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Environmental Protection Agency
1200 Pennsylvania Avenue NW, Washington,
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Milton Boyd
Office of the Assistant Secretary of the Army
for Civil Works, Department of the Army
108 Army Pentagon
Washington, DC 20310-0104

Re: Supplemental Notice of Proposed Rulemaking – Updated Definition of Waters of the United States, 91 Fed. Reg. 57,284 (September 9, 2026)

Dear Ms. Jensen and Mr. Boyd:

Thank you for the opportunity to provide comments on the Environmental Protection Agency's ("EPA") and U.S. Army Corps of Engineers' ("Corps") (collectively, the "Agencies") supplemental notice of proposed rulemaking that would define "waters of the United States" ("WOTUS") under the Clean Water Act ("CWA" or "Act"), *Updated Definition of "Waters of the United States,*" 91 Fed. Reg. 57,284 (Sept. 9, 2026) (hereinafter "SNPRM"). AEMA has commented on multiple proposed WOTUS rulemakings including the November 20, 2025 notice of proposed rulemaking ("NPRM"); the NPRM would be modified by the SNPRM. In that regard, AEMA reaffirms its comments on the NPRM (adopted by reference) relative to those issues not specifically raised in the SNPRM. The SNPRM issues are addressed by these supplemental comments.[1]

AEMA is a 131-year-old, 1,800-member national trade association representing the minerals industry with members residing in 46 U.S. states. AEMA's members are reflective of

[1] AEMA also works closely with the Waters Advocacy Coalition ("WAC") and endorses and adopts WAC's comments on the SNPRM.

the entire mining life cycle, from exploration to reclamation and closure. More than 80 percent of our members are small businesses or individuals who work for small businesses. Since AEMA members operate in a variety of locations often in the vicinity of aquatic resources, sites are typically evaluated for the presence of WOTUS to support an analysis of CWA regulatory obligations. 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.

1. Focus On Perennial Connectivity Adheres to Court Decisions.

The SNPRM would revise definitions of relatively permanent and continuous surface connection so that jurisdiction is explicitly based on perennial surface water connectivity between aquatic features (non-wetland and wetland) and waters subject to CWA jurisdiction. The foundation for the proposed changes stems from language in U.S. Supreme Court decisions. In *Sackett*, the Court concluded that WOTUS consist of relatively permanent, standing or continuous flowing bodies of water connected to traditional navigable waters and wetlands with a surface connection to the same. *Sackett v. Environmental Protection Agency,* 598 U.S. 651, 671 (2023) (reaffirming the holding of the plurality *in Rapanos v. United States*). The *Sackett* Court also concluded that wetlands must be indistinguishably part of a water body that itself constitutes WOTUS. *Id.* at 676. In *Rapanos*, the plurality decision held that the statutory term "waters" encompasses only those "relatively permanent, standing or continuously flowing water bodies 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes." 547 U.S. 715, 739 (2006). The decisions contemplate a definition of WOTUS that "would obviate the need for property owners to 'retain an expensive expert consultant' to assess CWA jurisdiction". See 91 Fed. Reg. at 57,290 (quoting *Sackett*). AEMA supports the Agencies' ongoing efforts to propose language that would best adhere to the holdings of the Court while seeking to clarify a WOTUS definition that would put years of jurisdictional second guessing behind us.

2. Supplemental Proposed Changes as Compared to NPRM May Be Easier to Implement.

The NPRM proposed the definition of WOTUS be limited to standing or continuously flowing bodies of water that are standing or continuously flowing year-round or at least during the wet season. AEMA's comments on the NPRM recognized the Agencies' effort to rely on the wet season assessment to account for climactic and regional flow variation while acknowledging uncertainty inherent in that assessment. In that context, the simplified definitions of relatively permanent and continuous surface connection in the SNPRM are responsive to those concerns.

The SNPRM would eliminate the wet year concept for evaluating jurisdiction. The proposed, revised definitions of relatively permanent and continuous surface connection would clarify that jurisdiction hinges on the presence of perennial surface water (in both streams and

wetlands) that is connected to jurisdictional waters. In turn, the rule would define perennial as standing or continuously flowing water every day of the year during ordinary conditions. Correspondingly, a waterbody that lacks perennial flow or a wetland that is not continuously connected to jurisdictional waters because it lacks a perennial surface water connection would not be WOTUS. The proposed SNPRM definitions would further clarify that intermittent and ephemeral waters do not fall within the definition of WOTUS. AEMA 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.

3. Characterization of Exceptions that Do Not Sever Perennial Connectivity Implements Court Decisions.

Given that the definition of perennial would require standing or continuously flowing water under ordinary conditions, the Agencies also specify conditions that are not ordinary and which should not undermine the characterization of a surface water as perennial and WOTUS. The exceptions to year-round flow in the revised definitions of relatively permanent and continuous surface connection track the language of both *Sackett* and the *Rapanos* plurality recognizing that temporary interruptions in surface connectivity may occur because of phenomena that should not disqualify a water or wetland from being characterized as WOTUS. Specifically, the SPRNM exceptions include anomalous events affecting year-round flow (e.g., drought) and non-anomalous temporary interruptions to year-round flow (e.g., a regularly occurring dry spell of up to 30 consecutive days in any given year). AEMA agrees that the Agencies' approach could simplify the assessment of WOTUS but that implementation considerations may prompt additional clarification; the following suggestions are directed towards implementation.

