Waterways Must Respect the Commerce Clause's Limits

EPA and the Army Corps acknowledge that Congress's power to regulate navigable waters arises from the Commerce Clause. 90 Fed. Reg. at 52,501 (citing *Solid Waste Agency of Northern Cook Cnty. v. Army Corps of Eng'rs,* 531 U.S. 159, 168 & n.3, 172, 173–174 (2001) [hereafter "*SWANCC*"]). When discussing the commerce power, "[w]e start with first principles." *United States v. Lopez*, 514 U.S. 549, 552 (1995). The federal government is one of limited and enumerated powers. *Id*. Unlike the states, which have general police powers, the federal government must point to an explicit grant of authority from the Constitution when it chooses to regulate. *Bond v. United States*, 572 U.S. 844, 854 (2014). The Ratifiers of the Constitution believed this limitation on federal power was necessary to "ensure protection of our fundamental liberties." *Lopez*, 514 U.S. at 552.

To meet this burden, Congress often places a "jurisdictional element" in statutes. *Id.* at 562; *see Smith v. U.S. Dep't of the Treasury*, 761 F. Supp. 3d 952, 967 (E.D. Tex. 2025); *Terkel v. CDC*, 521 F. Supp. 3d 662, 673 (E.D. Tex. 2021). For example, a federal statute regulating firearms may limit its scope to those firearms

"transported in interstate commerce." *See Terkel*, 521 F. Supp. 3d at 673. This jurisdictional element requires a "'through case-by-case inquiry,' that all applications of a regulation 'have an explicit connection with or effect on interstate commerce'" and therefore pass constitutional muster. *Id.* (quoting *Lopez*, 514 U.S. at 561–62). In such circumstances, "the Government must prove [the jurisdictional element] as an essential element of the offense." *United States v. Bass*, 404 U.S. 336, 339 (1971).

The term of art "waters of the United States" functions as the Clean Water Act's ("CWA") jurisdictional element. *See* 33 U.S.C. § 1362(7); *Sackett v. EPA*, 598 U.S. 651, 699 (2023) (Thomas, J., concurring) ("the term "of the United States" do[es] the independent work of requiring that such commerce be carried on with other States or foreign countries." (quotations omitted)). Congress's authority to regulate rivers and streams is not "expressly granted in the Constitution, but is a power incidental to the express 'power to regulate commerce with foreign nations, and among the several States and with the Indian tribes'" *Leovy v. United States*, 177 U.S. 621, 632 (1900).

At the time of the CWA's enactment in 1972, "waters of the United States" was a recognized legal term with inherent ties to the Commerce Clause. More than 100 years prior, the Supreme Court held that rivers constitute *"waters of the United States* within the meaning of the acts of Congress" only when they are "navigable in fact." *Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870) (emphasis added). A river is "navigable in fact," the Court explained, only when it is a "contained highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." *Id*. This narrow definition was necessary, the Court suggested, because Congress's authority in this area "is limited to commerce 'among the several States,' with foreign nations, and with the Indian tribes." *Id*. at 564–65. Indeed, if "the river is not of itself a highway for commerce with other States or foreign countries, or does not form such highway by its connection with other waters, and is only navigable between different places within the State, then it is not a navigable water of the United States, but only a navigable water of the State." *Montello*, 78 U.S. (11 Wall.) 411, 415 (1871).

The Court later expounded upon this principle, holding that if "the mere capacity to pass in a boat of any size, however small, from one stream or rivulet to another . . . is sufficient to constitute a navigable water of the United States . . . [it] would extend the paramount jurisdiction of the United States over all the flowing waters in the States." *Leovy*, 177 U.S. at 633. Instead, waters of the United States must be read with the scope of the commerce power in mind. Federal jurisdiction only applies when there is evidence showing that the waters can be navigated to such an extent to be "generally and commonly useful to some purpose of trade or agriculture." *Id.* at 634.

Leovy interpreted the then-recently enacted Rivers and Harbors Act § 10, now codified at 33 U.S.C. § 403, which uses the term "water of the United States." In subsequent years, the Court expanded the scope of the Act. In *Econ. Light & Power Co. v. United States*, 256 U.S. 113, 118 (1921), for example, the Court held that the Act reaches rivers that are navigable in their "natural state," even if a manmade obstruction has rendered them presently non-navigable. And in *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 409 (1940), the Court hinted at possible further expansion of the Act to include rivers that have the capacity for navigation with "reasonable improvements." But even these cases made it clear that *Daniel Ball* remains the test for navigability—and thus for federal jurisdiction over waters of the United States. *Sackett*, 598 U.S. at 696 (Thomas, J., concurring).

