



October 9, 2026

Ms. Stacey Jensen
Oceans, Wetlands and Communities Division
Office of Water (4504-T)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
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Mr. Milton Boyd
Office of the Assistant Secretary of the Army for
Civil Works
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**Re: Updated Definition of “Waters of the United States” Proposed Rule, Docket No. Docket ID No.
EPA-HQ-OW-2025--0322**

Dear Ms. Jensen and Mr. Boyd:

On behalf of the Society of Wetland Scientists (SWS) and representing more than 2,500 wetland and aquatic science professionals, we respectfully submit the following comments in response to the solicitation published by the U.S. Environmental Protection Agency and the U.S. Department of the Army (hereafter, “the agencies”) in the *Federal Register* on September 9, 2026, regarding the proposed rule “Updated Definition of ‘Waters of the United States.’”

SWS is a non-partisan scientific organization whose members study, manage, and restore wetlands. We are a science-based non-profit organization with a deep commitment to independent objectivity and peer review of ecological science, policy, and management practices. Our members have expertise in ecology, hydrology, biogeochemistry, ecological restoration, and biological sciences. They work across the private sector, academia, and tribal, state, local, county and federal agencies, supporting research, education, restoration, and sustainable management of wetland, aquatic, and ecological resources. Our members support the development and use of the best available applied science to sustainably manage and restore our freshwater, estuarine, coastal, and ocean resources for the benefit of the U.S. economy, environment, and public health and safety. SWS holds multiple scientific meetings each year focused on wetlands throughout the world and publishes the most important peer-reviewed journal dealing with wetlands (*Wetlands*) in the world.

SWS previously provided comment on the November 20, 2025, Notice of Proposed Rulemaking (NPRM) (EPA-HQ-OW-2025-0322-0424), noting that it strayed from the letter and intent of the Clean Water Act (CWA) in several important ways. Here, we note that this additional supplement to the proposed rule strays further still. In attempting to create a durable rule, the agencies have relied on an overly broad and incorrect interpretation of the U.S. Supreme Court decision, *Sackett v EPA*, creating a rule that cannot possibly satisfy any conceivable plain-language definition and understanding of the goals of the CWA. The result is a proposed rule that is legally deficient and scientifically indefensible.

Below, SWS provides additional comments on the questions the agencies posed in the supplemental notice.

1) The agencies solicit comment on defining “relatively permanent”.

It appears that the administration is attempting to develop bright-line rules to implement the *Sackett* ruling, which states that "the CWA does not define the EPA's jurisdiction based on ecological importance." However, the CWA *does* focus on water quality and the need for water quality regulations to protect the ecological functions that provide clean water for all Americans, regardless of whether those ecological functions are deemed to be important. *Sackett* fixed the outer bound of "waters of the United States" (WOTUS); it did not dictate that "relatively permanent" means perennial. Within the discretion the Court left, CWA § 101(a) provides the statute's own instruction for determining jurisdiction. CWA § 101(a) sets the objective: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." This section directly relates to an aquatic system's capacity to provide the ecological functions necessary to maintain chemical, physical, and biological integrity. Subsection 101(a)(2) sets the interim goal of water quality that "provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." This subsection directly relates to an aquatic system's capacity to provide ecological services for fishing, gathering, hunting, and recreating (fishable and swimmable for short). Maintaining a system's integrity/capacity requires a minimum level of water quality and hydrologic conditions.

The CWA is fundamentally a water-quality statute. Congress recognized that pollution, hydrology, and aquatic ecosystems operate through interconnected watersheds rather than according to artificial jurisdictional boundaries. A regulatory definition that excludes large portions of tributary networks and associated wetlands from federal jurisdiction risks undermining this statutory objective. Seasonally flowing waters may still transport pollutants into downstream rivers, lakes, reservoirs, and other jurisdictional waters. Wetlands that are temporarily flooded may still store floodwaters, retain sediment and nutrients, support groundwater processes, and substantially influence downstream water quality. The fact that these functions may occur seasonally does not make them insignificant.

2) The agencies solicit comment on the definition of “perennial”.

