



EPN Comments on Supplemental “Updated Definition of Waters of the United States”

Docket No.: EPA-HQ-OW-2025-0322; FRL 11132.1-04-OW

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The [Environmental Protection Network](https://environmentalprotectionnetwork.org) (EPN) harnesses the expertise of more than 800 former Environmental Protection Agency (EPA) career staff and confirmation-level appointees from Democratic and Republican administrations to provide the unique perspective of former regulators and scientists with decades of historical knowledge and subject matter expertise.

Introduction

Due to the foresight of Congressional leaders in the 1970s and bipartisan support for Clean Water Act (CWA) implementation over the next several decades, our Nation’s waters are of measurably improved quality and have stemmed the historic loss of 50% of our Nation’s wetlands. Implementation of the CWA rests on the definition of “Waters of the U.S.” (WOTUS). For the first 30+ years of the CWA’s implementation, the scope of waters protected was comprehensive and consistent with clearly documented Congressional intent. Robust administration of the CWA occurred as the U.S. population grew from 203 million in 1970 to over 340 million in 2025, and the U.S. economy expanded from \$1 trillion to \$31 trillion annual gross domestic product (GDP), an increase of 3.62 times its 1970 value after accounting for inflation. Strong water resource protection in the U.S. did not come at the expense of a strong economy and growing population.

Since 2001, a series of Supreme Court cases have considerably reduced the waters and wetlands that are protected as WOTUS—~80% of wetlands and a minimum of 70% of streams and rivers. Promulgation of the dramatic narrowing of protected resources, as contemplated in the 2025 proposed rule and 2026 supplemental proposed rule, would amount to an about-face relative to the approach that has produced remarkable environmental improvements since 1972.

During our time as career and political employees of EPA, we dedicated our efforts to faithfully advance the goals of the CWA, fundamentally to “protect, maintain and restore” the quality of our Nation’s waters. In retirement, we take great pride in having turned the tide on surface water pollution and the historic loss of wetland resources. There is great public support for the CWA: more than 70% of Americans strongly support restoring federal protections for wetlands and streams to pre-rollback levels; more than 90% believe that regulations to protect water quality in lakes, streams, and rivers are important.¹ Implementation of the CWA has enriched community amenities; reduced the cost of ensuring safe drinking water supplies; protected fisheries, species habitat, and recreational water uses; protected tribal treaty rights; and mitigated flooding damages. All of these clean water benefits and more are in jeopardy with the changes proposed.

¹ Public polls show that 72% of the U.S. public supports restoring federal protections of wetlands and streams to pre-rollback levels, and 96% of voters believe protecting water in lakes, streams, and rivers is important ([Walton Family Foundation](#), 2022).

On January 5, 2026, EPN submitted timely detailed comments² on the Nov. 2025 Notice of Proposed Rulemaking (NPRM)³ by the Environmental Protection Agency (hereinafter referred to as “EPA”) and the U.S. Army Corps of Engineers (hereinafter referred to as “the Corps” and hereinafter referred to alongside EPA as “the Agencies”). Consistent with the Agencies’ request in the Sept. 2026 Supplemental Notice of Proposed Rulemaking (SNPRM), we have not included most of those comments herein. We expect our earlier comments (and all other submitted comments) to be substantively addressed, consistent with the Administrative Procedures Act (APA) and a statement made in the Section III of the SNPRM: “The agencies will consider and address those previously submitted comments on the proposed rule, in addition to new comments submitted in response to this SNPRM, in taking final action on this rulemaking.”⁴

At the most basic level, our comments on this SNPRM fully align with our earlier (January 5, 2026) comments. Simply stated, if a final rule with the changes proposed (or contemplated as alternatives) are promulgated, it will prove impossible to achieve the fundamental goal of the CWA, to “.....restore and maintain the chemical, physical and biological integrity of the Nation’s waters.”⁵

Without continued CWA protection, the damage caused by unregulated dredge, fill, and pollution activities upstream will not be reversible in the waters still subject to the CWA. The cost to treat downstream waters, which support more than 100 million people’s drinking water sources, will increase exponentially. Loss of upstream wetlands will dramatically worsen flooding, resulting in greatly increased costs to the public for both flood insurance and flood damage recovery. The NPRM and SNPRM both opine that states will continue to have the ability to regulate water resources more broadly under their own authorities. However, more than 30 states have current legal prohibitions to exert regulatory control over waters beyond those subject to the CWA. Moreover the states depend on federal funding to protect WOTUS under the CWA to fully staff and implement the authorities they do have over state waters; such funding will be severely restricted based on the proposed definitions of WOTUS. The SNPRM’s assertion that states are free and able to protect such waters is simply not true. EPN has developed a checklist of all the actions states/Tribes must take in order to protect waters no longer covered by the CWA.⁶ It is clear from this checklist that many states/Tribes lack the staff and funding to provide this protection. If this SNPRM is finalized as the new definition of WOTUS, it will be virtually impossible to achieve the CWA objective of restoring and maintaining the chemical, physical, and biological integrity of the Nation’s waters.

² EPN Comments on Updated Definition of WOTUS (January 2026), available at <https://www.environmentalprotectionnetwork.org/wp-content/uploads/2026/01/EPN-Comments-on-Updated-Definition-of-WOTUS.pdf>

³ Updated Definition of “Waters of the United States”, 90 Fed. Reg. 52498 (November 20, 2025), <https://www.federalregister.gov/d/2025-20402>.

⁴ Updated Definition of “Waters of the United States”, 91 Fed. Reg. 57284 (Proposed September 9, 2026), <https://www.federalregister.gov/d/2026-18317>.

⁵ 33 U.S.C. § 1251

⁶ EPN’s State Protections Checklist: Critical Post-Sackett Actions for States and Tribes, available at <https://www.environmentalprotectionnetwork.org/wp-content/uploads/2023/07/EPN-CWA-State-Protections-Checklist.pdf>

The SNPRM proposes to equate the “relatively permanent” waters that retain CWA protection in the plurality opinions of the *Rapanos*⁷ and *Sackett*⁸ cases with perennial waters. If Justice Scalia intended only perennial waters to be protected, he would have used that very term in his *Rapanos* opinion, since it is widely understood from its dictionary definition.

Also, while emphasizing that drought conditions will be taken into account in determining if waters are covered, Section V.B.2 of the SNPRM makes clear that only rare “extreme” (D3) and “exceptional” (D4) droughts would be the basis of any exception to the 30 day threshold. As of September 29, 2026, ~50% of the United States and Puerto Rico and ~60% of the lower 48 states are in drought.⁹ As with streamflow regime, the occurrence and effects of drought vary regionally. Citing the National Oceanic and Atmospheric Administration’s National Integrated Drought Information System (NIDIS): “No two states experience the same set of impacts during a drought. Drought in Alaska looks different than drought in Arizona. The following state-specific drought impacts were compiled by the National Drought Mitigation Center. While these impacts are not exhaustive, they can help provide a clearer picture of drought across the United States” (Appendix, Figure 1).

