Waters of the United States/Clean Water Act: Arkansas and 18 other Attorneys General Comments on U.S. EPA Supplemental Proposed Rule



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Arkansas Attorney General Tim Griffin and 18 other State Attorneys General (collectively, "AGs") submitted October 9th 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).

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 AGs note that they supported the 2025 Proposed Rule but offered some "further refinements" to align the Rule more closely with the statutory text and ordinary understanding of "waters." This is stated to have included recommendations on terms such as:

- Continuous surface connection
- Relatively permanent
- Wet season

Further, they argue that those terms were defined inadequately, which could:

… reproduce some of the same problems that have plagued the CWA scheme for years.

The AGs contend that the Supplemental Proposed Rule "largely avoids the problems we identified." They support revisions of the definitions of "continuous surface connection" and "relatively permanent," and defining "perennial." This is contended to have aligned the terms with *Sackett v. EPA,* and therefore:

- Ensures the States maintain their constitutional sovereignty.
- States remain meaningful partners in the Clean Water Act's system of cooperative federalism.

Selected arguments raised by the AGs in the Discussion section of the comments include:

- Federal agencies lost sight of Congress's limited grant of authority over "navigable waters" and snatched regulatory power from States, who have always held primary responsibility to regulate their own waters.
- Supports dispensing with any reference to "wet seasons," arguing the term could have been manipulated to accomplish expansions by the agencies.
- The "continuous surface connection" definition helps avoid jurisdictional confusion by explaining a temporary interruption in the surface water connection may occur without rendering the water non-perennial or erasing the jurisdictional nature of the water.
- Supports the definition which forecloses the reasoning of *United States v. Andrews*, which is stated to have held that the Act does not require surface water but only soil that is regularly saturated by surface or ground water.
- Proposed revised definition of "relatively permanent" locks in the delineation between federally regulated waters and state-controlled waters.
- Agencies should treat all dry spells alike under the single 30-day allowance, which tracks *Sackett's* reference to low tides or dry spells and reserve the open-ended exception for the one extraordinary circumstance the *Rapanos* plurality identified - drought.
- Drought limits and the meaning of "ordinary conditions" should be codified so that neither future administrative guidance nor courts can expand them.

A copy of the AGs' comments can be found here.