WATERS ADVOCACY COALITION

Preliminary Summary of 2025 Proposed WOTUS Rule

On November 17, 2025, the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps"), collectively (the "Agencies"), released the pre-publication version of a Proposed Rule revising the definition of "waters of the United States" ("WOTUS") applicable to all Clean Water Act ("CWA") programs.

The Proposed Rule makes the following changes to the 2023 definition that is currently codified in the Code of Federal Regulations:

1. Eliminates the (a)(1)(iii) interstate waters category;
2. Deletes the term "intrastate" from the (a)(5) lakes and ponds category;
3. Adds definitions of several key terms and phrases: (i) continuous surface connection; (ii) ditch; (iii) prior converted cropland; (iv) relatively permanent; (v) tributary; and (vi) waste treatment system; and
4. Adds an exclusion for groundwater.

Below is a *preliminary* analysis of the Proposed Rule. We are still reviewing the rule and supporting materials and may supplement this analysis as needed.

Categories of Jurisdictional Waters

1. Traditional Navigable Waters ("TNWs") and Territorial Seas

- The Agencies are not making any substantive changes to these categories, but they solicit comment on the (a)(1)(i) TNW category—namely, what it means to be "susceptible to use in interstate or foreign commerce" and whether certain TNW determinations require elevation to headquarters.
- The Proposed Rule *eliminates* the former (a)(1)(iii) category (interstate waters) to ensure consistency with *Sackett* and to avoid reading the term "navigable" out of the CWA. Waters are no longer jurisdictional merely because they cross state lines.
    - The Agencies emphasize that the elimination of this category will have minimal practical impact, because an analysis of AJDs between August 2015 and September 2025 shows only 15 waters were found to be WOTUS as interstate waters.

2. Impoundments

- No changes to this category and no substantive preamble discussion.

3. Tributaries

- Defined as a body of water that: (i) has relatively permanent flow; (ii) has a bed and banks; and (iii) connects to a downstream TNW or territorial sea either directly or through one or more waters or features that convey relatively permanent flow.
    - Non-jurisdictional features (*e.g.*, channels, tunnels, debris piles, wetlands, etc.) sever jurisdiction if they don't convey relatively permanent flow.
    - If a tributary flips between having relatively permanent flow and non-relatively permanent flow, the non-relatively permanent reaches sever jurisdiction.
    - If a tributary is part of a water transfer that's currently operational, that maintains jurisdiction.
- Codifies a new definition of "relatively permanent" (*discussed below*)
- Lakes and ponds can qualify as tributaries if they meet this definition.

4. Adjacent Wetlands

- Retains the definition of "adjacent," which means "having a continuous surface connection."
- Codifies a new definition of "continuous surface connection" (*discussed below*).
- Does not change the longstanding definition of "wetland," but clarifies that wetlands (or portions thereof) are jurisdictional only if they (i) abut (*i.e.*, touch) another WOTUS; and (ii) have surface water at least during the wet season.
    - Regardless of what the full delineated scope of a wetland is, the only portions of the wetland that are jurisdictional are those that satisfy the new continuous surface connection test.
    - Preamble emphasizes that the surface hydrology requirement implements the "indistinguishable" concept because a wetland that lacks surface water may often look like dry land and be easily distinguishable from the surface water to which it abuts.
- The Agencies propose to modify their approach to mosaic wetlands and permafrost wetlands. Rather than considering such wetlands as a single wetland, the Proposed Rule

would delineate mosaic components individually, such that only those components meeting the new continuous surface connection test would be jurisdictional.

5. Lakes and Ponds

- Deletes the term "intrastate" from the lakes and ponds category; interstate or intrastate lakes and ponds are jurisdictional only if they are relatively permanent *and* have a continuous surface connection to TNWs, territorial seas, or tributaries.

- The Agencies solicit comment on whether to fold this category into the (a)(3) tributaries category and whether there are any non-navigable lakes or ponds that would not be appropriate to assess for jurisdiction under (a)(3).

Relatively Permanent

- Newly defined as "standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season."

    - The Agencies do not rely on the "typical year" concept, but they clarify in the preamble that the temporal component is intended to encompass an extended period where there is predictable, continuous surface hydrology in the same geographic feature year after year in response to the wet season.

    - Surface hydrology must be continuous *throughout the entirety* of the wet season.

    - The Agencies acknowledge there may be a lag between the start of the wet season and the demonstration of surface hydrology in a water feature (*e.g.*, because it takes time for the water table to rise) and they solicit comment on different ways to account for this.

- Ephemeral features (*i.e.*, flowing only in direct response to precipitation) are not jurisdictional.

- It is not enough to use physical indicators of flow to establish relatively permanent flow because non-jurisdictional features, such as ephemeral features, sometimes have such indicators like an OHWM or bed and banks.

- The Agencies solicit comment on alternatives to the proposed definition of "relatively permanent": perennial-only flow; fixed day thresholds such as 90 days per year or 270 days over 3 years; or minimum flow thresholds.

- Implementation

    - WebWIMP outputs reported in the Antecedent Precipitation Tool ("APT") are a "primary" tool for identifying the wet season (when precipitation exceeds evapotranspiration rates).

