

TO: TFG Clients

DATE: November 19, 2025

EPA/Corps Proposed Draft Rule – Definition of “Waters of the U.S.” (WOTUS)

Executive Summary

On November 17, 2025, the Trump Administration [proposed a rule to revise the definition of “waters of the United States,”](#) which seeks to clarify the scope of federal Clean Water Act (CWA) jurisdiction in light of the Supreme Court’s [Sackett v. EPA](#) decision, ensuring that only waters and wetlands consistent with the Court’s direction fall under federal oversight. Because the definition of “waters of the United States” (WOTUS) determines when CWA permitting requirements apply, including for discharges of a pollutant, dredge-and-fill activities, and water quality standards, the rule has major implications for farmers, landowners, and industry.

The proposal from the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (collectively referred to as “the agencies”) revises the Biden-era 2023 rule by narrowing jurisdiction, deleting the interstate waters category, and refining exclusions for waste treatment systems, prior converted cropland, and ditches. It also introduces a new groundwater exclusion and defines key terms, including “continuous surface connection,” “relatively permanent,” and “tributary.” These changes aim to respect state and Tribal authority while providing clearer, more predictable regulatory boundaries. Although wetlands are still defined as before, the new definition of “continuous surface connection” determines which wetlands qualify as adjacent and therefore jurisdictional under *Sackett*.

The agencies anticipate reduced permitting costs due to narrower federal jurisdiction and will accept public comments for 45 days before finalizing the rule in the [Federal Register](#). Approved jurisdictional determinations under prior rules remain valid for five years unless revisited due to new information or changed conditions.

Proposed Revisions to the Definition of WOTUS

The agencies’ proposed definition of WOTUS would fully implement the Supreme Court’s direction in *Sackett* by ensuring federal jurisdiction is focused on relatively permanent, standing, or continuously flowing bodies of water, such as streams, oceans, rivers, and lakes, and wetlands that are connected and indistinguishable from such waterbodies. Detailed descriptions of specific changes in the proposed rule are noted below.

Defining “Relatively Permanent” Waters

The agencies propose defining “relatively permanent” waters as surface waters that have standing or continuously flowing water year-round or at least throughout the wet season. This definition explicitly

excludes ephemeral waters, which flow only in direct response to precipitation. The wet season is designed to capture predictable, annual periods of continuous surface hydrology; however, the agencies acknowledge that hydrology may lag behind precipitation in certain regions (e.g., snowmelt-driven flow).

The proposed definition applies to tributaries, lakes, ponds, and wetlands that are adjacent to such waters. It aims to implement the Supreme Court's interpretations in *Rapanos* and *Sackett*, which limit CWA jurisdiction to relatively permanent bodies of water forming recognizable geographic features such as streams, rivers, and lakes. The agencies emphasize that seasonal waters, those with continuous flow for part of the year, may still qualify, consistent with the Court's reasoning.

The agencies reject limiting the definition only to perennial waters, noting that the term "relatively" allows for inclusion of seasonal streams, and excluding them would contradict signals in *Rapanos* and *Sackett*. They also decline to adopt bright-line criteria such as fixed minimum flow volumes or fixed day-count flow durations (e.g., 90 or 270 days), citing regional variability and implementation difficulties.

Numerous alternative approaches are discussed, and additional public comments are requested, including:

- Limiting jurisdiction to perennial waters
- Adopting fixed flow-duration thresholds
- Defining relativity based on physical indicators like bed and banks
- Using a three-month seasonal flow standard similar to pre-2015 guidance
- Defining "wet season" by precipitation metrics or climatological data
- Allowing proportional or lagged flow relative to the "wet season"

The agencies seek comments on all aspects of the proposal, including wet season identification methods, tools for assessing flow duration (e.g., APT, WebWIMP, SDAMs), and whether "standing or continuously flowing" should remain in the regulatory text.

Overall, the agencies say their proposed definition attempts to balance scientific practicality, legal constraints, administrative clarity, and regional hydrologic diversity while avoiding inclusion of ephemeral streams.

Defining "Tributary" to a "Water of the U.S."

