December 18, 2025

Lee Zeldin
EPA Administrator

U.S. Environmental Protection Agency
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Adam Telle
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Submitted to Regulations.gov, Docket ID No. EPA-HQ-OW-2025-0322

Re: NTWC's Comments on the Proposed Updated Definition of "Waters of the United States"

Dear Administrator Zeldin and Assistant Secretary Telle:

The National Tribal Water Council (NTWC) submits the following comments on the Proposed Rule titled "Updated Definition of Waters of the United States" (Proposed Rule), 90 Fed. Reg. 52498 (November 20, 2025), issued by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (collectively, the Agencies). The NTWC, along with all commenters, are faced with an unreasonably short timeframe to prepare sufficient comments. This timeframe is especially inappropriate for tribes as it does not fully consider the tribal consultation process.

Introduction

The NTWC has reviewed the Proposed Rule and concludes that the Agencies' proposed revised definition of "waters of the United States" (WOTUS) would limit the applicability of the Clean Water Act (CWA) more than is required by the Supreme Court's decision in *Sackett v. EPA,* 598 U.S. 651 (2023). They expand key terms and exclusions from the definition of WOTUS beyond the scope that is altogether necessary, even though doing so will not increase the clarity or implementability of the rule and in some cases will do the opposite. The Agencies justify their proposal by deliberately ignoring the objective of the CWA, which is ''to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251. The Agencies also ignore many of the national goals listed in § 1251(a). As a result, the Proposed Rule would remove CWA protections for countless waters across the country,

including many ephemeral streams and tributaries in the western United States and portions of wetlands that do not have a continuous visible surface connection to navigable waters, affecting a large majority of Alaska's wetlands in particular.

The NTWC addresses these concerns below, including a discussion of the comment period and the time allowed for consultation.

1. **Request for Extending the Comment Period**

We join numerous tribes that have requested the comment period to be extended. The proposal's 45-day comment period is generally the minimum time that EPA provides for complex or controversial matters or those involving substantial documents. See 40 C.F.R. § 25.5(b). The Agencies provided a longer time just for their pre-proposal consultation with states and tribes on the federalism implications of the proposed rule. See 90 Fed. Reg. at 52513 (60 days). The Agencies provided 90 days for the last three significant revisions of the WOTUS definition, see 88 Fed. Reg. 3004 (January 18, 2023), 85 Fed. Reg. 22250 (April 21, 2020), and 84 Fed. Reg. 56626 (Oct. 22, 2019), and more than 200 days for the first modern iteration of the rule, see 80 Fed. Reg. 37054, 37057 (June 29, 2015). Analogously, EPA provided 90 days for tribal input on two proposed rules for developing federal water quality standards (WQS) for the 85% of Indian country lacking the CWA's foundation mechanism. See 81 Fed. Reg. 66900 (Sept. 29, 2016) (Baseline WQS); 88 Fed. Reg. 29496 (May 5, 2023) (same).

It is true that frequently revisiting the WOTUS rule has created expertise among some stakeholders. For example, the Agencies' pre-proposal consultation meetings for states and tribes in Spring 2025 resulted in comment letters from all but two states, reflecting the capacity and expertise in state environmental agencies across the country. In comparison, only 25 of the 574 Indian tribes in the Nation submitted comments. 90 Fed. Reg. at 52513. That limited response is not from lack of interest – water quality directly implicates tribal health and welfare, treaty rights, Indigenous cultural interests, and the federal government's trust responsibility to Indian tribes. Yet, it took 15 years after enacting the modern Clean Water Act, which created federal-state partnerships to implement its programs, for Congress to authorize the Administrator to "treat tribes as states" for Indian country. And since then, Congress has never fully funded the agency's budget to build tribal environmental capacity and expertise allowing tribes to seek delegations and primacy. Many other systemic issues, most arising from the sordid history of the Nation's treatment of its First Peoples, have dramatically slowed the development of tribal regulatory capacity.

That is why EPA's 1984 Indian Policy, which Administrator Zeldin reaffirmed on July 18, 2025, and the Corps' 1999 Tribal Policy Principles, which the agency reaffirmed in 2019, remain critically important. Both Policies explicitly recognize tribes' inherent sovereignty to manage and protect tribal resources and promise agency assistance in government-to-government fashion for developing tribal capacity to do so as part of the federal government's trust responsibility. EPA Policy at 2; Corps Policy at 1. EPA's Policy depends on tribal capacity because its overarching goal is program delegation so that tribal governments become the primary parties for setting environmental standards, making policy decisions, and managing reservation programs. EPA recognized, however, the history of Indian affairs made it unlikely tribes' inherent sovereignty contained the technical capacity to immediately implement complex, environmental regulatory programs. So, in Principle 3 of the Indian Policy, EPA said it would retain Indian country program responsibility until tribal governments were ready and willing to accept

delegations. EPA promised to assist tribes in "preparing to assume regulatory and management responsibilities for reservation lands." (Principle 2). And while EPA directly implemented the programs, EPA promised to "encourage" tribes "to participate in policymaking and to assume lesser or partial roles," ensuring EPA has the benefit of tribal views and that tribes develop the capacity and expertise to assume delegable programs in the future. Id.