The agencies justify the perennial option as providing "transparency and regulatory certainty" and a "bright line," and concede the 30-day threshold is "not based on a specific, nationally applicable scientific standard." They defend that bright line on administrability grounds alone. However, neither *Sackett* nor *Rapanos* (*Rapanos v. United States*, 547 U.S. 715 (2006)) establishes a 30-day threshold for determining whether a stream is relatively permanent. The Court recognized that “efficiency” is not Congress’s primary consideration in the CWA. See *National Association of Manufacturers v. Department of Defense*, 138 S. Ct. 617 (2018). There is copious evidence that aquatic functions and services support CWA Section 101(a); however, the proposed rule fundamentally ignores the integrated coupling between perennial and intermittent aquatic systems. Wetlands and intermittent streams comprise a suite of biophysical structural components that interact in various ways to maintain ecological functions (Odum 1962, Brinson 1993, Brinson et al. 1995, Sullivan et al. 2025). The agencies’ dismissal of the facts directly conflicts with the claim of jurisdictional rationality and does not meet the intent of the CWA.

Wetland habitats do not provide functions and services separated in time and space. They are the seasonal components of systems whose perennial reaches remain jurisdictional. **Removing the seasonal components does not cleanly shrink the regulated universe; it degrades the integrity of waters that remain regulated.** An agency must consider the important aspects of the problem and the consequences of its choice.

The agencies concede that most adjacent wetlands would no longer be regulated but provide no analysis of the costs of maintaining the chemical, physical, and biological integrity of our nation's waters. For example, permanently flooded systems are less efficient per unit area for nitrogen cycling and nutrient retention than seasonally flooded ones; the agencies' proposed perennial test removes the high-performing class of seasonal hydrological systems, e.g., intermittent streams and wetlands. The functions and services most needed for protecting our nation's water quality and quantity are precisely those delivered by wetlands that are *seasonally* rather than *permanently* inundated, the class the supplemental option removes. The perennial test does not trim marginal cases; it targets the hydrologic regime that produces several of the functions necessary to maintain CWA § 101(a). Such an approach is inconsistent with *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), which expressly rejected a "frequently flooded" requirement, a standard that would include more waters than the agencies' proposal.

"Relatively permanent" is not synonymous with "perennial." The qualifier "relatively" requires a contextual assessment, not an absolute 365-day standard. *Sackett* did not hold that federal protection ends whenever drought or seasonal conditions temporarily interrupt visible water. The agencies cannot claim to implement the Court's language while disregarding the term "relatively". Therefore, the agencies should not define "relatively permanent" waters as those with standing or continuously flowing water every day of the year or that limit protected wetlands to those with a "perennial surface water connection." Neither standard is required by *Sackett v. EPA*; each is a policy choice that would restrict the CWA beyond the scope of the Court's ruling.

3) The agencies solicit comment on the definition of "continuous surface connection" and whether any other numeric threshold may be more consistent with *Sackett* and the *Rapanos* plurality.

Two considerations are central to defining a "continuous surface connection." First, the connection need not consist of continuous hydrologic flow. Justice Scalia's opinion in *Rapanos* permits continuous physical connection, and *Sackett* likewise did not require wetlands to contain flowing surface water every day of the year. Instead, the Court required a surface connection that makes it difficult to determine where the covered water ends and the wetland begins. Physical continuity is therefore distinct from uninterrupted flow: ordinary fluctuations in water levels do not prevent a wetland from remaining physically continuous with, and part of, a covered aquatic feature.

We recommend that the agencies interpret "continuous surface connection" to mean simply abutting. Such an interpretation would be consistent with Supreme Court precedent and Congressional actions, post 1972. In 1985, in *Riverside Bayview Homes*, the Court rejected a

requirement that adjacent wetlands must be “frequently flooded” by a traditional navigable water. 474 U.S. 121 (1985). As the Court explained:

If it is reasonable for the Corps to conclude that, in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand. That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps’ definition is, in fact, lacking in importance to the aquatic environment, or where its importance is outweighed by other values the Corps may always allow development of the wetland for other uses simply by issuing a permit.

- 4) The agencies solicit comment on an additional alternative approach whereby Sackett’s concept of “indistinguishability” would remove the applicability and, therefore, the relevance of the terms “adjacent” and “abutting” (and thus be removed from the definition of “continuous surface connection,” or removed from the definition entirely).**

Sackett established a single test - not two separate tests - for determining whether a wetland is “indistinguishable” from a WOTUS. Indistinguishability is the result of a continuous surface connection, not an additional, independent requirement for wetland jurisdiction. The proposed wetlands option would effectively remove wetlands entirely from the statute. The agencies acknowledge that it would exclude most currently covered adjacent wetlands because most do not have perennial surface water. Yet Congress expressly included adjacent wetlands in Section 404(g)(1). *Sackett* does not require perennial surface water – it requires a continuous surface connection. Please see our comments regarding the term “continual surface connection” above under #3.

