



National Association of Wetland Managers

“Dedicated to the Protection and Restoration of the Nation’s Wetlands”

January 5, 2026

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Re: Updated Definition of “Waters of the United States,” EPA-HQ-OW-2025-0322

Dear Ms. Jensen and Mr. Boyd:

The National Association of Wetland Managers (NAWM) submits the following comments in response to the request from the U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) for written feedback on the definition of “waters of the United States” (WOTUS) proposed on November 20, 2025.

NAWM is a national 501(c)(3) professional organization that supports the use of sound science, law, and policy in development and implementation of state and Tribal wetland and aquatic resource protection programs. Since 1983, our organization and our member states and Tribes have had longstanding positive and effective working relationships with federal agencies. As an association representing state and Tribal co-regulators, NAWM understands the complexity of the CWA and the implementation challenges the Act poses. We have worked together with federal agencies in the implementation of regulatory and non-regulatory programs designed to protect WOTUS, such as challenges in determining the jurisdictional status of wetlands and other waters as WOTUS, CWA section 404 permit program for dredged or fill material, state and Tribal water quality standards for wetlands, and CWA section 401 water quality certification of federal licenses and permits.

The CWA regulates discharges to “navigable waters,” defining the term to mean “the waters of the United States, including the territorial seas.”¹ This single definition of jurisdictional boundaries applies to all regulatory provisions of the Act, as acknowledged in the proposed rule preamble. Whether a particular waterbody is jurisdictional as a WOTUS is a key threshold question for determining whether a discharge into that water will require a permit or otherwise be regulated under the CWA. As such, the scope of WOTUS has been subject to considerable litigation, including four U.S. Supreme Court decisions, and several definitional rulemakings and implementation guidances by EPA and the Corps (collectively referred to as “the Agencies” in this letter). The last regulatory definition promulgated was the “Conforming Definition of ‘Waters of the United States,’” finalized in September 2023.

CWA section 101(a) notes the “objective of [the CWA] is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”² The U.S. Supreme Court decision in *Sackett* interpreted the CWA, and as a result the Agencies must construe the *Sackett* decision and any of its ambiguous terms in a manner consistent with Congress’ stated objective for the CWA. Therefore, the Agencies’ regulatory decisions interpreting the scope of WOTUS must be consistent with and furthering restoration and maintenance of the Nation’s waters.

Congress when enacting the CWA recognized a critical role for states and Tribes, stating in section 101(b) that “it is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.”³ CWA section 101(a) establishes the statutory objective, and section 101(b) provides one of the important contexts for implementing its programs to meet the CWA’s statutory objective.

Consistent with CWA sections 101(a) and (b), the CWA adopts a cooperative federalism approach to achieving its objective of restoring and maintaining the Nation’s waters. For example, the statute authorizes states (and Tribes with Treatment in a Manner Similar as a State) (TAS authority)⁴ to implement the section 402 and 404 permitting programs. The CWA likewise establishes a role for states and Tribes with TAS in implementing several other programs that are central to achieving the Act’s objective, such as administering the water quality standards program and impaired waters and total maximum daily loads program under section 303. Section 401 provides states and authorized Tribes with authority to review proposed federal permits and licenses that may result in a discharge into WOTUS, and to certify whether the proposed authorizations would be consistent with water quality standards and certain other CWA and state or Tribal provisions.

¹ 33 U.S.C. §1362(7), CWA §502(7).

² 33 U.S.C. §1251(a), CWA §101(a).

³ 33 U.S.C. §1251(b), CWA §101(b).

⁴ 33 U.S.C. § 362(7), CWA § 502(7).

Under the CWA, states and Tribes have a co-regulator relationship with the federal agencies and therefore a very strong interest in how WOTUS is defined. Changes in the definition of WOTUS and scope of federal jurisdiction have significant direct and indirect impacts on states and Tribes. Direct impacts arise because a changed WOTUS definition alters the extent of federal protection of vital clean water resources. Also, states and Tribes have repeatedly faced the task of deciding whether or not to align their laws and regulatory programs with each new WOTUS regulatory definition. This may require a state or Tribe to revisit and potentially revise their program to reflect a new definition of protected waters, or for those jurisdictions lacking programs protecting valued wetlands or other aquatic resources, to develop a program to “fill the gap” in federal jurisdiction. Such revisiting can consume substantial state and Tribal administrative resources. Indirect impacts occur when the changed WOTUS definition alters the existing relationships among multiple state, Tribal, federal, and local authorities that protect an array of public resources while minimizing overlap and delay of necessary permit processes.

Cooperative federalism involves federal, state, and Tribal governments collaborating, sharing power and responsibilities to implement policies and achieve objectives. The proposal preamble cites CWA section 101(b) several times to explain that the agencies are reducing the scope of waters protected as WOTUS under the CWA as a means of ensuring states “remain primary” in protecting aquatic resources.⁵ NAWM believes this is a false narrative. Cooperative federalism under the CWA does not require the federal government to abdicate much of its role protecting aquatic resources, but instead envisions federal agencies working in tandem with states and Tribes to restore and maintain the Nation’s waters. The federal definition of WOTUS since the CWA’s enactment in 1972 has served as a “floor,” establishing the scope of waters protected by the CWA while allowing states and Tribes to be more environmentally protective under state or Tribal law if desired.⁶

Input by states and Tribes to the definition of WOTUS is essential. In addition to being most familiar with existing relationships among the multiple water quality protection authorities, state and Tribal co-regulators have over fifty years of experience implementing CWA programs. As a result, state and Tribal perspectives are critical to ensure a clarified or revised definition of WOTUS is defensible, informed by science and implementation experience, and is (as the Agencies emphasize in their proposal) a durable rule.

NAWM appreciates the Agencies soliciting public comment on the proposed definition, and holding a series of listening sessions to solicit recommendations from state and Tribal co-regulators as well as a diverse group of stakeholders regarding key definitional terms such as “relatively permanent,” “continuous surface connection,” and “ditch.”

Recommendation: When developing the final rule defining WOTUS, NAWM encourages the Agencies to have a series of interactive regional working meetings with states and Tribes. Meaningful engagement means actual collaborative discussion

⁵ See, e.g., 90 Fed.Reg. 52498, 52518 (November 20, 2025)

⁶ CWA §510, 33 U.S.C. §1370.

and troubleshooting. We encourage the Agencies to reach out to state governors and Tribal leaders to invite them or their designees to participate in a future workshop or workshops focused on definitional and implementation challenges given national differences in ecology, geography, hydrology, and legal doctrines that create challenges for water, wetlands, and water quality program administration, in advance of finalizing the definition of WOTUS.

Proposed Approaches to Waters as WOTUS

One issue raised by the proposed rule is not directly called out for public comment: namely, whether the rulemaking is necessary in light of the September 2023 “Conforming Rule” definition of WOTUS that closely tracks the Supreme Court’s decision in *Sackett*.⁷ NAWM believes a new rulemaking is unnecessary. The 2023 Conforming Rule is legally defensible, reflects over fifty years of practical implementation experience, and is understood by co-regulators and stakeholders alike. Many of our state and Tribal members agree that the Conforming Rule is preferable to a new rule, as likely will be reflected in their directly submitted comments. **Recommendation: Do not do rulemaking to yet again revise the definition of WOTUS, but instead focus on technical assistance and tools to implement the September 2023 Rule that conforms to the *Sackett* opinion.**

The November 2025 WOTUS proposed rule and its preamble pose over a hundred issues upon which it seeks comment. NAWM has chosen to focus its comment letter on issues identified as key by our state and Tribal members, and where we can offer information and perspectives helpful for ensuring a final rule is consistent with CWA goals, should the Agencies decide to proceed with rulemaking. Issues which NAWM is not addressing in this letter should not be interpreted as an area where NAWM has no concerns. NAWM is encouraging its state and Tribal members to comment directly and provide additional specifics and information.

Definition and implementation of “Relatively Permanent Waters”

After *Sackett*, a tributary or other water must be “relatively permanent” to be considered WOTUS. Under the relatively permanent standard for jurisdiction, waters that are less than relatively permanent, such as ephemeral streams, are not WOTUS, nor are waters that do not connect to a traditional navigable water.

The Agencies have defined “relatively permanent” waters differently over time. The current regulatory definition of WOTUS considers relatively permanent waters as including surface waters that have flowing or standing water year-round or continuously during certain times of the year, and are connected to traditional navigable waters.⁸ In 27 states as a result of ongoing litigation, the pre-2015 regulatory regime is in effect instead of the current regulatory definition, and considers relatively permanent as typically flowing year-

⁷ 88 Fed.Reg. 61964 (September 8, 2023).

