Chris Racey
Chief of Staff

Ben Batten
Deputy Director

Brad Carner
Deputy Director

Spencer Griffith
Deputy Director

Arkansas Game and Fish Commission
Doug Schoenrock
Director

October 8, 2026

Ms. Stacey Jensen
Office of Wetlands, Oceans, and Watersheds
Office of Water (4504-T)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Mr. Milton Boyd
Office of the Assistant Secretary of the Army for Civil Works
Department of the Army
108 Army Pentagon
Washington, D.C. 20310-0104

Re: EPA-HQ-OW-2025-0322-15447, Updated Definition of "Waters of the United States," Supplemental Notice of Proposed Rulemaking - Supplemental notice of proposed rulemaking

Ms. Jensen and Mr. Boyd,

Under the authority of Amendment 35 of the Arkansas State Constitution, the Arkansas Game and Fish Commission (AGFC) is the agency charged with, "The control, management, restoration, conservation and regulation of birds, fish, game and wildlife resources of the State…." Staff members of the AGFC have reviewed Docket ID No. EPA-HQ-OW-2025-0322, Updated Definition of "Waters of the United States," Supplemental Notice of Proposed Rulemaking. We submit the following comments in response to the request from the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) (the Agencies) for written feedback on the definition of "waters of the United States" (WOTUS) as proposed on November 20, 2025, and supplemented on September 9, 2026.

Cooperative Federalism is a Cornerstone of the Clean Water Act and Must Be Protected

The Federal Water Pollution Control Act, as amended, also known as the Clean Water Act (CWA or the Act), section 101(a) notes the "objective of [the CWA] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 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." CWA section 101(a) establishes the statutory objective, and section 101(b) provides one of the important contexts for implementing its programs to meet the CWA's statutory objective.

Consistent with CWA sections 101(a) and (b), the CWA adopts a cooperative federalism approach to achieving its objective of restoring and maintaining the Nation's waters. For example, the statute authorizes states (and Tribes with Treatment in a Manner Similar as a State, TAS authority) to implement the section 402 and 404 permitting programs. The CWA likewise establishes a role for states and Tribes with TAS in implementing several other programs that are central to achieving the Act's objective, such as administering the water quality standards program and impaired waters and total maximum daily loads program under section 303. Section 401 provides states and authorized Tribes with authority to review proposed federal permits and licenses that may result in a discharge into WOTUS, and to certify whether the proposed authorizations would be consistent with water quality standards and certain other CWA and state or Tribal provisions.

Cooperative federalism involves federal, state, and Tribal governments collaborating, sharing power and responsibilities to implement policies and achieve objectives. Preambles in both the original and supplemental proposals refer to CWA section 101(b) several times to explain that the agencies are reducing the scope of waters protected as WOTUS under the CWA as a means of ensuring states "remain primary" in protecting aquatic resources. Cooperative federalism under the CWA does not require the federal government to abdicate much of its role protecting aquatic resources but instead envisions federal agencies working in tandem with states and Tribes to restore and maintain the Nation's waters. The federal definition of WOTUS since the CWA's enactment in 1972 has served as a "floor," establishing the scope of waters protected by the CWA while allowing states and Tribes to be more environmentally protective under state or Tribal law if desired. For the reasons discussed above, a strong federal presence is necessary for cooperative federalism to achieve CWA goals.

The Supplemental Notice's proposed 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. This is why a sufficient federal presence is necessary to create a baseline. 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. To be effective and consistent with CWA goals, the definition for WOTUS must reflect regional concerns and consider effects of discharges into waters with a shorter duration of surface water inundation. By eliminating a sound baseline of regulated waters and discharges, the Supplemental Notice's proposed rule undermines and weakens state authority by increasing the extent of harmful discharges from other jurisdictions over which the downstream State has no control and increases costs of state remedial actions to maintain water quality and continued use of waters, including wetlands.

The impact of the original and supplemental proposals' WOTUS definition must be considered in light of other EPA and Army Corps initiatives. For example, EPA is about to finalize a CWA section 401 water quality certification rule which, based on its proposal, seems likely to limit 401's use as an effective state and tribal water quality tool. The proposal's preamble suggests that states and Tribes are both "prepared and well-equipped" to protect non-WOTUS waters within their boundaries. However, the Supplemental Notice acknowledges that some States and Tribes may need to expend considerable resources to establish programs regulating non-WOTUS waters. State and Tribal 401 certification authorities have addressed water quality impacts of federal licenses and permits on both WOTUS and non-WOTUS waters. The assumption in the original proposal and Supplemental Notice that states and Tribes can protect newly non-jurisdictional waters is undermined when viewed in light of other federal policy initiatives such as CWA section 401.

