

October 8, 2026

ELECTRONIC SUBMISSION

Attn: Docket ID No. EPA-HQ-OW-2025-0322

U.S. Environmental Protection Agency

RE: Updated Definition of “Waters of the United States”

Dear Administrator Zeldin and Assistant Secretary Telle:

We appreciate the opportunity to comment on the Environmental Protection Agency and Department of the Army Supplemental Notice of Proposed Rulemaking (SNPRM) concerning the definition of “waters of the United States” under the Clean Water Act.¹

The supplemental alternatives are an important response to concerns raised regarding the original proposal. The agencies propose replacing the indeterminate “wet season” concept with standards centered on perennial waters and an actual continuous surface-water connection. Those alternatives better reflect the statutory text and *Sackett v. EPA*, and they would allow the agencies to direct federal resources toward waters Congress placed within federal jurisdiction.²

The final rule should incorporate or take four specific actions. The rule should adopt the supplemental definitions of “perennial,” “relatively permanent,” and “continuous surface connection.” It should also expressly decline to finalize (or reject) the original wet-season standard. It should establish objective criteria for determining “ordinary conditions.” The rule should also retain and clearly justify the 30-day ceiling.

Doing this better meets EPAs stated, “commitment to radical transparency and developing a durable, final definition of WOTUS that adheres to the Supreme Court’s direction in *Sackett v. EPA*, cuts bureaucratic red tape, and protects water quality while recognizing that states and Tribes know their water resources best.”³ The SNPRM supplements rather than withdraws the November 2025 proposal, so the original language remains under consideration. A final rule that retains “wet season,” even as one route to jurisdiction, would preserve the ambiguity the supplemental proposal was designed to address and would invite renewed judicial review.⁴

Meaningful environmental protection requires rules that reduce ambiguity and remain within the plain meaning of the Clean Water Act. Federal agencies should focus on relatively permanent waters and wetlands that are indistinguishably part of them. States, Tribes, landowners, and private conservation organizations remain able to protect other resources through authority and incentives suited to local conditions.⁵

¹ U.S. Environmental Protection Agency and U.S. Department of the Army, “Updated Definition of ‘Waters of the United States,’” 91 Fed. Reg. 57,284, 57,285-86 (Sept. 9, 2026).

² Id. at 57,286-96; *Sackett v. EPA*, 598 U.S. 651, 671, 678-81 (2023).

³ U.S. Environmental Protection Agency, “Fact Sheet: 2026 Supplemental Proposed ‘Waters of the United States’ Rule,” https://www.epa.gov/system/files/documents/2026-09/wotus_snprm_factsheet_508c.pdf.

⁴ 91 Fed. Reg. at 57,285-86; U.S. Environmental Protection Agency and U.S. Department of the Army, “Updated Definition of ‘Waters of the United States,’” 90 Fed. Reg. 52,498, 52,545 (Nov. 20, 2025).

⁵ 33 U.S.C. § 1251(b); *Sackett*, 598 U.S. at 679-80.

I. The SNPRM Better Implements the Clean Water Act and Sackett

In Sackett, the Supreme Court held that the Clean Water Act’s use of “waters” encompasses only relatively permanent, standing, or continuously flowing bodies of water forming geographic features ordinarily described as streams, oceans, rivers, and lakes. For wetlands, the party asserting jurisdiction must establish that the adjacent body is itself a jurisdictional water and that the wetland has a continuous surface connection making it difficult to determine where the water ends and the wetland begins. The Supreme Court rejected the significant-nexus test and emphasized fair notice and the States’ traditional authority over land and water use.⁶

The original 2025 proposal defined “relatively permanent” to include waters standing or continuously flowing year-round or “at least during the wet season.”⁷ It likewise proposed to define “continuous surface connection” through surface water during the wet season plus abutment. The proposal did not establish a uniform minimum duration for “wet season.” The Competitive Enterprise Institute’s docketed comments explained that the concept could permit seasonal waters to qualify without a minimum flow duration, vary across regions, and leave landowners unable to determine jurisdiction without technical analysis.⁸ Furthermore, repeated examples exist of state and federal agencies ignoring (or treating as non-binding) such technical analyses and engineering reports, leaving landowners unable to determine wetland status until after a final agency decision.⁹

The supplemental alternative answers those objections by replacing “wet season” with “perennial.” “Perennial” would mean having standing or continuously flowing water every day of the year during ordinary conditions. “Relatively permanent” would mean perennial bodies of water, subject to specified temporary interruptions. “Continuous surface connection” would require perennial surface water in a wetland continuously connected with surface water in a jurisdictional water such that the boundary is difficult to discern. Only the portion of the wetland that is indistinguishably part of the jurisdictional water would be jurisdictional.¹⁰

These formulations align with Sackett more closely than the wet-season language. A wet season describes climatic conditions; it does not establish that a feature is a relatively permanent body of water. Nor does seasonal inundation plus physical touching necessarily make a wetland indistinguishable from a jurisdictional water. The final rule should therefore use the supplemental text as the federal standard and remove “wet season” from the operative definitions.¹¹

II. The Agencies Should Adopt the Supplemental Alternatives, Not Merely Consider Them

The SNPRM does not revise every portion of the original proposal or foreclose its alternatives. Instead, it asks for comment on additional alternatives that the agencies will consider alongside the

⁶ Sackett, 598 U.S. at 671, 678-79.

