Waters of the United States/Clean Water Act: Arkansas Game and Fish Commission Comments on U.S. EPA Supplemental Proposed Rule



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

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The Arkansas Game and Fish Commission ("AGFC") submitted October 8th comments addressing the United States Environmental Protection Agency's ("EPA"):

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).

The comments include a discussion of areas in Arkansas that AGFC believes would be materially affected by the Supplemental Proposed Rule if finalized.

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 ("CWA"). 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 CWA 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.

The AGFC states by way of introduction that under the authority of Amendment 35 of the Arkansas State Constitution, that it is the agency charged with:

… The control, management, restoration, conservation and regulation of birds, fish, game and wildlife resources of the State….

Key components of the AGFC comments include:

- Cooperative Federalism is a Cornerstone of the CWA and Must Be Protected.
- Congress, when enacting the CWA, recognized a critical role for states and Tribes, stating in section 101(b) that "it is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter."
- Cooperative federalism involves federal, state, and Tribal governments collaborating, sharing power and responsibilities to implement policies and achieve objectives.
- The Supplemental Proposed Rule's definitions and time period for continuous inundation are too restrictive and would eliminate many interstate waters, including wetlands, from jurisdiction, with very limited authority under CWA 401(a) to resolve interstate concerns.
- States lack control over the quality of waters flowing into their jurisdiction and can only control and manage once the water crosses the state boundary.
- A sufficient federal presence is necessary to create a baseline and a downstream State should not have to spend additional funds to maintain the quality of its wetlands and other waters because of action from an upstream jurisdiction.
- Downstream states should be able to rely on a sufficiently robust federal program to set minimum standards on discharges into WOTUS in order to help safeguard the quality of their waters.
- Many states would find it difficult to "fill the gap" in jurisdiction as large as that the Supplemental Proposed Rule would create.
- Input from States and Tribes is Essential for Achieving CWA Goals.
- In addition to being most familiar with existing relationships among the multiple water quality protection authorities, state and Tribal co-regulators have over fifty years of experience implementing CWA programs.
- State and Tribal perspectives are critical to ensure a clarified or revised definition of WOTUS is defensible in light of Sackett and informed by science and implementation experience, and is (as the Agencies emphasize in the initial and supplemental proposals) a durable rule.
- States Cannot Stand Up Analogous Programs Quickly Enough to Prevent Resource Loss.
- Arkansas, like many states, does not currently administer a comprehensive state program regulating dredge and fill activities in waters outside federal jurisdiction.
- Establishing such a program would require new state legislation, rulemaking, funding, staffing, mapping and delineation capacity, and enforcement mechanisms, which could take years.
- During that gap, streams and wetlands that lose federal protection could be filled, drained, or altered without any regulatory review, avoidance and minimization analysis, or compensatory mitigation.
- Supplemental Notice Proposed Definitions of "Perennial" and "Relatively Permanent."
- Large majority of intermittent streams, which flow seasonally for weeks or months but routinely go dry for longer than 30 days, would fall outside federal jurisdiction.
- In Arkansas, intermittent and headwater streams make up a substantial share of stream miles, particularly in the Ozark and Ouachita Mountains and the Arkansas River Valley.
- Such streams are not isolated features and provide spawning and nursery habitat for fish, support aquatic invertebrate communities, supply cold, clean water and sediment control to downstream

perennial systems, and serve as habitat for species of greatest conservation need, including several federally listed or at-risk fishes, mussels, crayfish, and amphibians.

- Karst Headwater Streams.
- AGFC is particularly concerned about the effect of a perennial flow standard on karst headwater streams of the Ozark Plateaus in northern Arkansas.
- A definition based on continuous surface flow ignores this hydrology and would likely exclude many of these streams from federal jurisdiction.
- Supplemental Proposed Rule Definition of “Continuous Surface Connection.”
- Most wetlands do not hold perennial surface water, and many are saturated or seasonally flooded, and many are separated from nearby streams by natural berms, levees, roads, or short dry intervals despite being hydrologically and ecologically linked.
- Under the proposed alternatives, a large proportion Arkansas's bottomland hardwood forests, forested and emergent wetlands of the Mississippi Alluvial Valley, and floodplain wetlands would likely lose federal protection, even where they flood regularly from, and exchange water with adjacent rivers.
- Waterfowl Habitat and Wetlands of the Arkansas Delta.
- The Delta has already lost roughly three-quarters of its historic bottomland hardwood forest, largely through clearing and drainage for agriculture. The remaining wetlands are, by their nature, seasonally flooded.
- A large share of the Delta's remaining forested and emergent wetlands could lose federal protection.

AGFC’s comments include ten recommendations.

A copy of the AGFC comments can be found here.