⁸ See, e.g., 88 Fed.Reg. 3004, 3066, 3084-3085 (January 18, 2023).

round or having continuous flow at least seasonally.⁹ The proposed rule would redefine relatively permanent waters as “standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season.”¹⁰

“Wet Season.” The proposal’s definition of “relatively permanent waters” is built on the new concept of “wet season,” a term not found in the CWA or court decisions. The proposal preamble explains the wet season is intended to “include extended periods of predictable, continuous surface hydrology occurring in the same geographic feature year after year in response to the wet season.”¹¹ If two wet seasons are separated by drier months, under the proposal tributaries would need to have continuous surface hydrology at least during both wet seasons in order to meet definition of relatively permanent.¹²

NAWM believes that the definition of “wet season” reflecting “extended periods ... of surface hydrology” is both convoluted and subjective. An “extended period” is too long to capture the wide variability of wet seasons around the country. Even the plurality opinion from *Rapanos* explained that the term “‘relatively permanent’ does not exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months.”¹³ Not only do wet seasons vary substantially among regions, but also are often not consistent from year to year or across watersheds, particularly with recent drought cycles. Additionally, relatively permanent waters may include tributaries whose flow is driven less by precipitation and more by water management practices, such as diversions, water transfers, bypass channels, and irrigation withdrawals. For example, in the West where water withdrawals can substantially modify flow characteristics, onset and cessation of streamflow in some tributaries may be more closely tied to changes in water use associated with irrigation than with seasons of the year or a “wet season.”

For these and related reasons, NAWM believes the approach to relatively permanent waters used since the 2006 *Rapanos* opinion is preferable to a definition relying on a vague wet season concept. The 2008 post-*Rapanos* Guidance considers relatively permanent as including “waters that typically (e.g., except due to drought) flow or stand year-round or waters that have a continuous flow or stand at least seasonally (e.g., typically three months).”¹⁴ This approach helps ensure “predictable, continuous surface hydrology” accounts for the seasonal snowmelt and spring freshets common the Northeast, which support critical ecosystems. The approach also would encompass shorter seasonal flows such as those in the arid Southwest. **Recommendation: The final rule should adopt the longstanding definition of relatively permanent waters instead of incorporating the**

⁹ EPA and the Army Corps, CWA Jurisdiction Following the U.S. Supreme Court Decision in *Rapanos v. United States* and *Carabell v. United States*, December 2, 2008, at 6.

¹⁰ 90 Fed.Reg. 52498, 52517 (November 20, 2025).

¹¹ 90 Fed.Reg. 52498, 52518 (November 20, 2025).

¹² 90 Fed.Reg. 52498, 52524 (November 20, 2025).

¹³ *Rapanos* plurality opinion, cited in the proposal at 90 Fed.Reg. 52498, 52518 (November 20, 2025).

¹⁴ EPA and the Army Corps of Engineers, “Clean Water Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States* and *Carabell v. United States*,” p. 6 (December 2, 2008).

new and subjective wet season concept. If the Agencies continue to use wet season in the final rule, we recommend they avoid indicating that a wet season must be an “extended period,” and instead allow greater opportunity for regionalizing the wet season to reflect recurring local conditions as well as relevant water management regimes affecting flow. The Agencies also should work with states and Tribes to develop timely and accurate field methods and tools to determine the wet season in a particular area.

As proposed, surface hydrology would be required to be continuous throughout the entirety of the wet season to be considered relatively permanent.¹⁵ This raises issues where there is a time lag or delay in the surface hydrology response to seasonal precipitation. For example, this might occur in the case of snowpack melting several months after the snowy precipitation. The same issue may arise when the water table takes some time to respond to seasonal precipitation patterns, as is typical in some areas of the arid Southwest, and impacts of the wet season on streams’ surface hydrology might occur later in (or after) the wet season. In this latter example, it seems likely that under the proposed definition of wet season many streams in the arid Southwest would not be considered relatively permanent because their surface hydrology does not run concurrently with the wet season. **Recommendation: If the agencies retain the wet season approach to relatively permanent waters, the final rule should clarify the lagged surface hydrology issue by requiring surface hydrology to be the same duration as the wet season even if not running concurrently with the specific wet season timeframe.**

Alternative Approaches Identified in the Proposal Preamble. The proposal preamble solicits comment on several alternative approaches to “relatively permanent waters,” such as defining the term as applying only to perennial waters, or to waters that meet a minimum flow duration metric. NAWM believes that neither of these alternatives should be adopted in the final WOTUS rule, but in light of *Sackett* supports the pre-2015 approach and 2006 *Rapanos* plurality opinion that considers waters that flow at least seasonally to be relatively permanent.

The proposal preamble seek comment on whether “relatively permanent waters” should be limited to perennial waters. NAWM believes that such an approach would be inconsistent with the CWA, inconsistent with the *Sackett* and *Rapanos* decisions, and be very difficult and expensive to implement. First, the goal of the CWA is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,”¹⁶ and to protect only perennial waters would be to abandon the foundational goal of the CWA for all other categories of the Nation’s waters, leaving them unprotected. Some parts of the United

¹⁵ 90 Fed.Reg. 52498, 52518 (November 20, 2025).

¹⁶ 33 U.S.C. §1251(a), CWA §101(a).

States would have very few if any protected waters, such as streams in the arid West.¹⁷ Second, the U.S. Supreme Court does not require or even allow WOTUS to be defined as perennial only. The *Rapanos* plurality opinion indicated to be relatively permanent, water does not need to be present at all times:

“[b]y describing “waters” as ‘relatively permanent,’ we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months ...¹⁸

As noted in the proposal’s preamble, the very term – *relatively* permanent – suggests WOTUS is not limited to waters that are standing or continuously flowing every day of the year.¹⁹ Third, a requirement that a jurisdictional stream be perennial would be difficult and time-consuming to implement. Available methods and tools are more accurate in identifying when a stream has at least seasonal flow than determining that it flows year-round, and such methods and tools may require repeated or continuous monitoring over the course of a year to determine a water is flowing or standing year-round. The cost and delays caused by implementing such a definition would be unnecessary. Compounding the challenge, many streams considered “perennial” do not actually flow year-round without interruption.²⁰ Fourth, streams, headwaters, and streams that flow only part of the year provide many upstream and downstream benefits. As noted by EPA, such streams protect against floods, filter pollutants, recycle potentially harmful nutrients, and provide food and habitat for many types of fish. These streams also play a critical role in maintaining the quality and supply of our drinking water.²¹ **Recommendation: The Agencies should not define “relatively permanent” as perennial or flowing year-round, because the approach would be inconsistent with the CWA and Supreme Court decisions, be costly and slow to implement, and place out of reach the CWA’s primary objective of restoring and maintaining the Nation’s waters. It also would preclude regionalization.**

The proposal solicits public comments on whether “relatively permanent” should be defined by setting a minimum flow duration metric, such as 30, 90, or 270 days, as an

¹⁷ EPA has concluded “ephemeral and intermittent streams make up approximately 59% of all streams in the United States (excluding Alaska), and over 81% in the arid and semi-arid Southwest (Arizona, New Mexico, Nevada, Utah, Colorado and California) according to the U.S. Geological Survey National Hydrography dataset.

<https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414>

¹⁸ *Rapanos v. United States*, 547 U.S. 715, 732 n. 5 (2006).

¹⁹ See, e.g., *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023), quoted in 90 Fed.Reg. 52498, 52519 (November 20, 2025).

²⁰ To illustrate, many streams identified as perennial in the Pacific Northwest do not flow year-round. Many rivers and streams have changed in terms of their hydroperiods due to watershed development impacts that cause extreme high flows in the winter (from runoff in timbered areas and urban areas) and extreme low flows in the summer (sometimes subterranean flows or now flows). These streams are still classified as perennial.