⁷ *Updated Definition of “Waters of the United States”*, 90 Fed. Reg. 52,498, 52,519–20 (Nov. 20, 2025).

⁸ Id. at 679-81.

⁹ *People v. Taylor*, No. 145491 (Mich. Jan. 31, 2014) (Markman, J., concurring) and *Boucher v. U.S. Dept. of Agric.*, 934 F.3d 530 (7th Cir. 2019)

¹⁰ 90 Fed. Reg. at 52,519, 52,529-30, 52,545.

¹¹ Competitive Enterprise Institute, Comment on Updated Definition of “Waters of the United States,” Comment ID EPA-HQ-OW-2025-0322-1002, pp. 5-13 (Jan. 5, 2026), <https://www.regulations.gov/comment/EPA-HQ-OW-2025-0322-1002>; Daren Bakst, *New WOTUS Rule Has a Problem: The Use of “Wet Season,”* Competitive Enterprise Institute (Nov. 20, 2025), <https://cei.org/blog/new-wotus-rule-has-a-problem-the-use-of-wet-season/>.

2025 proposal. Implementing the best regulator definition will require the final regulatory text to adopt the supplemental definitions and reject the wet-season test.¹²

The agencies' reasoning supports that result. The preamble explains that perennial waters are the waters most obviously permanent, that "relatively" cannot cancel "permanent," and that an interpretation covering waters that flow significantly less than most of the time would be in tension with Sackett. It also recognizes that the prior approach incorporated flow-duration concepts without a minimum duration.

Those findings cannot readily be reconciled with retaining wet season as an alternative ground for jurisdiction.¹³

The final rule should also clarify "ordinary conditions." The SNPRM describes ordinary conditions as climatic conditions that ordinarily prevail at a particular place and time of year, but that explanation appears in the preamble rather than the proposed regulatory definition. The agencies distinguish ordinary, predictable dry spells from anomalous departures such as certain droughts, and they discuss tools that may inform those determinations. Even so, regulated parties may face uncertainty over recurring drought, low-flow periods, unusual precipitation, and regional hydrologic variation. The final rule should place objective criteria in the regulatory text clarifying that anomalous dry spells resulting in a temporary disruption of flow should last no more than 30 consecutive days.¹⁴

III. Clear Jurisdictional Boundaries Protect Property Owners and Reduce Litigation

WOTUS uncertainty has tangible consequences. In Sackett, property owners faced EPA compliance demands involving their residential lot near Priest Lake, Idaho, and the jurisdictional dispute continued for years. In *U.S. Army Corps of Engineers v. Hawkes Co.*, peat-mining companies challenged an approved jurisdictional determination covering wetlands on property they sought to use. The Supreme Court noted record evidence that an individual permit could require 788 days and more than \$271,000, while even a nationwide permit could require 313 days and more than \$28,000.¹⁵

Rapanos arose from federal enforcement involving Michigan properties where the government alleged wetlands were connected through drains and tributaries to navigable waters. The fractured decision produced competing tests that contributed to prolonged uncertainty. More recent lower-court decisions reinforce the need to give real effect to indistinguishability and a sufficient surface-water connection. In *United States v. Ace Black Ranches*, the district court dismissed allegations that failed adequately to connect wetlands to a traditional navigable water. In *United States v. Sharfi*, the court rejected an interpretation that did not sufficiently account for Sackett's requirement that water and wetland be difficult to distinguish.¹⁶

These cases show why a clearer rule matters. A perennial-water standard reduces the need for consultants merely to identify the governing legal test. It gives field personnel a more objective

¹² 91 Fed. Reg. at 57,288-96, 57,301.

¹³ Id. at 57,294-96; Sackett, 598 U.S. at 678-79.

¹⁴ 91 Fed. Reg. at 57,285-86.

¹⁵ Id. at 57,288-89.