Tribes' regulatory capacity challenges, of which the Agencies are well aware and have promised assistance for decades, are particularly relevant here because the proposed rule leaves the protection of excluded waters and wetlands to states and tribes. For example, the Agencies state they are deferring to "the primary responsibilities and rights of States to regulate their land and water resources," and draw tribes into the same net, asserting "the policy of preserving States' sovereign authority over land and water use is equally relevant to ensuring the primary authority of Tribes to address pollution and plan the development and use of Tribal land and water resources." 90 Fed. Reg. at 52514. The Agencies thus rely on state and tribal implementation to implement "the overall objective of the Clean Water Act," rather than acknowledging any federal duty to do so. Id. At the same time, the Agencies provide no funding for the additional burdens the proposed Rule would impose on tribes to protect their waters.

The Agencies' minimum comment period is inconsistent with their Policy promises. Exacerbating the time pressure is the Agencies' decision to center the comment period over the Thanksgiving, Christmas, and New Year's holidays. It is difficult to square that timing with the trust responsibility that both Agencies proclaim animate their interactions with tribes. Forty-five days over the holiday season is simply too short for tribes to make meaningful, detailed comments on the many complex technical and jurisdictional questions raised in the proposed WOTUS rule. The Agencies' December 5, 2025, announcement of an additional webinar on the proposed rule for tribes on December 18, 2025, is in the spirit of the Indian Policies but it is too little too late. It leaves no time for "honest consultation" as the Corps' Tribal Consultation Policy envisions at 2, or follow-up consultation or attempts at consensus as EPA's Tribal Consultation Policy envisions at 3.

Considering the greatly expanded responsibilities the proposed Rule would transfer to tribes and the lack of resources being provided to tribes to implement them, tribes should be given more time to address the Proposed Rule, its impacts, and implementation of the goal of the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." This timeframe must be adequate to allow tribes to consult with the Agencies and request formal government-to-government consultation if desired.

2. **The Proposed Rule Would Limit the Applicability of the CWA to the Nation's Waters Beyond what *Sackett* Requires**

The Agencies assert the Proposed Rule aligns with the Supreme Court's ruling in *Sackett*, which limited the scope of the CWA by imposing narrow definitions of what constitutes a "water of the United States" and an "adjacent" wetland. The Court held that a WOTUS must be a "relatively permanent body of water connected to traditional interstate navigable waters" and that to be an adjacent wetland, the wetland must have a "continuous surface connection" to a WOTUS, 598 U.S. at 678, "making it difficult to determine where the 'water' ends and the wetland' begins," *id*. at 678-679. The Court overturned the "significant nexus" test articulated by Justice Kennedy in *Rapanos v. United States*, 547 U.S. 715, 759 (2006).

Under the *Sackett* decision, ephemeral waters (surface water that flows or stands only in response to precipitation) do not constitute a WOTUS because they are not relatively permanent, *see, e.g.*, 90 Fed. Reg. at 52,517-18, but the Agencies find it unnecessary to codify a specific exclusion for such waters, *id*. at 52534. Instead, they propose to define WOTUS as waters that are standing or continuously flowing "at least during the wet season." 90 Fed. Reg. at 52517. The NTWC agrees with this overall approach, subject to the comments below. However, the Proposed Rule also limits the definition of "adjacent" wetlands, expands the exclusions for previously converted cropland, ditches, and wastewater treatment systems, and adds an exclusion for groundwater. The NTWC views several of these proposed revisions as exceeding the limitations imposed by *Sackett*, thereby unnecessarily diminishing the coverage of the CWA. The NTWC provides the following comments regarding the definitions of key terms in the Proposed Rule.

a. "**Relatively permanent**"

The Proposed Rule defines "relatively permanent" waters as **"**standing or continuously flowing year-round or at least during the wet season." 90 Fed. Reg. at 52,517. The Agencies explain that the phrase "at least during the wet season" includes "extended periods of predictable, continuous surface hydrology occurring in the same geographic feature year after year in response to the wet season, such as when average monthly precipitation exceeds average monthly evapotranspiration." 90 Fed. Reg. at 52,518. The Proposed Rule does not define "wet season" further but leaves it to the Agencies to implement. *Id*. at 52,518-19. The Proposed Rule mentions the Corps' Antecedent Precipitation Tool, which includes metrics from the Web-based Water-Budget Interactive Modeling Program, and states that the Agencies intend to use these "as a primary source for identifying the wet season." *Id*.