²¹ See, e.g., <https://www.epa.gov/cwa-404/learn-about-streams#types>

alternative to the wet season approach.²² The proposal describes this bright line approach as easy to understand, providing certainty for landowners, and enhancing national consistency. The proposal also notes that a minimum flow duration approach would prevent regionalization. NAWM believes such an approach would inappropriately set one minimum duration even though flow duration can vary extensively by region. As noted by EPA previously, “establishing a uniform number equally applicable to the deserts in the arid West, the Great Lakes region, and New England forests would not be scientifically sound” and would not account for specific conditions in each region.²³ The preamble to the Navigable Waters Protection Rule in 2020 stated “the time period that encompasses intermittent flow can vary widely across the country based upon climate, hydrology, topography, soils, and other conditions.”²⁴

Past EPA discussion of regional variation in intermittent stream flow illustrates this point. EPA has noted precipitation in parts of the southeastern United States is distributed somewhat regularly throughout the year, but increased evapotranspiration during the growing season can reduce surficial ground water levels and reduce or remove surface flows late in the growing season (that is, in late summer or early autumn). As a result, certain streams in the Southeast may flow primarily in the winter or early spring. Although streamflow in these tributaries may occur regularly, off and on, over the duration of a season or longer, they do not exhibit continuously flowing water for an extended period at any point during the year. In other areas of the United States, melting snowpack drives streamflow more than rainfall, and relatively permanent flow may therefore coincide with warming temperatures in the spring or early summer.²⁵ A minimum flow duration standard for “relatively permanent waters” would also be difficult to implement. It often would be infeasible for agency staff or the regulated community to determine whether a stream ordinarily flows for twelve as opposed to eleven weeks per year. Determining presence of standing water in lakes or ponds for a specific time would be similarly difficult. **Recommendation: The Agencies should not define “relatively permanent” using a stream flow duration metric, because the approach would be costly and slow to use in the field and is unsupported by science. A stream flow duration metric also could prevent regionalization.**

A third alternative approach discussed in the proposal preamble is to define relatively permanent waters as those that “typically have standing or flowing water at least seasonally (e.g., typically three months),” with flexibility to regionalize the concept of season.²⁶ This reflects the approach established in the *Rapanos* Guidance in 2008²⁷ and has

²² 90 Fed.Reg. 52498, 52519 (November 30, 2025).

²³ 88 Fed.Reg. 3004, 3085 (January 18, 2023).

²⁴ 85 FR 22250, 22292 (April 21, 2020).

²⁵ See, e.g., 88 Fed.Reg. 3004, 3085-6 (January 18, 2023).

²⁶ 90 Fed.Reg. 52498, 52520 (November 20, 2025).

²⁷ EPA and the Army Corps, “CWA Jurisdiction Following the U.S. Supreme Court Decision in *Rapanos v. United States* and *Carabell v. United States*,” December 2, 2008, at 6-7.

been implemented successfully for many years. The approach could be regionalized by adapting the three-month example to reflect seasonal differences in a particular region of the United States. It also would allow waterbodies with seasonal standing or continuously flowing water that lasts less than 90 days in a normal year to be potentially jurisdictional, such as those typical of the arid West. **Recommendation: The Agencies should consider retaining the “seasonal water” approach in place after *Rapanos*, since it reflects *Rapanos*’ “relatively permanent” standard, has been successfully implemented since 2006, and is readily adaptable to reflect local conditions.**

Definition and implementation of “Tributary”

The proposal defines “tributary” to mean “a body of water with relatively permanent flow, and a bed and bank, that connects to a downstream traditional navigable water or the territorial seas, either directly or through one or more waters or features that convey relatively permanent flow.”²⁸ The preamble states that tributaries can contribute flow downstream either directly, or through other jurisdictional waterbodies, or through features such as culverts or boulder fields, so long as they convey relatively permanent flow.²⁹ Tributaries can include natural, man-altered, and manmade waterbodies so long as they meet the proposed definition of tributary. Relocated or straightened streams can be tributaries under the proposed rule.³⁰ The preamble notes that jurisdiction upstream of a tributary is severed by features such as a dam, tunnel, debris pile, wetland, or other manmade or natural features if such features do not convey relatively permanent flow.³¹ The preamble also acknowledges that being frozen for part of the year does not preclude it from having flow that is perennial or at least during the wet season.³²

NAWM supports several aspects of the proposal’s definition of “tributary,” including that tributaries can: contribute flow to a downstream traditional navigable water (TNW) either directly or indirectly; can be natural, man-altered, or manmade; can consist of relocated or straightened streams; can be frozen and still have relatively permanent flow; and can contribute flow to a TNW through features such as a tunnel or debris pile even if the feature is itself is non-jurisdictional. As discussed below, NAWM has concerns about several other aspects of the tributary definition.

The proposal would require tributaries to have a bed and banks.³³ The proposal preamble acknowledges that not all features with relatively permanent flow will have a bed and banks and may instead display other ordinary high water mark (OHWM) indicators. Such features would not be jurisdictional under the proposal.³⁴ An OHWM indicates where the

²⁸ 90 Fed.Reg. 52498, 52521 (November 20, 2025).

²⁹ 90 Fed.Reg. 52498, 52520 (November 20, 2025).

³⁰ 90 Fed.Reg. 52498, 52525 (November 20, 2025).

³¹ 90 Fed.Reg. 52498, 52520 (November 20, 2025).

³² 90 Fed.Reg. 52498, 52523 (November 20, 2025).

³³ 90 Fed.Reg. 52498, 52522 (November 20, 2025).

³⁴ *Id.*

presence and action of water is so common that it leaves a distinct mark such as shelving, debris, and other indicators of flow. NAWM believes that requiring all tributaries to have a bed and bank is not consistent with *Sackett* and *Rapanos* in that it would exclude some relatively permanent waters that contribute flow to a downstream TNW, such as spring flows, beaver dam complexes in streams, rivers and streams that have slow moving water, and streams that flow through wetland flats (where the wetlands are contiguous and abutting, and flows are stable and do not cause downcutting or incision resulting in bed and banks). Bed and banks are just one of a number of reliable OHWM indicators that can be useful for identifying clear and predictable boundaries in systems with relatively permanent flow. For years, federal and state agencies as well as the regulated community have used the OHWM to identify the extent of streams and rivers.³⁵ **Recommendation: The final WOTUS rule should not define “tributary” as requiring a bed and banks. A durable definition of tributary capable of being implemented is “a body of water with standing or relatively permanent flow that connects to a downstream traditional navigable water or the territorial seas, either directly or through one or more waters or features that convey relatively permanent flow.”**

Another area of concern is that tributaries that flow through a wetland retain jurisdiction above the wetland only if the flows are relatively permanent through the wetland.³⁶ NAWM is concerned that it could be hard to determine if there are downstream or adjacent wetlands located at any point in the tributary’s path to a TNW and whether those wetlands have relatively permanent flow through them. Absent a data collection effort, jurisdictional determinations inappropriately could in practice default to the conclusion a flow-through wetland severs upstream jurisdiction, which would have substantial impacts on resource protection because entire watersheds could then become unprotected. **Recommendation: Instead of allowing a presumption that wetlands have less than relatively permanent flow through them when flow data is lacking, the Agencies’ final rule should require data supporting a conclusion that flow through wetlands is less than relatively permanent. This would result in more accurate jurisdictional determinations of waters above wetlands and encourage sufficient data collection.**

The proposal may be creating incentives for poor design or maintenance of culverts and other man-made features conveying jurisdictional tributaries. The proposed policy indicates such features sever upstream jurisdiction when they have less than relatively permanent flow, thereby establishing an incentive to allow partial or full blockages in the feature, or to allow a stream to incise around a culvert and create a perched culvert with less than relatively permanent flow. The result could be loss not only of the intended function of the culvert or other feature, but also loss of CWA protection for entire

³⁵ The Corps has provided field manuals for use of the OHWM. See, e.g., “National Ordinary High Water Mark Field Delineation Manual for Rivers and Streams: Final Version,” available at [National Ordinary High Water Mark Field Delineation Manual for Rivers and Streams : Final Version](#); U.S. Army Corps of Engineers Regulatory Guidance Letter No. 05-05, “Ordinary High Water Mark Identification,” available at [REGULATORY GUIDANCE](#)

³⁶ 90 Fed.Reg. 52498, 52523 (November 20, 2025).

watersheds and loss of access for migratory fish such as salmon, as well as having high potential for transport of pollutants to TNWs since flow may still pass through the features at less than a relatively permanent frequency. **Recommendation: The final rule should indicate that flow through culverts and other man-made features will be evaluated as if the features were being properly maintained, and that reductions in flow due to poor design or maintenance do not sever upstream jurisdiction.**

The proposal calls for evaluating whether a stream has relatively permanent flow on the “reach” basis, where “reach” means a section of a stream or river along which similar hydrologic conditions exist.³⁷ The non-relatively permanent reaches would sever jurisdiction of upstream reaches under the proposed rule, except where the tributary is part of a water transfer.³⁸ NAWM is very concerned about the fragmentation of connected waters, both in terms of policy implementation and impacts on resource protection. The definition of “tributary,” coupled with flow evaluation based on a stream reach, requires knowledge of whether any non-relatively permanent waters or features are downstream of the review area that would sever jurisdiction. This seems inconsistent with the proposal’s stated goal of having the WOTUS definition be easy for landowners and professionals alike.