¹⁶ Id. at 57,288-92.

instruction and allows enforcement resources to be directed toward actual Clean Water Act violations instead of litigation over jurisdiction.¹⁷

The economic consequences of jurisdictional uncertainty are substantial. In fiscal year 2023 alone, the U.S. Army Corps of Engineers issued permits covering permanent or temporary impacts to more than 73,000 acres of aquatic resources.¹⁸ Each permit can bring with it consultant costs, mitigation requirements, monitoring obligations, legal expenses, and project delays.¹⁹

Available data demonstrate that these costs can be significant. The Government Accountability Office reported that mitigation credit prices may range from less than \$100,000 in some rural areas to more than \$3 million in metropolitan and coastal regions.²⁰ The American Farm Bureau Federation similarly notes that permits can take years to obtain and cost tens or hundreds of thousands of dollars, with federal permitting requirements imposing especially heavy burdens on farmers, ranchers, and other landowners engaged in ordinary productive activities.²¹

Clear jurisdictional boundaries would not eliminate environmental protections, but they would reduce unnecessary compliance costs and allow federal resources to be focused on waters that clearly fall within the Clean Water Act's scope. Clarifying the federal limit permits farmers and property owners to plan lawful uses without treating every intermittently wet feature as presumptively federal.²²

IV. Reducing Unnecessary Permitting Burdens Would Benefit the Economy

The supplemental alternatives would narrow federal jurisdiction relative to the current baseline and would reduce the number of Section 404 permits and associated minimization and mitigation requirements. The agencies conclude that this would produce lower permitting and mitigation costs, and that both the cost savings and forgone benefits would be larger under the supplemental package than under the original proposal.²³

The agencies explain that national datasets do not accurately depict the jurisdictional baseline and therefore do not support sufficiently accurate quantitative estimates of avoided costs or forgone benefits. While finding the exact number is likely impossible, the record nevertheless correctly identifies the benefits: fewer permit applications, fewer jurisdictional determinations, lower consultant and legal expenses, less mitigation spending compelled solely by federal jurisdiction, and

¹⁷ Id. at 57,288-92; Sackett, 598 U.S. at 678.

¹⁸ U.S. Gov't Accountability Off., *Clean Water Act: Costs of Compensatory Mitigation Activities for Losses of Aquatic Resources*, GAO-24-107493, 1 (Sept. 25, 2024), <https://www.gao.gov/assets/gao-24-107493.pdf>

¹⁹ *People v. Taylor*, No. 145491 (Mich. Jan. 31, 2014) (Markman, J., concurring) and *Boucher v. U.S. Dept. of Agric.*, 934 F.3d 530 (7th Cir. 2019) indicate that consultant costs and technical analyses may be ignored by agency staff, leaving applicants vulnerable to potentially arbitrary agency decisions as to what constitutes a wetland or WOTUS.

²⁰ U.S. Gov't Accountability Off., *Clean Water Act: Costs of Compensatory Mitigation Activities for Losses of Aquatic Resources*, GAO-24-107493, 7–8 (Sept. 25, 2024), <https://www.gao.gov/assets/gao-24-107493.pdf>,

²¹ Am. Farm Bureau Fed'n et al., *Comments on the Definition of "Waters of the United States"* 2–3 (Sept. 3, 2021), https://www.fb.org/files/AFBF_et_al_WOTUS_Comments.pdf.

²² Sackett, 598 U.S. at 657-62.

²³ *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 594-95 (2016).

fewer delays in agriculture, housing, infrastructure, energy, and small-business projects.²⁴ These reduce both direct costs and opportunity costs faced by those living and working around regulated water bodies.

Reducing needless federal processes does not eliminate environmental protection. It aligns federal permitting with the statute while leaving States and Tribes free to protect non-federal waters as they see fit. Resources no longer spent contesting marginal jurisdiction can be directed toward productive investment, compliance with clearly applicable requirements, and remediation of actual pollution.

V. Clear Rules Improve Environmental Administration and Stewardship

Environmental protection is strengthened when agencies use standards they can administer consistently and defend in court. The agencies report that repeated WOTUS litigation has produced different governing regimes across the States. A final rule closely tied to Sackett offers the best prospect of replacing that patchwork with an understandable national jurisdictional line.²⁵

Wetlands and intermittent waters can provide ecological functions, but ecological value does not answer the separate statutory question whether each feature is a “water of the United States.”²⁶ The agencies themselves acknowledge ecological effects while also recognizing that scientific connectivity studies may not mirror the statutory constraints imposed by Sackett. Environmental value can inform state law, conservation easements, watershed partnerships, and private stewardship without necessitating federal jurisdiction.²⁷

Utah’s greater sage-grouse program provides a useful example of cooperative conservation outside a one-size-fits-all federal command. Utah’s plan sets measurable population and habitat objectives, calls for conservation easements and annual habitat improvement, uses adaptive management, and coordinates state, federal, and private participants.²⁸ The U.S. Fish and Wildlife Service’s 2015 not-warranted finding followed conservation efforts across the West, including state-led efforts. This example demonstrates that states, landowners, and partners can meaningfully steward sensitive natural resources based on their knowledge of local ecological conditions rather than relying exclusively on broad federal jurisdiction, often to greater effect.²⁹

VI. The Supplemental Alternatives Respect Federalism and Reduce Judicial Risk

²⁴Rapanos v. United States, 547 U.S. 715, 729-57 (2006) (plurality opinion).