The Court also recognized the ecological relationship between waters and adjacent wetlands, acknowledging the inherent difficulty of drawing precise boundaries between interconnected aquatic resources. It stated in *Riverside Bayview Homes*: “In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps’ ecological judgement about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.”

474 U.S. at 135, n.9. *Riverside Bayview Homes* remains good law; the Supreme Court has not expressly overruled it. And, of course, the scientific literature supports the view that adjacent wetlands have significant effects on the water quality of larger waterbodies (e.g., Sullivan et al. 2025).

- 5) The agencies solicit comment on the applicability of the above definitions to both “anomalous and non-anomalous events.”**

The idea of “anomalous” and “non-anomalous” events in the context of defining WOTUS jurisdiction is absurd in our current climatic reality where the U.S. and much of the world is experiencing unprecedented climatic change. Every day, American citizens face a rapidly

changing environment and natural disasters that continue to create new records for economic damages and loss of life. The drought provision is not logical, as it would withdraw protections as drought conditions intensify. Moderate and severe droughts would be excluded from consideration, while droughts lasting more than five years would be treated as the “new normal,” permanently eliminating protections in regions such as the Colorado River Basin, which has experienced drought since 2000.

6) The agencies solicit comment on whether this supplemental option appropriately aligns with the statutory text, *Sackett*, and any other relevant case law.

In SWS’ opinion and in comments throughout this letter, we do not believe that this supplemental option appropriately aligns with statutory text or any relevant case law. As the Court itself has instructed, the language of a judicial opinion is not to be parsed as though dealing with the language of a statute (*Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979)). Indeed, “[a] longstanding rule - now reiterated multiple times by the Supreme Court - warns against treating the expository language of a judicial opinion as equivalent to the concise text of a statute[.]” (Shyamkrishna Balganesh, Relying on Restatements, 122 Colum. L. Rev. 2119, 2124 (2022)).

For example, in the *Riverside Bayview Homes*, the Court recognized that Congress intended to reject limitations contained in earlier water-pollution statutes. In fact, it authorized federal regulation of waters beyond those considered “traditionally navigable”: “Congress intended to repudiate limits that had been placed on federal regulations by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed “navigable” under the classical understanding of that term.”

7) The agencies solicit comment on the appropriateness of using a five-year timeframe for interpreting “drought” or whether any other time frame would be more appropriate to sever jurisdiction as the result of the occurrence of a temporary interruption due to a non-anomalous event.

The 30-day and five-year thresholds lack a scientific basis and conflict with the 1987 manual and its regional supplements, which define wetland hydrology by average conditions rather than daily presence. *Sackett* did not hold that a water body loses federal protection whenever drought, freezing, evaporation, or seasonal conditions temporarily interrupt visible water. Please see our comments in this regard under question #2.

8) The agencies solicit comment on whether this supplemental regulatory approach could lead to greater transparency and clarity in implementation while remaining consistent with the *Rapanos* plurality and *Sackett* decision.

SWS does not believe that the agencies’ approach as outlined in the supplement notice will lead to greater transparency and clarity in implementation, nor do we believe that it is consistent with the *Rapanos* plurality or *Sackett* decisions.

The agencies’ claim that “such a determination can be made by the naked eye” is false, unrealistic, and misleading. Perennial status depends on year-round conditions, “ordinary

conditions,” and drought classifications—none of which can be established during a single site visit. Applying the proposed language would require a decision maker, for each stream, to define the relevant reach or water body; select the appropriate 12-month period; determine whether standing or flowing water was present every day; identify interruptions throughout the reach; count and measure those interruptions; classify each as anomalous or non-anomalous; and decide whether the observed record reflects conditions that “ordinarily” prevail. Assigning a familiar streamflow-duration class does not resolve these questions, and the proposal cites no method that does. Accordingly, the claim that the public could determine non-jurisdiction merely by observing a dry stream disregards the proposal’s exceptions and temporal requirements.

9) The agencies solicit comment on tools that can be used to determine if drought conditions, dry spell, and/or low tides are occurring that may result in a temporary interruption in standing or continuously flowing water.

The agencies’ discussion of available tools is in direct conflict with its goal to empower landowners to make jurisdictional determinations “by the naked eye”. The tools available for determining the occurrence of drought conditions, dry spells, and/or low tides that may result in a temporary interruption of standing or continuously flowing water are not simple to use and certainly cannot be used by one’s own “naked eyes”. They require advanced training and understanding of highly technical and sophisticated hydrological systems and advanced computer technology. The agencies cannot meet their obligations under the CWA by entrusting jurisdictional determinations to any landowner, any more than the USDA can meet its obligations to protect public health by allowing any farmer to determine whether a new untested pesticide is safe to use.