Regarding the practical realities of implementing proposed changes, the Agencies expect property owners to make these decisions on their own, without input from water professionals. While most landowners may do so honestly, there will be exceptions that call for Agency engagement. The logistical costs of repeated site visits to remote locations required to determine whether perennial flow and/or continuous surface connection are interrupted for more or less than 30 days will limit Agency engagement to the most egregious violations. This will further undermine achieving the CWA’s goal to restore and maintain water quality. As noted in our January 5, 2026 comment letter, if a member of the public decides to fill, dredge, or pollute a stream or wetland without consulting a professional or the Agencies, they will still be liable for unlawful discharges if the water body in question is found to be jurisdictional because the CWA is a strict liability statute.¹⁰ Past experience in defining perennial flow in the field since the Corps put their 1987 delineation manual¹¹ in place has shown it to be costly and time consuming to prove or disprove that continuous flow occurs for greater than 30 days during a typical year, as well as defining what is a typical year.

While the negative impacts of restricting CWA jurisdiction in the dramatic manner proposed will be harmful everywhere, the impacts will be greatest in the Arid West. Taking the San Pedro River in Arizona as an example, after 100+ years of groundwater over pumping, only a few stretches of this major river system have perennial flow. The San Pedro originates in the highlands of northern

⁷ *United States v. Rapanos*, 547 U.S. 715, 742-43(2006) (Scalia J., plurality op.).

https://www.epa.gov/sites/default/files/2016-04/documents/rapanos_decision_2006.pdf.

⁸ *Sackett v. U.S.*, Case No. 21-454 (2023) Slip opinion. https://www.supremecourt.gov/opinions/22pdf/21-454_4g15.pdf

⁹ National Integrated Drought Information System: National Current Conditions. As of October 5, 2026.

<https://www.congress.gov/crs-product/RS21665>. <https://www.drought.gov/current-conditions>.

See also: <https://droughtmonitor.unl.edu>

¹⁰ See *American Canoe Assoc. v. Murphy Farms, Inc.*, 412 F.3d 536 (4th Cir. 2005) (good-faith efforts to comply are not enough to shield a defendant from liability; “[I]t is plainly possible for those undertaking good-faith remediation, such as the Farms, nevertheless, ‘to be in violation’ of the Act within the meaning of section 505(a), because the CWA creates a regime of strict liability for violations of its standards.”)

¹¹ Environmental Laboratory. (1987). “Corps of Engineers Wetlands Delineation Manual,” Technical Report Y-87-1, U.S. Army Engineer Waterways Experiment Station, Vicksburg, Miss.

Mexico and flows northward for 140 miles before it joins the Gila River in the Phoenix suburbs. Its watershed is equal in size to the State of Connecticut!¹²

The Gila River provides drinking, agricultural, and recreational water for the Phoenix metropolitan area. In an area that is desperate for reliable surface water resources, the cost and harm of failing to protect the San Pedro/Gila River's water resources dwarf the public/private costs to prevent their degradation. Allowing degradation and loss of these water resources is also at odds with terms of treaties and legal agreements with Federally-recognized Indian Nations.

For the reasons noted here and fully detailed in the comments that follow, we strongly urge the Agencies to exert their administrative authority, informed by sound scientific knowledge, legal expertise, and successful past implementation strategies, to frame a final rule that provides a chance to continue to “protect, maintain and restore” the quality of our Nation's waters. While Supreme Court decisions very significantly constrain WOTUS, the Agencies are not required to establish implementing policies and operational definitions that go significantly further in their limitation of CWA jurisdiction. Accordingly, we urge use of more inclusive definitions for “relatively permanent” waters, and “continuous surface connection,” drawing from successful practices that have been in place for most of the years since the 2006 *Rapanos* decision.

Definition of “Perennial”

EPN does not agree with the need for a nationwide regulatory definition of “perennial” within the definition of WOTUS. The supplement makes abundantly clear that the Agencies' motive for introducing this novel term is to redefine current guidance on “relatively permanent” flow in the most restrictive manner possible. Equating “relatively permanent” to a standard that in hydrology is applied only to the highest end of the streamflow-permanence continuum conflicts with the Supreme Court's language in both *Rapanos* and *Sackett* and with common scientific understanding of perennial and relatively permanent streamflow.

EPN will first comment on the proposed, but unnecessary, definition of “perennial” and then on the relationship of “perennial” to “relatively permanent” in the following section. Our comments on “perennial” fall into two categories: (1) Conceptual and operational definitions of perennial streamflow, and (2) Methodologies for measuring and predicting stream permanence.

Conceptual and operational definitions of perennial streamflow

Conceptually, the first part of the SNPRM's definition of “perennial” (“having standing or continuously flowing water every day of the year during ordinary conditions”)¹³ is roughly consistent with the long-standing U.S. Geological Survey (USGS) definition of a perennial stream (“[a] perennial stream is one that flows throughout the year”¹⁴). However, by substituting “every day of the year” for “throughout the year”—or similar phrases in other hydrologic concepts of perennial flow, e.g., “year-round”—the proposal specifies a fine-scale unit of measurement (24-hour

¹² While ecological functions often are lost in this policy debate, it is noteworthy that the San Pedro is designated as a “globally important” bird habitat, with 150 resident species and 250 additional migratory birds observed.

¹³ Updated Definition of “Waters of the United States”, 91 Fed. Reg. 57284 (Proposed September 9, 2026), <https://www.federalregister.gov/d/2026-18317>.

¹⁴ Beaman, W.M. 1928. Topographic mapping, Chapter E. *In* Topographic Instructions of the United States Geological Survey; Birdseye, C.H., Ed.; Bulletin 788, United States Geological Survey: Washington, DC, USA, pp. 161–378.

day) that is intentionally absent from hydrologic conceptual definitions of stream permanence or flow duration class (i.e., a discrete class that represents the typical [stream] flow regime over many years).¹⁵

The purpose for this substitution becomes clear in the next paragraph of the SNPRM where the Agencies add a numerical criterion to operationalize their conceptual definition of “perennial.” The proposed operational definition imposes a nationwide limit requiring at least 335 days of continuous standing or flowing water over any given 12-month period. Taken as a whole, this two-part (conceptual anticipating operational) definition deviates from common hydrologic understanding of perennial flow developed over more than 40 years of research on regional variation in stream flow regime, which forms the basis for assigning stream permanence classes, including perennial flow.

One notable divergence of this proposal from established operational definitions that also use numerical criteria (i.e., annual flow duration thresholds, one of multiple approaches to flow duration assessment) concerns the classification of perennial streams in the western half of the U.S. In a landmark report, the USGS defines a perennial stream (or stream reach) as one having “measurable surface discharge more than 80 percent of the time [i.e., annually].”¹⁶ The approach in both definitions (EPA/the Corps and USGS) uses a percentage of flow over a 12-month period; however, the numerical criteria are substantially different (80% without requirement for daily continuous flow in the USGS definition, ~92% with a requirement for daily continuous flow in the proposed regulation).

In our review of the hydrologic literature, the Agencies’ proposed definition of “perennial” (~92% continuous annual flow) falls within generally accepted regional ranges of percent-annual flow duration ($\geq 80\%$ / $\geq 90\%$ / $\geq 95\%$) when expressed as a percentage of annual flow or as a flow percentile distribution (e.g., 90th percentile flow permanence of 100% over >30 year (Julian et al., 2024)¹⁷). However, when imposed as a nationwide limit this proposal is overly restrictive, particularly for the western half of the United States, where the combination of concurrent hot+dry extremes has increased the risk of drought and drought effects over most of the area (Appendix, Figure 2).^{18,19}

¹⁵ Fritz, K. M., Nadeau, T.-L., Kelso, J. E., Beck, W. S., Mazor, R. D., Harrington, R. A., & Topping, B. J. 2020. Classifying Streamflow Duration: The Scientific Basis and an Operational Framework for Method Development. *Water*, 12 (9):2545. <https://doi.org/10.3390/w12092545>.