The *Daniel Ball* test has survived to this day. The term navigable waters "remained tethered to Congress' traditional channels-of-commerce authority—not to the broader conceptions of the commerce authority adopted by the Court." *Id.* at 697. Thus, it would be inappropriate to apply the substantial effects test to expand the scope of waters of the United States. *Id.* at 701, 705–06 (an interpretation that expands the substantial effects test to waters of the United States "cannot be right"); c*f. United States v. Rife*, 33 F.4th 838, 842 (6th Cir. 2022) (noting that the Supreme Court has not extended the substantial effects test to Congress's power over foreign commerce); *Williams v. Homeland Ins. Co.*, 18 F.4th 806, 818 (5th Cir. 2021) (Ho, J., concurring) ("we decide every case faithful to the text and original understanding of the Constitution, to the maximum extent permitted by a faithful reading of binding precedent" (citation omitted)).

Although the CWA does not regulate waters for navigability per se, it was understood at the time of its enactment as being "limited by Congress' navigation authority." *Sackett*, 598 U.S. at 700 (Thomas, J., concurring) (citing Permits for Activities in Navigable Waters or Ocean Waters, 39 Fed. Reg. 12,115 (Apr. 3, 1974)). EPA tried to expand its jurisdiction to regulate any pollution that may affect interstate commerce. *Id.* at 701. But the Court rejected that approach in *SWANCC*. *Id.* at 703 (citing *SWANCC*, 531 U.S. at 172).

This narrower reading does not hollow out the CWA's protections. Dredge and fill material, while defined at 33 U.S.C. § 1362(6) as a pollutant, obviously can interfere with navigation. It is not a stretch to say that other pollutants can interfere with navigation as well. It would be difficult for a boat to navigate a river that is on fire. *See* Jonathan H. Adler, *Fables of the Cuyahoga*, 90 Fordham Envt'l L.J. 89 (2003) (describing the Cuyahoga River fire in 1969). The key here is that the regulations must have a connection to Congress's power to regulate navigability. Accordingly, the Proposed Rule generally makes several improvements that confine EPA and the Army Corps's jurisdiction to waters that Congress may regulate under the Commerce

Clause. But those improvements do not go far enough for the rule to pass constitutional muster.

II. Two Aspects of the Proposed Rule Exceed the Commerce Clause's Limits

With this framework in mind, the Proposed Rule stretches beyond traditionally navigable waters to impermissibly reach waters that are merely standing or continuously flowing in the "wet season" and any water with a past, present, or future capability of use in interstate or foreign commerce. The final rule must narrow these categories to avoid significant constitutional concerns. *See SWANCC*, 531 U.S. at 174. This can be achieved by changing the Proposed Rule in two specific ways: (1) adopting *Rapanos*'s 290-day seasonality framework for permanent waters, and (2) limiting jurisdiction to presently navigable waters except in the limited circumstances dictated by a certain Supreme Court precedent discussed below.

A. The Overbroad "Wet Season" Definition Impermissibly Sweeps In Non-Navigable Waters

In *Sackett v. EPA* the Supreme Court held that the CWA "encompasses only those relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes." 598 U.S. at 671 (quoting *Rapanos v. United States*, 547 U.S. 715, 739 (2006)) (cleaned up). *Sackett* largely relied upon Justice Scalia's plurality opinion in *Rapanos* and rejected the "significant nexus" standard Justice Kennedy promoted in his concurrence. *Id.* But the Court in *Sackett* did not provide a precise definition for "relatively permanent" waters. This left some ambiguity as to how the CWA applies to waters that flow seasonally.

Although *Sackett* did not consider seasonality, *Rapanos* did. Justice Scalia explained that "relatively permanent" waters are "continuously present, fixed bodies of water." *Rapanos*, 547 U.S. at 732. This does not "exclude streams, rivers, or lakes that might dry up in *extraordinary circumstances*, such as drought." *Id.* at n.5 (emphasis added). But the "relatively permanent" requirement does exclude intermittent and ephemeral streams. *Id.* What's left in the middle are seasonal rivers: those that "contain continuous flow during some months of the year but no flow during dry months." *Id.* Justice Scalia's opinion did not create a bright line rule for seasonal rivers. But he did opine that navigable rivers with continuously flow for 290 days per year are waters of the United States. *Id.*

The Proposed Rule treats waterways that continuously flow during the wet season as waters of the United States. 90 Fed. Reg. 52,517–18. The Proposed Rule

explains the "wet season" includes the "extended periods of predictable, continuous surface hydrology occurring in the same geographic feature year after year in response to the wet season, such as when average monthly precipitation exceeds average monthly evapotranspiration." *Id.* at 52,518.