The agencies propose defining a "tributary" as a body of water with relatively permanent flow that has a bed and banks and is connected to a downstream traditional navigable water or the territorial seas, either directly or through other features that also convey relatively permanent flow. The definition excludes waters that only contribute flow through features that do not carry relatively permanent flow, such as dry channels, certain wetlands, debris piles, or artificial structures that lack sustained flow. However, waters involved in an ongoing water transfer (under EPA's Water Transfer Rule) would retain jurisdictional status.

The definition is shaped by Supreme Court decisions, especially *Rapanos* and *Sackett*, which emphasize that CWA jurisdiction covers relatively permanent waters that function as streams or similar geographic features. Tributaries may be natural, altered, or man-made (e.g., streams, canals, ditches, lakes, ponds), provided they meet the flow and bed/bank requirements. Lakes and ponds can qualify as tributaries when they contribute relatively permanent flow downstream.

The proposal aims to set clear jurisdictional boundaries, ensuring federal oversight applies only to waters with sustained surface hydrology while avoiding regulation of features with only ephemeral or "non-relatively permanent" flow. Features that do not convey continuous seasonal or year-round flow break jurisdiction for upstream waters unless part of a water transfer system. This approach respects congressional direction in the CWA to maintain states' primary authority over land and water resource management.

The agencies request public comment on multiple implementation questions, including whether bed-and-bank requirements are appropriate, how to treat natural or artificial features that interrupt flow, whether the approach is suitable for regions with hydrologic variability (e.g., arid West), and whether alternative definitions from prior rules (such as the [Navigable Waters Protection Rule](#)) would be simpler or more effective.

Defining “Continuous Surface Connection” Consistent with *Sackett*

The agencies propose, for the first time in regulation, to define “continuous surface connection” to mean having surface water at least during the wet season and abutting (i.e., touching) a jurisdictional water. Under the proposal, adjacent wetlands (paragraph (a)(4)¹) and relatively permanent lakes and ponds (paragraph (a)(5)) are jurisdictional only if they both touch a water of the United States and have persistent surface water at least throughout the wet season. Only those portions of a wetland that meet both criteria would be treated as adjacent; the remainder of the wetland would be non-jurisdictional.

The proposed definition is intended to implement Supreme Court precedent, particularly the *Rapanos* plurality and *Sackett*, which limit jurisdiction to wetlands that are “adjacent” to and, as a practical matter, “indistinguishable” from jurisdictional surface waters. “Adjacent” is interpreted as physically abutting, not merely near or connected by subsurface or ecological links. The agencies view the wet-season surface water requirement as a bright-line duration test that respects regional hydrologic variation while ensuring that regulated wetlands truly function as part of the covered water.

In practice, a feature must first meet the longstanding regulatory definition of “wetlands” based on hydrology, hydric soils, and hydrophytic vegetation. If it is not itself a traditional navigable water, the agencies then assess adjacency: whether the wetland touches a jurisdictional water and whether it has surface water without interruption throughout the wet season, except in times of extreme drought. The agencies anticipate using a combination of field observations and remote tools, including maps, aerial and satellite imagery, elevation data, soil surveys, and NWI information, to identify abutment, breaks in surface connection, and the duration and timing of surface inundation.

The proposal addresses several special cases. Culverts do not automatically sever a continuous surface connection when they carry relatively permanent water such that the water effectively extends to and abuts the wetland. For wetland mosaics, the agencies would move away from treating the entire mosaic as one wetland and instead delineate individual wetland components. Only those components that abut a jurisdictional water and exhibit surface water at least during the wet season would be jurisdictional. This approach is expected to significantly narrow the set of permafrost and mosaic wetlands, particularly in Alaska, that qualify as adjacent.

The agencies also outline and solicit comments on alternative approaches. These include a stricter standard requiring permanent, year-round surface water in addition to abutment; an approach under which simple abutment alone would satisfy “continuous surface connection” regardless of surface-water duration; and bright-line duration thresholds such as requiring 90 or 270 days of surface water. The agencies further seek input on aligning the standard with the National Wetlands Inventory’s “semipermanently flooded” regime (using growing season rather than wet season) and on whether certain permafrost wetlands in Alaska with high agricultural potential should be expressly excluded to align with the Food Security Act.