10) The agencies solicit comment on any reliance interests that may be affected by this supplemental option and how the agencies may consider those interests while still adhering to the text of the CWA and *Sackett* decision.

The agencies’ approach in the supplemental notice would run afoul of the federal trust responsibility to federally recognized tribes. In the notice, the agencies state that “Tribes would be free to address rivers, lakes, streams, ponds, and other features that do not meet the definition of “relatively permanent” and that otherwise do not meet the definition of “waters of the United States” as... “waters of the Tribe” under their own laws to the extent that they deem appropriate, as envisioned under section 101(b) of the Clean Water Act.”

However, given the federal government’s trust obligations and the direct connection between CWA jurisdiction and protecting treaty-reserved rights and resources, this supplemental rule would severely impact the interests of federally recognized tribes. The federal Indian trust responsibility is a legally enforceable fiduciary obligation of the United States to protect tribal treaty rights, lands, assets, and resources, as well as a duty to carry out the mandates of federal law with respect to American Indian and Alaska Native tribes and villages. It is a legal obligation under which the United States “has charged itself with moral obligations of the highest responsibility and trust” toward Indian tribes (*Seminole Nation v. United States*, 1942). This obligation was first discussed by Chief Justice John Marshall in *Cherokee Nation v. Georgia* (1831).

The agencies also suggest that they “seek to avoid “impairing” or in any manner affecting any right or jurisdiction of the States with respect to waters (including boundary waters) of such States.” They further state that states, like tribes, are “free to address rivers, lakes, streams, ponds, and other features that do not meet the definition of “relatively permanent” and that otherwise do not meet the definition of “waters of the United States” as... “waters of the State”. However, they do not address the comments provided for the 2025 proposed rule, which clearly state that many states do not have the capacity to do so, and many have laws that prevent them from creating protections that go above and beyond the federal level. Changes to these laws can take years, leaving significant gaps in protections while federal protections have been drastically reduced.

Further, although the notice states that the agencies are considering whether the proposal aligns with the policy of Congress in Clean Water Act section 101(b) regarding the responsibilities and rights of States, the agencies do not appear to be considering whether the proposal aligns with the objective of Congress in Clean Water Act section 101(a). Ignoring the purpose of the CWA is an abdication of the agencies' CWA responsibilities.

This supplemental rule would severely impact the ecological restoration community, which includes restoration practices, mitigation banking, monitoring programs, and state programs; it potentially generates \$9.5 billion in direct revenue and more than 126,000 jobs. Indirect and induced effects generate an additional \$15 billion dollars and 95,000 jobs. Ecological restoration generates more jobs than iron and steel, coal, and logging in the US (BenDor et al., 2015).

The agencies’ proposed approach disrupts the NPDES program and given the County of Maui and the “functional equivalent of a direct discharge” test, litigation will surely ensue. The definition of WOTUS is central to the CWA; it applies beyond the section 404 program. If intermittent streams and associated wetlands are removed, then the increased direct discharge of pollutants will further harm the chemical, physical, and biological integrity of our nation's waters. If an intermittent stream is no longer jurisdictional under the CWA, then a section 402 permit is not needed to discharge pollutants into it. For example, Concentrated Animal Feeding Operations (CAFOs), which Congress expressly included in the definition of point sources, discharge waste—both permitted and unpermitted—into intermittent streams (see, e.g., *In the Matter of Morgan Feed Yard L.L.C.*, Thurston County, Nebraska, Docket No. CWA-07-2002-0172, July 31, 2002 (finding of violation and compliance order for discharges to unnamed tributary described as an “intermittent stream”) (USEPA 2015). Under the agencies’ proposal, CAFOs would no longer be subject to section 402 requirements if they are discharging into intermittent streams. The agencies have not considered the severe impacts on water quality that would result should intermittent streams no longer be covered for purposes of CWA section 402.

Similarly, if intermittent streams are not WOTUS, then they will not need to be listed as impaired waters under CWA section 303(d). Currently, many intermittent streams are listed as impaired, and not just streams in the arid West. For example, in Missouri, state classifications include Class C streams, which may cease flow in dry periods, and Unclassified Streams, many of which are considered intermittent streams. Missouri's 2024-2026 303(d) list identifies more than 200

impairments of these Class C and Unclassified Streams (Missouri Department of Natural Resources 2026). The agencies have not considered the severe impacts to water quality that would result should intermittent streams no longer be covered for purposes of CWA section 303(d).

