

**Comments of
American Council of Engineering Companies**

**Docket No. EPA-HQ-OW-2025-0322
Department of The Army, Corps of Engineers
U.S. Environmental Protection Agency
Updated Definition of “Waters of the United States”**

Federal Register, November 20, 2025

Background

The American Council of Engineering Companies (ACEC) is the business voice of America’s engineering industry with more than 5,500 member firms representing more than 640,000 engineers, architects, and land surveyors throughout the United States. ACEC member firms are engaged in a wide range of engineering works that advance the nation’s economy and enhance and safeguard America’s quality of life through transportation, energy, water infrastructure, buildings, and other projects in the built environment. These works provide access to clean drinking water, safe and efficient transportation systems, reliable energy, and projects that protect the environment.

ACEC’s members are routinely involved in implementation of the Clean Water Act permitting program and have direct experience in the field working on wetland delineations and assisting with jurisdictional determinations on behalf of public and private sector clients. As such, ACEC’s members have faced practical challenges resulting from inconsistent regulatory interpretations that have delayed and complicated project approvals.

ACEC has reviewed the revisions to the definition of “Waters of the United States” (WOTUS) proposed by the Army Corps of Engineers and U.S. Environmental Protection Agency (EPA) and is pleased to provide the following comments.

ACEC Comments

ACEC fully supports the Clean Water Act’s objectives to restore and maintain the integrity of the nation’s water and to achieve quality levels that are fishable and swimmable by controlling the discharge of pollutants into jurisdictional waters. At the same time, ACEC members have experienced firsthand the regulatory confusion created by changing definitions and implementation of the Act over succeeding administrations. For this reason, ACEC supported the 2020 Navigable Waters Protection Rule, which successfully clarified many of the uncertainties faced by ACEC member firms with the Corps’ and EPA’s implementation of prior iterations of WOTUS. ACEC continues to support a comprehensive approach to defining WOTUS with the goal of achieving consistent standards that can be readily applied by practitioners in the field.

The draft rule is a welcome step in improving practical implementation of WOTUS. ACEC supports many aspects of the draft rule, including clearer exemptions for ditches, groundwater, waste management systems, and other non-jurisdictional waters consistent with the U.S. Supreme Court's *Sackett* decision. The proposed rule could be even stronger. ACEC recommends that the Corps and EPA provide additional clarity around the new definitions of "relatively permanent" waters and "continuous surface connection," as outlined below.

Exemptions

Ditches: Continued ambiguity around the jurisdictional status of ditches under competing WOTUS definitions has caused practical challenges for ACEC members and their clients. ACEC supports the proposed rule's effort to clearly exempt all ditches, including roadside ditches, that are constructed entirely on dry land. Agricultural ditches, roadside ditches, and stormwater conveyances are constructed features designed to manage surface water and should generally not be considered tributaries. These features are ubiquitous in developed and agricultural landscapes and treating them as non-jurisdictional avoids maintenance restrictions on roadway and utility corridor management, liability for property owners conducting routine property management, and burdensome permits for cleaning, vegetation management, and sediment removal from constructed drainage features. For example, without clear exemptions for ditches, member firms have experienced challenges with the regulation of parallel and perpendicular roadway drainage ditches, requiring stream mitigation for relocating a drainage ditch as part of a road widening project. Jurisdictional ambiguity around ditches has also affected projects to rehabilitate irrigation ditches, increasing costs and administration time for routine maintenance.

Waste Treatment Systems: ACEC supports the updated definition of "waste treatment systems" to incorporate all components of a waste treatment system, including lagoons and treatment ponds. This comprehensive exemption will provide greater certainty for drinking water and clean water utilities, and it will also be critical to ensure that this definition includes water recycling structures.

Stormwater management: ACEC also seeks clear regulatory exemptions for stormwater control features, similar to the 2020 Navigable Waters Protection Rule. Member firms have relayed issues with unmaintained stormwater management facilities, including unmaintained ditches associated with stormwater management, being regulated as a 'jurisdictional feature' and delaying permits for transportation improvement projects. In one state, firms regularly have to produce a NPDES/NOI permit number and frequently have to go through a lengthy process in order for the Army Corps to not regulate stormwater management features. This process needlessly delays projects and creates additional challenges, particularly for older stormwater management facilities for which an NPDES permit is difficult to find.

Definition of Tributary

Under the proposed definition of "tributary," the agencies are seeking comment on whether channelized non-jurisdictional features, such as culverts, should sever jurisdiction for upstream tributaries. ACEC agrees with the approach taken in the proposed rule. We believe that such features should not sever jurisdiction if they contribute surface water flow to downstream

jurisdictional waters. Because these waters maintain a surface water connection between upstream tributaries and downstream jurisdictional waters, maintaining jurisdictional status for waters connected through culverts, dams, tunnels, or other similar features is consistent with the Supreme Court's *Sackett* decision.

Definition of Relatively Permanent

ACEC recommends that a final rule provide greater clarity in the definition of “relatively permanent” and the introduction of an undefined “wet season” for determining jurisdiction. ACEC is concerned that without clear regulatory language and guidance, relying on an ambiguous “wet season” could introduce the same kind of uncertainty that ACEC members and their clients have confronted in the “case-by-case” approach to jurisdictional determinations that animated prior interpretations of WOTUS. Under the proposed rule, waters must flow “at least during the wet season” to be considered “relatively permanent.” However, the proposed rule does not specify clear thresholds for what constitutes a wet season, nor does it specify the quantities or duration of flow required for relatively permanent waters during the wet season. The proposed definition also fails to address variability in flow from year to year, particularly as it relates to drought or other periods of low flow. While the proposed rule takes many positive steps to provide regulated entities and their engineering representatives certainty in the implementation of the Clean Water Act permitting program, further clarity is needed concerning the wet season considerations to provide for consistency in jurisdictional status from year to year. Clear thresholds enable firms and their clients to conduct preliminary desktop screenings, assess project risks early in the development process, and avoid investing in site control, engineering, and permitting for projects that will face protracted jurisdictional disputes.

To address these concerns, ACEC recommends that the final rule specify the timing and duration of the wet season in a given location that allows for the agencies to account for regional and geographical differences. Approaches that would help practitioners include:

- Referencing more than one acceptable data source for determining the wet season without relying on one proprietary or specialized method;
- Allowing for site-specific indicators, including an ordinary high-water mark, vegetation and hydric soil indicators, and repeatable seasonal observation;
- Providing for a quantifiable, regionally adaptable minimum duration requirement for “relatively permanent” flow.
- Allowing state-developed stream assessment methodologies when applicable.
- Developing regional supplements to the Ordinary High Water Mark Manual that address seasonality and geomorphological differences that occur in different regions in order to identify the indicators on a tributary for practitioners in the field to determine “relatively permanent flow.”

Conclusion

The uncertainty around the prior interpretations of the WOTUS definition, including following the *Sackett* ruling has led to confusion and practical difficulties for ACEC members working in the field. As the agencies finalize the definition of WOTUS, the adopted rule should provide clear, consistent, and predictable standards for determining Clean Water Act jurisdiction.

If you have questions regarding ACEC's comments, please contact Jordan Baugh, Vice President for Water and Environment, at jbaugh@acec.org.