Waters of the United States/Clean Water Act: American Exploration & Mining Association Comments on U.S. EPA Supplemental Proposed Rule



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

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The American Exploration & Mining Association ("AEMA") submitted October 9th 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.

AEMA describes the organization as a 131-year-old, 1,800-member national trade association representing the minerals industry with members residing in 46 states. The organization's members are stated to be reflective of the entire mining life cycle, from exploration to reclamation and closure.

AEMA states its interest in the Supplemental Proposed Rule indicating that its members operate in a variety of locations often in the vicinity of aquatic resources, sites that are typically evaluated for the presence of WOTUS to support an analysis of Clean Water Act ("CWA") regulatory obligations. It further notes:

… Accordingly, any changes to the definition of WOTUS will directly affect AEMA members. AEMA members have substantial CWA regulatory experience and recognize the importance of a rule that aligns the definition of WOTUS with the intended scope of federal regulatory authority under the CWA.

Issues addressed by the AEMA comments include:

- Focus On Perennial Connectivity Adheres to Court Decisions.
- Supports agencies' efforts to propose language that would best adhere to the holdings of the U.S. Supreme Court while seeking to clarify a WOTUS definition that would put years of jurisdictional second guessing behind us.
- Supplemental Proposed Changes as Compared to Notice of Proposed Rulemaking May Be Easier to Implement.
- Agrees that the proposed revisions closely track the Supreme Court's characterizations of WOTUS and that these clarifications should simplify the assessment of WOTUS at sites.
- Characterization of Exceptions that Do Not Sever Perennial Connectivity Implements Court Decisions.
- Agrees that the Agencies' approach could simplify the assessment of WOTUS but that implementation considerations may prompt additional clarification; suggestions are provided towards implementation.
- Suggestions for Clarifying the Exceptions that Do Not Sever Perennial Connectivity.
- With respect to anomalous events, the Supplemental Proposed Rule's characterization as a qualifying interruption due to drought may warrant further explanation.
- Explicit Inclusion of Indistinguishability Component in Proposed Continuous Surface Connection Definition is Consistent with Court Decisions.
- Given that current practices do not require express hydrology to the surface, the proposed visual confirmation of connectivity should be addressed in implementation details.
- The Proposed Revisions Eliminate the Need for Referencing Adjacent or Abutting Wetlands.
- Proposal to eliminate amorphous references to wetlands' geographic location would likely streamline the process for evaluating federal jurisdiction.
- Requests the Agencies Clarify Permittees Can Elect to Proceed with Permitting under Valid AJDs or PJDs.
- Agencies should acknowledge that project proponents can rely on PJDs issued under prior regulatory definitions (a common sense approach that recognizes the expansive nature of PJDs).

A copy of the AEMA comments can be found here.