Depending on the area's climate, this definition for "wet season" may encompass streams that are dry for a majority of the year. Such a reading defies *Sackett* and *Rapanos*'s requirement that the flow be "relatively permanent." *See Sackett*, 598 U.S. at 671; *Rapanos*, 547 U.S. at 739. Indeed, such a definition may allow EPA and the Army Corps to regulate washes and other drainage systems that carry away water in response to rain falling in the wet season. Asserting federal jurisdiction over these drainages has vexed farmers and landowners for decades—especially in the arid West. *See* Courtney Briggs, WOTUS and the American Farmer, American Farm Bureau (Dec. 18, 2025), https://www.fb.org/market-intel/wotus-and-the-american-farmer-understanding-the-regulatory-reach.

Rapanos provides a clear example of seasonal rivers that meet the definition of waters of the United States: rivers that continuously flow for 290 or more days per year. *Rapanos*, 547 U.S. at 732 n.5. If EPA and the Army Corps wish to extend jurisdictional seasonal rivers to those with a flow of less than 290 days per year, it must show that those waters are usable as a "highway over which commerce is or may be carried on with other States or foreign countries." *Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870). It is doubtful that a river flowing during a wet season that lasts less than a majority of the year constitutes a true highway of interstate or foreign commerce. *Rapanos* explained that waters remain jurisdictional even if they dry up during extraordinary—not seasonal—dry periods. *Rapanos*, 547 U.S. at 732 n.5. As it finalizes the Proposed Rule, EPA and the Army Corps should consider amending its "wet season" definition to (1) presumptively include waters that flow 290 or more days per year; (2) exclude waters that do not flow for a majority of the year; and (3) evaluate waters that flow between 183 and 290 days based on their use as a highway for interstate and foreign commerce. In crafting the final rule, EPA and the Army Corps must ensure they eliminate any loopholes that future administrations may exploit to improperly expand federal jurisdiction over non-navigable waters.

B. The Past, Present, and Future Use Test Likewise Impermissibly Covers Non-Navigable Waters

The Proposed Rule unfortunately maintains 33 C.F.R. § 328.3(a)(1)(i)'s test for navigability. That test covers waters with any past, present, or future use in interstate or foreign commerce. 90 Fed. Reg. at 52,545 (defining waters of the United States as waters which are "[c]urrently used, or were used in the past, or may be

susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide"). This "past, present, or future use" test extends beyond Congress's power over navigable waters.

To begin, the CWA uses the term "navigable waters" in the present tense. *See, e.g.*, 33 U.S.C. § 1312(a). The past, present, or future use test only exists in EPA's regulations. Neither courts nor agencies may add words to the statutory text. *See Alabama v. North Carolina*, 560 U.S. 330, 351–52 (2010) ("We do not—we cannot—add provisions to a federal statute."). True, the Dictionary Act provides that, unless the context indicates otherwise, "words used in the present tense include the future as well as the present." 1 U.S.C. § 1; *see Carr v. United States*, 560 U.S. 438, 448 (2010). The Supreme Court has recognized that future use extends to those "waters that could be made navigable with reasonable and feasible improvement." *Sackett v. EPA*, 598 U.S. 651, 696 (2023) (Thomas, J., concurring) (citing *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377, 408–09 (1940)). *Appalachian Electric* represents the broadest view of navigability based upon future improvements by refraining from requiring such future projects "be actually completed or even authorized." *Appalachian Elec. Power Co.*, 311 U.S. at 408. But at the same time the Court limited future navigability to waters where it is "feasible" that "reasonable improvements" would lead to interstate use. *Id.* at 409.

These limits reinforce the project must not only be "capable of being done" but that the project is at least "reasonable" or "likely" to be completed. *See Feasible*, Merriam-Webster's Dictionary, https://www.merriam-webster.com/dictionary/feasible (last visited Dec. 18, 2025) (defining "feasible" as "capable of being done or carried out" and "reasonable, likely"). Otherwise, any isthmus or other flat path between two waterways could be "susceptible" for use as a canal route. After all, the word "susceptible" means merely being "capable of submitting to an action, process, or operation." *Susceptible*, Merriam-Webster's Dictionary, https://www.merriam-webster.com/dictionary/susceptible (last visited Dec. 18, 2025). Such a broad reading would be constitutionally impermissible under the Commerce Clause.

