



National Association of Wetland Managers

"Dedicated to the Protection and Restoration of the Nation's Wetlands"

October 7, 2026

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RE: EPA-HQ-OW-2025-0322, "Updated Definition of 'Waters of the United States,' Supplemental Notice of Proposed Rulemaking"

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) (together, the "Agencies") for written feedback on the definition of "waters of the United States" (WOTUS) as proposed on November 20, 2025, and supplemented on September 9, 2026. In this letter, NAWM is commenting only on issues raised in the supplemental proposal but considers its letter submitted on January 5, 2026, as part of this comment and requests that they be considered together.

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 Clean Water Act (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 definition of WOTUS establishes which waters and wetlands are considered jurisdictional and protected by CWA programs. As such, the definition is the key threshold consideration when implementing the CWA.

Cooperative Federalism is a Cornerstone of the CWA and Must Be Protected.

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.”¹ 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.”² 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) to implement the section 401 certification authority, and to request delegation of sections 402 and 404 permitting programs. The CWA establishes a role for states and Tribes with TAS to develop and implement programs that are central to achieving the Act’s objective, such as administering the section 303(c) water quality standards program and 303(d) impaired waters and total maximum daily loads program.³ 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, condition, or deny, based on an analysis of whether the proposed authorizations would be consistent with water quality standards and certain other CWA and state or Tribal provisions.

Cooperative federalism involves federal, state, and Tribal governments collaborating, sharing power and responsibilities to implement policies and achieve objectives. Preambles in both the original and supplemental proposals refer to 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.⁴ 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 waters and 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

¹ 33 U.S.C. §1251(a), CWA §101(a).

² 33 U.S.C. §1251(b), CWA §101(b).

³ 33 U.S.C. §1313(c)-(d), CWA 303(c)-(d).

⁴ See, e.g., 90 Fed.Reg. 52498, 52518 (November 20, 2025); *see also* 91 Fed.Reg. 57284, 57290 (September 9, 2026).

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.⁵

For the reasons discussed above, a strong federal presence is necessary for cooperative federalism to achieve CWA goals. A related but separate argument can be made that the proposal and related federal policy initiatives would prevent states and Tribes from compensating for newly absent federal EPA and Army Corps partners.

The Supplemental Notice's proposed definitions and time period for standing or flowing perennial water are too restrictive and would eliminate many interstate waters, including numerous streams and wetlands, from jurisdiction, with very limited authority under CWA 401(a) to resolve interstate concerns. States lack control over the quality of waters flowing into their jurisdiction and can only control and manage once the water crosses the state boundary. This is why a sufficient federal presence is necessary to create a baseline. A downstream State should not have to spend additional funds to maintain the quality of its wetlands and other waters because of action from an upstream jurisdiction.

Downstream states should be able to rely on a sufficiently robust federal program to set minimum standards on discharges into WOTUS in order to help safeguard the quality of their waters and to achieve the CWA goal of protecting the nation's waters. To be effective and consistent with CWA goals, the definition for WOTUS must reflect regional concerns and consider effects of discharges into waters with a shorter duration of surface water inundation. By eliminating a legally sound, scientifically informed, and consistent national baseline of federally regulated waters and discharges, the Supplemental Notice's proposed rule undermines and weakens state and tribal authority by increasing the extent of harmful discharges from other jurisdictions over which the downstream state has no control and increases costs of state remedial actions to maintain water quality and continued use of waters, including wetlands.

The impact of the original and supplemental proposals' WOTUS definition must be considered in light of other EPA and Army Corps initiatives. For example, EPA is about to finalize a CWA section 401 water quality certification rule which, based on its proposal, seems likely to limit 401's use as an effective state and tribal water quality tool. The original and supplemental proposal preambles suggest that states and Tribes are both "prepared and well-equipped"⁶ to protect non-WOTUS waters within their boundaries. However, the Supplemental Notice also acknowledges that some states and Tribes may need to expend considerable resources to establish programs regulating non-WOTUS waters, and that some states currently have laws restricting their ability to adopt requirements more stringent than Federal regulations.⁷ Under current practice, state and tribal 401 certification authorities have addressed water quality impacts of federal licenses and permits on both WOTUS and non-WOTUS waters. The assumption in the original proposal and Supplemental Notice that states and Tribes can protect newly non-

⁵ CWA §510, 33 U.S.C. §1370.

⁶ See, e.g., 91 Fed.Reg. 57284, 57296 (September 9, 2026).

⁷ 91 Fed.Reg. 57284, 57296 (September 9, 2026). Data from NAWM's state members suggests around 23 states have "no more stringent than" provisions.

jurisdictional waters becomes unconvincing when viewed in light of other federal policy initiatives such as proposals to narrow the scope of CWA section 401 and its applicability to non-WOTUS waters and, therefore, its utility to protect state and tribal waters and water quality. Together, the proposals to narrow the scope of WOTUS and section 401 authority will make it difficult for states and Tribes to protect their own waters, undermining their ability to achieve the CWA goal of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters.

Recommendation: EPA and the Army Corps should develop final rule policies that are supportive of the CWA's cooperative federalism framework and not interpret CWA section 101(b) in a way that undermines that framework. Similarly, the Agencies should evaluate the impacts of how the proposed definitions would weaken states' and tribes' abilities to protect their waters and water quality effectively, including addressing the potential impacts from federally issued licenses and permits, from interstate waters, as well as the economic impacts to states and tribes of redirecting resources to administer expanded state and tribal programs to achieve the goal of the CWA.

Collaborative Input from States and Tribes is Essential for Achieving CWA Goals.

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 in light of *Sackett* and informed by science and implementation experience, and is (as the Agencies emphasize in the initial and supplemental proposals) a durable rule. A rule that cannot be implemented will fail.

NAWM appreciates the Agencies soliciting public comment on the proposed definitions, and holding after the initial proposal 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 "perennial."

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

The Supplemental Notice Proposed Definitions of "Perennial" and "Relatively Permanent".

In *Sackett*, the Supreme Court established that WOTUS "encompasses 'only those relatively permanent, standing or continuously flowing bodies of water forming geographic[al]

features that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes.’”⁸ As such, the definition of “relatively permanent” is a critical component of the definition of WOTUS. The Supplemental Notice bases its approach to “relatively permanent” on a proposed definition of “perennial.” NAWM believes that the two terms in the Supplemental Notice pose significant problems.

Definition of “Perennial.”

