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The EPA and Army Corps Advance Supplemental WOTUS Rule Limiting CWA Jurisdiction to Perennial Waters

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The definition of "waters of the United States" under the Clean Water Act has been one of the most contested issues in federal environmental law for over a decade, with five rule revisions, a landmark Supreme Court decision, and ongoing litigation reshaping the regulatory landscape. Following the Supreme Court's 2023 decision in *Sackett v. EPA*, which rejected the broad "significant nexus" test and held that federal jurisdiction reaches only "relatively permanent" waters and wetlands with a "continuous surface connection" to those waters, the EPA and U.S. Army Corps of Engineers have been working to codify that narrower standard in regulation. On September 9, 2026, the agencies published a Supplemental Notice of Proposed Rulemaking (91 FR 57284) that goes further than their November 2025 proposal by introducing a supplemental option that would limit federal jurisdiction to perennial waters only — those with standing or continuously flowing water every day of the year during ordinary conditions. If adopted, this approach would mark the most significant narrowing of federal wetland jurisdiction since the Clean Water Act was enacted in 1972, with far-reaching implications for landowners, developers, agricultural operators, and environmental compliance nationwide.

I. Federal Regulatory History

The term "waters of the United States" — commonly known as WOTUS — is the linchpin of federal environmental regulation under the Clean Water Act. It determines whether a waterbody, stream, or wetland is subject to federal oversight, including Section 404 dredge-and-fill permitting administered by the Army Corps of Engineers. If a feature qualifies as a "water of the United States," anyone proposing to discharge dredged or fill material into it must obtain a federal permit.

The scope of federal wetland jurisdiction over "waters of the United States" ("WOTUS") under the Clean Water Act ("CWA") has narrowed significantly following the Supreme Court's May 2023 decision in *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023) ("*Sackett II*"). In *Sackett II*, the Court adopted the *Rapanos* case plurality's two-part test, holding that CWA

jurisdiction extends only to those wetlands with a "continuous surface connection" to WOTUS, defined as "relatively permanent, standing or continuously flowing bodies of water forming geographical features" such as streams, rivers, lakes, and oceans. Under the new standard, a wetland is jurisdictional only if the adjacent body of water is a "relatively permanent body of water connected to traditional interstate navigable waters" and the wetland is "practically indistinguishable" from that water—meaning it is difficult to determine where the water ends and the wetland begins.

II. 2025 Proposed WOTUS Rule

In March 2025, the EPA and Army Corps of Engineers issued joint guidance clarifying that WOTUS includes "only those adjacent wetlands that have a continuous surface connection because they directly abut" a jurisdictional water, and that wetlands separated by uplands, berms, dikes, or similar features are non-jurisdictional. The agencies rescinded prior field memoranda suggesting that channels, ditches, swales, pipes, or culverts could establish a continuous surface connection, further narrowing federal reach.

On November 17, 2025, the EPA and Army Corps of Engineers signed a proposed rule titled "Updated Definition of Waters of the United States," which seeks to codify these principles by, for the first time, adding regulatory definitions for "relatively permanent" and "continuous surface connection" to the agencies' regulations. The proposed rule would define "relatively permanent" as standing or continuously flowing bodies of surface water year-round or "at least during the wet season," and would define "continuous surface connection" as requiring both physical abutment of a jurisdictional water and having surface water "at least during the wet season." Notably, the proposed rule clarifies exclusions for ditches constructed entirely in dry land and prior converted cropland. The proposed rule explicitly confirms that ephemeral waters are non-jurisdictional. Importantly, isolated or seasonally saturated wetlands lacking persistent surface water may no longer fall within federal CWA jurisdiction.

III. September 2026 Supplemental Rule

The supplemental proposal introduces an alternative that would narrow federal jurisdiction even further than the November 2025 proposed rule. The three primary components of the supplemental rule include:

Perennial-Only Standard for "Relatively Permanent"

The supplemental option would define "relatively permanent" to mean "perennial bodies of water," and would add a new regulatory definition of

"perennial" as "having standing or continuously flowing water every day of the year during ordinary conditions." Under this approach, "[a] body of water does not lose its relatively permanent status if it dries up as a result of anomalous events such as drought or dry spell." The agencies are considering implementing drought such that only extreme and exceptional droughts as categorized by the U.S. Drought Monitor would qualify as anomalous drought conditions, which "can extend continuously across no more than a five-year timeframe, after which the drought condition would be nullified for purposes of identifying 'relatively permanent' waters, and that water would no longer be jurisdictional under its ordinary conditions."