The proposal also is unclear how discharges into connected upstream non-jurisdictional waters would be addressed. Would a CWA section 402 National Pollutant Discharge Elimination System (NPDES) permit be required for the discharge into non-jurisdictional waters that reach a downstream WOTUS, considering the non-jurisdictional waters as conveyances of pollutant discharges from point sources? The *Rapanos* plurality opinion and the preamble to the 2020 Navigable Waters Protection Rule suggest a NPDES permit would be required under these circumstances.³⁹ Similarly, discharges to waters no longer considered jurisdictional may nonetheless still require section 404 permits if discharges of dredged or fill material reach jurisdictional waters. The Agencies do acknowledge the Supreme Court’s decision in *Maui v. Hawaii Wildlife Fund*,⁴⁰ but offer no explanation as to why the provisions and implications of the current proposed rulemaking are consistent with that decision with respect to requirements when discharges into non-jurisdictional waters reach jurisdictional waters.

It is incorrect to merely assert that *Maui* solely applies to Section 402, when the *Maui* decision extensively quotes and explains itself in the broader terms of the CWA (e.g., “point sources” and not NPDES-permitted sources), the “functional equivalent” definition and factors in *Maui* are equally relevant to Section 404 as to section 402, the factors and modes of pollutant transport via groundwater may be identical or the equivalent as those through manmade structures (e.g., earthen berms) or natural ones (e.g., wetland mosaics), and the

³⁷ 90 Fed.Reg. 52498, 52525 (November 20, 2025).

³⁸ *Id.*

³⁹ See, e.g., 85 Fed.Reg. 22250, 22319 (April 21, 2020).

⁴⁰ *County of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165 (2020)(holding that the statute also requires a permit “when there is the functional equivalent of a direct discharge.”)

“no longer regulated waters” are precisely those that may now require Section 404 authorizations for pollutant discharges. The implications of reduced *geographic* jurisdiction are not simply that these waters are no longer relevant to CWA coverage, but also have implications for CWA *activity* jurisdiction that should be clarified in the WOTUS rulemaking. These potential implications of the *Maui* decision for CWA Section 404 regulation have already emerged in the legal literature.⁴¹ **Recommendation: The final rule should clarify that NPDES or section 404 permits would be required for pollutant discharges into non-jurisdictional waters and features that reach WOTUS.**

In prior rulemakings to define WOTUS, some have encouraged the Agencies to require that tributaries contribute flow directly to a traditional navigable water (TNW) in order to be considered WOTUS. NAWM observes that there is no text in the CWA supporting a requirement that jurisdictional tributaries must contribute flow directly to a TNW, and neither EPA nor the Corps have ever interpreted the CWA as covering only such tributaries. Moreover, science is clear that the chemical, physical, and biological integrity of TNWs depends on the many tributaries, including headwater streams, that feed such waters. As EPA has previously noted, it would be impossible to restore and maintain the integrity of the Nation’s waters as required by the CWA with a definition of “waters of the United States” that included solely the last tributary that flows “directly” into a paragraph (a)(1) water.⁴² Tributaries upstream provide key functions that support the chemical, physical, and biological integrity of TNWs and other (a)(1) waters. If protections for tributaries ended just above the very last one, functions like habitat for salmon spawning, baseflow to maintain water levels, water quality, and nutrient replenishment would all be at risk as discharges with pollutants into the waters could reach a TNW without limits or mitigation measures. **Recommendation: The Agencies should emphasize and make clear in the final rule that tributaries may contribute flow either directly or indirectly to a TNW.**

Definition and implementation of “Adjacent Wetland”

To be jurisdictional, a wetland must qualify as “adjacent,” which currently is defined as “having a continuous surface connection” and the Agencies say they are not proposing a change to the definition of “adjacent.”⁴³ However, the proposal defines “continuous surface connection” as “having surface water at least during the wet season and abutting (i.e., touching) a jurisdictional water,”⁴⁴ which in effect does change the definition of adjacent because it now must meet the wet season surface water. The preamble explains this proposed definition establishes a two-prong test that requires both (1) abutment of a jurisdictional water, and (2) having surface water at least during the wet season. “Only those portions of a wetland with continuous surface hydrology at least during the wet season, and that are abutting, would be jurisdictional as adjacent wetlands, no matter the

⁴¹ See, e.g., “Clean Water Act – “Waters of the United States – Sackett v. EPA,” 137 Harv. L. Rev. 390 (2023).

⁴² See, e.g., 88 Fed.Reg. 3004, 3082 (January 18, 2023).

⁴³ 33 C.F.R. §328.3(c)(2), 40 C.F.R. §120.2(c)(2); see also 90 Fed.Reg. 52498, 52527 (November 20, 2025).

⁴⁴ 90 Fed.Reg. 52498, 52527 (November 20, 2025).

full delineated scope of the wetland.”⁴⁵ The proposed requirement for surface hydrology at least during the wet season allows for regional variation given the range in hydrology and precipitation throughout the country.⁴⁶ The preamble also notes that the *Sackett* decision recognized that temporary interruptions in surface connection may occur, such as during periods of drought or low tide.⁴⁷

NAWM supports some aspects of the proposal’s approach to adjacent wetlands. For example, NAWM strongly supports that a tidal wetland is considered an (a)(1) traditional navigable water and is jurisdictional without needing to assess whether the wetland meets the tests for adjacency.⁴⁸ NAWM also appreciates the proposal’s acknowledgement that temporary interruptions in surface connection do not render a wetland not WOTUS. However, as discussed below, NAWM has concerns about several aspects of the proposed approach for adjacent wetlands.

A major area of concern about the proposed wetlands approach is that only those portions of a delineated wetland that have surface water at least during the wet season may be considered adjacent and thus WOTUS. Identifying areas of a delineated wetland with surface water at least during the wet season will be difficult. First, determining the appropriate wet season for a wetland area raises conceptual and implementation challenges, as discussed earlier in this comment letter. Second, when the wet season concept is coupled with the requirement for surface inundation, the result does not reflect scientific understanding of wetland function, nor the role that wetlands play in the watershed even with saturated soil conditions and no prolonged surface water. Within a delineated wetland, neither *Rapanos* nor *Sackett* compel distinguishing wetland surface hydrology from shallow subsurface hydrology, and even when discussing how adjacent wetlands must have a “continuous surface connection to bodies that are ‘waters of the United States’ in their own right” the connection is not limited to a hydrologic one.⁴⁹ Third, defining adjacent wetlands as including only those portions of delineated wetlands with surface hydrology for an entire wet season will result in a substantial reduction in wetlands protected as WOTUS, particularly in the arid Southwest. Impacts likely will extend to the humid East, the Pacific Northwest, and all regions where wetlands have seasonal inundation and surface water connections. For example, at least one state has indicated to NAWM that non-tidal wetlands with continuous surface inundation over a period of months are rare in their state. However, surface water in many wetlands can be predictably present within seasons for shorter periods, and water quality impacts and damage from flooding can be severe within that shorter window. Fourth, the proposed approach to adjacent wetlands would create substantial implementation challenges,

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*, citing *Sackett* at 678.

⁴⁸ 33 C.F.R. §328.3(a)(1)(i), 40 C.F.R. §120.2(a)(1)(i) (“...including all waters which are subject to the ebb and flow of the tide...”); See also 90 Fed.Reg. 52498, 52530 (November 20, 2025).

⁴⁹ See, e.g., *Rapanos v. United States*, 547 U.S. 715, 742 (2006).

including the expense and time to determine which parts of a delineated wetland have the required surface hydrology during the applicable wet season. Costs to permit applicants will likely increase substantially with the proposal's two-part seasonal test for wetland jurisdiction.