The Agencies are seeking comment on Supplemental Notice’s definition of “perennial,” proposing to define the term as “having standing or continuously flowing water every day of the year during ordinary conditions.”⁹ A water that does not flow 365 days in a year could still be considered perennial provided that ordinary conditions are present. According to the Supplemental Notice preamble, ordinary conditions include certain non-anomalous events resulting in a temporary flow interruption, such as low tide or a regularly occurring dry spell, or an anomalous circumstance that is exceptional such as drought that disrupts a perennial water’s year-round flow. The Agencies assert this definition would “provide certainty and clarity for landowners and is easily administrable for the implementing agencies.”¹⁰ For the reasons discussed below, NAWM believes the Supplemental Notice’s definition of “perennial” is inconsistent with the *Sackett* and *Rapanos* opinions, is not scientifically supported, lacks tools for ready implementation, and will result in outcomes inconsistent with the goals of the CWA.

The Agencies also seek comment on the definition from the 2020 Navigable Waters Protection Rule, which considered perennial waters to mean “surface water flowing continuously year-round.”¹¹ NAWM believes this definition would be indefensibly narrow because it would exclude standing waters from perennial waters, thereby eliminating from jurisdiction lakes, ponds, slack-water areas of streams, and other waters without year-round flowing water. NAWM also notes that the 2020 Navigable Waters Protection Rule definition of perennial is inconsistent with both the *Sackett* and *Rapanos* opinions, which concluded that waters protected by the CWA “... encompasses ‘only those relatively permanent, standing, or continuing flowing bodies of water...’”¹²

Definition of “Relatively Permanent.”

The initial WOTUS proposal defined “relatively permanent” to mean “standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season,”¹³ while seeking comments on several alternative approaches.

⁸ *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023) at 671 (quoting *Rapanos v. United States*, 547 U.S. 715, 739 (2006) (plurality op.).

⁹ *Id.*

¹⁰ *Id.*

¹¹ 85 Fed.Reg. 22250 (April 21, 2020).

¹² *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023) at 671 (quoting *Rapanos v. United States*, 547 U.S. 715, 739 (2006) (plurality op.).

¹³ 90 Fed.Reg. 52498, 52545 (November 20, 2025).

In the Supplemental Notice, EPA and the Corps propose to consider waters as “relatively permanent” and thus jurisdictional only if a water is “perennial, i.e., has standing or continuously flowing water every day of the year during ordinary conditions.”¹⁴ The Supplemental Notice goes on to explain that “‘relatively permanent’ would include only perennial waters, but perennial waters with flow that dries up due to anomalous events such as drought or due to non-anomalous events such as low tide or a regularly occurring dry spell would still be jurisdictional.”¹⁵ The Supplemental Notice also proposes that “interruption of flow can occur only once in any given year, up to 30 consecutive days ... When flow is interrupted for more than a single period in any given year, and the interruptions are non-anomalous and ordinary for that water body, the Agencies would consider this to be an ephemeral or intermittent feature even if each period of interruption does not amount to 30 consecutive days.”¹⁶ In such cases, the Supplemental Notice’s proposed definition would exclude all ephemeral and virtually all intermittent waters from jurisdiction, which would significantly reduce the scope of federal water protection.

Concerns about the proposed definitions of “relatively permanent” and “perennial.”

NAWM has several concerns about the Supplemental Notice’s approach to “relatively permanent” and “perennial.”

First, while NAWM agrees waters that are perennial are most obviously “permanent” and therefore meet a relatively permanent threshold, NAWM believes the term “relatively permanent” extends beyond just perennial waters. The “relatively” qualifier in *Sackett* and *Rapanos* indicates CWA jurisdiction is not limited to only perennial waters. “Relatively permanent” is clearly not equivalent to “always permanent” or “typically permanent.” The Supplemental Notice’s proposed definition of perennial and definition of ordinary conditions are not sufficient to encompass all waters that *Rapanos* and *Sackett* would consider “relatively” permanent. The Supplemental’s proposed approach also fails to reflect the *Rapanos* plurality’s decision to include seasonality as a basis for determining jurisdiction, which allows seasonal intermittent streams to be considered WOTUS.¹⁷ The Supplemental Notice’s 30-day once a year thresholds are too limited and, because of the extent of waters excluded from WOTUS, would be inconsistent with CWA goals of protecting the Nation’s waters.

Second, NAWM believes monitoring and analyses will be needed when documenting that a water has or lacks the Supplemental Notice’s characteristics of a relatively permanent water. The Supplemental Notice concludes its definition of “relatively permanent” would be easy to implement, because

¹⁴ 91 Fed.Reg. 57284, 57288 (September 9, 2026).

¹⁵ 91 Fed.Reg. 57284, 57288 (September 9, 2026).

¹⁶ *Id.*

¹⁷ See, e.g., *Rapanos v. United States*, 547 U.S. 715, 732 n. 5 (2006). Justice Scalia’s plurality opinion noted that its reference to “relatively permanent” waters did “not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought,” or “seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months.” *Id.* at 732 n.5, also quoted in the November 2025 proposal at 90 Fed.Reg. 52498, 52507 (November 20, 2025).

“if members of the public see that waters dry up in circumstances other than during anomalous events ... or non-anomalous events ... they would know those waters would not be jurisdictional under this supplemental option simply by observation, without the need for any further analysis or professional consultation.”¹⁸

The Supplemental Notice’s enthusiastic statement that a 30-day limit “would establish a bright line duration that would be predictable, transparent, and easy to administer”¹⁹ is overly optimistic. The 30-day limit is arbitrary, has no scientific basis, and will require field work to implement. NAWM believes that the proposed hard threshold of 30 days or less for a water to dry up in a non-anomalous event only once a 12-month period will require documented field observations and analysis before determining the water meets the threshold and remains jurisdictional. Without data, how does a landowner, an implementing agency, or interested stakeholders demonstrate the dryness did not exceed 30 days and did not occur more than once in a 12-month period? Or determine that an extraordinary drought does not last more than five consecutive years and thus does not represent the “new normal? EPA and the Army Corps previously recognized this implementation challenge in the November 2025 proposed rule. When discussing a perennial-flow standard, the Agencies acknowledged that distinguishing a stream that flows year-round from one that only flows a few days less than year-round may require repeated or continuous monitoring over the course of a year or longer.²⁰ The Agencies also recognized the difficulty of applying specific flow-duration thresholds where landowners, regulators and others may not know the precise number of days a stream flows during a given year.²¹

The Supplemental Notice preamble asserts that tools and methods discussed in the November 2025 proposal could be used to implement the new supplemental definition of “relatively permanent.”²² However, the Supplemental Notice does not explain how a 30-day threshold resolves the practical limitations identified in the November 2025 proposal. Determining whether a waterbody was dry for 30 days or less, whether another interruption occurred during the same 12-month period, and whether the interruption resulted from anomalous rather than ordinary conditions requires information about conditions over an extended period of time. A single observation cannot establish those facts.

