

Quick Take: WOTUS Supplemental Proposed Rule

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On September 9, 2026, EPA and the Army Corps of Engineers (the agencies) published a [supplemental notice of proposed rulemaking](#) (supplemental proposal) that builds on the agencies' [November 2025 proposal](#) and seeks comment on additional options for revising the definition of "Waters of the United States" (WOTUS). This definition determines which waters are subject to federal regulation under the Clean Water Act.¹ Environmental groups, industry groups, landowners, and states have repeatedly challenged the definition of WOTUS, resulting in a long and [complex regulatory and legal history](#). [Comments on the supplemental proposal](#) are due October 9, 2026.

This Supplemental Proposal Builds on *Sackett* and the November 2025 Proposal

The Supreme Court's 2023 decision in [Sackett v. EPA](#) limited WOTUS to relatively permanent, standing, or continuously flowing waters.² Under *Sackett*, a wetland is protected only if it is adjacent to a relatively permanent body of water and has a continuous surface connection to that water. The Court explained that a wetland has a continuous surface connection only if it is "as a practical matter indistinguishable from" the adjacent water.³ The decision, however, left it to the agencies to determine how to define those terms, and the agencies now seek comment on possible interpretations.

Following *Sackett*, the Biden administration issued a conforming rule in 2023.⁴ In November 2025, the Trump administration issued a proposed rule containing a narrower interpretation of WOTUS. This September 2026 proposal would adopt an even more restrictive definition of WOTUS than the pending November 2025 proposal,⁵ further limiting protections granted under the Biden administration's amended 2023 rule.⁶

This quick take summarizes the key aspects of the supplemental proposal, describes how it differs from the November 2025 proposal, and outlines the agencies' likely next steps.

¹ Under the CWA, the agencies may regulate "navigable waters," which the Clean Water Act defines as "the waters of the United States, including the territorial seas" (33 U.S.C § 1362). Although states and Tribes may adopt stricter pollution standards than the federal government, the WOTUS definition determines which waters are federally protected by the CWA.

² *Sackett v. Env't Prot. Agency*, 598 U.S. 651, 671 (2023).

³ *Id.* at 678.

⁴ Revised Definition of "Waters of the United States"; Conforming, 88 FR 61964 (Sept. 8, 2023).

⁵ The November 2025 proposal has not yet been finalized, and this proposal adds additional options for agencies to consider. See EELP, [Proposed Definition of Waters of the United States](#) (Jan. 2026).

⁶ The 2023 rule remains in effect in 23 states until Trump administration's proposals are finalized. The pre-2015 definition of WOTUS is in effect in the 27 states that challenged the Biden administration's rule, as enforcement of the 2023 rule is currently stayed in those states due to litigation. *Commonwealth of Kentucky v. United States Environmental Protection Agency et al*, Docket No. 3:23-cv-00007 (E.D. Ky. Feb 22, 2023); See also, *West Virginia, State of et al v. U.S. Environmental Protection Agency et al*, Docket No. 3:23-cv-00032 (D.N.D. Feb 16, 2023).

Updated Options for the Definition of WOTUS

The supplemental proposal seeks comment on additional options for defining “relatively permanent” and “continuous surface connection” and asks whether these options reflect the scope of jurisdiction outlined in *Sackett*.

Relatively Permanent

The November 2025 proposal defined “relatively permanent” as bodies of water that flow continuously all year or during the “wet season.”⁷ The supplemental proposal would replace this standard with a stricter one, defining “relatively permanent” to mean “perennial” waters.⁸ The agencies seek comment on two possible definitions of perennial: (1) “having standing or continuously flowing water every day of the year during ordinary conditions” or (2) “surface water flowing continuously year-round.”⁹ In interpreting *Sackett*, the agencies argue that “‘relatively’ cannot stretch the meaning of ‘permanent’ to the point that ‘permanent’ would encompass flow for significantly less than the majority of the time.”¹⁰

The agencies also propose two categories of exceptions during which a body of water could dry up but keep its “relatively permanent” status:

- (1) *Non-anomalous events*: A water body keeps its status if it dries up due to an expected, recurring event (such as a low tide or predictable dry spell) that lasts for no more than 30 consecutive days and occurs only once per year. If the body dries up more than once per year or for more than 30 days, it would be reclassified as intermittent or ephemeral, losing federal protection and no longer subject to the Clean Water Act permitting requirements.¹¹

The agencies argue that this test is easy for landowners to understand and apply, though they acknowledge that the 30-day threshold is for administrative convenience and not “scientifically-grounded.”¹² US Geological Survey data show variation in the time, frequency, and duration of stream drying across the country.¹³ It is likely that many waters that would have qualified as relatively permanent under the wet season test would not qualify under this test.