Another area of concern is the proposed change to how wetland delineations and jurisdictional determinations are made for wetland mosaics. Wetland mosaics are landscapes where wetland and non-wetland components have complex micro-topography with repeated small changes in elevation occurring over small distances. An example provided in the preamble is where ridges and hummocks are often non-wetland but are interspersed throughout a wetland matrix having hydrophytic vegetation, hydric soils, and wetland hydrology.⁵⁰ Wetland mosaics are particularly common in Alaska, but are found in forested wetland complexes of the Pacific Northwest, the East Coast, and other regions as well. Currently, wetlands in the mosaic are considered collectively as one wetland because of the difficulty of delineating and mapping individual wetlands in the mosaic.⁵¹ Under the proposal such wetlands would need to be delineated individually, and only portions of the individually delineated wetlands that meet the definition of "continuous surface connection" would be jurisdictional as adjacent wetlands.⁵²

NAWM agrees with how the proposal summarizes the problem with the proposed approach to mosaics, but does not agree that remote sensing tools can make the delineation readily workable. The proposal says the "problem for the wetland delineator often is that microtopographic features may be quite small and intermingled, and there may be many such features per acre, creating challenges for accurate and efficient delineations and mapping."⁵³ The proposal believes "high-quality aerial photography"⁵⁴ and other tools will assist in the delineation. Challenges that NAWM believes are understated include the fact that wetland hydrology changes over the course of a year, perhaps only in some years having the surface inundation called for by the proposal's two-part test for adjacency. Consequently, an accurate delineation and jurisdictional determination of individual wetlands in a mosaic likely will require multiple field observations over time in addition to use of "high quality aerial photography" reflecting conditions throughout the year. The proposed approach to mosaics will be very time-

⁵⁰ 90 Fed.Reg. 52498, 52532(November 20, 2025).

⁵¹ 90 Fed.Reg. 52498, 52532 (November 20, 2025), citing 88 Fed.Reg 3004, 3093 (January 18, 2023). The "Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Northcentral and Northeast Region" indicates "[w]etland components of a mosaic are often not difficult to identify. The problem for the wetland delineator is that microtopographic features are too small and intermingled, and there are too many such features per acre to delineate and map them accurately. Instead, [a] sampling approach can be used to estimate the percentage of wetland in the mosaic. From this, the number of acres of wetland on the site can be calculated if needed." The Regional Supplement then describes at length a sampling method that "avoids the need to identify wetland boundaries in each swale," and requires onsite verification. Available at: [ERDC/EL TR-12-1 "Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Northcentral and Northeast Region: \(Version 2.0\)"](#)

⁵² 90 Fed.Reg. 52498, 52532 (November 20, 2025).

⁵³ *Id.*

⁵⁴ *See, e.g.*, 90 Fed.Reg. 52498, 52531 (November 20, 2025).

consuming and require expensive desktop assessment tools the proposal describes as “high resolution”⁵⁵ that still may be inadequate when evaluating closed-canopy forested areas. Remote sensing tools cannot easily detect wetlands from uplands in mosaic wetlands in forested environments and field verification with on-the-ground delineations is required. Agencies and permit applicants will have incentives to save time and money by either declaring the area entirely jurisdictional or entirely non-jurisdictional without performing the analyses called for by the proposal. Another concern NAWM has about the proposed approach to mosaics is that it ignores the science indicating mosaics are interactive systems that generally provide important functions in the watershed by acting as a single ecological unit.⁵⁶ **Recommendation: The final rule should reflect the current approach to wetland mosaics and consider whether the mosaic complex as a unit meets the two-part test for adjacency (abutting, surface water in wet season). The current Army Corps of Engineers Technical Guidance provides clear and field-tested procedures for delineating wetland mosaics.**

A Cross-Cutting Issue: Appropriateness of Proposed Tools for Implementing Jurisdictional Tests

The proposal lays out several tests for establishing whether a stream, wetland, or other waters are WOTUS. The stated goal is to implement *Sackett* “in an understandable and implementable way for both ordinary citizens and expertly trained scientists.”⁵⁷ To approach achieving this goal, technically defensible and implementable tools must be available to support WOTUS determinations. The proposal endorses use of specific tools.

NAWM believes that the proposal relies on specific tools to reach conclusions beyond those for which the tools were designed or are suitable. The preamble to the proposed rule references several analytical tools, including WebWIMP, the Antecedent Precipitation Tool (APT), and Streamflow Duration Assessment Methods (SDAMs), to inform determinations of wet season timing, normal precipitation conditions, and whether a water exhibits relatively permanent flow. These tools were not developed or validated to establish site-specific, legally defensible jurisdictional determinations regarding the wet-season continuity or relatively permanent flow. Reliance on these tools as described in the proposal raises concerns about scientific support, consistency of application, and practical implementation by federal agencies, and state and Tribal co-regulators.

WebWIMP. The proposal describes the use of the WebWIMP model to identify the wet season using a simplified climatic water-balance approach in which periods when precipitation exceeds evapotranspiration are considered wet. WebWIMP is a web-based model built on a modified Thornthwaite moisture model and climate datasets developed by the University of Delaware. Available documentation indicates that WebWIMP operates at a relatively coarse spatial and temporal resolution and does not incorporate groundwater

⁵⁵ *Id.*

⁵⁶ *See, e.g.*, 88 Fed.Reg. 3004, 3093 (January 18, 2023).

⁵⁷ 90 Fed.Reg. 52498, 52518 (November 20, 2025).

dynamics, subsurface flow paths, or hydrologic lag effects.⁵⁸ These limitations are particularly important in regions where surface flow responds after precipitation events or snowpack melt, conditions under which WebWIMP outputs may not align with observed streamflow or wetland inundation patterns relevant to evaluating hydrologic connectivity. There is limited documentation demonstrating that WebWIMP has been field validated or calibrated for determining jurisdictional attributes such as wet-season flow persistence or continuous surface connection, and the Corps has acknowledged that the tool's coarse resolution may limit its effectiveness during transitional periods between wet and dry seasons raising concerns about its reliability as a primary basis for determining the wet season for jurisdictional purposes.

APT. The proposal references the Antecedent Precipitation Tool (APT) to evaluate whether precipitation conditions represent "normal" conditions. APT may provide useful context regarding recent precipitation trends. However, EPA guidance notes that APT results are based on interpolated averages and that the timing of wet and dry seasons varies by location and year.⁵⁹ The rule does not clearly describe how determinations should proceed when APT indicates drought or anomalous precipitation conditions, nor does it explain how jurisdictional decisions should be made when evaluations are requested outside the identified wet season. These uncertainties create implementation challenges and raise questions about consistency and defensibility of determinations across regions and years.

In combination, the use of WebWIMP to define the wet season and APT to assess normal conditions introduces compounding uncertainty into jurisdictional determinations. The proposal does not provide sufficient guidance for reconciling conflicting outputs, addressing anomalous years, or determining jurisdiction when hydrologic conditions deviate from modeled averages. The proposal also does not specify which field indicators will be acceptable to correlate surface water presence, since direct hydrologic monitoring and remotely sensed data (e.g. aerial photography) may not be practical in many circumstances. These unresolved questions are particularly significant for states and Tribes responsible for implementing CWA programs under time-sensitive permitting frameworks.

SDAMs. The proposal further references Streamflow Duration Assessment Methods (SDAMs) as a potential tool to inform determinations of flow characteristics. SDAMs were developed to classify streams as perennial, intermittent, or ephemeral based on physical, biological, and hydrologic indicators observed during a field assessment conducted at a

⁵⁸ University of Delaware. 2009. WebWIMP: The Web-Based, Water-Budget, Interactive, Modeling Program, available at http://cyclops.deos.udel.edu/wimp/public_html/index.html.

⁵⁹ See, e.g., Sparrow, Kent H., Stephen W. Brown, Christopher E. French, Kyle B. Gordon, Joseph L. Gutenson, Chase O. Hamilton, Jason C. Deters. 2025. Antecedent Precipitation Tool (APT) Version 3.0 : Technical and User Guide. Engineer Research and Development Center ERDC-TN WRAP-25-1; U.S. Environmental Protection Agency, "Additional Information on the Antecedent Precipitation Tool (APT)," available at <https://www.epa.gov/wotus/antecedent-precipitation-tool-apt>.

single point in time.⁶⁰ They were not designed to determine whether flow persists throughout the wet season or whether a stream exhibits relatively permanent flow as defined in the proposed rule. SDAMs are also region-specific and are not uniformly available, adopted, or implemented nationwide. Effective implementation would require substantial investment in training, formal method adoption, and multi-year field validation. Requiring routine use of SDAMs for jurisdictional determinations would increase administrative costs, extend review timelines, heighten the likelihood of inconsistent outcomes, and divert limited state and Tribal resources from core CWA program responsibilities. These limitations increase the likelihood of misclassification in landscapes dominated by intermittent stream networks, where seasonal variability is high and establishing a consistent hydroperiod is particularly difficult.

Karst landscapes present additional implementation challenges for tools that rely on surface flow indicators. In karst systems, surface flow can be highly variable or discontinuous even during periods of sustained subsurface flow. These conditions complicate the application of SDAMs and similar tools when evaluating the presence or absence of relatively permanent flow and continuous surface connection under the proposed rule. Reliance on surface indicators in these settings would likely result in underclassification of flow duration and misidentification of jurisdictional waters. These factors increase the risk of misclassification, particularly in landscapes dominated by intermittent stream networks or in karst settings where surface flow may be discontinuous. Areas with karst geology are particularly vulnerable to groundwater contamination, which then may emerge as surface water, as well as being potentially hazardous as building sites due to risk of sinkhole formation.