The Supplemental Notice does not provide a clear method for determining whether a particular waterbody satisfies the proposed standard for relatively permanent. EPA’s own technical materials demonstrate the difficulty of determining whether a stream is perennial based on a single observation. Direct hydrologic monitoring may require years of data collection to confidently identify a streamflow duration class. EPA’s Regional Streamflow Duration Assessment Methods (SDAMs) were developed and validated using long-term stream gage data, hydrologic studies, repeat observations across years and seasons, and

¹⁸ 91 Fed.Reg. 57284, 57290-57291 (September 9, 2026).

¹⁹ 91 Fed.Reg. 57284, 57290 (September 9, 2026).

²⁰ 90 Fed.Reg., 52498, 52519 (November 20, 2025).

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

²² 91 Fed.Reg. 57284, 57291 (September 9, 2026).

data loggers. EPA also acknowledges that these methods are less successful at distinguishing perennial streams from intermittent streams than distinguishing ephemeral streams from streams that are intermittent.²³

Third, NAWM is concerned that the time-based thresholds are artificial and arbitrary, and do not account for regional variability. A 30-day maximum consecutive days for a drying out of a water in a 12-month period does not take regional variability into account when determining WOTUS. A minimum flow and duration could enhance national consistency but at the cost of actual regional variability of hydrologic patterns. A 30-day period in Virginia has a different on-the-ground implication than in Arizona. Additionally, what is the legal or scientific basis for 30 days? The Agencies have previously recognized this concern. In the 2023 WOTUS rule, the Agencies declined to establish a minimum flow duration because flow duration varies extensively by region and concluded that establishing a uniform minimum duration applicable to the deserts of the arid West, the Great Lakes region, and New England forests “would not be scientifically sound.”²⁴ The 2020 Navigable Waters Protection Rule similarly recognized that the duration of intermittent flow varies widely based upon climate, hydrology, topography, soils, and other conditions. The preamble to the Navigable Waters Protection Rule noted “the agencies have not identified a reasonable or appropriate rationale or justification for specific flow volumes that should establish jurisdiction given the broad nationwide applicability of the final rule.”²⁵ Nothing in the Supplemental Notice discusses that the Agencies have identified a reasonable rationale for specific flow volumes.

Hydrologic research continues to support the importance of regional variation. A U.S. Geologic Survey (USGS) 2021 analysis of 540 watershed across the contiguous United States found regional difference in the duration and timing of no-flow conditions, with aridity serving as a major driver nationally and differing combinations of climatic, physiographic and anthropogenic factors including stream drying at regional scales.²⁶ These findings illustrate why a nationally uniform 30-day threshold may not have the same hydrologic meaning in all regions. A 30-day interruption in a waterbody located in a humid region may result from different climatic and watershed conditions than the same duration of interruption in an arid or semi-arid region. Similarly, the duration and timing of no-flow conditions may be influenced by geology, watershed characteristics, water use, and other factors in addition to precipitation. A 30-day interruption may have substantially different hydrologic meaning depending upon the region, watershed, season, and factors controlling

²³EPA’s Great Plains SDAM states, “[t]he ability of the GP SDAM to discriminate ephemeral more accurately and consistently from at least intermittent reaches is consistent with previous studies evaluating streamflow duration indicators and assessment methods.” The GP SDAM is available at:

https://www.epa.gov/system/files/documents/2024-10/gp-sdam_user_manual_october2024.pdf

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

²⁵ 85 Fed.Reg. 22250, 22292 (April 21, 2020).

²⁶ John C. Hammond et al., “Spatial Patterns and Drivers of Nonperennial Flow Regimes in the Contiguous United States,” *Geophysical Research Letters* 48 (2021), e2020GL090794, available at <https://doi.org/10.1029/2020GL090794> (study analyzed data from 1979 to 2018).

streamflow. The Supplemental Notice acknowledges that there are no precise, scientifically grounded, nationally consistent time limits for temporary interruptions.²⁷

Fourth, NAWM believes that the specified and required frequency of temporary interruptions to flow is unsupported by both law and science. The Supplemental Notice would allow one non-anomalous interruption of up to 30 consecutive days in a year, but more than one interruption would cause a water to be considered non-WOTUS. The Agencies give the example of two separate 10-day interruptions, which would disqualify a water even though the total period without flow is less than one allowable 30-day interruption. NAWM questions the scientific basis for this distinction. Hydrologic science treats frequency and duration as separate characteristics of a stream's flow regime. A 2016 joint EPA-USGS technical report identifies magnitude, timing, duration, frequency, and rate of change as distinct components of the natural flow regime.²⁸ The Supplemental Notice does not explain why the number of interruptions, independent of their cumulative duration, timing, seasonality, or cause, should determine whether a water is relatively permanent. The Supplemental Notice instead only suggests the proposed approach is to draw a hard line, and for ease of implementation by the public without the need to hire a consultant.

The rigid limits proposed in the Supplemental Notice for "relatively permanent" negate the inherently unpredictable nature of the environment and ignores regional hydrological and geological variation. For example, stream reaches in karst and arid regions often have extended periods of subterranean flow. These vulnerable systems sustain rare and imperiled aquatic species and are a source of drinking water. When surface flows inevitably return, accumulated pollutants, nutrients, and sediment will wash downstream. Federal oversight is necessary to protect states' and Tribes' designated beneficial uses, preserve biodiversity, protect public health, and minimize costly interstate legal battles over water quality.

A longer duration or multiple dry events should not remove a water from being a WOTUS. EPA noted in its comprehensive and peer-reviewed summary on connectivity that "[a]ll tributary streams, including perennial, intermittent, and ephemeral streams, are physically, chemically, and biologically connected to downstream rivers via channels and associated alluvial deposits where water and other materials are concentrated, mixed, transformed, and transported."²⁹ The CWA goal to "restore and maintain the chemical, physical, and

²⁷ 91 Fed.Reg. 57284, 57290 (September 9, 2026).