¹⁶ Hedman, E.R.; Osterkamp, W.R. 1982. Stream Flow Characteristics Related to Channel Geometry of Streams in Western United States; Water-Supply Paper 2193; United States Geological Survey: Washington, DC, USA, p. 17.

¹⁷ Julian, J. P., Stuhldreher, C., & Wade, M. T. 2024. What Is Relatively Permanent? Flow Regimes of Arizona Streams within the Context of the 2023 Conforming Rule on the Revised Definition of “Waters of the United States”. *Water*, 16(18), 2641. <https://doi.org/10.3390/w16182641>.

¹⁸ Alizadeh, M. R., Adamowski, J., Nikoo, M. R., AghaKouchak, A., Dennison, P., & Sadegh, M. 2020. A century of observations reveals increasing likelihood of continental-scale compound dry-hot extremes. *Science advances*, 6(39). DOI: 10.1126/sciadv.aaz4571.

¹⁹ The drivers of drought include both natural and human activities, i.e., human controls over water fluxes and storage that can modify drought – or even cause drought – in the absence of its natural causes. See: Van Loon, A. F., Stahl, K., Di Baldassarre, G., Clark, J., Rangecroft, S., Wanders, N., Gleeson, T., Van Dijk, A. I. J. M., Tallaksen, L. M., Hannaford, J., Uijlenhoet, R., Teuling, A. J., Hannah, D. M., Sheffield, J., Svoboda, M., Verbeiren, B., Wagener, T., and Van Lanen, H. A. J. 2016. Drought in a human-modified world: reframing drought definitions, understanding, and analysis approaches, *Hydrol. Earth Syst. Sci.*, 20, 3631–3650, <https://doi.org/10.5194/hess-20-3631-2016>.

Established alternatives with regional definitions of perennial flow are readily available. For example, Hewlett (1982)²⁰ provided a stricter definition of perennial streams for forested watersheds ($\geq 90\%$ annual flow duration, allowing for 37 no-flow days/year) than that of Hedman and Osterkamp (1982) ($\geq 80\%$, allowing for ~ 73 no-flow days/year) for western streams. In this comparison of similar stream hydrographs from watersheds in two geographic regions, expert analysis and classification of perennial vs. non-perennial flow differed based on hydrologic understanding of regional differences in climate, geology, and topography. In the years following these landmark studies, the need for incorporating regional variation into operational definitions of flow duration class (and the definition of perennial in particular) has become increasingly clear. Citing Fritz et al. (2020): “...the timing of streamflow becomes more predictable going from ephemeral to intermittent to perennial within a given geographic area. Similarly, while there is not a universally accepted length of record needed to classify streamflow duration, it is generally accepted that streamflow duration classes represent the typical regime at a reach over many years. While a reach may change streamflow duration classes in the long term due to any number of factors (e.g., long-term water withdrawal or augmentation, channel headcutting, changing climatic conditions), the streamflow duration classification of a reach represents the typical regime and, therefore, does not change year to year”(emphasis added).²¹

Methodologies for measuring and predicting stream permanence

The Agencies propose a nationwide numerical threshold of $\sim 92\%$ annual continuous flow for “perennial” flows with the assumption that it “provides certainty and clarity for landowners and is easily administrable for the implementing agencies”, but with no pretense of concern about its legality or efficacy in protecting the nation’s waters. While not completely inconsistent with its hydrologic interpretation, this use of the term “perennial” takes the implementation back to methods used in the early 20th century when streamflow was determined visually in the field and mapped according to field observation(s) of presence/absence, often with errors.²²

More recent research has moved beyond short (< 1 to 5 years) periods of direct presence/absence observation to predictive models of annual percentage of flow (or no-flow) over a longer period of record (≥ 30 years) or evaluation of flow percentile distributions.²³ Most recently, field methods based on multi-metric field observations and robust regional stream data-sets have been developed and validated as rapid assessment tools to classify regional flow duration across the coterminous U.S.²⁴ Fritz et al. (2020) also provide a framework and template for developing regional flow duration assessment tools in new areas.

²⁰ Hewlett, J.D. 1982. Principles of Forest Hydrology. University of Georgia Press, Athens, GA.

²¹ See Fritz et al. 2020. Streamflow Duration Assessment Methods (SDAMs) For a concise review of regional and global operational definitions. Available at <https://www.epa.gov/streamflow-duration-assessment/development-regional-sdams>.

²² Beaman, W.M. 1928. Topographic mapping, Chapter E. *In* Topographic Instructions of the United States Geological Survey; Birdseye, C.H., Ed.; Bulletin 788, United States Geological Survey: Washington, DC, USA, pp. 161–378.

²³ Julian, J. P., Stuhldreher, C., & Wade, M. T. 2024. What Is Relatively Permanent? Flow Regimes of Arizona Streams within the Context of the 2023 Conforming Rule on the Revised Definition of “Waters of the United States”. *Water*, 16(18), 2641. <https://doi.org/10.3390/w16182641>.

²⁴ Nadeau, Tracie-Lynn. 2015. Streamflow Duration Assessment Method for the Pacific Northwest. EPA 910-K-14-001, U.S. Environmental Protection Agency, Region 10, Seattle, WA; https://www.epa.gov/system/files/documents/2022-03/sdam-pnw_nov-2015-final.pdf

In addition, the proposal to reclassify streamflow class after a 5-year period of “anomalous” conditions has no basis in science.²⁵ The Agencies state that a 5-year period “tracks” the Corps’ jurisdictional determinations (JD). We do not know what “track” means in this context, however, for assessments of streamflow regime we do know that a 5-year limit is completely arbitrary. We recommend that, at a minimum, the Agencies avoid assigning a universal/national limit (so-called “bright line”) on recovery periods and provide technical guidance for regional assessments of streamflow class in the face of a changing climate. Defensible methods for assessment of streamflow duration should apply multiple lines of evidence and consideration of geographically relevant factors (such as topography, snowpack, land use, soils, Ordinary High Water Mark (OHWM) indicators, etc., that reflect recurring local conditions).

Lastly, scientists at EPA have been global leaders in applied research on classification of streamflow dynamics. Their tools, including Streamflow Duration Assessment Models (SDAMs)²⁶, and protocols for assessing streamflow duration are already in use by regulators and water resource managers to conduct streamflow assessments, set restoration goals, and apply water quality standards. It appears that in developing this proposal EPA did not consult with their own scientists or consider well-researched and validated tools for defensible assessments of stream permanence class - here, perennial flows.

Definition of “Relatively Permanent”

Defining “relatively permanent” as “perennial” and the proposed definition of “perennial” above in particular—makes no sense scientifically and is inconsistent with the clear wording in *Rapanos*. Sackett adopted the usage of “relatively permanent” in *Rapanos*. Referring to our January 5, 2026 comments on the 2025 NPRM about the proposed implementation of delimiting seasonal flows, we gave the following recommendations:

A key recommendation is that there be no hard limits set a priori on the onset or duration of flow or surface water connectivity, whether from a basic estimation of climatic wet and dry seasons, a fixed period of flow/connectivity, or other untested or arbitrary standards for jurisdiction.

and:

Given that the Sackett opinion severely limits the application of sound science in CWA implementation, and that the proposal exceeds restrictions imposed by Sackett in its approach to determining a standard for relative permanence, we recommend that the agencies adopt the 2023 WOTUS rule definition of relatively permanent waters.