NAWM discourages the codification or endorsement of specific technological models or tools in regulation. Prescribing particular tools limits flexibility, does not account for future scientific advancements, and may necessitate additional rulemaking to accommodate improved methodologies. NAWM also notes that WebWIMP is hosted on an unsecured website, raising concerns regarding data security and reliability. **Recommendation: The final rule should establish that determinations of relatively permanent flow should rely primarily on traditional field methods, supplemented by precipitation records and multiple lines of evidence. Specific tools and data sources should not be required by the final rule. Instead, tools and data sources should be identified regionally through collaboration among federal, state, Tribal, and local experts, allowing for flexibility and recognition of regional hydrologic variability.**

A durable WOTUS rule must be grounded in approaches that are scientifically defensible, practically implementable, and capable of consistent application by the co-regulators responsible for its implementation.

⁶⁰ U.S. Environmental Protection Agency, “Learn about Regional SDAMS,” available at <https://www.epa.gov/streamflow-duration-assessment/learn-about-regional-sdams>

Proposed Approaches to Exclusions from WOTUS

The proposed definition of WOTUS provides three modified exclusions for waste treatment systems, prior converted cropland, and ditches. The proposal also adds a new exclusion for groundwater and retains unchanged four current exclusions for irrigated areas that would dry up should irrigation cease, for artificial lakes and ponds, for ornamental ponds, and for water-filled depressions on construction sites.⁶¹ NAWM recognizes the need for some of the proposed exclusions, but has concerns regarding the scope of the proposed exclusions.

Waste treatment systems: The proposed exclusion would apply only to waste treatment systems constructed in accordance with the CWA and to all waste treatment systems constructed prior to the 1972 enactment of the CWA.⁶² The proposal defines “waste treatment system” as including “all components of a waste treatment system designed to meet the requirements of the Clean Water Act, including lagoons and treatment ponds (such as settling or cooling ponds), designed to either convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).”⁶³ The proposal explicitly states that the waste treatment exclusion would not free the system from CWA requirements such as effluent guidelines applicable to the waste treatment system, or from requirements to get a permit for discharges from the system into a WOTUS. “Only discharges *into* the waste treatment system would be excluded from the Act’s requirements.”⁶⁴ Agencies propose to continue their longstanding practice that a CWA section 404 permit is required for construction of a new waste treatment system in WOTUS, and a CWA section 402 permit if there are discharges of pollutants from a waste treatment system into WOTUS.⁶⁵ The proposal also states a waste treatment system that is abandoned and otherwise ceases to serve the treatment function for which it was designed would not continue to qualify for the exclusion. Such former waste treatment systems could be deemed jurisdictional if they otherwise meet the proposed rule’s definition of WOTUS.⁶⁶ Lastly, the proposal raises questions about whether stormwater treatment and management systems should be excluded as waste treatment systems.

NAWM recognizes the need for an exclusion for waste treatment systems designed to meet CWA requirements, to avoid a circularity where such systems themselves need to meet CWA requirements even as they remove pollutants from wastewater as required by the CWA prior to discharge into WOTUS. NAWM also appreciates the clarification that the exclusion does not alleviate project proponents from the need to obtain a section 404 permit before constructing a treatment system in WOTUS or a section 402 permit before discharging pollutants into WOTUS. However, NAWM is concerned about the very broad

⁶¹ 90 Fed.Reg. 52498, 52533 (November 20, 2025).

⁶² *Id.*

⁶³ 90 Fed.Reg. 52498, 52534 (November 20, 2025).

⁶⁴ 90 Fed.Reg. 52498, 52535 (November 20, 2025).

⁶⁵ *Id.*

⁶⁶ *Id.*

scope of system components that would be exempt. For example, one of the proposed exempt system components are those that convey pollutants. While treatment system internal pipes and similar conveyances seem appropriately excluded from WOTUS, some treatment systems rely on streams that may be WOTUS to convey pollutants to and between treatment components. Use of potentially jurisdictional streams as pollutant conveyances seems particularly common in stormwater management and treatment systems. Many stormwater facilities are constructed within WOTUS, possess outlets for downstream flow, or contain specific wetland conditions preserved by past authorizations. Furthermore, non-continuous flow resulting from water level management within a facility should not be interpreted as severing the connection to jurisdictional tributaries.

Recommendation: The final rule should not extend the wastewater treatment system exclusion to exclude those components that had been considered WOTUS prior to construction of the system, unless its section 404 permit for construction required appropriate compensatory mitigation for newly non-jurisdictional waters. Jurisdiction over stormwater management facilities is best made on a case-by-case basis.

Prior Converted Cropland: The U.S. Department of Agriculture’s Food Security Act Manual defines “Prior Converted Cropland” (PCC) as “areas that, prior to December 23, 1985, were drained or otherwise manipulated for the purpose, or having the effect, of making production of a commodity crop possible.”⁶⁷ The CWA does not define PCC explicitly or provide for its exclusion from WOTUS. However, since 1993 EPA and Corps regulations have excluded PCC from WOTUS, unless the PCC has been abandoned and reverted to wetlands.⁶⁸ The proposal would not require that PCC areas were drained or otherwise manipulated to make production of a commodity crop possible. Instead, to qualify as PCC the cropland must have been manipulated for “an agricultural purpose.”⁶⁹ The proposal also clarifies that the PCC exclusion would no longer apply “when the cropland is abandoned, (i.e., when the cropland has not been used for or in support of agricultural purposes for a period of greater than five years, and the land has reverted to wetlands”),⁷⁰ while asking for comment on whether to require the same five-year abandonment period for when there is a change in use from agriculture. The preamble provides illustrative examples of “an agricultural purpose,” including grazing, haying, idling land for conservation uses such as pollinator management, water storage and flood management, nutrient retention, and soil recovery.⁷¹

⁶⁷ 58 Fed.Reg. 45031(August 25, 1993).

⁶⁸ *Id.* In response to 1996 amendments to the Food Security Act that modified the abandonment principle and incorporated a “change in use” policy. The Agencies in the 2023 WOTUS definition reflected the “change in use” policy for identifying when PCC ceased to be PCC and lost its exclusion from WOTUS. 88 Fed.Reg. 3004, 3106 (January 18, 2023).

⁶⁹ 90 Fed.Reg. 52498, 52535, 52538 (November 20, 2025).

⁷⁰ 90 Fed.Reg. 52498, 52536 (November 20, 2025).

⁷¹ *Id.* at 52536-7.

NAWM is concerned that the WOTUS proposal greatly broadens PCC exclusion. The proposal shifts to the term “agricultural purposes,” thereby changing the PCC definition from land that produces an agricultural commodity crop to land that more generally supports agriculture. Under the abandonment criteria in the 1993 rule’s preamble, an area was required to be used for the production of an agricultural commodity once within a five-year period. Under the proposed new approach to PCC, the exclusion no longer requires actual production. Additionally, the requirement for the land to be used at least once in five years for an agricultural purpose has essentially been eliminated by the proposal. The proposal considers “cropland that is left idle or fallow for conservation or agricultural purposes for any period or duration of time remains in agricultural use (i.e., it is used for, or in support of agricultural purposes).”⁷² As a result, under the proposal almost any land that was manipulated prior to December 1985 and remains undeveloped could now be excluded from WOTUS protections as PCC.

In addition to being broader, the PCC exclusion under the proposal is unclear. It remains uncertain, for example, if a single cow grazing in a large field, or even if a farmer is preparing the field for a single cow, would be sufficient to ensure the area remains exempt as PCC. Any field with wildflowers could be considered pollinator habitat and therefore sufficient for an area to remain exempt as PCC. The proposal’s approach to PCC is very similar to that adopted in the since-vacated 2020 Navigable Waters Protection Rule (NWPR). An article quotes a Corps staffer as saying the NWPR’s changes to the PCC exclusion could remove federal jurisdiction from “two-thirds, but more like three-quarters” of the entire state of Texas.⁷³ Another Corps staffer said that now “word is getting out” after the NWPR was finalized that grazing makes land qualify as PCC, and the Corps had seen a significant increase in requests for jurisdictional determinations as exempt PCC.⁷⁴

In short, the proposal’s approach to the PCC exclusion is ambiguous, subject to misinterpretation, and is potentially so broad that it interferes with attaining the CWA’s goal of restoring and maintaining the Nation’s waters. Would land supporting a tractor dealership be excluded as PCC because it supports agricultural purposes?