²⁸ R. Novak et al., *Final EPA-USGS Technical Report: Protecting Aquatic Life from Effects of Hydrologic Alteration*, U.S. Geological Survey Scientific Investigations Report 2016-5164; U.S. Environmental Protection Agency Report 822-R-16-007, at 17 (2016). ("The natural flow regime of a water body, defined as its characteristic pattern of flow magnitude, timing, duration, frequency, and rate of change, plays a critical role in supporting the chemical, physical, and biological integrity of streams and rivers and the services they provide.")

²⁹ Alexander, Laurie C., Ken M. Fritz, Kate A. Schofield, Bradley C. Autrey, Julie E. DeMeester, Heather E. Golden, David C. Goodrich, William G. Kepner, Hadas R. Kiperwas, Charles R. Lane, Stephen D. LeDuc, Scott G. Leibowitz, Michael G. McManus, Amina I. Pollard, Caroline E. Ridley, Melanie K. Vanderhoof, and Parker J. Wigington, Jr., 2018. Featured Collection Introduction: Connectivity of Streams and Wetlands to Downstream Waters. *Journal of the American Water Resources Association (JAWRA)* 54(2): 287–297. <https://doi.org/10.1111/1752-1688.12630>.

biological integrity of the Nation's waters"³⁰ requires that more than only perennial waters be included in the definition of WOTUS. Protecting perennial waters, while not regulating the water quality of their tributaries and adjacent wetlands, could prove difficult due to the connectivity among these waters. *Sackett* also clearly noted that there were times when surface water was not present, and that did not automatically remove wetlands and other waters from status as a WOTUS.

Fifth, NAWM believes the Supplemental Notice's approach to drought is unnecessarily narrow and unsupported by science. The Supplemental Notice proposes that drought may be considered an anomalous condition for no more than five continuous years, after which the conditions would be considered the "new normal" for purposes of determining whether a water is relatively permanent.³¹ The Agencies explain that the five-year timeframe is consistent with the five-year effective period of an approved jurisdictional determination and would be easier to administer.

NAWM questions whether an administrative timeframe provides an appropriate basis for determining when hydrologic conditions cease to be anomalous. Long-term drought conditions can persist substantially longer than five years. For example, Drought.gov has reported that parts of the western United States have experienced long-term drought for more than 20 years and notes that severe hydrologic impacts, including depleted groundwater aquifers and reservoirs, can take months to years of normal or above-normal precipitation to recover.³² Drought.gov further recognizes that there is no universal drought-ending or recovery process. USGS similarly recognizes that the Southwest is susceptible to multidecadal droughts lasting 20 years or longer.³³ These examples demonstrate that the duration and recovery of hydrologic drought vary by region and water resource and may not correspond to the five-year administrative life of an approved jurisdictional determination.

Further, NAWM believes that recognizing only the two highest categories of drought conditions, extreme and exceptional, is too limiting and that all categories should be considered as reflecting a drought condition. Rather than establishing a nationally uniform time period for determining when drought or other conditions become "ordinary" and the "new normal," NAWM recommends that the Agencies allow ordinary conditions to be evaluated based on regional, geological, and site-specific hydrologic conditions. Determining ordinary conditions should consider multiple sources of available information, including long-term hydrologic and climatic data, field observations, and other appropriate regional information. No single drought index, time period, or other indicator should be determined because the duration, frequency, and effects of drought and other dry conditions vary considerably across the United States.

Sixth, NAWM is concerned that tools for implementing the Supplemental Notice's approach for drought and dry-spell determinations are unsuitable in many contexts. The

³⁰33 U.S.C. §1251(a), CWA §101(a).

³¹ Id.

³² [special edition update Archives - Climate Program Office](#)

³³See, e.g., <https://www.usgs.gov/publications/future-dryness-southwest-us-and-hydrology-early-21st-century-drought>

Supplemental Notice identifies several tools the Agencies believe could be used to distinguish anomalous drought conditions from regularly occurring dry spells. These tools include the U.S. Drought Monitor, Antecedent Precipitation Tool (APT), WebWIMP, and the Palmer Drought Severity Index (PDSI). However, these tools evaluate different conditions and operate at different spatial and temporal scales than those called for when making a WOTUS determination. For example, the Drought Monitor provides a broad weekly assessment of drought conditions and cautions against using the map to infer specific local conditions.³⁴ The APT evaluates precipitation normalcy for a specific location and observation date, and EPA notes that results can vary between nearby locations and can change over periods of days or weeks.³⁵ WebWIMP uses climatologically averaged monthly data, while PDSI information identified in the Supplemental Notice is reported at a climate-division and monthly scale.³⁶ EPA's existing WOTUS implementation guidance similarly recognizes that the availability, accuracy, completeness, reliability, and applicability of these types of tools and information may vary regionally and for site-specific reasons.³⁷

These limitations and differences are important because the Supplemental Notice would use the distinction between anomalous and ordinary conditions to determine whether an interruption in flow affects a waterbody's jurisdictional status. The Supplemental Notice does not explain how these different sources of information should be weighed when they produce different characterizations of conditions or when a regional drought indicator does not reflect site-specific hydrologic conditions. States and Tribes may have existing methods, data, and classifications for identifying and managing perennial, intermittent, and ephemeral waters that reflect regional hydrologic conditions and implementation experience. The Supplemental Notice does not explain how these states and tribal methods or existing classifications would be considered when determining whether a water is perennial or relatively permanent. For example, where a state or Tribe has previously classified a waterbody or stream reach based on an established regional methodology, it is unclear what weight that information would receive in a federal jurisdictional determination. NAWM encourages the Agencies to clarify how state and tribal methods, data, and existing classifications should be incorporated as lines of evidence when determining flow duration and relatively permanent status. Field research also illustrates this challenge. For example, a USGS study conducted in eastern Kentucky found that classification of streams as ephemeral, intermittent, or perennial can be influenced by the

³⁴ See, e.g., <https://droughtmonitor.unl.edu/About/AbouttheData/DroughtClassification.aspx> ("Although [the U.S. Drought Monitor] is based on many types of data, including observations from local experts across the country, we don't recommend using it to infer specifics about local conditions.")

