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September 21, 2026

Ms. Stacey Jensen

EPA Office of Wetlands, Oceans, and Watersheds, Office of Water (4504-T)

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Mr. Milton Boyd

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RE: Review and Comment on Supplemental Notice of Proposed Rulemaking, Updated Definition of "Waters of the United States," Docket No. EPA-HQ-OW-2025-0322, 91 Fed. Reg. 57,284 (Sept. 9, 2026), FR Doc. 2026-18317.

Dear Ms. Jensen and Mr. Boyd:

The National Environmental Banking Association (NEBA) submits these comments regarding the Supplemental Notice of Proposed Rulemaking addressing the definition of "Waters of the United States" (WOTUS). NEBA is deeply concerned that the proposed definitions would substantially reduce federal protection of streams and wetlands throughout the United States and would do so in a manner that is inconsistent with the objectives of the Clean Water Act, congressional intent, and relevant Supreme Court precedent.

As proposed, the modified definitions would effectively equate "relatively permanent" waters with "perennial" waters and could disqualify streams that cease flowing for more than 30 consecutive days. Similarly, adjacent wetlands could lose jurisdiction where a surface water connection is interrupted for more than 30 days. These thresholds would have consequences far beyond any single geographic region because intermittent streams, seasonally flowing waters, and temporarily flooded wetlands are common throughout the United States.

I. National Implications for Waters of the United States

Based on the EPA National Hydrographic Dataset - Hydrologic Permanence Studies, almost 60 percent of stream miles within the conterminous United States flow only seasonally or after storms. The EPA GIS Analysis of Drinking Water Relevant to Streams similarly places this number at 58 percent. These waters occur across virtually every region of the country. Intermittent and seasonal streams are integral

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components of watersheds in the Great Plains, Midwest, Southeast, Northeast, Rocky Mountains, Pacific states, and Southwest. In the Arid West, these numbers are truly severe: Arizona = 94-percent, Nevada = 89-percent, New Mexico = 88-percent, Utah = 79-percent.

These waters perform important ecological and hydrologic functions even when surface flow is not continuous throughout the year. They convey water, sediment, nutrients, organic material, and aquatic organisms downstream; provide flood storage and groundwater interaction; support aquatic and terrestrial habitat; and contribute directly to the physical, chemical, and biological integrity of larger downstream waters.

Wetlands present a similar national issue. Based on the National Wetlands Inventory, Palustrine Wetlands account for 94.9 percent of wetlands in the conterminous United States. Between 49 and 62 percent of these wetlands are seasonally or temporarily flooded. Within the Arid West these numbers range from 40-65 percent. The absence of standing water or an uninterrupted surface connection during part of the year does not eliminate their ecological relationship with downstream waters. A regulatory definition based primarily upon whether water is continuously visible at the surface risks excluding substantial portions of the nation's functioning aquatic system.

The proposed definitions could therefore remove federal protection from a majority of streams and wetlands throughout the United States.

II. Are These Proposed Changes Consistent With The Clean Water Act?

The stated objective of the Clean Water Act is found at 33 U.S.C. § 1251 (Objectives and Goals):

"The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

The Act is fundamentally a water-quality statute. Congress recognized that pollution, hydrology, and aquatic ecosystems operate through interconnected watersheds rather than according to artificial jurisdictional boundaries.

A regulatory definition that excludes large portions of tributary networks and associated wetlands from federal jurisdiction risks undermining this statutory objective. Waters that flow seasonally may still transport pollutants into downstream rivers, lakes, reservoirs, and other jurisdictional waters. Wetlands that are temporarily flooded may still store floodwaters, retain sediment and nutrients, support groundwater processes, and materially influence downstream water quality. The fact that these functions may occur seasonally does not make them insignificant.

III. Congressional Intent in Enacting the Clean Water Act

The legislative history of the Clean Water Act demonstrates that Congress deliberately moved away from narrow interpretations of federal water jurisdiction.

Senate Report No. 92-414, dated October 28, 1971, criticized the restrictive interpretation of earlier federal water pollution laws. The Senate emphasized the importance of controlling pollution throughout interconnected hydrologic systems and specifically recognized tributaries as part of the regulatory framework.

Congress understood a basic hydrologic reality: water moves through watersheds, and pollutants introduced into smaller or periodically flowing waters can ultimately affect larger downstream waters.