Recommendation: The final WOTUS rule should indicate that PCC loses its exclusion if not used for the production of an agricultural commodity in the preceding five years and has reverted to wetlands, or if there is a change in land use from production of an agricultural commodity.

Definition of “Ditch” and scope of the ditch exclusion: Ditches have historically been one of the most challenging issues when defining WOTUS. The concept of “ditch” has remained vague and the term not well-defined, in part because naturally occurring streams often have been modified by man and can look like ditches, and from the scientific point of

⁷² *Id.* at 52536.

⁷³ Groves, David, “How the Trump Administration Eased Destruction of the Nation’s Wetlands and Streams,” 51 ELR 10194, 10196 (March 2021).

⁷⁴ *Id.*

view, constructed ditches often function as tributaries with effects on the stream network similar to naturally occurring streams.

The proposal adopts the same definition as provided in the 2020 Navigable Waters Protection Rule, defining “ditch” as “a constructed or excavated channel used to convey water.”⁷⁵ Under the proposed rule, “ditches (including roadside ditches) that are constructed or excavated entirely in dry land are not ‘waters of the United States.’”⁷⁶ The 2023 WOTUS Rule currently in effect in many states similarly excludes ditches but neither retained the NWPR definition nor provided its own definition of “ditch.”⁷⁷ The 2023 Conforming Rule does exclude “ditches (including roadside ditches) that are excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water.”⁷⁸

NAWM is concerned that the proposal excludes ditches that are constructed or excavated entirely in dry land but, unlike longstanding practice, does not specify that excluded ditches must also drain only dry land. Under the proposal, excluded ditches can drain wetlands and other waters without any environmental review under the CWA. Limiting the ditch exclusion to channels constructed or excavated in dry land and draining only dry land would help provide greater predictability for agriculture, state departments of transportation, and others. Additionally, limiting excluded ditches to those that drain only dry land seems likely to help protect wetlands as well as channelized and relocated streams, and therefore be consistent with the goal of the CWA to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters. **Recommendation: The final WOTUS rule should include the proposed definition of “ditch” for clarity, and indicate a feature must have been created in dry land and drain only dry land to be considered an excluded ditch. It also would be helpful to clarify that tidal ditches are not excluded because they were not created in dry land.**

Exclusion for groundwater: The proposal would exclude groundwater, including groundwater drained through subsurface drainage systems.⁷⁹ The preamble indicates that the exclusion would not apply to surface expressions of groundwater, such as where groundwater emerges on the surface and becomes baseflow in relatively permanent streams.⁸⁰

NAWM appreciates the preamble’s statement distinguishing excluded groundwater from surface expressions of groundwater. Nonetheless, NAWM is not supportive of the new exclusion for groundwater. The CWA since its enactment has never considered

⁷⁵ 90 Fed.Reg. 52498, 52535, 52538-9 (November 20, 2025); 85 Fed.Reg. 22250, 22295, 22338 (April 21, 2020).

⁷⁶ 90 Fed.Reg. 52498, 52535, 52538-9 (November 20, 2025).

⁷⁷ 88 Fed.Reg. 3004, 3112-3113 (January 18, 2023).

⁷⁸ *Id.* at 3112. The 2023 WOTUS Rule reflected longstanding policy and practice as discussed in the 2008 *Rapanos Guidance*.

⁷⁹ 90 Fed.Reg. 52498, 52541 (November 20, 2025).

⁸⁰ *Id.*

groundwater to be a WOTUS and, as a result, the exclusion is both unnecessary and potentially confusing. Groundwater connections have in the past served as important considerations when determining whether a particular water is a WOTUS by establishing a hydrologic and ecologic relationship between the water in question and a WOTUS. After *Sackett*, groundwater connections are less relevant to WOTUS jurisdictional determinations with the decision's emphasis on surface hydrologic connections between waters. However, as the proposed rule's preamble emphasizes, groundwater can be critical for maintaining hydroperiods and baseflow in relatively permanent waters.⁸¹ Groundwater connections may also serve as a conduit for discharges that are the "functional equivalent of a discharge" and subject to permitting requirements after the U.S. Supreme Court's ruling in the *Maui* case.⁸² The exclusion would extend to subsurface drainage systems such as tile drains used to remove shallow subsurface hydrology in agricultural areas. NAWM is concerned about the potential for subsurface drainage systems to remove wetland hydrology without any CWA environmental review, due to groundwater in such systems being excluded from WOTUS. Generally, a new exclusion could create confusion about when and where groundwater may be relevant to determinations under the CWA, particularly regarding when a section 402 permit may be required. **Recommendation: The final rule should not include an exclusion for groundwater, particularly an exclusion that extends to cover subsurface drainage systems such as tile drains.**

Elimination of Interstate Waters as a Category of WOTUS.

The proposed rule would remove interstate waters as a separate category of WOTUS, and would protect interstate waters only if they fall into another category within the WOTUS definition.⁸³ NAWM strongly believes interstate waters should be a category of WOTUS. The CWA's legislative history, statutory provisions, policy goals, the history of federal jurisdiction over interstate waters prior to the 1972 CWA, and CWA regulatory history all provide strong support for including interstate waters and their tributaries and adjacent waters within the scope of WOTUS.

Legislative and Regulatory History: When Congress passed the CWA in 1972, it was not starting from scratch but instead was amending the Federal Water Pollution Control Act of 1948 (FWPCA). The legislative history of the 1972 CWA, the Act's overall structure⁸⁴, and the caselaw interpreting it⁸⁵ universally support the position that the

⁸¹ See, e.g., 90 Fed.Reg. 52498, 52541 (November 20, 2025) ("The agencies acknowledge the importance of groundwater as a resource and its role in the hydrologic cycle.") See also 52518, 52524, FN on 52526, and 52527 for additional acknowledgements in the proposal preamble about the importance of groundwater.

⁸² *County of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165 (2020).

⁸³ 90 Fed.Reg. 52498, 52516 (November 20, 2025).

⁸⁴ See, e.g., CWA §303(a)(1), where Congress indicated the CWA's ongoing independent protection for interstate waters by providing that pre-existing water quality standards for interstate waters remain in effect.

⁸⁵ See, e.g., *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 492 ("Congressional views on the comprehensive nature of the legislation were practically universal.") (internal cites omitted).

1972 Act was intended to broaden regulatory jurisdiction in almost every respect. Therefore, when analyzing what is the authorized scope of WOTUS under the 1972 Act with respect to interstate waters, it is useful to analyze the FWPCA as it existed at the time.

In 1948, Congress enacted the FWPCA "in connection with the exercise of jurisdiction over the waterways of the Nation and in the consequence of the benefits to public health and welfare by the abatement of stream pollution."⁸⁶ The FWPCA defined "interstate waters" as "all rivers, lakes, and other waters that flow across, or form a part of, State boundaries."⁸⁷ The Act authorized technical assistance and financial aid to states for stream pollution abatement programs, and made discharges of pollutants *into interstate waters and their tributaries* a nuisance subject to abatement and prosecution by the United States.⁸⁸ Other FWPCA provisions similarly emphasized interstate waters. For example, the planning provisions required comprehensive programs for *interstate waters and tributaries thereof*,⁸⁹ and the FWPCA authorized loans for sewage treatment to abate discharges into "*interstate waters or into a tributary of such waters*."⁹⁰

Subsequent changes to the FWPCA continued to include protection of interstate waters. Congress amended the FWPCA in 1961 to substitute the term "interstate or navigable waters" for "interstate waters." As a result, from 1961, the provisions of the FWPCA applied to all *interstate and navigable waters and the tributaries of each*.⁹¹ Congress did not define the term "navigable waters" until 1972 when enacting the CWA. In 1965, Congress amended the FWPCA to require each state to develop water quality standards for *interstate waters* within its boundaries by 1967,⁹² with the federal government establishing such standards if states failed to do so.⁹³

When enacting the 1972 CWA, Congress did not merely define "navigable waters" as "waters of the United States including the territorial seas" but also indicated the scope of protected waters in programmatic provisions in the Act. The text and legislative history of the CWA shows that Congress intended the term "navigable waters" to include interstate waters without imposing a requirement that they be traditional

⁸⁶ See Pub. L. No. 80-845, 62 Stat. 1155 (June 30, 1948).

⁸⁷ FWPCA § 10, 62 Stat. 1161.