Many states would find it difficult to "fill the gap" in jurisdiction as large as that the Supplemental Notice would create. Such state action likely would require considerable resources to create an aquatic resource program to protect waters and wetlands newly unprotected by the CWA. AGFC encourages EPA and the Army Corps to support additional federal funding to help administer aquatic resource protection programs, particularly if the scope of WOTUS contracts. The CWA establishes several grant programs to provide such funding, such as 106 grants for surface water protection, 104(b)(3) wetland program development grants, and section 319 grants to protect waters from nonpoint source pollution.

The Supplemental Notice emphasizes that its WOTUS interpretation preserves the states' primary authority under CWA section 101(b) by limiting the federal government's. As discussed earlier, the CWA does not establish separate spheres where states, Tribes, and the federal government work separately towards achieving water quality goals. Instead, the CWA is framed around the concept of cooperative federalism where goals are pursued working collaboratively.

Input from States and Tribes is Essential for Achieving CWA Goals

Input by states and Tribes to the definition of WOTUS is essential. 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. As a result, 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.

AGFC appreciates the Agencies soliciting public comment on the proposed definitions, and holding after the initial proposal a series of listening sessions to solicit recommendations from state and Tribal co regulators as well as a diverse group of stakeholders regarding key definitional terms such as "relatively permanent," "continuous surface connection," and "perennial."

States Cannot Stand Up Analogous Programs Quickly Enough to Prevent Resource Loss

The Agencies state that the proposal recognizes "... that states and Tribes know their water resources best." AGFC agrees that states play a central role in water resource management. However, 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. Realistically, that process would 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. Unlike many other environmental impacts, the loss of a wetland or headwater stream is often permanent and cannot be undone once a regulatory program is eventually put in place. The agencies should not finalize a definition that creates a regulatory void before states have had a reasonable opportunity, and the resources, to respond.

Supplemental Notice Proposed Definitions of "Perennial" and "Relatively Permanent"

The SNPRM proposes defining "relatively permanent" to include only perennial waters, meaning waters "having standing or continuously flowing water every day of the year during ordinary conditions," with allowance for interruptions of no more than 30 consecutive days per year. Under this definition, the 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. These streams are not isolated features. They 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. Removing federal protection from these tributaries would expose the headwaters of our most important fisheries and drinking water sources to unregulated filling, channelization, and degradation, with impacts that accumulate downstream.

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. In karst terrain, surface streams frequently lose flow into fractured limestone and dolomite, sinking underground for extended periods along "losing" reaches before re-emerging at springs and seeps. These streams may appear dry at the surface for well over 30 days in a normal year, even though they continue to convey water through the subsurface to perennial rivers such as the Buffalo, White, Illinois, Spring, Eleven Point, and Strawberry. A definition based on continuous surface flow ignores this hydrology and would likely exclude many of these streams from federal jurisdiction.

Karst systems provide little natural filtration, so sediment, nutrients, and contaminants entering a karst headwater move rapidly into groundwater, springs, caves, and downstream waters, including sources of public and private drinking water. These systems also support highly specialized, often endemic, species with very limited ranges, including federally listed species such as the Ozark cavefish (*Amblyopsis rosae*), the Benton County cave crayfish (*Cambarus aculabrum*), and cave-dependent bats including the gray bat (*Myotis grisescens*) and Ozark big-eared bat (*Corynorhinus townsendii ingens*), along with numerous state species of greatest conservation need. Unregulated filling or alteration of karst headwaters could permanently degrade habitat that cannot be replaced or mitigated elsewhere.

Supplemental Notice Proposed Definition of "Continuous Surface Connection"

The SNPRM proposes defining "continuous surface connection" to require perennial surface water in a wetland that is continuously connected to a jurisdictional water, and alternatively proposes limiting adjacent wetlands to those "... indistinguishably part of…" a jurisdictional water and deleting the definition of "adjacent" altogether. Most wetlands do not hold perennial surface water. 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.

Arkansas's bottomland hardwood forests, forested and emergent wetlands of the Mississippi Alluvial Valley, and floodplain wetlands of the White, Cache, Ouachita, and Arkansas River systems are among the most important waterfowl and wildlife habitats in North America. These wetlands provide flood storage, water quality filtration, groundwater recharge, and critical habitat for migratory birds, fish, and other wildlife. Under the proposed alternatives, a large proportion of these 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 Mississippi Alluvial Valley in eastern Arkansas (the Arkansas Delta) is among the most important wintering areas for waterfowl in North America and a cornerstone of the Mississippi Flyway. Each winter, the Delta's flooded bottomland hardwoods, oxbows, sloughs, brakes, and moist-soil wetlands support large proportions of the flyway's mallards and other dabbling ducks, as well as geese, wading birds, shorebirds, and other migratory birds. The Cache River and Lower White River wetlands are recognized as a Wetland of International Importance under the Ramsar Convention, and places such as the George H. Dunklin Jr. Bayou Meto and Dave Donaldson Black River Wildlife Management Areas, along with the White River and Cache River National Wildlife Refuges, anchor a waterfowl heritage that is central to Arkansas's economy and culture.