The 2023 definition is insufficient for protection of all ephemeral flows and most wetlands, which collectively have enormous consequences for downstream water quality and quantity. However, it is still preferable to the proposed approach in that it allows for multiple lines of evidence and

²⁵ Nagamoto, E., Ombadi, M., Ciulla, F. et al. 2026. Widespread drought-driven declines in streamflows and water quality in the Upper Colorado River Basin during 1998-2022. *Commun Earth Environ* 7, 734. <https://doi.org/10.1038/s43247-026-03890-5>.

²⁶ U.S. Environmental Protection Agency. Regional Streamflow Duration Assessment Methods. <https://www.epa.gov/streamflow-duration-assessment>.

consideration of geographically relevant factors (such as topography, snowpack, land use, soils, OHWM indicators, etc., that reflect recurring local conditions) in developing regional standards for relatively permanent surface flow and connectivity. Further, it provides greater opportunity for states and Tribes to regionalize jurisdictional standards for human uses (including relevant water management regimes) and current climate conditions that affect flow within their jurisdiction. The agencies should also work with states and Tribes to provide funding and technical support for developing practical and accurate field methods and tools for this purpose.²⁷

To be clear, our objections to the 2025 NPRM were focused entirely on the *implementation* of “relatively permanent”, i.e., defining “wet season” based on WebWIMP²⁸ to place regulatory limits on the onset and duration of seasonal relatively permanent flows. That proposed implementation—using a simple model of precipitative wet season to predict streamflow presence/absence—was subject to error and made the Agencies vulnerable to litigation.

Unfortunately, with this supplemental proposal the Agencies have put themselves in an even more precarious position with respect to both science and the law. The supplement’s proposed definition of “relatively permanent” is fatally flawed in both concept and implementation.

The term “relatively permanent” flow is used by Supreme Court justices in their opinions in *Rapanos* and *Sackett* citing relatively permanent connections to Navigable Waters. Justice Scalia’s plurality opinion in *Rapanos* introduced the “relatively permanent standard” for CWA jurisdiction. In a footnote Scalia said: “By 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—such as the 290-day, continuously flowing stream postulated by Justice Stevens’ dissent (hereinafter the dissent), post, at 15. Common sense and common usage distinguish between a wash and seasonal river.”²⁹

His interpretation aligns with hydrologic understanding of relatively permanent waters. It also aligns with the evident need for a regulatory definition of “relatively permanent” that can be tailored to geographic conditions and regional streamflow regimes.

The plurality in *Sackett* cites and concurs with the definition of “waters” in *Rapanos*: “To make sense of Congress’s choice to define “navigable waters” as “the waters of the United States,” the Court concludes that the CWA’s use of “waters” 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.’”³⁰

In the scientific literature, the term “relatively permanent” is used to describe flow or standing water that persists for a predictable period—e.g., seasonally—but is not necessarily continuous throughout the year (i.e., perennially). The concept of regional seasonal persistence and

²⁷ See Page 19, EPN Comments on Updated Definition of WOTUS (January 5, 2026), available at <https://www.environmentalprotectionnetwork.org/wp-content/uploads/2026/01/EPN-Comments-on-Updated-Definition-of-WOTUS.pdf>.

²⁸ WebWIMP. The Web-based, Water-Budget, Interactive, Modeling Program. http://cyclops.deos.udel.edu/wimp/public_html/index.html.

²⁹ United States v. Rapanos, 547 U.S. 715, 742-43(2006) (Scalia J., plurality op.).

³⁰ Id.

predictability are shared by both hydrologic, the Supreme Court, and regulatory understanding of relative permanence. This class of persistent flow is broader than perennial and includes most waters that could be classified as intermittent under existing classification systems.

The proposed definition of “relatively permanent” as “perennial” is also inconsistent with the use and development of SDAMS by EPA to discern, using both regionalized data and instream technical criteria and observations, the difference between ephemeral, intermittent, and perennial streams (whereby ephemeral streams are only those fed by precipitation, and intermittent and perennial are fed by groundwater baseflow and precipitation). The SDAMS have been used as a tool to distinguish what has been regulated as meeting the "relatively permanent" seasonal criterion.

Like the 2025 NPRM, the 2026 SNPRM would disparately affect huge portions of the U.S., notably Alaska plus the Southwestern and Western states, by (1) Mis-applying established standards in streamflow duration classification and (2) Removing jurisdiction over the majority of surface waters in many watersheds in these parts of the nation. Any definition of “waters of the United States” that removes CWA protections for most surface waters in roughly two thirds of the land area of the entire U.S. would clearly be inconsistent with the mandate in the CWA to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters” to protect the health of all Americans and our environment.³¹

The preamble to the 2025 NPRM notes that the proposed implementation does not have nationwide applicability. That is a gross understatement of the facts. What these proposals do is remove CWA protections for all people, including the vast majority of landowners, who would lose the benefits conferred by past protections on wetlands and streams.

In both proposals (2025 NPRM and 2026 SNPRM), the Agencies prioritize landowners who are fortunate enough to have one or more water features on their private property as the highest priority for CWA administration. All people in the U.S., with or without private property, containing waters or not, depend on clean water and have come to rely on the Agencies implementing the CWA to ensure that good water quality is available to everyone. In their repeated expressions of concern for “transparency and regulatory clarity to landowners,” the Agencies appear to ignore the economic benefits of healthy water ecosystems. These economic benefits have been discussed in our previous comments and in tens of thousands of other public comments on the 2025 NPRM as well as in numerous scientific and economic studies and are not included here.

Past administrations have worked closely with the public and with water professionals in EPA regions, labs, Tribes and states to learn from their many years of experience in national and regional water research and the implementation of CWA programs. This administration appears to have excluded those experts and partners, choosing instead to propose a set of scientifically vague definitions in the hope that CWA jurisdiction can be shifted to private individuals or corporations who have shared resources (waters) on their private property, but who lack the ability to delineate and determine the boundaries of hydrologic systems. This proposal alters the entire intent of the CWA and undermines the decades of work that have been so successful in maintaining and restoring clean, safe waters for public benefits.

Insofar as scientific understanding and legal defensibility have any relevance to the environmental or economic outcome of the proposed action, the option in this supplement rates below some

³¹ 33 U.S.C. § 1251

options in the 2025 NPRM, in comments on that proposal that incorporated seasonal flows clearly acknowledged by SCOTUS to be included as WOTUS, and the 2023 WOTUS rule definitions.

Definition of “Continuous Surface Connection”

In the SNPRM regarding “continuous surface connection,” EPA cites numerous comments received regarding the November 2025 NPRM and uses those comments to articulate a new approach.³² However, once again EPA articulates and seeks comment on a new approach leaving the choice of the final regulation up in the air. “In this supplemental notice, the agencies are requesting comment on an alternative definition of ‘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.’”³³

In this approach, the Agencies are adding the concept of “perennial” (discussed above) to continuous surface connection “for the sake of consistency with the the supplements proposed definition of ‘relatively permanent.’” Importantly, this approach restrictively requires the presence of water all year except possibly during 30 consecutive days during a dry spell, and further restricts waters that have more than one singular day departed from connectivity (i.e., if connectivity occurs for a day, rewets, then dries again during a 365-day period, that second drying eliminates the water as a WOTUS, regardless of the number of days it is dry).

The Agencies note that *Sackett* recognizes an undefined “temporary interruption in surface water connection that may occur because of a non-anomalous phenomena like low-tide or a regularly occurring dry spell would not break jurisdiction.”³⁴ However, by including the new definition of perennial which only allows for a 30 consecutive day period of no water, they have severely restricted the court’s opinion.