³⁵ U.S. Environmental Protection Agency, "Additional Information on the Antecedent Precipitation Tool," available at: https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=CAESmAEB6zswFdT8ekSYih9G_E5uwG1xtocjT3rTe-5GsPrErEDB-VO84xNQIFolXd038MR4LcolhbUPybA6w6vFPmnHecJzc0vMNoMQS08GeQfIQKBWOFaSFip1BEhu2EDoPD7SS_0HnbxeJYolp0Q2UVymLXAZRhQWG39hGzv_qdhwUgvVmoL7-cgG4nWoJHS5XNCwGyDI4gCqg&ved=2ahUKewiv0erq6_iWAXv26skDHZbIACUQFnoECB4QAQ&uoh=2&usg=AOvVa w0Cx0p80dx2wb8kYhmzs8n1.

³⁶ 91 Fed.Reg. 57284, 57201 (September 9, 2026).

³⁷ [Implementation Tools and Methods | US EPA](#)

time of year, antecedent moisture conditions, and investigator experience.³⁸ The researchers used flow-state sensors over a period of several months to establish an objective record of flow conditions. These limitations are particularly important for waters near the proposed jurisdictional threshold. A single observation may readily identify a water that is routinely dry, but it cannot necessarily establish whether a water otherwise flows year-round, whether a no-flow period exceeded 30 days, or whether observed conditions represent the water's ordinary hydrologic regime.

Seventh, NAWM is concerned that impacts of the Supplemental Notice on intermittent streams would be so extensive the impacts would be inconsistent with the CWA and its goals. The Supplemental Notice acknowledges that most intermittent streams would not satisfy the proposed definition of “relatively permanent” and anticipates impacts throughout the country,³⁹ with the greatest effects in regions where intermittent streams comprise an important component of regional hydrology.⁴⁰ Although the National Hydrography Dataset (NHD) does not represent CWA jurisdiction, the Agencies cite the dataset as providing context regarding the potential scale of the change. NHD high-resolution data identify approximately 3.5 million miles of intermittent streams and 1.3 million miles of perennial streams in the contiguous United States. The potential aquatic resource implications of excluding intermittent streams extend beyond the loss of federal jurisdiction over individual stream reaches. EPA’s 2015 peer-reviewed report *Connectivity of Streams and Wetlands to Downstream Waters*, based on a review of more than 1,200 peer-reviewed publications, concluded that perennial, intermittent, and ephemeral streams are physically, chemically, and biologically connected to downstream waters and can influence downstream water quality and functions.⁴¹ EPA also recognizes that streams that flow only part of the year not only contribute to maintaining hydrology of downstream waters, but also provide critical functions including flood protection, pollutant filtering, nutrient processing, aquatic habitat, groundwater recharge, and contributions to the quality and supply of drinking water.⁴²

EPA’s 2015 connectivity report provided a synthesis of references showing that wetlands and intermittent/ephemeral streams export invertebrates to downstream waters; support seasonal fish spawning; serve as refugia in otherwise too high or low flows; contribute baseflow downstream to permanent flowing or standing waters; and transport material needed for habitat in downstream perennial waters. When there are no national water

³⁸ Tanja N. Williamson et al., “Classification of Ephemeral, Intermittent, and Perennial Stream Reaches Using a TOPMODEL-Based Approach,” 51 *Journal of the American Water Resources Association* 1739–1759 (2015), doi:10.1111/1752-1688.12352.

³⁹ 91 Fed.Reg. 57284, 57297 (September 9, 2026).

⁴⁰ *Id.*

⁴¹ U.S. Environmental Protection Agency, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*, EPA/600/R-14/475F (Jan. 2015). Available at: https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=CAEShwEB6zswFXE9wGc7K5Do7rmQB0ADz3IL8AuFjLtgaTqKBt7MtQTQdeK8dWOvNThVg3_lftGRiv2Mw7sDLM19dLKew4LJRE7eEgPOqrmhou4wENJs2zq2TSavufsv_sClnOYwyN_nnZAmTaLvDiAz2pOs8UFScZRzyqNK-FuODIguJ2ZfITaPFc&ved=2ahUKEwik4JPJ8viWAX4ENAFHT_elygQFnoECCYQAQ&uoh=2&usg=AOvVaw2zRSCCxCszYQT8a_9kuoRG.

⁴² *Id.*

quality-related requirements protecting non-perennial waters, these waters can also transport pathogens and human waste downstream.

More recent studies continue to highlight the importance of intermittent and ephemeral streams. For example, Stubbington et al. noted numerous services important for clean water and public welfare performed by “temporary” streams such as flood flow reduction and groundwater recharge, as well as improved nutrient processing for improved water quality via denitrification in wet/drying cycles.⁴³ Contributions to public water supplies from small or “temporary” streams were also mentioned. Colonizing plants which emerge as waters recede may also support pollinator species, which are vital to many agricultural crops. Zarek et al. found higher rates of denitrification during the drying period, which is important for water quality.⁴⁴ This points to the importance of these systems for continued use and maintenance of clean water. Treatment costs for downstream water users would likely increase if unregulated discharges were allowed to enter intermittent or ephemeral streams, which would then combine into larger, more polluted perennial rivers. Alexander et al.⁴⁵, Leibowitz et al.⁴⁶, and Schofield et al.⁴⁷ repeated these findings. Wenger et al. summarized benefits of small streams (mostly non-perennial) and wetlands and their role in flood control; water supply; sediment trapping; nutrient processing; biodiversity; and human wellbeing.⁴⁸

Recommendation: NAWM recommends the Agencies retain the approach to relatively permanent waters reflected in the 2023 Conforming Rule and not limit relatively permanent waters to perennial waters or establish a national minimum flow duration, maximum period of interrupted flow, or number of allowable flow interruptions. The definition should account for regional differences in hydrology and other relevant conditions.

⁴³ Stubbington, Rachel, Mike Acreman, Vicenç Acuña, Philip J. Boon, Andrew J. Boulton, Judy England, David Gilvear, Tim Sykes, and Paul J. Wood. "Ecosystem services of temporary streams differ between wet and dry phases in regions with contrasting climates and economies." *People and Nature* 2, no. 3 (2020): 660-677.

⁴⁴ Zarek, Kaci, C. Nathan Jones, Delaney M. Peterson, Stephen Plont, Ariel J. Shogren, Corianne Tatariw, Shannon L. Speir, Behzad Mortazavi, and Amy J. Burgin. "Investigating spatial and temporal nitrogen dynamics in a forested headwater stream over the course of an annual drying event." *Journal of Geophysical Research: Biogeosciences* 130, no. 4 (2025): e2024JG008522.