The NTWC supports this approach to the definition of "relatively permanent" because it recognizes that flow does not need to be year-round and, as the Agencies explain, it "would . . . allow for regional variation given the range of hydrology and precipitation throughout the country." *Id*. at 52,519. We also agree that this approach is consistent with the incorporation of the *Rapanos* holding into the *Sackett* decision. The NTWC does not support the approach suggested by Justice Thomas in *Sackett*, under which only navigable streams and their constantly flowing tributaries would be recognized as WOTUS. This extreme approach lacks support in the statute, legislative history, and caselaw and would instead return to the barebones protections that existed prior to the Clean Water Act's implementation.

In defining "relatively permanent," allowing for regional variation, the Agencies should not require a specific flow volume or flow duration. *See id*. First, such an approach would not account for the effects of drought or climatic change on the predictability of hydrologic systems. Wet and dry seasons are becoming more variable, and their impacts are less predictable. Moreover, artificial time limits and "strict threshold cutoff[s]," *id*. at 52,520, have little bearing on how wetlands and streams interact in the ecosystem. They also fail to account for regional hydrological variability and flow characteristics, which make them less likely to further the CWA's goal of restoring the chemical, physical, and biological integrity of the Nation's waters. Similarly, surface flow does not need to be evident for every day of the wet season to be continuous, which would in any event be virtually impossible to verify, *see id*. at 52,521. Surface flow should be viewed as relatively permanent as long as it continues to come and go throughout the wet season or for a significant portion of it; the NTWC agrees that "[t]his approach may better account for climatological differences in certain regions, such as the arid West," *id*.

The NTWC therefore recommends the updated definition of "relatively permanent" should avoid establishing a minimum period of flow or specific flow volume. Instead, it should identify factors for consideration, allowing a case-by case determination within that framework to account for regional hydrology, flow duration, topography, and other relevant scientific factors. We also endorse the use of "wet season" rather than "seasonally," *see id*., since, as discussed in the Proposed Rule, the wet season, and hydrologic responses to it can vary from year to year.

b. "**Tributary**"

The proposal defines a tributary as "a body of water with relatively permanent flow, and a bed and bank, that connects to a downstream traditional navigable water or the territorial seas, either directly or through one or more waters or features that convey relatively permanent flow." *Id*. at 52,521. Such waters and features include "other jurisdictional tributaries, adjacent wetlands that convey relatively permanent flow, certain jurisdictional impoundments, or jurisdictional paragraph (a)(5) lakes and ponds." *Id*. at 52,522. They also include various "features, both natural (*e.g.,* debris piles, boulder fields, beaver dams) and artificial (*e.g.,* culverts, ditches, pipes, tunnels, pumps, tide gates, dams), even if such features themselves are non-jurisdictional under the proposed rule, so long as those features convey relatively permanent flow." *Id*. A body of water is not, however, a tributary "if such feature does not convey relatively permanent flow." *Id.*

The NTWC is concerned that, according to this definition, a waterbody lacking a bed and bank, such as a grassed stream, would not qualify as a tributary, even if it retains surface water throughout the year. The proposed regulation would seemingly exclude nationally significant waters located in the Florida Everglades, which flow across grasses, irrespective of their relative permanency.

In addition, the NTWC objects to the proposal to exclude a body of water from the definition of "tributary" when the features (including wetlands) connecting it to a downstream WOTUS do not convey relatively permanent flow. This approach is more stringent than even the one taken in the 2020 Navigable Waters Protection Rule. *See id*. at 52,523. Further, as the Proposed Rule acknowledges, "[h]ydrologic regime shifts of relatively permanent flow to non-relatively permanent flow back to relatively permanent flow may be commonly found in the arid West and mountainous regions. Under the proposed rule, these shifts from relatively permanent to non-relatively permanent flow would sever Federal jurisdiction of upstream reaches under the Clean Water Act." *Id*. at 52,523.

Furthermore, if a tributary passes through artificial structures, like a culvert or a boulder field, and it is not visible on the surface, it does not sever jurisdiction over the upstream section of the stream if there is a continuous relative permanent flow through the artificial structure. If a relatively permanent flow is not demonstrated through the feature, then jurisdiction does not extend to the upstream portion, and it does not qualify as WOTUS as a tributary.

