# EPA'S SUPPLEMENTAL WOTUS PROPOSAL: WHAT PERMIT APPLICANTS SHOULD KNOW

Date: 15 September 2026

**US Policy and Regulatory Alert**

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On 9 September 2026, the Environmental Protection Agency (EPA) and the US Army Corps of Engineers published a supplemental proposal to revise the definition of “waters of the United States” (WOTUS) under the Clean Water Act.[1] The supplemental proposal builds on the agencies' November 2025 proposed rule and responds to the Supreme Court's 2023 decision in *Sackett v. EPA*, which significantly narrowed the scope of waters subject to federal jurisdiction under the Clean Water Act and established a new framework for determining which waters fall within that jurisdiction.

In *Sackett*, the Supreme Court rejected the “significant nexus” test previously used by the agencies to determine whether certain waters were subject to federal jurisdiction.[2] Instead, the Supreme Court concluded that the Clean Water Act extends to relatively permanent bodies of water connected to traditional interstate navigable waters and, in the case of wetlands, requires a continuous surface connection between the wetland and a covered water such that it is difficult to determine where the “water” ends and the “wetland” begins.

The *Sackett* decision therefore has implications beyond the particular wetlands at issue in that case. It provides the legal framework underlying the agencies' current effort to define the scope of WOTUS—including what constitutes a “relatively permanent” water and when a wetland has the requisite “continuous surface connection.” The November 2025 proposed rule began that process, and the September 2026 supplemental proposal seeks additional comment on these two concepts.

The agencies are considering defining “relatively permanent” to mean a standing or continuously flowing body of surface water having water every day of the year during ordinary conditions. A temporary interruption of up to 30 consecutive days caused by a nonanomalous event, such as low tide or a regularly occurring dry spell, would not necessarily prevent a water from qualifying. Anomalous events, such as drought, likewise could cause temporary interruptions without changing the water's classification.

The agencies' proposal for “continuous surface connection” would require the wetland to have perennial surface water continuously connecting it to a jurisdictional water. Limited temporary interruptions, including those associated with drought, dry spells, or low tides, would not necessarily defeat jurisdiction.

The agencies anticipate that this approach could have a significant practical effect on wetlands. They state that the majority of wetlands currently jurisdictional as adjacent wetlands would not satisfy the supplemental definition because most wetlands do not contain perennial surface water.[3]

So, what does this mean for Clean Water Act permitting?

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First, project proponents should continue to evaluate federal and state jurisdictions separately. The agencies recognize that states and tribes may regulate waters that fall outside federal WOTUS jurisdiction. A reduction in federal jurisdiction therefore does not necessarily eliminate permitting or other regulatory requirements.

Second, timing will be critical. This is still a proposal, and the agencies are accepting comments through 9 October 2026. The ultimate jurisdictional framework—and when it takes effect—remains uncertain. For projects where permitting will occur after a final rule is adopted, the proposed approach could make jurisdictional screening more favorable, particularly where intermittent or ephemeral features are currently driving federal permitting requirements. Project proponents may therefore want to evaluate how the proposed definitions could affect existing and planned projects and consider submitting comments before the deadline.

The firm is monitoring this development closely and is prepared to assist clients in evaluating how the proposed changes may affect their projects and Clean Water Act permitting requirements and provide comment on the proposed rule.

## FOOTNOTES

[1] Supplemental Notice of Proposed Rulemaking, Updated Definition of "Waters of the United States," 91 Fed. Reg. 57284 (Sep. 9, 2026) (to be codified at 40 C.F.R. Part 120).

[2] *Sackett v. E.P.A.*, 598 U.S. 651 (2023).

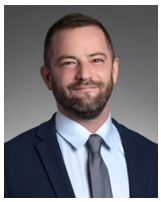
[3] 91 Fed. Reg. at 57298.

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