⁴⁵ Alexander, Laurie C., Ken M. Fritz, Kate A. Schofield, Bradley C. Autrey, Julie E. DeMeester, Heather E. Golden, David C. Goodrich, William G. Kepner, Hadas R. Kiperwas, Charles R. Lane, Stephen D. LeDuc, Scott G. Leibowitz, Michael G. McManus, Amina I. Pollard, Caroline E. Ridley, Melanie K. Vanderhoof, and Parker J. Wigington, Jr., 2018. Featured Collection Introduction: Connectivity of Streams and Wetlands to Downstream Waters. *Journal of the American Water Resources Association (JAWRA)* 54(2): 287–297. <https://doi.org/10.1111/1752-1688.12630>.

⁴⁶ Leibowitz, Scott G., Parker J. Wigington Jr, Kate A. Schofield, Laurie C. Alexander, Melanie K. Vanderhoof, and Heather E. Golden. Connectivity of streams and wetlands to downstream waters: an integrated systems framework. *JAWRA Journal of the American Water Resources Association* 54, no. 2 (2018): 298-322.

⁴⁷ Schofield, K.A., Alexander, L.C., Ridley, C.E., Vanderhoof, M.K., Fritz, K.M., Autrey, B.C., DeMeester, J.E., Kepner, W.G., Lane, C.R., Leibowitz, S.G. and Pollard, A.I., 2018. Biota connect aquatic habitats throughout freshwater ecosystem mosaics. *JAWRA Journal of the American Water Resources Association*, 54(2), pp.372-399.

⁴⁸ Wenger, S. J., Wohl, E., German, L., Abrams, J., & Struthers, C. L. (2026). *Where rivers are born: The scientific imperative for protecting small streams and wetlands* (2nd ed.). American Rivers / UGA River Basin Center.

The Supplemental Notice Proposed Definition of “Continuous Surface Connection.”

The November 2025 proposal would define continuous surface connection as “having surface water at least during the wet season and abutting (*i.e.*, touching) a jurisdictional water.”⁴⁹ In contrast, the Supplemental Notice instead would define “continuous surface connection” as meaning “perennial surface water in a wetland that is continuously connected with the surface water in the jurisdictional water such that it is difficult to determine where the jurisdictional water ends and the wetland begins.”⁵⁰ The definition incorporates the concept of “perennial,” which would be interpreted similar to the Supplemental Notice’s approach to relatively permanent waters.⁵¹ Only the portion of the wetland that is indistinguishably part of the jurisdictional water would itself be jurisdictional.

NAWM has several concerns regarding the Supplemental Notice’s proposed approach defining “continuous surface connection.”

First, NAWM believes that a continuous surface connection need not be hydrologic. A “continuous surface connection” as called for by the plurality opinion in *Rapanos* does not require that the connection be hydrologic but can encompass continuous physical connections. As observed in the Supplemental Notice, Justice Scalia in his plurality opinion twice suggested that the continuous surface connection requirement “contemplated a ‘physical connection,’ rather than solely a hydrologic connection.”⁵² At times it seems as if the Supplemental Notice carefully references Justice Scalia’s *Rapanos* opinion, while not following his approach at other times. With the important question of whether the surface connection must be hydrologic or not, NAWM suggests that the Agencies follow Scalia’s approach and not require a purely hydrologic connection. Wetlands and streams have fundamentally different hydrologic characteristics, making a requirement that wetlands have perennial surface water not appropriate.

NAWM recognizes that identifying an area as a wetland and determining whether that wetland is jurisdictional under the CWA are two distinct determinations. NAWM’s concern is not that the Supplemental Notice would change the longstanding definition of a wetland, but rather that it establishes perennial surface water (*i.e.*, year-round inundation) as the threshold for determining whether a wetland has a continuous surface connection.

This requirement would represent a substantial departure from current practice, which, as the Agencies acknowledge, does not require adjacent wetlands to express hydrology at the surface or to have surface water year-round.⁵³ The practical significance of this change is substantial. The Agencies anticipate that the majority of wetlands currently jurisdictional as adjacent wetlands would not satisfy the supplemental definition of continuous surface connection because most wetlands do not contain perennial surface water.⁵⁴ One NAWM state member reported that an analysis of their waters found that less than one percent of

⁴⁹ 91 Fed.Reg. 57284, 57294 (September 9, 2026).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² 91 Fed.Reg. 57284, 57293, citing *Rapanos*, 547 U.S. at 737, 747.

⁵³ 91 Fed.Reg. 57284, 57298 (September 9, 2026).

⁵⁴ *Id.*

wetlands would meet this requirement, leaving the other 99 percent at risk. This raises important questions regarding the technical basis for selecting perennial surface water as the jurisdictional threshold, how that condition can be reliably established in the field, and whether the approach can be implemented consistently across wetland types and regions. Wetland hydrology occurs across a continuum. The Corps' longstanding wetland delineation framework recognizes periodic inundation and soil saturation and the National Wetlands Inventory (NWI) recognizes water regimes ranging from permanently and semi-permanently flooded to seasonally flooded, temporarily flooded, and saturated. While those classifications do not themselves determine CWA jurisdiction, they illustrate the wide range of hydrologic conditions exhibited by wetlands and demonstrate the need for the Agencies to explain why perennial surface water represents the appropriate break point for continuous surface connection.

Second, NAWM believes that *Sackett* and *Rapanos* establish one test, not two, for determining if a wetland is "indistinguishable." NAWM believes that "indistinguishability" is the outcome of a continuous surface connection and is not a second and independent part of the test for wetland jurisdiction. This interpretation is consistent with caselaw, such as the *White v. U.S. EPA* decision that held the continuous surface connection implements the concept of indistinguishability.⁵⁵ In other words, a continuous surface connection is itself the physical feature that renders a wetland indistinguishable from the jurisdictional water to which it is adjacent, without requiring that surface water perennially inundates the wetland.⁵⁶

The Supplemental Notice states that only the portion of the wetland that is indistinguishably part of the jurisdictional water would itself be jurisdictional. This would make a new implementation challenge, with the proposed narrowed definition calling for perennial inundation for jurisdiction, thereby requiring that an additional boundary determination be created inside an already delineated wetland. NAWM raised this concern in its January 2026 comments when the proposed threshold was considerably less demanding where the proposal included surface water during the wet season. At that time, NAWM noted that hydrology varies across a wetland over time and that accurately identifying jurisdictional portions of wetland mosaics could require multiple field observations and high-resolution information.