¹ [40 CFR 120.2 -- Definitions.](#)

Overall, the proposal draws a relatively narrow jurisdictional line: only wetlands, lakes, and ponds that both touch a jurisdictional water and maintain surface water at least throughout the wet season are considered to have a continuous surface connection and thus may be regulated as “adjacent” waters under the CWA.

Removing Intrastate and Interstate Waters

The agencies propose deleting the word “intrastate” from paragraph (a)(5), which currently applies to “intrastate lakes and ponds” that are relatively permanent and have a continuous surface connection to certain jurisdictional waters. Because the proposal also eliminates the separate category for interstate waters, the agencies view the removal of “intrastate” as a ministerial revision. Under the proposed rule, paragraph (a)(5) would simply cover lakes and ponds, whether interstate or intrastate, that are relatively permanent and have a continuous surface connection to a traditional navigable water, the territorial seas, or a paragraph (a)(3) tributary.

The agencies also seek comment on whether paragraph (a)(5) is needed at all. They note that most non-navigable lakes and ponds meeting the proposed criteria, relatively permanent flow and a continuous surface connection, would likely qualify as tributaries under paragraph (a)(3) when applying the proposed definition of “tributary” informed by *Rapanos* and *Sackett*. Eliminating the (a)(5) category could simplify the regulatory text, though the agencies ask whether any lakes or ponds would not be appropriately assessed as tributaries.

For implementation, the agencies would continue their existing practice of first evaluating waters under paragraphs (a)(1) through (4) and applicable exclusions before turning to (a)(5). Lakes and ponds would be assessed for relatively permanent flow using the same approach applied to tributaries, and for continuous surface connection using the same framework applied to adjacent wetlands. Jurisdiction would extend to the ordinary high water mark of the lake or pond, consistent with longstanding Corps practice. The agencies reiterate that lakes and ponds under (a)(5) must meet both requirements, relatively permanent flow and a continuous surface connection, to be jurisdictional; waters failing either requirement would be non-jurisdictional.

The agencies request comment on the implementation tools, data sources, and methods proposed for evaluating these features, as well as any additional resources that may support consistent application of paragraph (a)(5) in the final rule.

Exclusions from CWA Jurisdiction

The EPA and the Corps propose to revise three existing exclusions, waste treatment systems, prior converted cropland, and certain ditches, and to add a new explicit exclusion for groundwater. These exclusions, contained in paragraph (b) of the regulations, identify features that are not considered WOTUS even when they might otherwise meet the characteristics of jurisdictional categories under paragraphs (a)(2) through (a)(5). Consistent with longstanding policy, the exclusions would not apply to paragraph (a)(1) waters, meaning traditional navigable waters and the territorial seas cannot be excluded.

The proposed revisions build on decades of regulatory practice. Waste treatment systems and previously converted cropland have been excluded since the 1970s. Certain ditches have long been considered non-jurisdictional through regulatory text, preamble discussion, or guidance dating to 1986. Groundwater, likewise, was expressly excluded under the Navigable Waters Protection Rule, and the agencies now propose to restore that exclusion. The agencies emphasize that these updates aim to provide clearer and more administrable boundaries, responding to widespread requests from states and stakeholders for more explicit, consistent, and easily applied exclusions.

The agencies also explain that they are not proposing to adopt most of the additional exclusions from the 2020 Navigable Waters Protection Rule. In their view, these extra exclusions are unnecessary because the proposed rule's jurisdictional framework already excludes such features. For example, ephemeral features are not expressly excluded because they would fail the proposed "relatively permanent" standard, grounded in *Sackett* and *Rapanos*, and therefore would not qualify as WOTUS in any event.

Waste Treatment Systems: The EPA and the Corps propose to retain but clarify the longstanding exclusion for waste treatment systems in paragraph (b)(1). Although these systems have been excluded from the definition of "waters of the United States" since 1979, the agencies now propose to revise the text to improve clarity, including by adding a new definition of "waste treatment system" in paragraph (c)(11) and removing redundant language. Under the proposed definition, a waste treatment system includes all components designed to meet Clean Water Act requirements by conveying, retaining, settling, or otherwise treating pollutants in wastewater, whether through active or passive processes. The exclusion would apply only to systems built in accordance with the CWA or constructed before the 1972 amendments.