Specifically, in addressing the failure of narrow interpretation contained in the 1965 Act, Congress stated:

*“The control strategy of the Act extends to navigable waters. The definition of this term means the navigable waters of the United States, portions thereof, tributaries thereof, and includes the territorial seas and Great Lakes. **Through a narrow interpretation of the definition of interstate waters, the implementation [of the] 1965 Act was severely limited.** Water moves in hydrologic cycles and it is essential that **discharge of pollutants be controlled at the source.** Therefore, reference to the control requirements must be made to the navigable waters, portions thereof, and their tributaries” ---S. Rep No 92d Cong., 1st Sess. 77(1971)*

The 1972 Conference Report (Conference Report No. 92-1236 - September 28, 1972) further demonstrates Congress’s intent. The conferees stated that the term “navigable waters” should receive the broadest constitutional interpretation available, rather than being constrained by narrow administrative interpretations. In explaining their reasons for this they stated:

*“The conferees fully intend that the term “navigable waters” be given the broadest possible constitutional interpretation **unencumbered by agency determinations which have been made or may be made for administrative purposes.**”*

Congress made its intent absolutely clear here. They wanted the interpretation of navigable waters to be as broad as their legislative authority allowed and anticipated that agencies may try to narrow the definition. They openly and preemptively rejected the concept of allowing agencies to narrow the definition. Yet, this is precisely what the proposed new definitions are intended to do.

This legislative history is difficult to reconcile with a categorical approach that excludes streams primarily because they stop flowing for a specified number of days. Intermittent streams are not isolated from the nation’s waters simply because their flow varies seasonally. They are components of larger hydrologic systems and frequently serve as tributaries to downstream waters.

IV. Supreme Court Interpretation of the Scope the Clean Waters Act

The Supreme Court has likewise recognized that Congress intended the Clean Water Act to extend beyond waters traditionally understood to be navigable.

In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the Court recognized that Congress intended to repudiate limitations contained in earlier water-pollution statutes and authorized federal

regulation of waters beyond those considered navigable under the traditional meaning of that term. Specifically, they state:

“Congress intended to repudiate limits that had been placed on federal regulations by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed “navigable” under the classical understanding of that term.”

The Court also recognized the ecological relationship between waters and adjacent wetlands, acknowledging the inherent difficulty of drawing precise boundaries between interconnected aquatic resources. They state:

“In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps ecological judgement about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgement that adjacent wetlands may be defined as waters under the Act.”

This principle remains important. Aquatic systems do not function according to a simple distinction between water that flows every day of the year and water that does not. Flow duration varies naturally with climate, geology, groundwater conditions, season, precipitation, watershed size, and geographic location.

A nationally applicable rule should reflect those realities and conform to the intent of Congress and Supreme Court’s Opinions.

V. The Proposed Definitions Go Beyond What *Sackett* Requires

The Supreme Court’s decision in *Sackett v. EPA* specifically addressed the circumstances under which wetlands constitute Waters of the United States.

The question before the Court concerned adjacent wetlands. The Court did not establish a numerical flow-duration requirement for streams or duration limits for continuity of adjacent wetlands with navigational waters in order to define them as jurisdictional waters. With regard to this issue the Court relied upon language from the plurality opinion in *Rapanos v. United States* describing:

- relatively permanent, standing, or continuously flowing bodies of water connected to traditional navigable waters; and
- wetlands with a continuous surface connection to those waters such that it is difficult to determine where the water ends and the wetland begins.

These Rapanos definitions were made within the context distinguishing between ordinary dry channels that carry water only in response to occasional runoff, and recognizable streams that may not flow every day of the year but nevertheless have a continuous presence as geographic and hydrologic features.

That distinction should not be replaced by an arbitrary numerical threshold.

VI. “Relatively Permanent” Does Not Mean “Perennial”

The word “relatively” is an important and defining term deliberately intended to distinguish seasonal streams (intermittent streams) from perennial streams.

If the Supreme Court intended jurisdiction to be restricted exclusively to perennial waters, it could have used that term. Instead, the Court used “relatively permanent,” indicating a category that is broader than waters flowing continuously every day of every year.

Intermittent streams may contain well-defined beds and banks, established channels, aquatic habitat, recurring seasonal flow, groundwater interaction, and direct hydrologic connections to downstream waters. Their temporary lack of surface flow does not transform them into uplands or erase their existence as aquatic resources.