⁵⁵ *White v. U.S. EPA*, 737 F.Supp. 3d 310 (E.D.N.C. 2024).

⁵⁶ Interestingly, the unanimous U.S. Supreme Court decision in *United States v. Riverside Bayview Homes*, 474 U.S. 121, 130 (1985) indicates surface inundation is not required for wetlands to be jurisdictional. The Court explains that "[t]he regulation extends the Corps' authority under § 404 to all wetlands adjacent to navigable or interstate waters and their tributaries. Wetlands, in turn, are defined as lands that are 'inundated or *saturated* by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.' 33 CFR § 323.2(c) (195) (emphasis added). The plain language of the regulation refutes the Court of Appeals' conclusion that inundation or 'frequent flooding' by the adjacent body of water is a *sine qua non* of a wetland under the regulation. Indeed, the regulation could hardly state more clearly that saturation by either surface or ground water is sufficient to bring an area within the category of wetlands, provided that the saturation is sufficient to, and does, support wetland vegetation. The history of the regulation underscores the absence of any requirement of inundation."

The Agencies' own Regulatory Impact Analysis acknowledged that, even under the earlier wet-season standard, delineators would have to identify the boundary between portions of a wetland having qualifying surface water and portions supported by seasonally saturated hydrology, and that this additional data collection could increase approved jurisdictional determination processing times. The Supplemental Notice now raises that threshold to requiring perennial surface water. This could make the jurisdictional boundary within a single wetland dependent on subtle differences in hydroperiod that vary spatially, seasonally, and from year to year. Implementation would not be simple, nor could a determination be – as the Supplemental Notice asserts – “made by the naked eye.”⁵⁷

Third, NAWM believes that wetlands subject to the ebb and flow of the tide are *per se* jurisdictional. The supplemental proposal suggests that regularly flooded areas below mean high water, but above low water, may not be regulated. NAWM does not recommend focusing on low tide. Regular tidal extents can be predicted using National Oceanic Atmospheric Administration (NOAA) tools for averaging tidal mean high water. These tools are well established and used. NAWM recommends using the mean higher high water using the national tidal datum epoch, including a spring tide, as an appropriate level for what are considered waters subject to the ebb and flow of the tide. Wetlands adjacent to these areas should also be included, as called for by the CWA.⁵⁸ NAWM strongly objects to exclusion of any tidal waters as WOTUS, including their adjacent wetlands, particularly because they may qualify not only as wetlands with a continuous surface connection but also as (a)(1) waters subject to the ebb and flow of the tide. The values of tidal wetlands have been known for decades,⁵⁹ including important services for shore erosion protection, water quality, and habitat.

Fourth, NAWM encourages the Agencies to retain the definition of “adjacent” and “abutting” as used in the 2023 Conforming Rule. The terms “adjacent” and “abutting” appear in the *Rapanos* and *Sackett* opinions, and “adjacent” in the CWA section 404(g), and therefore should be reflected in the regulatory definition of WOTUS. These terms remain relevant for when there is a drought or a regularly occurring dry spell, which are acknowledged in *Rapanos* and *Sackett*. “Indistinguishable” as used in the Supplemental Notice is a term more narrowly defined than is required by the Supreme Court opinions, and thus is not consistent with caselaw nor a substitute for “adjacent.”

Fifth, NAWM believes the definition of WOTUS should allow for regional variability and should not establish a “one size fits all” approach. It is not possible in a national rule to set a duration and account for the normal wet/dry cycles across the United States. Further, there is no basis in science nor a legal requirement to set the period at 30 consecutive days in a single annual event. This is unduly restrictive and would eliminate too many waters, including a significant majority of wetlands, from jurisdiction while still allowing harmful discharges to be transported when the surface water is again flowing. Justice Scalia’s

⁵⁷ 91 Fed.Reg. 57284, 57296 (September 9, 2026).

⁵⁸ See, e.g., 33 U.S.C. §1344(g), CWA §404(g).

⁵⁹ See, e.g., Tiner, R. W., “Tidal wetlands primer: an introduction to their ecology, natural history, status, and conservation,” in *Tidal Wetlands Primer*. University of Massachusetts Press. (2013); and McCormick, J. and Somes, H.A., “The coastal wetlands of Maryland,” (1982).

Rapanos opinion asserted that the Court “do[es] not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months....”⁶⁰ This allows for dry periods much longer than 30 days.

The Supplemental Notice does not identify a wetland-science or hydrologic basis demonstrating that 30 consecutive days, or the distinction between one interruption and multiple shorter interruptions, defines a meaningful breakpoint in wetland hydrology or connectivity. The practical implementation problem is equally important when determining whether an interruption lasted 29, 31, or 40 days, or occurred once rather than twice, and may require information that does not exist for most ungaged wetlands.

Sixth, NAWM believes the Supplemental Notice’s approach to continuous surface connection would not be easy to implement. The Supplemental Notice emphasizes how easy its approach to a continuous surface water connection would be to implement, asserting a landowner can understand whether a portion of a wetland is continuously covered by perennial surface water that is connected with surface water in a jurisdictional water, and that “[s]uch a determination can be made by the naked eye.”⁶¹ NAWM believes the Agencies’ enthusiasm for what it calls a “bright line rule” is overstated and unsupported. How, for example, would a landowner’s naked eye determine that the wetland is connected to a jurisdictional water, particularly when the wetland is large and the connection may occur some distance from the landowner’s property? How does the naked eye determine potential presence of anomalous and non-anomalous circumstances under which the wetland would retain its jurisdictional status? A single field observation cannot reliably establish a hydrologic condition that must be evaluated over time, yet the Supplemental Notice suggests that such determinations should be relatively simple and observable without professional consultation. Existing Corps practices illustrate the problems by recognizing that the most reliable evidence of wetland hydrology may include gage or groundwater-well data but that such information frequently is unavailable and may require data collection and interpretation by trained personnel.⁶²

The NWI and other remote sensing datasets including the USGS NHD layer remain useful as preliminary and planning tools but cannot be used to determine presence and extent of perennial surface water. NWI water-regime modifiers provide important information about the frequency and duration of inundation, but NWI was not developed as a jurisdictional dataset, and its classifications include a broad range of hydrologic regimes rather than a simple perennial/non-perennial distinction. Field verification and site-specific information including monitoring data should be used for jurisdictional determinations.