The Agencies next misinterpret the *Sackett* court’s view of “indistinguishability” as removing the “the applicability and, therefore the relevance of the terms ‘adjacency’ and ‘abutting.’”³⁵ The Agencies are seeking comment as to whether these terms “are operative in the definition of ‘continuous surface connection’ or should be removed from the definition entirely.”

The terms “adjacency” and “abutting” are terms that the Agencies have used for a number of years, have been interpreted consistently by the courts, and are very familiar to the regulated communities. Removing these terms from the regulatory approach will cause confusion and make it more difficult to interpret the definition of WOTUS. The Agencies take a step further by revising the regulations to state “[w]etlands that are indistinguishably part of a body of water that itself is jurisdictional under (a)(1) through (3) of this section. . . . Only the portion of the wetland that is

³² Although EPA mentions and summarizes numerous comments made to the NRPM to support their approach to this supplement, as noted above in the introduction, EPA will need to fully address these and all comments submitted in detail when issuing the final rulemaking.

³³ Updated Definition of “Waters of the United States”, 91 Fed. Reg. 57284 (Proposed September 9, 2026), <https://www.federalregister.gov/d/2026-18317>.

³⁴ *Sackett v U.S.*, Case No. 21-454 (2023) Slip opinion. https://www.supremecourt.gov/opinions/22pdf/21-454_4g15.pdf.

³⁵ *Id.*

indistinguishably part of the jurisdictional water, *due to the presence of surface water*, is itself jurisdictional.”³⁶ Use of the term “indistinguishable” instead of “adjacent” and/or “abutting” does not provide clarity to defining connectivity and adds confusion to the regulation.

The Agencies specifically recognize that their interpretation is inconsistent with the lower Courts and that “a surface *water* connection is not required under *Sackett*.”³⁷ They acknowledge that their approach relies on a different interpretation of “indistinguishable” by finding that the definition of a “continuous surface connection” requires that the wetlands and the jurisdictional water share a surface water connection which, as noted above, would impose a strained view of what that connection requires. Although requiring the presence of water all the time except during a continuous 30-day period may sound easier to implement, it will in fact require the regulated community to monitor each connection and count the days it is wet and dry.

This definition is inconsistent with the Supreme Court’s opinions in *Sackett* and *Rapanos*. As noted in our comments to the NRPM, it is essential to understand that the Supreme Court in *Sackett* did not fully overturn the *Rapanos* decision.³⁸ While EPN recognizes the Agencies have asked the commenters to not resubmit their comments, this particular comment is specifically relevant to the proposed SNPRM. In fact, the *Sackett* Court adopted the Scalia plurality opinion of the *Rapanos* decision, while rejecting only the Kennedy significant nexus approach.³⁹ Importantly, the *Sackett* decision left open a central issue for further interpretation that EPA and the Corps have only partially addressed since the decision was issued. Citing *Rapanos v. United States*, the *Sackett* Court mandated that there needed to be “a continuous surface connection” between the wetlands and a water of the U.S. that is relatively permanent and connected to a traditionally navigable water (TNW) to maintain jurisdiction.⁴⁰

After the *Rapanos* and then the *Sackett* decisions were issued, the Agencies issued several guidance documents defining the terms “relatively permanent water” and “continuous surface connection” that EPA has now informally rescinded. These terms were also fully defined in the preamble to the 2023 WOTUS rule, and the subsequent conforming rule that was based on *Sackett*. Neither the guidance documents nor the *Sackett* decision absolutely required a relatively permanently flowing waterbody to traditional navigable waters (TNWs) to maintain a continuous surface water connection to adjacent/abutting wetlands during the wet season to justify CWA jurisdiction.

After *Rapanos* was issued, EPA and the Corps issued guidance in 2008 explaining how the Agencies would implement the *Rapanos* decision. This 2008 *Rapanos* guidance explains the scope of

³⁶ Updated Definition of “Waters of the United States”, 91 Fed. Reg. 57284 (Proposed September 9, 2026), <https://www.federalregister.gov/d/2026-18317>.

³⁷ Id.

³⁸ EPN Comments on Updated Definition of WOTUS (January 2026), available at <https://www.environmentalprotectionnetwork.org/wp-content/uploads/2026/01/EPN-Comments-on-Updated-Definition-of-WOTUS.pdf>

³⁹ *Sackett v U.S.*, Case No. 21-454 (2023) Slip opinion. https://www.supremecourt.gov/opinions/22pdf/21-454_4g15.pdf

⁴⁰ 547 U.S. 715, 742 (2006).

jurisdiction for wetlands in particular and discusses a “continuous surface connection.”⁴¹ This guidance is still posted on the web.⁴²

In the 2008 *Rapanos* Guidance, EPA quoted from the *Rapanos* case: “Four Justices, in a plurality opinion authored by Justice Scalia, rejected the argument that the term “waters of the United States” is limited to only those waters that are navigable in the traditional sense and their abutting wetlands.”⁴³ However, the plurality concluded that the Agencies’ regulatory authority should extend only to “relatively permanent, standing, or continuously flowing bodies of water” connected to TNWs, and to “wetlands with a continuous surface connection to” such relatively permanent waters.”⁴⁴

The 2008 Guidance further states: “Both the plurality opinion and the dissent would uphold CWA jurisdiction over non-navigable tributaries that are ‘relatively permanent’—waters that typically (e.g. except during drought) flow year-round or waters that have a continuous flow at least seasonally (e.g. typically three months).”⁴⁵

In summary, this means that a continuous surface connection is defined by a connecting feature that does not have to contain water at all times nor itself be inundated over its full spatial extent, but has the ability to connect and exchange water between wetlands and the downstream TNW. The approach the Agencies are proposing, that water must be present all year except possibly for 30 consecutive days, is inconsistent with the *Rapanos* opinion which was adopted by *Sackett*.

Removal of “Adjacent” and “Abutting”

In the very first line of the *Sackett* plurality decision⁴⁶, the Supreme Court clarifies that the CWA “...use of the word ‘waters’ refers only to ‘geographic[al] features that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes’” and to adjacent wetlands that are “indistinguishable” from those bodies of water due to a continuous surface connection” (citation reference omitted). The Court further notes in the finding (page 1) that once a water has been deemed a water of the United States (i.e., a “relatively permanent body of water connected to a traditional interstate navigable water”), an adjacent wetland is itself jurisdictional when it has a “...continuous surface connection with that water...”

To determine when a wetland is part of an adjacent “waters of the United States,” the Court agrees with the *Rapanos* plurality that the use of “waters” in §1362(7) may be fairly read to include only wetlands that are “indistinguishable from waters of the United States.” This

⁴¹ https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf

⁴² There was also considerable discussion in the preamble to 2023 WOTUS rule and the subsequent conforming rule issued after *Sackett* addressing this issue. There was additional guidance issued by EPA and the Corps as it relates to the Scalia opinion that EPA announced it had rescinded.

⁴³ 126 S. Ct. 2208, 2220. (2006).

⁴⁴ *Id.* 2225-2227.

⁴⁵ Citing 126 S. Ct. at 2221 n 5 (Justice Scalia, plurality opinion) (explain that “relatively permanent” does not necessarily exclude waters that “might dry up in extraordinary circumstances such as drought” or “seasonal rivers which contains continuous flow during some months of the year but no flow during dry months.”).

