



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

Waters of the United States/Clean Water Act: National Environmental Banking Association Comments on U.S. EPA Supplemental Proposed Rule

10/08/2026

The National Environmental Banking Association (“NEBA”) submitted September 21st comments addressing the United States Environmental Protection Agency’s:

Supplemental Notice of Proposed Rulemaking, Updated Definition of “Waters of the United States” (“Supplemental Proposed Rule”).

See Docket No. EPA-HQ-OW-2025-0322; 91 Fed. Reg. 57,284 (Sept. 9, 2026).

EPA and the U.S. Army Corps of Engineers (collectively, “EPA”) describe the Supplemental Proposed Rule as:

... collecting input on additional regulatory language for defining “waters of the United States” (“WOTUS”) to be considered alongside the 2025 proposed rule.

The Supplemental Proposed Rule would supplement the regulatory text in the November 20, 2025 Notice of Proposed Rulemaking, which proposes to revise the regulations defining the scope of waters federally covered under the Clean Water Act. See 90 Fed. Reg. 52498 (Nov. 20, 2025) (“2025 Proposed Rule”).

The definition of WOTUS is arguably one of the most critical jurisdictional terms in the Clean Water Act. Its importance is magnified since it is relevant to both National Pollutant Discharge Elimination System (“NPDES”) permitting and non-NPDES programs such as:

- Section 404 of the Clean Water Act wetland permits.
- Section 311 oil/hazardous substance release requirements.
- Clean Water Act Spill Prevention Control and Countermeasure regulations.

As a result, the definition of WOTUS has been and continues to be the subject of frequent litigation, legislative oversight, rulemakings, and public policy debates since the enactment of the modern version of the Clean Water Act in 1972.

EPA states that in regard to the 2025 Proposed Rule that it received approximately 220,000 public comments. The federal agencies state that they are now seeking additional input on the regulatory text for the following definitions:

- Relatively permanent.
- Continuous surface connection.

- Perennial.

NEBA describes the organization as representing:

... hundreds of businesses from across the United States committed to high standards for ecological restoration and the preservation of wetlands and natural habitats through the use of environmental banks.

The association members are stated to have established and operated mitigation, conservation, and other environmental banks throughout the U.S. since the early 1990's.

Initial points raised by the NEBA comments include:

- The proposed modified definitions would effectively equate “relatively permanent” waters with “perennial” waters and could disqualify streams that cease flowing for more than 30 consecutive days.
- Adjacent wetlands could lose jurisdiction where a surface water connection is interrupted for more than 30 days.
- The referenced thresholds would have consequences far beyond any single geographic region because intermittent streams, seasonally flowing waters, and temporarily flooded wetlands are common throughout the United States.

The comments also address:

- National Implications for Waters of the United States.
- Based on referenced EPA studies, almost 60 percent of stream miles within the conterminous United States flow only seasonally or after storms.
- Referenced waters perform important ecological and hydrologic functions even when surface flow is not continuous throughout the year.
- The absence of standing water or an uninterrupted surface connection during part of the year does not eliminate their ecological relationship with downstream waters.
- Are These Proposed Changes Consistent With The Clean Water Act?
- A regulatory definition that excludes large portions of tributary networks and associated wetlands from federal jurisdiction risks undermining this statutory objective.
- Wetlands that are temporarily flooded may still store floodwaters, retain sediment and nutrients, support groundwater processes, and materially influence downstream water quality.
- Congressional Intent in Enacting the Clean Water Act.
- The legislative history of the Clean Water Act demonstrates that Congress deliberately moved away from narrow interpretations of federal water jurisdiction.
- Congress wanted the interpretation of navigable waters to be as broad as their legislative authority allowed and anticipated that agencies may try to narrow the definition.
- The cited legislative history is difficult to reconcile with a categorical approach that excludes streams primarily because they stop flowing for a specified number of days.
- Supreme Court Interpretation of the Scope the Clean Waters Act.
- The Supreme Court has likewise recognized that Congress intended the Clean Water Act to extend beyond waters traditionally understood to be navigable, citing *United States v. Riverside Bayview Homes, Inc.*
- The Supreme Court also recognized the ecological relationship between waters and adjacent wetlands, acknowledging the inherent difficulty of drawing precise boundaries between interconnected aquatic resources.
- Aquatic systems do not function according to a simple distinction between water that flows every day of the year and water that does not.
- The Proposed Definitions Go Beyond What *Sackett* Requires.

- The Supreme Court did not establish a numerical flow-duration requirement for streams or duration limits for continuity of adjacent wetlands with navigational waters in order to define them as jurisdictional waters.
- That distinction should not be replaced by an arbitrary numerical threshold.
- “Relatively Permanent” Does Not Mean “Perennial.”
- The word “relatively” is an important and defining term deliberately intended to distinguish seasonal streams (intermittent streams) from perennial streams.
- If the Supreme Court intended jurisdiction to be restricted exclusively to perennial waters, it could have used that term.
- The 30-Consecutive-Day Threshold Is Not Required by Supreme Court Precedent.
- Neither *Sackett* nor *Rapanos* establishes a 30-day threshold for determining whether a stream is relatively permanent.
- A national jurisdictional standard should be based upon legally defensible and scientifically supportable distinctions.
- The Agencies’ 2023 Conforming Rule Did Not Require These Restrictions.
- The agencies previously implemented the Supreme Court’s decision without concluding that *Sackett* required these additional restrictions.
- The Proposed Supplemental Rule should clearly explain why the agencies now believe restrictions not considered necessary in 2023 are now legally compelled or scientifically justified.
- National Consequences for Clean Water Protection.
- *Seasonal and intermittent tributaries account for up to 60-percent of stream miles in the conterminous U.S. and form the headwaters of most major river systems.*
- *Removing federal jurisdiction does not remove the majority of streams and wetlands from a watershed; however, it does remove their protection under the Clean Water Act.*

A copy of the NEBA comments can be found [here](#).