The Supplemental Notice preamble repeatedly emphasizes a benefit of its proposed approaches: that a landowner could know a water’s jurisdictional status “simply by

⁶⁰ *Rapanos v. United States*, 547 U.S. 715, 732 n. 5 (2006).

⁶¹ 91 Fed.Reg. 57284, 97296 (September 9, 2026).

⁶² <https://www.sam.usace.army.mil/Missions/Regulatory/Wetlands/> “(Although the most reliable evidence of wetland hydrology may be provided by gaging station or groundwater well data, such information is limited for most areas and, when available, requires analysis by trained individuals.”)

observation, without the need for any further analysis or professional consultation.”⁶³ As discussed above, NAWM believes that expectation is unlikely to be met. Further, neither *Rapanos* nor *Sackett* call for eliminating the need for a landowner (or other project proponent) to hire a consultant. Other CWA programs unquestionably require some level of expertise to implement, such as testing for toxic materials in discharges, so the hiring of an expert to identify jurisdictional wetlands and other waters should not be problematic. Similarly, it is not unusual in federal, State, or local law to require expert assistance, such as engineering designs as part of licenses or permits, other environmental analyses for toxic materials, plans to protect endangered species consistent with current statutory requirements, and to design highways and comply with building codes. Not all support for landowners or other project proponents involve hiring experts. The Corps of Engineers accepts requests for a jurisdictional determination, even where a project that might trigger a section 404 permit is anticipated.

Recommendation: NAWM recommends the Agencies retain the definitions of “adjacent” and “abutting” used in the 2023 Conforming Rule and not define “continuous surface connection” to require perennial surface water. Consistent with NAWM’s prior comments, a continuous surface connection should not require continuous hydrologic inundation or flow. NAWM also recommends that the Agencies interpret *Sackett* as establishing a single test for wetland adjacency, such that a wetland with a continuous surface connection to a jurisdictional water (including physical connections) is considered indistinguishable from that water. “Indistinguishability” should not be treated as a second and independent test for wetlands to be jurisdictional. Temporary interruptions in surface water, including those resulting from drought, low tide, or regularly occurring dry spells, should not automatically sever an otherwise continuous surface connection.

The Supplemental Notice Overstates the Ability of States and Tribes to Readily Fill the Jurisdictional Gap

The November 2025 proposal and its supplement both emphasize that states and Tribes can choose to protect waters that are no longer WOTUS. The Agencies emphasize they received comments asserting that “[s]tates were both prepared and well-equipped to regulate non-jurisdictional waters within their boundaries,” while acknowledging some states and Tribes “may need to expend considerable resources to effectuate a [s]tate or [t]ribal program to regulate these non-jurisdictional waters.”⁶⁴

Many states would find it difficult to “fill the gap” in jurisdiction as large as that the Supplemental Notice would create. Such state action likely would require considerable resources to create an aquatic resource program to protect waters and wetlands newly unprotected by the CWA. Even those states with existing programs to protect wetlands and other waters under state law would face additional resource demands as the scope of WOTUS shrinks. For example, Washington State staff have indicated they would need to issue more permits under state law for projects that previously were addressed by the

⁶³ 91 Fed.Reg. 57284, 57291 (September 9, 2026).

⁶⁴ 91 Fed.Reg. 57284, 57296 (September 9, 2026).

Corps of Engineers' nationwide general permit program. Additionally, some states have enacted "no more stringent" provisions that limit the state's ability to protect waters outside the scope of WOTUS.

Similarly, many Tribes would find it difficult to protect waters that are no longer federally protected as WOTUS. Tribes, even more than states, have relied on the CWA and other federal programs to protect their wetlands and other water resources. Tribes also often have limited administrative and technical resources upon which to build or expand programs to protect wetlands and other waters.

NAWM encourages EPA and the Army Corps to support additional federal funding to help administer state and tribal aquatic resource protection programs, particularly if the scope of WOTUS narrows. The CWA established several grant programs to provide such funding, such as 106 grants for surface water protection, 104(b)(3) wetland program development grants, and section 319 grants to protect waters from nonpoint source pollution. Funding of these programs has been flat for years, and when adjusted for inflation actually represents a reduction in assistance even as *Rapanos* and *Sackett* expanded the size of the jurisdictional gap the Agencies expect states and Tribes to address. Additionally, the availability of these grant programs does not guarantee that states and Tribes will receive funding sufficient to assume additional responsibilities resulting from a narrowing federal jurisdiction. Some of these funding sources, including 104(b)(3) wetland program development grants are competitive and thus not a reliable source for long-term program support. Further, some of these funding sources currently are solely focused on program development, effectively prohibiting these funding sources from being used to implement a gap-filling program.

The Supplemental Notice emphasizes that its WOTUS interpretation preserves the states' primary authority under CWA section 101(b) by limiting the federal government's. As discussed earlier, the CWA does not establish separate spheres where states, Tribes, and the federal government work separately towards achieving water quality goals. Instead, the CWA is framed around the concept of cooperative federalism where goals are pursued working collaboratively. A sharply narrowed scope of WOTUS would result in the federal government retreating in substantial part from the cooperative federalism approach of the CWA.

NAWM does not agree that the definitions in the Supplemental Notice and original proposal support state primacy over waters. Rather, this proposed approach would damage state and tribal ability to protect their waters and limit their abilities to achieve CWA goals in partnership with the Federal government. As mentioned throughout this comment letter, the proposed definitions are too restrictive and would eliminate from jurisdiction many intrastate and interstate waters, and most intermittent streams and wetlands. Under this definition, even some perennial streams may be viewed as non-jurisdictional due to the duration limitations imposed.

Conclusions

Thank you for the opportunity to submit information, policy recommendations, and other feedback in response to the Supplemental Notice proposing additional alternatives for defining WOTUS under the CWA.

NAWM supports the Agencies' stated objective of having clear definitions that are fully consistent with CWA goals and authorities and informed by implementation experience and aquatic resource science. However, NAWM believes the Supplemental Notice's proposed options would not achieve this objective. As discussed in this comment letter and NAWM's letter submitted in response to the November 2025 initial proposal, NAWM believes the Agencies would achieve their stated objective and be more productive by working with states and Tribes to develop tools and technical assistance to help implement the 2023 Conforming Rule, instead of creating 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 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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Cc: NAWM Board of Directors