²⁵Sackett, 598 U.S. at 669-70, 680-81; 91 Fed. Reg. at 57,290-92.

²⁶ 91 Fed. Reg. at 57,297-98.

²⁷ Courtney Briggs, WOTUS and the American Farmer: Understanding the Regulatory Reach, American Farm Bureau Federation (Dec. 18, 2025), <https://www.fb.org/intel/markets/wotus-and-the-american-farmer-understanding-the-regulatory-reach>; Roger A. McEowen, WOTUS Returns: What EPA’s New Rule Means for Farmers and Landowners, Kansas State University Department of Agricultural Economics Extension (Sept. 2026), https://www.agmanager.info/sites/default/files/pdf/McEowen_WOTUS_09-08-26.pdf.

²⁸ Utah Division of Wildlife Resources, Overview and Conservation Plan: Greater Sage-Grouse, updated Apr. 24, 2026, <https://wildlife.utah.gov/sage-grouse>; Bureau of Land Management, Greater Sage-Grouse Conservation in Utah, <https://www.blm.gov/sites/blm.gov/files/Utah%20Fact%20Sheet%20Final.pdf>.

²⁹ 91 Fed. Reg. at 57,296-99.

The Clean Water Act recognizes the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution and to plan the development and use of land and water resources.³⁰ Sackett relied on that federalism background³¹ and required clear congressional authorization before reading the Act to alter the federal-state balance over land and water use.³²

The SNPRM appropriately explains that States and Tribes remain free to regulate rivers, lakes, streams, ponds, wetlands, and other features that do not satisfy the federal definition. Colorado, for example, described its establishment of a state dredge-and-fill program for waters no longer covered federally after Sackett.³³ Hydrology and land use differ across regions. The supplemental alternatives establish a lawful federal line while preserving room for states to use tools suited to local conditions.³⁴

The final rule must also account for *Loper Bright Enterprises v. Raimondo*, which instructs courts to exercise independent judgment in determining statutory meaning.³⁵ The supplemental alternatives are better positioned to withstand review because they use Sackett’s operative concepts: relatively permanent waters, perennial flow under ordinary conditions, continuous surface water, and wetlands that are difficult to distinguish from jurisdictional waters. The wet-season language lacks the same textual anchor.³⁶

Judicial durability benefits all sides. Regulated parties gain stable expectations, agencies avoid repeated implementation changes, and states can design complementary programs around a known federal boundary. The agencies should not sacrifice those benefits by blending the supplemental approach with the wet-season language that prompted the supplemental proceeding.

Conclusion

The SNPRM is a meaningful improvement and deserves support if its alternatives are incorporated into the final rule. Its perennial-water and continuous-surface-water approaches better implement Sackett, provide clearer notice, reduce unnecessary burdens, respect land use and property rights, preserve state authority, and focus federal environmental administration on waters Congress placed within the Clean Water Act. Setting in place objective definitions and jurisdictional standards will reduce case-by-case determinations, helping to streamline agency actions, preserve agency resources for attention to clearly jurisdictional waters, and improve regulatory certainty for landowners.

To realize those benefits, EPA and the Army should adopt the supplemental alternatives and reject the original wet-season language. The final rule should also define “ordinary conditions” more

³⁰ 33 U.S.C. § 1251(b).

³¹ Sackett, 598 U.S. at 679-80.

³² Id. at 57,296-98.

³³ Colorado Department of Public Health and Environment, Comment on Proposed Updated Definition of WOTUS 1-3 (Jan. 5, 2026), https://downloads.regulations.gov/EPA-HQ-OW-2025-0322-1035/attachment_1.pdf.

³⁴ Hawkes, 578 U.S. at 594-95.

³⁵ *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 400-13 (2024).

³⁶ U.S. Environmental Protection Agency, Waters of the United States, updated Sept. 9, 2026, <https://www.epa.gov/wotus>.

clearly and explain the 30-day ceiling. A rule built on those principles would be more administrable and more likely to withstand judicial review.

We commend the agencies for issuing the SNPRM and appreciate the opportunity to comment.

Respectfully yours,

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³⁷ Professional affiliation provided for identification purposes only. These comments do not necessarily represent the views of The Heritage Foundation.