The agencies explain that the revisions are grounded in the regulatory history of the exclusion, which has been refined through multiple rulemakings since 1979. Earlier iterations emphasized that manmade treatment systems are excluded, while systems created in waters of the United States or resulting from their impoundment are not. By incorporating a clear definition directly into the regulatory text, the proposed rule seeks to enhance transparency and eliminate reliance on preamble explanations or informal guidance.

The agencies request comment on whether the proposed definition or the current regulatory language provides greater clarity, particularly regarding the requirement that systems meet CWA standards and the inclusion of different treatment components. They also note that some commenters have historically raised questions about whether stormwater controls or reuse facilities qualify as waste treatment systems. Consistent with prior practice, the agencies propose to continue assessing such features on a case-by-case basis and reiterate that stormwater features generally do not fall under the exclusion, though they may be excluded under other provisions.

In terms of implementation, the proposed exclusion does not relieve operators of CWA obligations. Dischargers must still obtain section 404 permits when constructing treatment systems in jurisdictional waters and section 402 permits for any discharges from treatment systems to waters of the United States. Treatment systems constructed before 1972 remain eligible for the exclusion but continue to be regulated for their discharges under section 402. Systems that are abandoned or cease to perform their treatment function would no longer qualify for the exclusion and could be considered jurisdictional if they otherwise meet the definition of "waters of the United States."

Prior Converted Cropland: The agencies propose to retain the longstanding exclusion for prior converted cropland, first adopted in 1993, and to codify a definition in paragraph (c)(7). For more than three decades, EPA, the Army, and USDA have sought to maintain consistency between the CWA and the Food Security Act's wetland conservation provisions, and the agencies continue to view such consistency as important for regulatory clarity. The exclusion supports the CWA's policy of preserving state authority over land and water use, particularly in agricultural areas where decisions about development and conservation fall squarely within state responsibilities.

The proposed rule adopts the "abandonment" framework first articulated in the 1993 preamble and later incorporated into the Trump-45 Navigable Waters Protection Rule. Under this approach, land loses its prior converted cropland status only when it has not been used for, or in support of, agricultural purposes at least once in the preceding five years and has reverted to wetlands. Reversion to wetlands does not automatically make the land jurisdictional; the area must still meet the definition of a jurisdictional wetland, most critically, being adjacent to a qualifying water under the continuous surface connection test required by *Sackett*.

Agricultural purposes under the proposal include both traditional production activities and a wide range of conservation practices such as idling land for habitat, participation in conservation easements, water storage or flood management programs, nutrient retention, cranberry bogs, crawfish farming, and land recovery following natural disasters. The agencies emphasize that leaving land fallow or idle for conservation does not constitute abandonment. The five-year timeframe aligns with past policy and parallels existing regulatory timelines, providing familiarity and predictability.

The proposal reinstates much of the NWPR framework, which many agricultural stakeholders supported because it provided a straightforward, less burdensome process for recognizing prior converted cropland without requiring a formal U.S. Department of Agriculture (USDA) determination. The agencies would make their own determinations for CWA purposes, though USDA determinations would be recognized when supplied by the landowner. Because the USDA is restricted by privacy statutes, landowners would need to provide documentation or consent for the agencies to access USDA records.

Implementation would involve confirming agricultural use within the preceding five years and assessing whether forgotten or altered land has regained wetland characteristics. The agencies would rely on a broad set of documentation, including aerial imagery, crop records, conservation program records, weather data, and disaster recovery information from USDA, NOAA, FEMA, and other sources. Only after determining abandonment would the agencies evaluate whether wetland conditions have returned and whether any resulting wetlands meet the regulatory definition and adjacency criteria.

The agencies note that most prior converted cropland has been so heavily altered that it will not reestablish wetland hydrology or vegetation even after agricultural use ceases. As a result, most such lands are expected to remain non-jurisdictional under the CWA.