Equating “relatively permanent” with “perennial” therefore risks collapsing two different hydrologic classifications into one and excluding waters the Court did not categorically remove from Clean Water Act jurisdiction.

VII. The 30-Consecutive-Day Threshold Is Not Required by Supreme Court Precedent

Neither *Sackett* nor *Rapanos* establishes a 30-day threshold for determining whether a stream is relatively permanent.

No Supreme Court decision identified 30 consecutive dry days as the dividing line between jurisdictional and non-jurisdictional waters.

The proposed threshold therefore raises several significant questions:

- What scientific evidence demonstrates that 30 days represents an ecologically or hydrologically meaningful boundary?
- Why would a stream that ceases flowing for 29 days qualify while a comparable stream dry for 31 days would not?
- How would the threshold account for regional climate, drought, seasonal hydrology, groundwater conditions, or annual variability?
- How would the agencies consistently determine flow duration where long-term monitoring data do not exist?

A national jurisdictional standard should be based upon legally defensible and scientifically supportable distinctions. A rigid numerical threshold that produces dramatically different regulatory outcomes based upon a small difference in observed dry-period duration risks being arbitrary.

VIII. The Agencies’ 2023 Conforming Rule Did Not Require These Restrictions

Following *Sackett*, EPA and the Army issued amendments in September 2023 to conform the WOTUS definition to the Supreme Court’s decision.

Those amendments removed provisions the agencies concluded were invalid under *Sackett*. Importantly, the 2023 conforming rule did not:

- establish a 30-day dry-period threshold for streams;
- redefine “relatively permanent” as synonymous with “perennial;”
- categorically exclude intermittent streams; or
- establish a new national definition of perennial waters.

The agencies therefore previously implemented the Supreme Court’s decision without concluding that *Sackett* required these additional restrictions.

The Supplemental Rule should clearly explain why the agencies now believe restrictions not considered necessary in 2023 are now legally compelled or scientifically justified.

IX. National Consequences for Clean Water Protection

The practical consequences of the proposed definitions extend throughout the country.

Seasonal and intermittent tributaries account for up to 60-percent of stream miles in the conterminous U.S. and form the headwaters of most major river systems. Wetlands with seasonal hydrologic connections account for up to 62-percent of wetlands in the conterminous U.S. and provide floodwater storage, nutrient retention, sediment control, wildlife habitat, groundwater interaction, and water-quality functions across diverse landscapes.

Removing federal jurisdiction does not remove the majority of streams and wetlands from a watershed; however, it does remove their protection under the Clean Water Act.

Pollutants discharged into an intermittent tributary can still move downstream when flow returns. Wetlands disconnected from surface water during dry periods can reconnect during wet seasons, snowmelt, storms, or high groundwater conditions. Development or filling of these resources can still affect downstream flooding, sedimentation, water quality, and aquatic habitat.

The Clean Water Act was enacted in recognition of precisely this interconnected nature of the Nation’s waters and both the Congressional Record and Supreme Court Opinions make this intent clear.

X. Conclusion

If implemented as proposed, the new definitions could remove federal protection for the majority of streams and wetlands across the United States.

Such an outcome would be difficult to reconcile with the Clean Water Act’s objective of restoring and maintaining the chemical, physical, and biological integrity of the Nation’s waters. It would also extend *Sackett* beyond the specific questions decided by the Supreme Court by establishing a numerical flow-duration threshold that appears nowhere in the Court’s opinions.

NEBA respectfully recommends that the EPA and USACE:

1. Withdraw the proposed 30 consecutive day threshold from relatively permanent waters and adjacent wetlands.
2. Avoid defining “relatively permanent” as synonymous with “perennial”;
3. Recognize that intermittent streams may constitute relatively permanent waters where they exist as recurring and identifiable components of tributary systems;
4. Develop any jurisdictional criteria using nationally applicable hydrologic and ecological science rather than a single numerical dry-period threshold; and
5. Ensure that the final rule remains consistent with the Clean Water Act’s central purpose of protecting the integrity of the Nation’s waters.

The Clean Water Act has produced extraordinary improvements in water quality during the past five decades. A national definition of Waters of the United States should preserve those gains while respecting the limits established by the Supreme Court. It should not unnecessarily eliminate protection for functioning streams and wetlands simply because their surface hydrology varies during the year.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jeff Oyen", with a long horizontal flourish extending to the right.

Jeff Oyen
Chairman
National Environmental Banking Association