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. They typically flood in winter and spring from overbank flooding, backwater, and rainfall, then draw down and dry in summer and fall. That seasonal cycle is exactly what makes them productive for waterfowl, yet it is the very characteristic that would disqualify them under a standard requiring perennial surface water and a continuous surface connection. Many are also separated from rivers by levees, ditches, or natural ridges despite regular flooding and exchange of water. Under the SNPRM's alternatives, a large share of the Delta's remaining forested and emergent wetlands could lose federal protection, opening them to clearing, draining, and conversion without review.

Federal, state, and private partners, through the North American Waterfowl Management Plan and the Lower Mississippi Valley Joint Venture, have invested decades of effort and substantial public and private funding to protect and restore Delta wetlands. Removing Clean Water Act protection from these wetlands would undermine that investment, reduce the habitat carrying capacity needed to support continental waterfowl population objectives, and harm the hunting, outdoor recreation, and rural economies that depend on them. It would also eliminate the flood storage and water quality benefits these wetlands provide to Delta communities and to the lower Mississippi River.

Recommendations

AGFC respectfully recommends that the Agencies:

- Develop final rule policies that are supportive of the CWA's cooperative federalism framework and not use CWA section 101(b) to undermine that framework. Similarly, the Agencies should consider how the proposed definitions would weaken state and tribal abilities to manage their resources effectively, including potential impacts from federally issued licenses and permits and from interstate waters.
- When developing the final rule defining WOTUS, AGFC encourages the Agencies to have a series of interactive regional working meetings with states and Tribes. Meaningful engagement means actual collaborative discussion and troubleshooting. We encourage the Agencies to reach out to state governors, constitutional agencies, and Tribal leaders to invite them or their designees to participate in a future workshop or workshops focused on definitional and implementation challenges given national differences in ecology, geography, hydrology, and legal doctrines that create challenges for water, wetlands, and water quality program administration, in advance of finalizing the definition of WOTUS
- Decline to adopt the proposed definitions of "perennial," "relatively permanent," and "continuous surface connection" set out in the SNPRM, and retain protection for intermittent tributaries and their adjacent wetlands to the fullest extent consistent with Sackett v. EPA.
- Retain the definition of "adjacent" rather than deleting it, and avoid a standard requiring perennial surface water in wetlands.
- Recognize that karst streams convey flow through the subsurface and do not treat losing reaches or seasonally dry karst channels as non-jurisdictional based on surface flow alone.
- Retain jurisdiction over seasonally flooded bottomland hardwood and floodplain wetlands, such as those of the Mississippi Alluvial Valley, that regularly flood from and exchange water with jurisdictional rivers.
- Prepare and publish a quantitative analysis, by state, of the stream miles and wetland acres expected to lose jurisdiction under each alternative, including impacts to fish and wildlife habitat, so that states and the public can meaningfully evaluate the consequences.
- If any narrowing of jurisdiction is finalized, provide a substantial transition period and federal funding and technical assistance so that states can develop analogous programs before protections lapse.
- Extend the 30-day comment period to allow states, Tribes, and resource agencies adequate time to evaluate the new alternatives against their own resource data.

Conclusion

AGFC shares the Agencies' goal of a clear and durable definition of "waters of the United States," but clarity should not come at the cost of the streams and wetlands that sustain Arkansas's fish and wildlife and the communities that depend on them, from the karst headwaters of the Ozarks to the waterfowl sustaining wetlands of the Delta. The proposal in the SNPRM would remove federal protection from a large share of these resources and the time required for states to build replacement programs would leave many of them vulnerable to permanent loss.

In order to better assess how the proposed definitions in Docket ID No. EPA-HQ-OW-2025-0322, Updated Definition of “Waters of the United States,” Supplemental Notice of Proposed Rulemaking will affect aquatic resources in the state of Arkansas and, as the state wildlife agency, our ability to manage those resources, AGFC requests an extension of the public review period from 30 days to 120 days.

AGFC reviews hundreds of development projects each year and relies on the Clean Water Act as a foundational tool for avoiding and minimizing impacts to aquatic habitats. The opportunity to comment on this Supplemental Notice of Proposed Rulemaking is appreciated. If you have any questions or need additional information please contact Jennifer Elise Sheehan at jennifer.sheehan@agfc.ar.gov or 501-680-0319.

Sincerely,



Brad Carner
Deputy Director, Arkansas Game and Fish Commission