Ditches: The agencies propose to clarify and streamline the regulatory treatment of ditches, which have historically caused confusion for farmers, irrigation districts, municipalities, transportation agencies, and others. Under the proposed rule, any ditch, including roadside ditches, is excluded from the definition of “waters of the United States” if it was constructed or excavated entirely in dry land, even if those ditches have relatively permanent flow and connect to a jurisdictional water. The agencies also propose to define “ditch” as a “constructed or excavated channel used to convey water,” a definition intended to improve clarity and align with existing CWA usage.

The proposal draws from decades of regulatory history. Since the 1970s, both EPA and the Corps have generally excluded non-tidal drainage and irrigation ditches excavated in dry land, while treating some ditches, such as canals used for navigation, as jurisdictional waters when they function like traditional navigable waters. The agencies emphasize that Congress explicitly classified ditches as “point sources,” not waters, supporting the distinction between ditches and WOTUS. The proposed exclusion is therefore limited to non-navigable ditches created in uplands; ditches constructed in tributaries, wetlands, or other aquatic resources, such as channelized or relocated streams, would remain jurisdictional if they meet the proposed tributary definition.

The rule also establishes how the ditch exclusion would be implemented. Agencies would first evaluate whether a ditch is a traditional navigable water; if not, they would determine whether it was built entirely on dry land. This may require using historic topographic maps, aerial imagery, soil surveys, county drainage maps, and other records. The agencies carry the burden of proof: if they cannot demonstrate that a ditch was constructed in an aquatic resource or relocates a tributary, it is excluded. Even excluded ditches may still require permits as point sources if they discharge pollutants (other than mostly agricultural return flows and runoff) into jurisdictional waters.

The proposal also asks for comment on alternative approaches, including broader exclusions based on flow duration or exclusions for all non-navigable irrigation and drainage ditches. However, the agencies view the proposed dry-land-construction standard as most consistent with the CWA and with the Supreme Court's guidance that "waters" do not include artificial conveyances that are not part of the natural tributary system.

Groundwater: The agencies propose to codify an explicit exclusion for groundwater, including groundwater conveyed through subsurface drainage systems, in paragraph (b)(9) of the rule. This reflects the agencies' longstanding position that groundwater is not, and has never been, considered "waters of the United States." The exclusion is grounded in statutory interpretation and Supreme Court precedent: groundwater is not surface water and therefore falls outside the meaning of "navigable waters" under the CWA. The Supreme Court confirmed in *County of Maui v. Hawai'i Wildlife Fund* that Congress deliberately left groundwater regulation primarily to the states.

Although groundwater can influence surface waters, the agencies emphasize that such hydrologic connections do not expand the statutory meaning of WOTUS. Other federal laws, including the Safe Drinking Water Act and the Resource Conservation and Recovery Act, as well as Tribal, state, and local programs, provide groundwater protections. The proposed rule also clarifies that channelized groundwater, such as agricultural tile drains, remains excluded. However, once groundwater emerges as surface water, for example, as baseflow in a relatively permanent stream, it would no longer fall within the exclusion. The agencies also propose minor, ministerial edits to paragraph (b) to accommodate the new groundwater exclusion.

Public Opportunities on the Proposed Rule: Updated Definition of "Waters of the United States"

The agencies will hold two in-person public meetings, with an option for virtual participation. Additional information about the public meetings, including a link to register to participate or to provide verbal remarks, will be posted to the [EPA webpage](#) shortly. Additionally, requests to speak will be taken the day of the meeting at the meeting registration desk for those participating in-person and during the speaker waitlist for those participating virtually.

The EPA and the Corps announced they will make every effort to accommodate all speakers who arrive and register, although preferences on speaking times may not be fulfilled. On the last working day before each meeting, the EPA will post a general agenda for the meeting that will list pre-registered speakers in approximate order. The agencies will make every effort to follow the schedule as closely as possible on the day of the public meeting; however, they caution that the meetings could run either ahead of schedule or behind schedule.

Each commenter will have three minutes to provide oral testimony. The agencies encourage commenters to provide them with a copy of their oral testimony electronically by emailing it to wotus-outreach@epa.gov. The EPA and the Corps also recommend that those who speak at the public meetings submit the text of their oral comments as written comments to the [Federal Register](#) rulemaking docket EPA-HQ-OW-2025-0322.