



Massachusetts Association of Conservation Commissions

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Stacey Jensen
Office of Wetlands, Oceans, and Watersheds
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Milton Boyd
Office of the Assistant Secretary of the Army for Civil Works
Department of the Army
108 Army Pentagon
Washington, DC 20310

RE: Comments on the Updated Definition of “Waters of the United States” (Supplemental notice of proposed rulemaking) Docket ID No. EPA-HQ-OW-2025-0322

Dear Ms. Jensen and Mr. Boyd:

Earlier this year, the Massachusetts Association of Conservation Commissions, “MACC, along with our environmental coalition partners documented our opposition to the proposed changes that the US Environmental Protection Agency and the Department of the Army (the “agencies”) sought to make to the definition of the “Waters of the United States” (WOTUS) under the Clean Water Act (CWA) (“Proposed Rule”). The agencies purportedly now offer an updated definition, which is the subject of the Supplemental Notice of Proposed Rulemaking (“Supplemental Proposal”).

MACC opposes the proposed rulemaking—which effectively amounts to an administrative repeal of the CWA and the most consequential attack on clean water that our nation has witnessed since the enactment of this law in 1972.

The Supplemental Proposal is short-sighted. It will negatively impact water quality, flood resiliency, and effectively eliminate inland wetlands from federal protections. The proposed definitions ignore established hydrologic science and are not based in science; the proposed definitions perpetuate confusion and uncertainty by introducing arbitrary parameters that extend beyond those set out in the *Sackett* decision; and the proposed definitions are inconsistent with the purpose of the CWA.

There have been significant rollbacks of federal protections for over half of the nation’s wetlands and thousands of miles of streams, pursuant to the Court’s decision in *Sackett*. At the same time, the state of Massachusetts is committed to restoring 75% of our most

important habitats by 2050, which translates to 400,000 acres of upland wetlands, 4,500 miles of rivers and streams, and 100,000 acres of lakes and ponds. We urge the agencies to avoid undermining the protective actions of our states and abandon these changes presented in the Supplemental Proposal. We request that the agencies instead retain the definitions set forth in the current WOTUS rule, which conform to the Court's interpretation in *Sackett*, without additional changes.

1. The Supplemental Proposal ignores established hydrologic science and seeks to advance definitions that are not science based.

The Supplemental Proposal presents a “perennial water” alternative to the “wet season” framework introduced in the Proposed Rule—a term that does not appear in the Court's *Sackett* decision, and which was widely critiqued as poorly defined and difficult to implement. The Supplemental Proposal suggests the following definitions for the alternative term:

- “Having standing or continuously flowing water every day of the year during ordinary conditions.”
- “Surface water flowing continuously year-round,” consistent with the 2020 Navigable Waters Protection Rule.

Unfortunately, the “perennial water” alternative – another term that does not appear in the *Sackett* decision – is neither a viable nor a scientifically-sound solution.

The suggested “perennial water” language would leave nearly 80% of rivers and streams vulnerable to pollution and ignore scientific consensus on the hydrologic connection and value of intermittent, ephemeral, and headwater streams.

Massachusetts rivers, streams and wetlands - including intermittent and ephemeral headwaters – are vital to the health of Massachusetts' residents, ecosystems, and economy. Fish and other aquatic species can only survive in continuously flowing waters that are regularly renewed by clean and healthy headwaters – regardless of whether those waters maintain a continuous flow. The natural filtration benefits of wetlands and ephemeral headwaters improve water quality and minimize flooding.

Carving out these ephemeral and intermittent streams from the CWA would eliminate essential protections for those who use the downstream waters for drinking, swimming, and recreation. In Massachusetts – of the 2,600+ miles of streams that provide surface water for public drinking water supplies, more than 50% are intermittent, ephemeral, or headwaters – meaning that these waters would not meet this standing or continuous flow definition for perennial waters. Without adequate protections of these waters, more than 5 million people in Massachusetts who depend on these non-standing or continuously-flowing waters would face uncertainty as to the safety of their public drinking water supplies.

Ephemeral streams dramatically affect the interstate waters. Take the Connecticut River, for example, which runs through Vermont, New Hampshire, Massachusetts, and Connecticut, flowing into the Long Island Sound. Researchers have confirmed that when all streams from the Connecticut River are flowing according to average annual conditions, 59% of the water

that enters the Long Island Sounds is sourced from ephemeral streams. Removing protections for these ephemeral tributaries means exposing all downstream communities and ecosystems to potential pollution, as there is no longer incentive and requirements for upstream entities to manage the nutrients, sediments, and other waste that may be dumped into these non-perennial streams.