Implementing the Court's command to only include waters where reasonable and feasible future improvements could yield a navigable waterway for interstate commerce requires EPA and the Army Corps to devise a narrower test to determine whether a future navigable water is properly within the CWA's jurisdiction. TPPF proposes amending 33 C.F.R. § 328.3(a)(1)(i) by striking "may be susceptible to use" and inserting "where the federal government has proposed a specific project to improve the waters for navigability." This standard would require a concrete intention to create or improve a waterway for future use in interstate commerce. But it would not require the project "be actually completed or even authorized." *Appalachian Elec. Power Co.*, 311 U.S. at 408.

The Dictionary Act's inclusion of the future tense cuts against including waters that were navigable in the past but can no longer support navigation. *Carr*, 560 U.S. at 448 ("By implication, then, the Dictionary Act instructs that the present tense generally does not include the past."). In *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921), the Supreme Court weighed the jurisdictional consequences of a previously navigable river losing its navigability. Some courts have read *Economy Light & Power Co.* as establishing a "once navigable, always navigable" rule. *See, e.g.*, *United States v. Abbott*, 110 F.4th 700, 709 (5th Cir. 2024). This reading stretches *Economy Light & Power Co.* beyond its underlying facts. As the Court put it:

> Since about the year 1835 a number of dams have been built in the Desplaines, without authority from the United States, and one or more of them still remain; besides, a considerable number of bridges of various kinds span the river. The fact, however, that *artificial obstructions* exist capable of being abated by due exercise of the public authority, does not prevent the stream from being regarded as navigable in law, if, supposing them to be abated, it be navigable in fact in its natural state. The authority of Congress to prohibit added obstructions is not taken away by the fact that it has omitted to take action in previous cases.

Economy Light & Power, 256 U.S. at 118 (emphasis added). *Economy Light & Power Co.* thus stands for the limited proposition that a naturally navigable river does not cease to be a jurisdictional water due to certain artificial obstructions that can be removed by exercise of public authority. EPA and the Army Corps must limit *Economy Light and Power* to its facts, because reading *Economy Light & Power Co.* as establishing a general "once navigable, always navigable" rule ignores the Rivers and Harbors Act and CWA's omission of *formerly* navigable waters of the United States. As explained above, those laws regulate navigable waters of the United States in the present tense. Agencies may not add words to a statute. *Cf. Alabama*, 560 U.S. at 351–52.

Indeed, a "once navigable, always navigable" rule would lead to absurd (and likely unconstitutional) results. Navigability cannot be established forever simply because navigation was *ever* possible at *any* time in history. For example, the geologic record shows that most of Texas was once covered by seas. C. Reid Ferring, The Geology of Texas 4 (2007) (available at: https://custom.cengage.com/regional_geology.bak/data/Texas.pdf). Under a "once navigable, always navigable" rule, any structure built anywhere in Texas could conceivably be deemed an obstruction to navigation subject to federal regulation. That certainly was not the intent of Congress in 1899 or 1972. As the Supreme Court has made clear, "Congress does not casually authorize administrative agencies to

interpret a statute to push the limit of congressional authority." *SWANCC*, 531 U.S. 159, 172—73 (2001).

Therefore, EPA and the Army Corps's "past, present, or future use" test embodied in the Proposed Rule likely exceeds Congress's power over navigable waters. Waters that are presently navigable and used for interstate and foreign commerce fall squarely within the Commerce Clause. These comments provide EPA and the Army Corps with specific ways by which they may devise standards for past and future navigable waters that respect the limits on Congress's power to regulate navigable waters.

CONCLUSION

The Proposed Rule generally right-sizes federal jurisdiction over the nation's waters and for the most part properly implements the Supreme Court's decisions in *Rapanos* and *Sackett*. However, the Proposed Rule's treatment of seasonal rivers and waters that are not presently navigable extends jurisdiction beyond the Commerce Clause's limits and invites future administrations to improperly expand federal jurisdiction. EPA and the Army Corps must be mindful of the limits on Congress's power over navigable waters and appropriately tailor the final rule to cover only waters that are used as highways for interstate or foreign commerce, as set forth in these Comments.

Dated: January 5, 2026,

Respectfully submitted,

ROBERT HENNEKE
CHANCE WELDON
THEODORE HADZI-ANTICH
ERIC HEIGIS

901 Congress Avenue
Austin, Texas 78701
Telephone: (512) 472-2700
Facsimile: (512) 472-2728

By: 

ERIC HEIGIS
eheigis@texaspolicy.com