        - The preamble states there are other possible sources of information for identifying the "wet season" such as NOAA, NRCS, and USGS sources.

    - The Agencies say they have experience evaluating if a water has the requisite surface hydrology (*i.e.*, if it is standing or continuously flowing throughout the wet season) using remote and field-based indicators such as Streamflow Duration Assessment Methods and the USGS Enhanced Runoff Method.

        - The Agencies seemingly acknowledge that SDAMs aren't designed to differentiate between relatively permanent and non-relatively permanent flow, but they nevertheless insist SDAMs are "still informative" and can be used as part of the weight-of-evidence to demonstrate relatively permanent flow.

    - There is typically only one wet season in most regions, but it is possible for there to be more than one wet season. If there is more than one wet season in a given region, a feature must have continuous surface hydrology throughout *both* wet seasons to be considered relatively permanent.

<u>Continuous Surface Connection</u>

- Newly defined as "having surface water at least during the wet season and abutting (*i.e.*, touching) a jurisdictional water."

    - Having surface water at least during the wet season means having persistent surface water hydrology uninterrupted throughout the duration of the wet season except in times of extreme drought; it is *not* enough to have saturated soil conditions supported by groundwater.

    - The preamble references National Wetlands Inventory ("NWI") water regime flooding modifiers, but notes the Agencies are using a modified version of "semipermanently flooded." Surface water must persist throughout the wet season without interruption, and this must occur predictably, year after year, except during period of extreme drought. The proposal does not rely on the "typical year" concept.

        - Wet season is not the same as the "growing season."

- The Agencies are *not* proposing to interpret "continuous surface connection" to mean "continuous surface *water* connection." They believe "continuous surface water connection" would require the presence of surface water year-round over the wetland, lake, or pond.

- Implementation

    - The Agencies provide a long list of tools that can be used to assess abutment: USGS topographic maps, high-resolution elevation data, the National Hydrography Dataset, NWI classifications, aerial and satellite imagery, NRCS maps, etc. The Agencies say these can help identify physical barriers that sever jurisdiction or illustrate the location of wetlands relative to other WOTUS.

    - The Agencies also suggest several tools for identifying whether a wetland has surface water at least during the wet season: direct observations, stream gage data, lake gage data, flood predictions, NWI data, remotely sensed images, soil permeability data, vegetative cover info, historical record, USGS Landsat Level-3 Dynamic Surface Water Extent, Global Surface Water Explorer. The Agencies say these may be useful to identify surface water inundation.

Categorical Exclusions

- **Waste Treatment Systems**

    - The Proposed Rule would codify a definition that is almost identical to the NWPR's definition with one key difference (bolded/italicized): "waste treatment system means all components of a waste treatment system ***designed to meet the requirements of the Clean Water Act***, including lagoons and treatment ponds (such as settling or cooling ponds), designed to either convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge)."

    - Systems created in jurisdictional waters pursuant to a 404 permit and that have 402 permits covering any discharges to WOTUS would be excluded. Systems constructed prior to 1972 remain excluded if they are in compliance with CWA requirements, which presumably means that discharges from the system are covered by a 402 permit.

    - Abandoned waste treatment systems no longer qualify for the exclusion and could be deemed jurisdictional if they otherwise meet the definition of WOTUS.

- **Prior Converted Cropland**

    - The Agencies propose to re-codify the NWPR's definition for PCC.

- PCC is excluded unless it has been abandoned (*i.e.,* not used for, or in support of, agricultural purposes at least once in the immediately preceding five years) *and* the land has reverted to wetland conditions.
    - The Proposed Rule eliminates the "change of use" test in the 2023 Rule.
    - Agricultural purpose is broadly defined just as it was in the NWPR.
- The Agencies will recognize USDA PCC determinations, but unlike the 2023 Rule, a USDA determination is not a necessary predicate. The Agencies recognize that USDA only makes determinations under certain circumstances.

- **Ditches**
    - The Agencies propose to exclude ditches, including roadside ditches, that are constructed or excavated entirely in dry land, regardless of whether they carry relatively permanent flow or non-relatively permanent flow.
    - The Proposed Rule defines "ditch" to mean "a constructed or excavated channel used to convey water."
    - Ditches constructed in tributaries or that relocate tributaries, and ditches excavated in wetlands, are not excluded. They must be evaluated under the tributary definition. The preamble does not directly address why ditches constructed in *non-jurisdictional* features are not necessarily excluded.
    - Excluded ditches may still be point sources requiring NPDES permits for discharges.
    - The Agencies bear the burden to demonstrate that a ditch was not constructed entirely in dry land. If the evidence is inconclusive, the ditch is presumed to be non-jurisdictional.
    - The Agencies would apply a reach-based approach to assessing whether a water body is a ditch. Thus, different reaches of the same ditch may have different jurisdictional statuses.

- **Groundwater**
    - The proposed rule expressly excludes groundwater, including groundwater drained through subsurface drainage systems (*e.g.,* agricultural tile drains). The proposal does not define groundwater.