4. Suggestions for Clarifying the Exceptions that Do Not Sever Perennial Connectivity.

With respect to anomalous events, the SNPRM's characterization of a qualifying interruption due to drought may warrant further explanation. First, the basis for identifying D3 and D4 droughts as those that would not disrupt a finding of perennial flows is unclear. Why would a severe drought (D2) or a moderate drought (D1) not constitute an anomalous event? The SNPRM does not explain the foundation for characterizing certain drought conditions as anomalous and others as not. 91 Fed. Reg. at 57,290. A more robust explanation would better inform all stakeholders. Second, the SNPRM identifies multiple tools for assessing whether conditions are ordinary or anomalous including the Antecedent Precipitation Tool, WebWIMP and the Climate Division Scale Palmer Drought Severity Index. 91 Fed. Reg. at 57,291. As explained in AEMA's NPRM comments, these tools need to be carefully evaluated to ensure they are applied consistently and appropriately by the regulated community and Corps' District offices. Third, the Agencies' examples illustrate the difficulty in describing circumstances that would not disrupt perennial flow. "Droughts are . . . an extraordinary departure from the ordinary climactic conditions . . . [t]here also may be scenarios whereby a dry spell – not necessarily rising to the level of categorical drought - happens in an anomalous way . . . ." 91 Fed. Reg. at 57,288. How

do the Agencies or the regulated community identify the distinction between an anomalous drought or an anomalous dry spell? Additional information would promote consistent implementation. Fourth, on what basis have the Agencies determined that anomalous temporary interruptions in flow constitute more permanent interruptions if they extend for more than a five-year time frame? 91 Fed. Reg. at 57,291. Additional explanation of that reasonable time period may be useful. The time period should be included in the rule to provide greater certainty in the definition of WOTUS.

With respect to non-anomalous events, the SNPRM would limit that characterization to temporary disruptions that occur up to 30 consecutive days in any given year. Some implementation details would be helpful. First, AEMA suggests the Agencies further clarify disruptions of flow regimes by lawfully constructed features such as dams, stormwater management practices, diversions or other activities should be evaluated by the same metrics as for other non-anomalous events, i.e., if flow is disrupted for 30 days or more, that condition constitutes a break in the perennial connection such that the water is not WOTUS. Second, as AEMA asserted in the NPRM comments, the Agencies should also clarify that flow through a culvert, pipe or ditch would not be adequate to establish the requisite connection between aquatic features. Third, the Agencies should clarify whether frozen water is non-anomalous if it disrupts continuity of the surface connection. On a related topic and as recommended in the NPRM comments, AEMA urges the Agencies to specifically exclude permafrost wetland areas from the definition of WOTUS and to seek further input from Alaska (and other states with questions regarding frozen conditions in wetlands) in developing further implementation information on these specific issues.

5. Explicit Inclusion of Indistinguishability Component in Proposed Continuous Surface Connection Definition is Consistent with Court Decisions.

The SNPRM's other proposed revisions for defining continuous surface connection are also potentially straightforward. The revisions would clarify that in addition to the presence of perennial water in the wetland, the wetland must have a surface connection to jurisdictional waters "such that it is difficult to determine where the jurisdictional water ends and the wetland begins." 91 Fed. Reg. at 57,301 (proposed definition at 40 CFR 328.3(c)(3) and 120.2 (c)(3)). That language echoes the holding in *Sackett*. 598 U.S. at 678 (quoting *Rapanos* plurality, 547 U.S. at 742). The reinforcement of the indistinguishability test for determining wetland jurisdiction would simplify line drawing for confirming federal jurisdiction. AEMA recognizes that the Agencies believe a continuous surface connection determination can be made "by the naked eye". 91 Fed. Reg. at 57,296. Nonetheless, given that current practices do not require wetlands to express hydrology to the surface, the proposed visual confirmation of connectivity should be addressed in implementation details. Additionally, those implementation details could further clarify how such a determination will be assessed by and coordinated with the Agencies that will reportedly "continue to use multiple tools, including remote and field-based indicators, to inform decisions". *Id*.

6. The Proposed Revisions Eliminate the Need for Referencing Adjacent or Abutting Wetlands.

AEMA agrees that if jurisdiction over wetlands is predicated on a perennial surface water connection, there is no need for retaining the terms "adjacent" or "abutting" in the rule. The elimination of adjacent wetlands would be a potentially important clarification given multiple complications in evaluating where a break exists between wetlands or between wetlands and jurisdictional waters. For years, the characterization of adjacent or abutting wetlands has been confusing and confounding. The proposal to eliminate amorphous references to wetlands' geographic location would likely streamline the process for evaluating federal jurisdiction.

7. AEMA Requests the Agencies Clarify Permittees Can Elect to Proceed with Permitting under Valid AJDs or PJDs.

In the NPRM, the Agencies reinforced the long-standing view that, in the face of regulatory changes, project proponents can continue to move forward based on the existing assessment of WOTUS provided there is a valid Approved Jurisdictional Determination (AJD) or permit covering the site. 90 Fed. Reg. 52,498, 52,506. The agencies have consistently maintained that AJDs and permits issued under a previous regulatory definition of WOTUS would still be considered valid unless the landowner or applicant seeks to reopen the same. *Id.* As the Agencies work to finalize a definition of WOTUS, that same concept warrants clarification in a final rulemaking. The Agencies should also acknowledge that project proponents can rely on PJDs issued under prior regulatory definitions (a common sense approach that recognizes the expansive nature of PJDs). This clarification is important for projects that are in the NEPA and permitting processes when a revised rule is finalized; those applicants should not be expected to restart the processes and should be able to rely on valid AJDs or PJDs that cover a site. Such a clarification would also address Agency uncertainties related to how the rule should be applied to ongoing permitting actions by allowing ongoing processes to move forward as planned. The Agencies should ensure that this approach is clearly reinforced and stated as part of a final rulemaking.

Thank you for your consideration of these comments.

Sincerely,



Mark Compton
Executive Director