Similarly, "[a] body of water also does not lose its relatively permanent status if it dries up for no more than a single period of up to 30 consecutive days in any given year as a result of non-anomalous events resulting in a temporary interruption such as low tide or a regularly occurring dry spell." The agencies emphasize that "the qualifier 'a single period' is intended to convey that the interruption of flow can only occur once in any given year." If flow is interrupted for more than one period, even if each interruption is less than 30 days, the water would not be jurisdictional.

Under this supplemental option, "[a] waterbody that does not meet this proposed interpretation of 'relatively permanent,' would be the type of 'intermittent' or 'ephemeral' feature that does not meet the definition of 'waters' under the Clean Water Act." This is a significant departure from the November 2025 proposal, which would have included waters flowing "at least during the wet season" — potentially reaching seasonal and intermittent features.

Stricter Surface Water Connection Requirement for Adjacent Wetlands

The supplemental option would redefine "continuous surface connection" to mean "perennial surface water in a wetland that is continuously connected with the surface water in the jurisdictional water such that it is difficult to determine where the jurisdictional water ends and the wetland begins. A temporary interruption in the surface water connection may occur as the result of anomalous events such as drought or a dry spell. A temporary interruption in the surface water connection lasting for no more than a single period of up to 30 consecutive days in any given year may also occur as a result of non-anomalous events such as low tide or a regularly occurring dry spell."

Critically, "[o]nly the portion of the wetland that is indistinguishably part of the jurisdictional water would be itself jurisdictional." This supplemental option "relies on a reading of *Sackett* whereby a wetland can be indistinguishably part of a jurisdictional water only when the wetland and the jurisdictional

water share a surface water connection. Under this option, where that continuous surface water connection runs out, the wetland and the water become distinguishable and Federal jurisdiction ends." This represents a significant narrowing from the November 2025 rule, which proposed defining continuous surface connection as "having surface water at least during the wet season and abutting (i.e., touching) a jurisdictional water" — a standard that did not require perennial surface water and that, according to commenters, did not adequately account for climates where wetland hydrology is temporally offset from the wet season.

Possible Removal of "Adjacent" and "Abutting"

The agencies are "soliciting supplemental comments on whether the terms 'adjacent' or 'abutting' are operative in the definition of 'continuous surface connection,' or should be removed from the definition entirely." Under this alternative interpretation of Sackett, the agencies would "delete the term 'adjacent' from the definition in paragraph (c)(2) and revise paragraph (a)(4) of their regulations to read: 'Wetlands that are indistinguishably part of a body of water that itself is jurisdictional under (a)(1) through (3) of this section.'" This approach follows Sackett's directive that "adjacent wetlands . . . are 'includ[ed]' within 'the waters of the United States,' . . . [and therefore] [adjacent wetlands] must qualify as 'waters of the United States' in their own right." If adopted, this would represent a fundamental break from the adjacency framework that has defined federal wetland jurisdiction for nearly fifty years.

IV. Potential Benefits to Development Projects

The practical implications of this supplemental rule are substantial. The agencies anticipate that the proposed rule would be "deregulatory in nature," with impacts "most significant for the Clean Water Act section 404 program, reducing the number of 404 permits issued and acres of wetland impacts mitigated relative to the baseline." The agencies expect the changes to "produce cost savings to project proponents from avoided permitting and mitigation activities, as well as potential indirect benefits from long-term reduction in regulatory burden."

Landowners and developers may see significantly reduced permitting burdens for projects near intermittent or ephemeral waters and seasonally saturated wetlands. Under the perennial-only standard, a water that "lacks standing or continuously flowing water from June through August (approximately 90 days) every year, i.e., under ordinary conditions, would not be relatively permanent" and would fall outside federal jurisdiction entirely. The agencies also expect "increased opportunities and shorter delays for approved jurisdictional

determinations ("AJDs") for projects still requiring a permit due to less demand for AJDs and clearer regulatory language."

Agricultural operations would also benefit from the clarified exclusions. The proposed rule would "eliminate jurisdiction over ditches dug in dry land regardless of flow." The prior converted cropland exclusion would be maintained, with the exclusion ceasing only "when the area is abandoned (i.e., not used for, or in support of, agricultural purposes in the immediately preceding five years) and has reverted to wetlands." The proposed groundwater exclusion expressly covers "groundwater drained through subsurface drainage systems, such as tile drains" — providing greater certainty for routine farming, ranching, and silviculture activities.

As this rulemaking proceeds, Bilzin Sumberg's Environmental team will continue to monitor developments and provide timely updates on how the proposed changes may affect wetland permitting, land development, and agricultural operations if the rule is finalized.

Read the full proposal: [**Federal Register :: Updated Definition of "Waters of the United States"**](#).



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