The Supplemental Proposal would narrow the proposed “continuous surface connection” definition for wetlands, as follows:

- A wetland would need to contain perennial surface water that is continuously connected to surface water in a jurisdictional water, such that it is difficult to distinguish where the jurisdictional water ends and the wetland begins.
- A separate alternative would go further by limiting jurisdictional wetlands to the portion that is “indistinguishably part of” an otherwise jurisdictional water. It would also remove “adjacent” from the definition of “continuous surface connection.”
- The proposed narrowing of the “continuous surface connection” definition for wetlands would eliminate at least 95% of non-tidal wetland protections, seriously impacting water quality, and reducing climate resiliency to floodwaters from intense storms.

Wetlands not only provide essential fish and wildlife habitats, but they also store carbon and serve as the “kidneys” of the watershed— filtering out harmful pollution and protecting clean drinking water vital to public health. When wetlands are damaged or destroyed, the impacts cascade far downstream: Just one acre of wetlands can store up to 1.5 million acres of flood water. This storage translates into measurable and significant cost-savings following damage to housing and infrastructure from severe storms. In proven disasters, like Hurricane Katrina, coastal wetlands saved communities hundreds of millions of dollars in damages.

The Supplemental Proposal would position communities around the country in a heightened state of flood risk and economic vulnerability. The Proposed Rule already sought to essentially eliminate protections for non-tidal wetlands. The Supplemental Proposal now proposes to safeguard only those wetlands that have continuous, perennial surface water connections to another protected water or, alternatively, be indistinguishably part of a traditional navigable water, the territorial seas, a jurisdictional impoundment, or a jurisdictional tributary. In other words, to maintain protections under the CWA, a wetland would need to contain perennial surface water that is continuously connected to surface water in a jurisdictional water—to the point where the boundary between the jurisdictional water and the wetland is *de facto* indistinguishable; an alternative proposal even suggests that the jurisdictional wetlands should be “indistinguishably part of” a jurisdictional water—removing the word “adjacent” from the definition of “continuous surface connection.”

There is no scientific basis for the definitions featured in this Supplemental Proposal.

- The ecological and economic value of wetlands is wholly unrelated to whether surface waters are continuous and in no way diminished by the absence of perennial waters.
- The agencies even acknowledge in the Supplemental Proposal that the majority of wetlands currently jurisdictional under existing rules – and which have a proven

ecological benefit – would not satisfy the proposed “continuous surface connection” standard (as most wetlands do not contain perennial surface water).

- Moreover, the Court in *Sackett* cautioned against requiring extensive testing of properties to determine if they are subject to regulation—yet operationalizing this restrictive definition of wetlands would require just this.

2. The Supplemental Proposal will create new uncertainty and confusion by introducing arbitrary flow tests not supported by the Court’s decision in *Sackett*.

The Supplemental Proposal further creates an inflexible and arbitrary bright line test to distinguish between “anomalous” and “non-anomalous” interruptions to flow, as follows:

- Anomalous (extraordinary) events, such as drought or an unusual dry spell, would not affect a water body’s jurisdictional status, regardless of duration.
- Non-anomalous (ordinary) events, such as low tides or a regularly occurring dry spell, would preserve perennial status only if the interruption occurs no more than once in a given year and lasts no more than 30 consecutive days. A water feature that experiences two or more ordinary dry periods in a single year would not qualify as perennial, even if each period is short.
- This distinction offers no meaningful or actionable guidance for addressing flow interruptions given the variability of drought conditions across the US.

Massachusetts has been experiencing an increase in drought conditions in recent years—prompting several drought declarations in nine of the past 11 years.

- At the time of this comment, regions of Massachusetts remain at some level of drought that began over two years ago, and Boston is experiencing its sixth-driest year on record.
- Low water levels in streams and rivers threaten fish and aquatic life, but also place pressure on our drinking water supply, agricultural production, and recreation industry.
- Using flow interruptions to determine whether to protect certain waters – as suggested by the Agencies’ definition – would not only undermine water conservation measures designed to protect these industries and resources but will also prove unworkable in practice.

The distinction between “drought” – as an extraordinary event and “an unusual dry spell” – as a non-anomalous event falsely assumes that there is a clear delineation between “drought” and “dry” conditions– and that there is a discrete period of time in which an interrupted flow would logically affect a water’s perennially status. The reality is that most droughts gradually occur over time and there is such variability in “types” of drought that categorizing the interruption of flow as resulting from an anomalous vs. non-anomalous event is nearly impossible. Even if the agencies obtain adequate resources to conduct this test in any meaningful way, the CWA jurisdiction would be continually revoked and reinstated based on normal fluctuations in precipitation and weather.

Flow interruptions in perennial rivers include those that arise from reduced precipitation (meteorological droughts), extended disruptions to the water cycle (hydrologic droughts), and substantial deterioration of ecological health and functions. From 2020-2023, over 40% of the continuous US experienced some type of drought for more than 119 weeks. As we've learned from drought designations in Massachusetts, however, the specific metrics used to assess these conditions are location-specific and would not enable the agencies to generalize if and when "droughts" constitute anomalous events or whether the impacts on jurisdictional waters in these areas would affect their perennial status.