⁸⁸ FWPCA §2(d)(l),(4), 62 Stat. at 1156-1157 (declaring the pollution of interstate waters, "whether the matter causing or contributing to such pollution is discharge directly into such waters or reaches such waters after discharge into a tributary of such waters," which endangers the health or welfare of persons to be a public nuisance, subject to abatement provided by the Act, including suit by the United States).(emphasis added).

⁸⁹ FWPCA §2(a), 62 Stat. 1155 (requiring comprehensive programs for "interstate waters and tributaries thereof")(emphasis added).

⁹⁰ FWPCA §5, 62 Stat. 1158 (authorizing loans for sewage treatment to abate discharges into "interstate waters or into a tributary of such waters")(emphasis added).

⁹¹ See 33 U.S.C. §§466a, 466g(a) (1964)(emphasis added).

⁹² Pub. L. No. 89-234, 79 Stat. 908 (1965).

⁹³ *Id.* at 908.

navigable waters themselves or be connected to traditional navigable waters.⁹⁴ Programmatic provisions in the 1972 CWA provide additional textual evidence that its geographic scope included interstate waters. For example, the CWA provided that any previous water quality standard applicable to interstate waters was to remain in effect unless inconsistent with the CWA, at which time states or EPA were to modify the standard.⁹⁵

Legislative history of the CWA indicates an intent to expand the FWPCA's definition of regulated waters, not shrink protections. For example, the Senate report for the CWA stated:

"The control strategy of the Act extends to navigable waters. ... Through a narrow interpretation of the definition of interstate waters the implementation of the 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source. Therefore, reference to the control requirements must be made the navigable waters, portions thereof, and their tributaries."⁹⁶

The House of Representatives similarly viewed the 1972 CWA as establishing broad protections. The House Report noted:

"The Committee fully intends that the term "navigable waters" be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."⁹⁷

In summary, legislative history and CWA text strongly indicate Congress intended to expand federal protection of waters when enacting the CWA. No evidence exists that Congress intended to exclude interstate waters which were not themselves traditional navigable waters or connected to traditional navigable waters. Excluding interstate waters when enacting the 1972 CWA would have contradicted the goals of the statute.

The Agencies have long included interstate waters in the regulatory definition of WOTUS. Prior to the 2020 Navigable Waters Protection Rule, EPA had always

⁹⁴ The Conference Committee for the 1972 CWA deleted the word "navigable" and expressed the intent to reject prior geographic limits on the scope of federal water-protection measures. Compare S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972), with H.R. Rep. No. 911, 92 Cong., 2d Sess. 356 (1972) (bill reported by the House Committee provided that "[t]he term 'navigable waters' means the navigable waters of the United States, including the territorial seas"); see also S. Rep. No. 414, 92d Cong., 1st Sess. 77 ("Through a narrow interpretation of the definition of interstate waters the implementation of the 1965 Act was severely limited. . . . Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries.").

⁹⁵ CWA §303(a), 33 U.S.C. §1313(a).

⁹⁶ S. Rep. 414, 92d Cong., 1st Sess. 77 (1971).

⁹⁷ H.R. Rep. No. 911, 92d Cong., 2d Sess. 131 (1972).

interpreted the 1972 CWA as covering interstate waters,⁹⁸ and the Corps similarly included interstate waters when defining its CWA programmatic scope.⁹⁹ When finalizing its 1977 definition of navigable waters, the Corps provided an explanation for the inclusion of interstate waters:

“The affects [sic] of water pollution in one state can adversely affect the quality of the waters in another, particularly if the waters are interstate. Prior to the FWPCA amendments of 1972, most federal statutes pertaining to water quality were limited to interstate waters. We have, therefore, included [interstate waters] consistent with the Federal government’s traditional role to protect these waters from the standpoint of water quality and the obvious effects on interstate commerce that will occur through pollution of interstate waters and their tributaries.”¹⁰⁰

The same rationale regarding protection of interstate waters applies today.

Policy Considerations. The primary goal of the 1972 CWA is to restore and maintain the chemical, physical, and biological integrity of the nation’s waters.¹⁰¹ This goal cannot be met unless interstate waters are regulated at the federal level. One of the primary CWA obligations of the federal agencies is to protect states and Tribes from actions of upstream or neighboring states or Tribes that harm downstream interstate waters. That obligation is not met if interstate waters are not a WOTUS.

The NWPR preamble indicated “interstate waters without any connection to traditional navigable waters would be more appropriately regulated by the states...”¹⁰² The preamble also indicated the 2020 definition of WOTUS “preserves the traditional sovereignty of States over their own land and water resources.”¹⁰³ The 2025 proposed rule preamble adopts similar arguments when eliminating interstate waters as a category.¹⁰⁴ Yet removing jurisdiction from interstate waters serves only to place the financial and administrative burden of preventing the degradation of these waters on multiple state governments and ultimately the Supreme Court. A state or tribe has no mechanism – short of a series of legal water wars fought in the Supreme Court – to compel an upstream state to control pollution of waters flowing downstream if not regulated by the CWA. The result is a need for federal authority reflected in a regulatory definition of WOTUS. The CWA framework was intended to avoid precisely

⁹⁸ See, e.g., 38 Fed.Reg. 13538 (May 22, 1973)(the term “waters of the United States” includes “interstate waters and their tributaries, including adjacent wetlands.”).

⁹⁹ In 1975, Corps regulations defined navigable waters to include “[i]nterstate waters landward to their ordinary high water mark and up to their headwaters.” 40 Fed.Reg. 31320, 31324 (July 25, 1975). In a revised regulatory definition finalized in 1977, the Corps adopted EPA’s definition and included within the definition of WOTUS “interstate waters and their tributaries, including adjacent wetlands.” 42 Fed.Reg. 37122 (July 19, 1977).

¹⁰⁰ 42 Fed.Reg. 37122 (July 19, 1977).

¹⁰¹ CWA §101(a), 33 U.S.C. §1251(a).

¹⁰² 84 Fed.Reg. 4154, 4172 (February 14, 2019). See also 85 Fed.Reg. 22250, 22282-22286 (April 21, 2020).

¹⁰³ 85 Fed.Reg. 22250, 22252 (April 21, 2020).

¹⁰⁴ 90 Fed.Reg. 52498, 52516-17 (November 20, 2025).

this type of litigation. Justice Scalia noted the importance of the federal agencies in regulating interstate waters in his *Rapanos* plurality opinion: “...the Act protects downstream States from out-of-state pollution that they cannot themselves regulate.”¹⁰⁵ In short, federal jurisdiction over interstate waters rather than threatening state sovereignty, protects it.

A new definition including interstate waters as WOTUS should clarify that tributaries to interstate waters and wetlands adjacent to an interstate water also are WOTUS. Including these waters as WOTUS in effect treats relationships with interstate waters as the equivalent of relationships with traditional navigable waters. Such an approach is well-supported by legislative history; note that the legislative history discussed above always refers to interstate waters and their tributaries. As a result, the argument for tributaries to interstate waters and waters adjacent to interstate waters is the same: that tributaries to interstate waters and wetlands adjacent to such waters should be WOTUS.

Recommendation: The Agencies should include interstate waters as categorically WOTUS in the final rule. As discussed above, interstate waters may be the water that is most clearly WOTUS because they are the waters of the several states and, therefore, the United States. Such a policy would be consistent with the CWA’s text and legislative history, reflect prior regulatory approaches, and help protect the quality of downstream waters. **NAWM also recommends that tributaries to interstate waters be identified as WOTUS, as well as wetlands adjacent to such tributaries.** If tributaries to interstate waters are not within the scope of CWA protections as WOTUS it will be difficult to ensure the chemical, physical, and biological integrity of interstate waters are restored and maintained.

Conclusions

Thank you for the opportunity to submit information, policy recommendations, and other feedback in response to the proposed definition of WOTUS protected under the CWA. NAWM supports the Agencies’ objective of having a clear definition that is fully consistent with CWA goals and authorities while being informed by implementation experience and aquatic resource science. As discussed earlier in this comment letter, NAWM believes it would achieve this objective and be more productive to work on tools and technical assistance to help implement the 2023 Conforming Rule, instead of yet another new WOTUS definition. NAWM also believes meaningful engagement with states and Tribes through regional working groups is important for achieving the Agencies’ objective.

Although these comments have been prepared by NAWM with input from the NAWM Board of Directors, they do not necessarily represent the individual views of all states and Tribes

¹⁰⁵ *Rapanos v United States*, 547 U.S. 715, 776 (2006).

or NAWM member organizations. We have encouraged our member states and Tribes to submit their own comments on the WOTUS proposal.

Sincerely,



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