⁴⁶ *Sackett v U.S.*, Case No. 21-454 (2023) Slip opinion.

https://www.supremecourt.gov/opinions/22pdf/21-454_4g15.pdf

occurs only when wetlands have “a continuous surface connection to bodies that are ‘waters of the United States’ in their own right, so that there is no clear demarcation between ‘waters’ and wetlands.”⁴⁷

The use of the adjective water in the SNPRM to describe the connection goes well beyond the *Sackett* decision. The terms “adjacent” and “abutting” are meaningful and important to describe the connections between wetlands and the waters with which they are inseparably bound. The terms “adjacent” and “abutting” should therefore not be removed from the definition of “continuous surface connection.”

The Agencies recognize in their summary of comments on the November 2025 NPRM that “...commenters have argued and lower courts have held that a surface *water* connection is not required under *Sackett*...”⁴⁸ EPN agrees with commenters to the NPRM who found that “continuous surface connection” is best interpreted to mean simply abutting, *i.e.*, touching, consistent with the approach under the March 2025 Continuous Surface Connection Guidance...”⁴⁹ That follows established jurisprudence as “...none of the Supreme Court decisions addressing “waters of the United States,” from *Riverside Bayview* through *Sackett*, demanded that a wetland be continuously filled with water, during a wet season or otherwise, in order to be deemed jurisdictional...”⁵⁰

We further underscore and agree with the comments that, “...the Supreme Court has consistently recognized that wetlands abutting, or touching, otherwise covered waters are covered under the Clean Water Act...” including that *Sackett* decision, noting that it favorably “...cited *Riverside Bayview*’s holding that wetlands “actually abutting a navigable waterway” are jurisdictional, as it affirmed that “waters of the United States” include wetlands “contiguous” to navigable waters.”⁵¹

We recognize that many important hydrological and ecological functions are performed by wetlands that the Supreme Court has deemed outside the scope of the CWA. As Justice Alito stated in *Sackett*: “‘adjacent’ cannot include wetlands that are *merely* nearby covered waters” (emphasis added).⁵² Adjacent and abutting waters are not simply “nearby”; rather, they are hydrologically, chemically, and physically connected to covered waters, forming systems that bidirectionally exchange water and materials (including pollutants added to adjacent or abutting wetlands), as the Agencies’ own experts have identified through scientific communications in peer-reviewed

⁴⁷ Id. Page 4

⁴⁸ Updated Definition of “Waters of the United States”, 91 Fed. Reg. 57284 (Proposed September 9, 2026), <https://www.federalregister.gov/d/2026-18317>.

⁴⁹ Updated Definition of “Waters of the United States”, 91 Fed. Reg. 57284 (Proposed September 9, 2026), <https://www.federalregister.gov/d/2026-18317>, comment citing U.S. Army Corps of Engineers and U.S. Environmental Protection Agency. Memorandum to the Field between the U.S. Department of the Army, U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency concerning the proper implementation of “continuous surface connection” under the definition of “Waters of the United States” under the Clean Water Act. March 2025. <https://www.epa.gov/system/files/documents/2025-03/2025cscguidance.pdf>

⁵⁰ Updated Definition of “Waters of the United States”, 91 Fed. Reg. 57284 (Proposed September 9, 2026), <https://www.federalregister.gov/d/2026-18317>.

⁵¹ Id.

⁵² *Sackett v U.S.*, Case No. 21-454 (2023) Slip opinion. https://www.supremecourt.gov/opinions/22pdf/21-454_4g15.pdf.

journals.⁵³ EPA’s scientists further clearly articulated that these inseparably surface-connected and adjacent waters provide biogeochemical processes that remove in-stream pollutants thereby directly affecting downstream communities and users,⁵⁴ and through the time-varying mixing and exchanging of water can slow or attenuate flooding events, protecting human health and reducing economic damages downstream.⁵⁵

The reading that the Agencies wish to take from *Sackett* further does not comport with the Court’s own reading of *Sackett*. Justice Kavanaugh’s concurring opinion states, “The Act covers ‘adjacent’ wetlands. And adjacent wetlands is a broader category than adjoining wetlands. But instead of adhering to the ordinary meaning of ‘adjacent’ wetlands, to the 45 years of consistent agency practice, and to this Court’s precedents, the Court today adopts a test under which a wetland is covered only if the wetland has a ‘continuous surface connection’ to a covered water—in other words, if it adjoins a covered water.” Justice Kavanaugh further states, “The Court essentially reads ‘adjacent’ to mean ‘adjoining’”;⁵⁶ a footnote states, “Adjoining wetlands are a subset of adjacent wetlands...”⁵⁷ But the Agencies are seeking to arbitrarily narrow and reinterpret text—striking the terms adjacent and abutting—that the Supreme Court *Sackett* opinions clearly states are meaningful.

Thus, we strongly disagree with the proposed additional alternative approach to remove the words “adjacent” or “abutting” from the definition of “continuous surface connection.” As admitted by the Agencies, “...this supplemental option to ‘continuous surface connection’ relies on a reading of *Sackett* whereby a wetland can be indistinguishably part of a jurisdictional water only when the wetland and the jurisdictional water share a surface water connection.”⁵⁸ That is predicated not only on a fallible reading of *Sackett*, but also on the unsubstantiated insertion of the adjective “water” to arbitrarily define connectivity well beyond that articulated by the justices in *Sackett*.

Implementation Issues

In the sections above, we have explained the many reasons the proposed definitions of “perennial,” “relatively permanent,” and “continuous surface connection” are inconsistent with science and the rulings in the *Rapanos* and *Sackett* decisions. We now will explain why these same definitions fail in terms of the ability to implement them in the field.

⁵³ Leibowitz, Scott G., Parker J. Wigington, 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. <https://doi.org/10.1111/1752-1688.12631>.

⁵⁴ USEPA. *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence*. US EPA Office of Research and Development, Washington, DC, 2015.

⁵⁵ Fritz, Ken M., Kate A. Schofield, Laurie C. Alexander, et al. “Physical and Chemical Connectivity of Streams and Riparian Wetlands to Downstream Waters: A Synthesis.” *JAWRA Journal of the American Water Resources Association* 54, no. 2 (2018): 323–45. <https://doi.org/10.1111/1752-1688.12632>.

⁵⁶ *Sackett v U.S.*, Case No. 21-454 (2023) Slip opinion P. 4. https://www.supremecourt.gov/opinions/22pdf/21-454_4g15.pdf.

⁵⁷ *Sackett v U.S.*, Case No. 21-454 (2023) Slip opinion. https://www.supremecourt.gov/opinions/22pdf/21-454_4g15.pdf.

⁵⁸ Updated Definition of “Waters of the United States”, 91 Fed. Reg. 57284 (Proposed September 9, 2026), <https://www.federalregister.gov/d/2026-18317>.

Determining perennial vs. intermittent and ephemeral flow regimes has been challenging since the early years of CWA implementation. However, when the CWA applied comprehensively to water resources, this was not the be-all and end-all focus of CWA jurisdiction. With the definitions included in the SNPRM, this extremely difficult field assessment becomes pivotal for implementing the CWA.

The proposed requirement that there be continuous standing or flowing water present perennially, except for gaps of less than 30 days or less than one day of departure from connectivity, would require daily stream flow and water gauge monitoring. Mechanical stream flow monitoring is only possible in the tiny fraction of streams where stream gauges are installed. Observational stream flow monitoring requires eyes on the stream for up to a 30-day continuous period, something that is impossible with the limited number of EPA and the Corps field staff, and their location relative to that of the streams and wetlands in question. In many cases, a water body (e.g., whether tidal water, stream, lake, or wetland of interest) could easily be a few hundred miles from the work site of field staff.