⁷ 90 Fed. Reg. 52517-18 (Nov. 20, 2025).

⁸ 91 Fed. Reg. 57286-87 (Sep. 9, 2026).

⁹ This matches the definition from the Trump administration’s 2020 rule. The Navigable Waters Protection Rule, 85 Fed. Reg. 22250 (Apr. 21, 2020).

¹⁰ 91 Fed. Reg. 57289 (Sep. 9, 2026).

¹¹ *Id.* at 57291.

¹² “While there are no precise, scientifically-grounded, nationally consistent time limits for the durations of the temporary interruption due to non-anomalous events like low tide or a regularly occurring dry spell, a 30-day limit, which is roughly the length of a month, would establish a bright line duration that would be predictable, transparent, and easy to administer.” *Id.*

¹³ *About Streamflow Permanence*, U.S. Geological Survey, <https://webapps.usgs.gov/streamflow-permanence/about.html> (last visited Oct. 5, 2026).

- (2) *Anomalous events*: A water body would also keep its relatively permanent status if it dries up due to an unusual event such as a drought.¹⁴ The agencies propose limiting “anomalous” to only extreme or exceptional droughts as tracked by the US Drought Monitor.¹⁵

The agencies also propose a five-year limit on drought-related interruptions, after which the dry conditions would be treated as the region’s new baseline.¹⁶ They acknowledge that this five-year limit could have outsized effects in the arid West, where droughts are more frequent and last longer.¹⁷

Continuous Surface Connection

The November 2025 proposal defined “continuous surface connection” as a wetland “having surface water at least during the wet season and abutting (i.e., touching) a jurisdictional water.”¹⁸ The agencies now propose to require perennial, not just seasonal, surface water connecting the wetland to the jurisdictional water “such that it is difficult to determine where the jurisdictional water ends and the wetland begins.”¹⁹ As with “relatively permanent,” the same two exceptions apply. The connection can break for up to 30 days only once per year due to a non-anomalous event or for up to five years due to an anomalous event.²⁰

This proposed approach represents a narrowing from the earlier proposal. The agencies note that “the majority of wetlands that are jurisdictional as adjacent wetlands under current regimes would not satisfy the supplemental definition of ‘continuous surface connection,’ as most wetlands do not contain perennial surface water.”²¹

This mirrors the two-part test from *Sackett* described above. The agencies cite *Sackett*’s indistinguishability concept, which requires showing “first, that the adjacent [body of water constitutes] . . . ‘water[s] of the United States,’ (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”²²

Similar to the relatively permanent test, the agencies argue that this test will be easy for landowners to understand and for agencies to implement.²³

The agencies also ask for comment on whether to remove the terms “adjacent” and “abutting” from the definition, which would mean that only the portion of the wetland that is indistinguishable from a water of the United States is subject to Clean Water Act regulations.²⁴ This would reduce the amount

¹⁴ 91 Fed. Reg. 57288 (Sep. 9, 2026).

¹⁵ *Id.* at 57290.

¹⁶ *Id.*

¹⁷ *Id.* at 57297.

¹⁸ *Id.* at 57292.

¹⁹ *Id.* at 57294.

²⁰ *Id.*

²¹ *Id.* at 57298.

²² *Sackett v. Env’t Prot. Agency*, 598 U.S. 651, 678 (2023), citing *Rapanos v. United States*, 547 U.S. 715, 755.

²³ 91 Fed. Reg. at 57296.

²⁴ *Id.* 57295 (Sep. 9, 2026).

of wetland acreage protected, since the current rule covers the entire adjacent wetland, not just the portion touching the jurisdictional water.

What the Supplemental Proposal Does Not Change from the November 2025 Proposal

The supplemental proposal does not alter or seek comment on several parts of the November 2025 proposal, including:

- The definitions for “ditch,” “prior converted cropland,” “tributary,” and “waste treatment system;”
- The removal of the “interstate waters” category;
- The removal of “intrastate” from the lakes and ponds category; and
- The exclusions for waste treatment systems, prior converted cropland, certain ditches, and groundwater.²⁵

Next Steps

[Comments on the supplemental proposal](#) are due **October 9, 2026**. After this deadline, the agencies will consider and respond to the comments received. EELP will be [monitoring](#) the agencies’ next steps and evaluate any final rule. The WOTUS definition has been subject to decades of [litigation from states, environmental organizations, and industry groups](#), and we expect a final rule to be challenged as well.

²⁵ *Id.* at 57286.