The supplemental rule would also run afoul of the Administrative Procedures Act (APA). The APA's notice-and-comment process requires disclosure of the technical studies and data on which an agency relies so interested parties can evaluate the rule's basis and identify erroneous information or conclusions. This proposed supplemental rule does not make the "rational connection between the facts found and the choice made" the APA requires (*Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 43 (1983)). An agency may revise its policy after a change in administration, but it must acknowledge the change and provide a reasoned explanation (*FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009)). A more detailed justification is required when the new policy rests on factual findings that contradict the prior policy or affects substantial reliance interests. Although the supplemental notice recognizes reliance on the existing regulatory framework, it offers no new hydrologic evidence to support the single-period rule, does not explain why established regional methods should be abandoned, and fails to address the investments that applicants, consultants, states, and Corps districts have made in those methods.

SWS points to the 2023 WOTUS rule where the agencies said establishing a minimum flow duration for the whole country "would not be scientifically sound." Additionally, the 2020 NWPR stated that "the agencies have not identified a reasonable or appropriate rationale or justification for specific flow volumes that should establish jurisdiction given the broad nationwide applicability of the final rule."

Conclusion

The definition of “waters of the United States” must be informed by science. The CWA's only objective is “to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.” 33 U.S.C. § 1251(a). The Court noted that the CWA's “objective incorporated a broad, systemic view of the goal of maintaining and improving water quality. As the House Report on the legislation put it: ‘the word “integrity” . . . refers to a condition in which the natural structure and function of ecosystems . . . [are] maintained.’” (*United States v. Riverside Bayview Homes, Inc.*, 474 U.S. at 132 (1985) (quoting H.R. Rep. No. 92–911, at 76 (1972)). Science is critical to making the empirical determinations needed about the chemical, physical, and biological integrity of our waters to achieve the CWA's broad, clear objective. The only way to empirically assess “the chemical, physical, and biological integrity of the Nation's waters” and the “water quality” and “natural structure” or “function of ecosystems” is through science. Indeed, since at least 1975, every version of the regulatory definition of waters of the United States has included intermittent streams.

The agencies are misinterpreting the scope of *Sackett v. EPA*. In that decision, the Court attempted to define the scope of CWA coverage of wetlands - determining whether, and to what extent, wetlands are “waters of the United States” (WOTUS) under the CWA. Notably, the decision did not expressly address intermittent streams. Because the Court did not define intermittent streams, the agencies have erroneously

taken an extreme position that ignores the CWA's objective in section 101(a): "restoring and maintaining the chemical, biological, and physical integrity of the Nation's waters."

Fishable means the aquatic system can maintain healthy fish populations, which means it can support spawning and rearing habitat and thermal refugia for those species. Swimmable means that the pathogen and nutrient loads in the aquatic system are low enough for contact recreation, which is what the nutrient and sediment retention functions of intermittent streams and abutting and adjacent wetlands deliver. These functions and ecosystem services have immense economic value. For instance, according to EPA's own document (EPA843-F-06-004), wetlands' ability to absorb and store floodwaters is worth over \$2 billion annually. This figure does not include the value of these resources in maintaining irrigation for agriculture, attenuating flood damage, boosting property values, supporting hunting, or providing cultural importance to local populations. Mamun et al. (2023) found that property values increase by \$6-9 billion with a 10% improvement in water quality.

As proposed, the modified definitions would effectively equate "relatively permanent" waters with "perennial" waters and could disqualify streams that cease flowing for more than 30 consecutive days. Similarly, adjacent wetlands could lose jurisdiction where a surface water connection is interrupted for more than 30 days. These thresholds would have consequences far beyond any single geographic region, because intermittent streams, seasonally flowing waters, and temporarily flooded wetlands are common throughout the United States.

The legal and policy decisions at issue in this rulemaking must be based on sound science. As Justice Stephen Breyer noted, "[t]he law must seek decisions that fall within the boundaries of scientifically sound knowledge." Fed. Judicial Ctr. & Nat'l Research Council, Reference Manual on Scientific Evidence 4 (3d ed. 2011).

SWS appreciates the opportunity to provide comments on Docket No. EPA-HQ-OW-2025-0322. Please do not hesitate to contact us should you wish to discuss these comments.

Sincerely,



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