Cases will surely arise where the property owner and the Agencies do not agree on the CWA jurisdictional status of a water resource. In such cases, the only way to resolve the different perspectives is with daily and continuous monitoring. If this were the requirement, the burden of proof is in practice placed on the landowner, since the Agencies' staff are simply unable to perform daily monitoring of sites distributed across the landscape. Landowners would most likely need to hire a consultant to conduct and document stream monitoring, and this would be at odds with the stated intention that landowners could readily determine CWA jurisdictional status on their own.

If, instead, the burden of proof were placed on the Agencies, in the absence of tremendous staffing increases, the Agencies would only be able to challenge the landowner's determination in the rarest cases. The practical impossibility of basing CWA jurisdiction on flow monitoring results is the reason that the Agencies have developed and refined discrete (one time) physical observational methods over the history of implementing the CWA.

For streams, this work has culminated in recent years in the development of Regional SDAMs for many regions of the country and methods for developing them in regions that do not currently have them.⁵⁹ These methods have been developed through detailed scientific studies and field observations, and undergone peer review before adoption. Once developed for a region, they can determine whether a stream is ephemeral, intermittent, or perennial using site specific physical and biological field observations of a scope that field staff can readily implement.

The Agencies have been determining and making decisions on what are "relatively permanent" streams using SDAMs to discern streams that are "at least intermittent" and they should continue to be used allowing for the recognized scope of this term that includes seasonal systems, including intermittent and perennial streams.

Identifying whether wetlands have a "continuous surface connection" with a jurisdictional water, as contemplated in the SNPRM, would also require field monitoring beyond the capacity of the Agencies and would not realistically allow for a simple "naked eye" landowner observation to make that determination. And as with determining "relatively permanent" waters, placing the burden of proof on landowners appears at odds with the intent of the supplemental proposal. Accordingly, we

⁵⁹ U.S. Environmental Protection Agency. Regional Streamflow Duration Assessment Methods. <https://www.epa.gov/streamflow-duration-assessment>.

urge the Agencies to determine if a continuous surface connection is present on physical factors that can be observed discretely in the field (absent requiring daily monitoring of water presence at the surface).

For these reasons, and beyond our concerns with the definitions of the proposed regulatory terms, we believe the approach articulated in the SNPRM will not be easy or realistic to implement. Rather we encourage use of the state-of-the-art methods developed by the Agencies to rapidly assess stream flow conditions. The Agencies own statements support this suggestion:

- From EPA’s SDAM Webpage: “The Regional SDAMs for the Northeast and Southeast can be applied whenever there is uncertainty regarding streamflow duration class and a rapid evaluation method is desired. The methods provide a scientifically supported, rapid assessment framework to support best professional judgment in a consistent, robust, repeatable, and defensible way.”
- From the June 12, 2025 EPA-Corps joint statement: “These Regional SDAMs were developed for use in all or part of the states of Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, West Virginia, and the District of Columbia by the Corps and the EPA (Figure 1). These methods result from a literature review and multi-year field study conducted at 358 stream reaches across the range of hydrologic landscapes of the Northeast and Southeast. Developed through statistical analyses of the field data, these SDAMs provide a data-driven approach using reliable indicators to determine streamflow duration class at the reach scale.”

The SNPRM’s enthusiastic statement that a 30-day limit “would establish a bright line duration that would be predictable, transparent, and easy to administer”⁶⁰ is overly optimistic. The proposed hard threshold of 30 days or less for a water to dry up in an 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? EPA and the 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.⁶¹ 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.⁶²

⁶⁰ Updated Definition of “Waters of the United States”, 91 Fed. Reg. 57284, 57290 (Proposed September 9, 2026), <https://www.federalregister.gov/d/2026-18317>.

⁶¹ Updated Definition of “Waters of the United States”, 90 Fed. Reg. 52498, 52519 (November 20, 2025), <https://www.federalregister.gov/d/2025-20402>.

⁶² Updated Definition of “Waters of the United States”, 90 Fed. Reg. 52498, 52520 (November 20, 2025), <https://www.federalregister.gov/d/2025-20402>.

The SNPRM preamble asserts that tools and methods discussed in the November 2025 proposal could be used to implement the new supplemental definition of “relatively permanent.”⁶³ However, the SNPRM 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 SNPRM 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 SDAMs were developed and validated using long-term stream gauge data, hydrologic studies, repeat observations across years and seasons, and 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.⁶⁴

Importantly, SDAMs have been successfully used to determine what are relatively permanent waters inclusive of perennial and intermittent streams. This proposed new option to substantially narrow and define relatively permanent waters to be only those with perennial flow but for the “anomalous” and “non-anomalous” exceptions described will not create bright-lines but continue to cause problems for implementation while significantly eliminating protection of many waters under the CWA.

The SNPRM states that only the portion of the wetland that is indistinguishably part of the jurisdictional water, that meets this restrictive definition of continuous surface connection requiring perennial surface water, would itself be jurisdictional. This would make a new implementation challenge, requiring that an additional boundary determination be created inside an already delineated wetland. EPN 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, EPN 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.

The Agencies’ own Regulatory Impact Analysis (RIA) 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 the Corps’ approved jurisdictional determination processing times.⁶⁵ The SNPRM now raises that threshold to requiring perennial surface water. This could make the jurisdictional boundary within a single wetland dependent on

⁶³ Updated Definition of “Waters of the United States”, 91 Fed. Reg. 57284, 57291 (Proposed September 9, 2026), <https://www.federalregister.gov/d/2026-18317>.

⁶⁴ U.S. Environmental Protection Agency. Regional Streamflow Duration Assessment Methods. <https://www.epa.gov/streamflow-duration-assessment>.

⁶⁵ Regulatory Impact Analysis for the Proposed Updated Definition of Waters of the United States Rule (November 2025). Available at https://www.epa.gov/system/files/documents/2025-11/11132.1-01-ow_wotus_nprm_ria_20251110_508.pdf.

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 SNPRM asserts, “made by the naked eye.”⁶⁶

In addition, the SNPRM conceals the charade of landowners and the Agencies’ abilities to document tributary long-term surface water connections across floodplain and adjacent wetlands. A tributary’s continuous surface water connection to floodplain wetlands only occurs while in flood stage during overbank flow. Tributaries may exhibit flood stage, or overbank flow, during storm events or seasonal precipitation patterns: monsoons, winter/spring precipitation during low evapotranspiration periods, snowmelt, or latitude dependent rain/dry seasons (South Florida). During these occurrences, tributary waters may inundate adjacent/floodplain wetlands but only temporarily. The notion that a tributary can permanently (or for eleven months) inundate floodplain or adjacent wetlands invalidates riverine and basic hydrology concepts. The SNPRM’s requirement that a landowner or Agency representative must document long-term tributary wetland inundation to establish federal jurisdiction is ignoring the science and hydrologic reality. Tributary and riverine systems do not permanently flood or they would be called lakes. As we noted in our earlier comments, outside of lacustrine or tidal wetlands, most, if not all, freshwater wetlands in the United States would not be waters.