- The tools mentioned in the Proposed Rule and Supplemental Proposal are not fit for this purpose.
- The US Drought Monitor, for example, relies on NOAA's Standardized Precipitation Index, which has been critiqued for several inadequacies, including that it does not consider the intensity of precipitation or its potential impacts on runoff, streamflow, and water availability within the system of interest.
- Moreover, language in the Proposed Rule addressed the impracticality and difficulty of assessing minimum flow volume—noting that it "is challenging to measure directly, in particular in a stream where flow is not always present and may require multiple field-based measurements that can make implementation inefficient and result in delays in making a jurisdictional determination."
- Ultimately, the agencies have failed to demonstrate how the Supplemental Proposal reconciles the rationale for excluding ephemeral and intermittent streams from CWA jurisdiction with this anomalous test that seems to allow for flow interruptions from short-term weather events.

This inconsistency not only suggests that the proposed rule would be unworkable but reveals that the agencies are taking steps beyond what was required in *Sackett*.

3. The Supplemental Proposal is fundamentally inconsistent with and antithetical to the purpose of the Clean Water Act.

The Supplemental Proposal and any rulemaking conducted under the CWA must ultimately be consistent with its legislative purpose, *i.e.*, "restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters." The Proposed Rule and Supplemental Proposal should therefore only include definitions that are consistent with the Court's reading of the CWA in *Sackett* and which do not serve as a vehicle to fundamentally alter or amend the Act itself.

In *Sackett*, the Court narrowed the scope of the CWA's protections to extend only to those waters that are "relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes." The agencies subsequently adopted a rule conforming to this decision.

- The Proposed Rule would extend beyond the Court's directive and leave vast areas of wetlands, headwaters, and intermittent streams unprotected.

- It would measurably worsen the infrastructural damage of floods, costs of drinking water treatment, and make water supplies less reliably available to those in Massachusetts and around the US.
- The Supplemental Rule goes even further – effectively eliminating even more waters from the scope of federal protection, directly undermining the intention for the CWA to protect the health of the Nation’s waters.
- The Proposed Rule demonstrates indefensible inconsistencies with and contradictions to the CWA, including, *inter alia*:
 - First, the “perennial flow” and continuous/indistinguishable connection requirements directly undermine efforts to restore and maintain the integrity of the Nation’s waters, pursuant to the legislative intent of the CWA. Preventing downstream pollution, habitat loss, and flooding begins with healthy headwaters, tributaries, and wetlands even those that do not maintain a continuous surface flow or connection. Not only do these definitions ignore established science, but they arbitrarily fail to recognize the transboundary nature of waters and fail to protect downstream states from the actions of those upstream. The additional connection requirements for wetlands further abandons the longstanding recognition and position of agencies that wetland complexes – contiguous areas of wetlands – should be regulated as a single unit.
 - Second, the significant narrowing of the definition to exclude most wetlands, rivers, and streams also has major implications for Section 404 dredge and fill permit coverage. The justification for the Proposed Rule included a misguided explanation of the administrative cost savings, stating that the *“the impacts of the proposed rule, as a result of implementing the Sackett decision, would be most significant for the Clean Water Act section 404 program, reducing the number of 404 permits issued and acres of wetland impacts mitigated relative to the baseline. The agencies expect the changes to produce cost savings to proponents from avoided permitting and mitigation activities, as well as potential indirect benefits from long-term reduction in regulatory burden.”*

What the agencies fail to consider, however, is that Section 404 is intended to safeguard against high-risk, flood-prone development that will only expose communities to increased environmental dangers and economic costs.

Flooding already has a high price tag on the U.S. economy while, every \$1 invested in flood plain restoration helps to avoid \$5 in future flood losses. It is well understood that private landowners, developers, or public and private agencies or entities are expected to comply with Section 404 – not to prevent progress or make it difficult to complete projects, but to avoid or minimize losses to wetlands and other waters that protect communities from water contamination and flood risk.

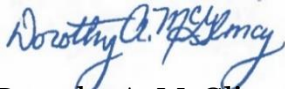
The Supplemental Proposal would derail efforts to clearly understand and obtain jurisdictional determinations in compliance with Section 404, costing time, expense, and ecological damage.

It was the intention of the US Congress that the CWA safeguard the health and wellbeing of our communities through the protection of our waters. Eliminating protection for nearly all inland/non-tidal wetlands and non-perennial rivers and streams effectively repeals this and other protective mechanisms of the CWA.

Massachusetts Association of Conservation Commissions urges the agencies to retain definitions in the conforming rule without further changes. If the agencies decide to finalize the Proposed Rule and Supplemental Proposal, it will be the nation's taxpayers (and those who the CWA was enacted to protect) who will bear the economic burden and ecological consequences.

Respectfully submitted,

Massachusetts Association of Conservation Commissions



Dorothy A. McGlincy
Executive Director

dorothy.mcglincy@maccweb.org