In this light, the Supreme Court’s holding in *Sackett*, requiring jurisdictional wetlands to have a continuous surface connection to a jurisdictional water, is at odds with scientific and hydrologic realities. In issuing implementing regulatory policy, the Agencies are proposing to operationalize this holding in the most restrictive manner possible, such that only in the rarest cases would adjacent wetlands be found to satisfy the requirement, and only following nearly-impossible-to-satisfy field monitoring observations.

We urge the Agencies to instead use a field standard based upon observable signs of interconnectivity to establish that a continuous surface connection exists. The Agencies have decades of experience and defined field practices to identify where there is a clear hydrologic connection between adjacent wetlands and the jurisdictional waters along which they are located. In light of *Sackett*’s jurisdictional limitations, the only way to align implementing policies with the decision and Congress’ clearly stated CWA goals is to promulgate a standard that is implementable in the field and allows for positive jurisdictional findings where there are clear indications of regular interconnection of the hydrology of adjacent wetlands and the jurisdictional waters they are co-located with. Finalizing the standard proposed in the SNPRM will have the effect of removing nearly all wetlands in the U.S. from CWA jurisdiction, which would completely undermine the ability to achieve the unchanged goal of the CWA to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”

Economic Analysis

The Agencies’ focus on the economic impacts is based on the Executive Order, 14192 finding that the “burden reduction by narrowing the scope of jurisdictional waters . . . fewer Clean Water Act

⁶⁶ Updated Definition of “Waters of the United States”, 91 Fed. Reg. 57284, 57296 (Proposed September 9, 2026), <https://www.federalregister.gov/d/2026-18317>.

permits will be required which will result in a cost savings and reduced regulatory burden.”⁶⁷ This focus on the cost of permitting ignores the costs associated with loss of wetlands and protection of waters under the CWA. As discussed below, the significant loss of wetlands itself will have major economic impacts. Beyond wetland losses, the SNPRM's narrowed definition of "relatively permanent" would effectively eliminate all intermittent streams and potentially numerous water bodies that may be classified by states as perennial but do not meet the arbitrary definitions of this proposal. With these extreme changes to the scope of CWA protection, the intended foundation and national baseline to protect, maintain and restore the nation's waters (including water quality and all designated beneficial uses, aquatic resources and associated functions) is lost.

In addition, without the National foundation and protection that the CWA was intended to provide through the water quality standards program, and traditional and stormwater permits under the National Pollutant Discharge Elimination Systems (NPDES) program, there will be significant impacts and costs associated with restoring and maintaining the water quality necessary for recreation, industrial and other uses, and as drinking water sources. In some cases, the entire stream system may be lost.

Also, existing businesses such as mitigation banking which have already established banks based on the need for wetland mitigation credits, as required by the Agencies, will likely go bankrupt.⁶⁸

The economic effects of this SNPRM are widespread and egregious. The proposed changes would shift the costs and burden to the public sector and significantly impact the public good. Narrowing federal protections shifts long-term environmental costs from private developers to the public. Should the Agencies perceived efforts to remove potential CWA jurisdiction for all inland freshwater wetlands with the exception of those in-channel systems (e.g., riverine system in the Cowardin classification⁶⁹) be adopted, some scientific assessments have estimated that more than 86% of freshwater wetlands will no longer be protected by the CWA.⁷⁰

Wetland losses will likely increase as a result of this narrow and flawed reading of the *Sackett* decision the Agencies are attempting to promulgate. Destroyed wetlands—wetland losses—will remove many of the functions wetlands perform that protect human health and property. A recent scientific study by Gourevitch et al. (2026) reported that, “...wetland loss since 1985 has increased flood insurance payments by an average of US\$5,915 per [insurance] claim, and a total of US\$10.1 billion...”⁷¹ Gourevitch et al. (2026) identified that the flood-hazard mitigation benefits provided by wetlands the Agencies are seeking to remove from CWA consideration provide US\$177 billion. The authors conclude (p.6) “...that wetland loss so far has increased flood losses by several billion

⁶⁷ Updated Definition of “Waters of the United States”, 91 Fed. Reg. 57284, 57299 (Proposed September 9, 2026), <https://www.federalregister.gov/d/2026-18317>.

⁶⁸ National Environmental Banking Association. Proposed WOTUS Rule Puts U.S. Mitigation Banking at a Crossroads. November 25, 2025. <https://environmentalbanking.org/proposed-wotus-rule-puts-u-s-mitigation-banking-at-a-crossroads/>.

⁶⁹ Cowardin, L. M., Carter, V., Golet, F. C., & LaRoe, E. T. (1979). Classification of wetlands and deepwater habitats of the United States. U.S. Fish and Wildlife Service, Biological Services Program.

⁷⁰ National Resources Defense Council. September 2, 2026. U.S. Wetlands and Streams Are Already Losing Protections—Why Make It Worse? <https://www.nrdc.org/resources/us-wetlands-and-streams-are-already-losing-protections-why-make-it-worse>.

⁷¹ Gourevitch, Jesse D., Adam C. Gold, and Helena M. Garcia. “The Economic Value of Wetlands in Reducing Riverine Flood Losses in the USA.” *Nature Water*, ahead of print, June 1, 2026, p. 4. <https://doi.org/10.1038/s44221-026-00656-3>.

dollars, and the conversion of wetlands without state or federal protections could result in additional flood losses orders of magnitude greater...” Another econometric analysis published in the *American Economic Review* also examined wetland flood mitigation, finding that the “...average hectare of wetland lost between 2001 and 2016 cost society \$1,840 annually and over \$8,000 in developed areas.”⁷² Using discount rates of 7% and 3%, these expert economists estimate that the “...US wetlands provide \$1.2 to \$2.9 trillion...in flood mitigation value.” The costs of wetland flood mitigation, restoring or maintaining water quality, and downstream health impacts from unmonitored and unmitigated water pollution far outweigh any purported cost savings of the proposal.

⁷² Taylor, Charles A., and Hannah Druckenmiller. “Wetlands, Flooding, and the Clean Water Act.” *American Economic Review* 112, no. 4 (2022): 1334–63. <https://doi.org/10.1257/aer.20210497>.

Appendix

Figure 1. State-specific drought impacts compiled by the National Drought Mitigation Center (<https://droughtmonitor.unl.edu/DmData/StateImpacts.aspx>). Figure source: NOAA NIDIS (<https://www.drought.gov/impacts#impacts-table>).

	D0 - Abnormally Dry • Short-term dryness slowing planting, growth of crops or pastures. • Some lingering water deficits • Pastures or crops not fully recovered	53.3% of U.S. (D0–D4)
	D1 - Moderate Drought • Some damage to crops, pastures • Streams, reservoirs, or wells low, some water shortages developing or imminent • Voluntary water-use restrictions requested	36.9% of U.S. (D1–D4)
	D2 - Severe Drought • Crop or pasture loss likely • Water shortages common • Water restrictions imposed	25.9% of U.S. (D2–D4)
	D3 - Extreme Drought • Major crop/pasture losses • Widespread water shortages or restrictions	18.3% of U.S. (D3–D4)
	D4 - Exceptional Drought • Exceptional and widespread crop/pasture losses • Shortages of water in reservoirs, streams, and wells creating water emergencies	8.1% of U.S. (D4)

Figure 2. Nonparametric Mann-Kendall trend analysis. Red shaded areas show a statistically significant increase (at the 5% level) in the return period level of (C) concurrent dry AND hot extremes across CONUS over the past 122 years (1896–2017) at the annual scale. Fraction of area in each region and the entire CONUS with significant trends are also shown in the figure. (Figure Source: Figure 1.C in Alizadeh et al. (2020)).