The NTWC supports the agency's proposal to retain jurisdiction over the upstream portion of a stream when there is no visible surface flow due to disruption from an artificial structure. However, the field tests utilized to verify the relatively permanent flow as it passes through these structures may be unreliable and subjective. Calculating relative permanence in a culvert is straightforward, but determining relative permanence in a boulder field is more

complicated and requires additional time and resources. The NTWC recommends that all flow evaluation methodologies used by the Agencies be field-tested and verified to ensure that these features are appropriately assessed. Another concern is that providing an opportunity to sever the connection may "incentiviz[e] the construction of certain features within the tributary network to prevent relatively permanent flow through the features with the intent to sever upstream jurisdiction." *Id*.

The Proposed Rule confirms, however, that "[e]ven if a waterbody does not satisfy the definition of ''tributary,'' it may function as a point source . . . such that discharges of pollutants from these features could require a Clean Water Act permit." *Id*. at 52,521-21 (citing *Rapanos*). The NTWC believes this proposal to retain jurisdiction over the upstream portion of a stream is the minimal approach required if the current proposal to sever jurisdiction for travel through features with less than relatively permanent flow is adopted.

The Proposed Rule also explains that tributaries will be evaluated on a "reach" basis to determine if they have relatively permanent flow, 'utilizing the approach used in the NWPR, where ''reach'' would mean a section of a stream or river along which similar hydrologic conditions exist, such as discharge, depth, area, and slope.' *Id*. at 52,525. If a stream's flow varies between relatively permanent and non-relatively permanent, then sections with different flows may be considered independently to determine whether a stream is intermittent or ephemeral at various locations within the stream reach or project site. This approach would result in an increase in site visits and case-by-case determinations, however, and may not be administratively feasible.

The Agencies currently use the Strahler stream order methodology to assess the permanence of a stream within a given reach. However, the NTWC maintains that this approach lacks transparency, efficiency, and predictability. Deciding where stream orders begin, determining whether the majority of a reach has relatively permanent characteristics, and then determining jurisdiction based on a percentage comparison of relatively permanent versus non-relatively permanent waters can be arbitrary and open to individual interpretation. Because stream reaches and flow might be understood and graded differently, it is impossible to predict how a certain stream reach will be classified. Furthermore, many stream reaches stretch beyond project boundaries, preventing field staff from visually inspecting the full reach when making jurisdictional decisions and making a final determination difficult. This reliance on insufficient information further reduces transparency, as many jurisdictional determinations lack a clear explanation of how the final decision was reached.

The NTWC supports the exemption in the Proposed Rule for water transfers, water storage reservoirs, flood irrigation channels, and similar structures, such that if "upstream tributaries that are part of a water transfer ultimately flow through non-relatively permanent reaches that eventually connect to traditional navigable waters or the territorial seas, the upstream tributaries would retain their jurisdictional status as waters of the United States." *Id*. at 52,523. The NTWC agrees with the Agencies that "this is appropriate to ensure vital water management practices continue as currently implemented." *Id*. The NTWC also supports the Agencies' statement that "A tributary's frozen status for parts of the year does not preclude it from having flow year-round or at least during the wet season." *Id*.

The NTWC recognizes that determining whether a water body is classified as relatively permanent or ephemeral requires validated sources of information appropriate to the

region where a jurisdictional decision is being made. Some agencies use regionalized streamflow duration assessment methods (SDAMs), *see id*. at 52,513, 52,521, which are quick field-based assessment procedures used to classify streamflow duration and help determine the relative permanence of flow, including for tributaries, *see id*. at 52,525-26. The NTWC recommends that the Agencies continue to evaluate and validate SDAMs for regional use in establishing relative permanence.

c. "**Continuous surface connection**"

For a wetland (or at paragraph (a)(5) relatively permanent lake or pond) to be considered a WOTUS, it must be "adjacent" to a WOTUS, *see* CWA § 404(g)(1), which, according to *Sackett*, *see, e.g.*, 598 U.S. at 678, means it must have a "continuous surface connection" to that WOTUS. This requirement was already included in the revised 2023 WOTUS. 90 Fed. Reg. at 52,527. That rule did not, however, define the term "continuous surface connection," leaving it instead to case-by-case determinations.

The Proposed Rule defines the term "continuous surface connection" for the first time, proposing it to mean "having surface water at least during the wet season and abutting (*i.e.*, touching) a jurisdictional water." *Id*. The Agencies characterize this definition as "a two-prong test that requires both (1) abutment of a jurisdictional water; and (2) having surface water at least during the wet season." *Id*. The Agencies provide further that "abutting" means "touching" and that "having surface water at least during the wet season" would be implemented in the same way as proposed in the discussion of "relatively permanent." *Id*.

The Agencies argue this definition of "continuous surface connection" satisfies the requirement in *Sackett* that the wetland be "indistinguishable" from the WOTUS it abuts. *Id*. at 52,527-28. The Agencies also propose that "only the portion of an abutting wetland which demonstrates surface water at least during the wet season would be jurisdictional." *Id*. at 52,527. The NTWC supports the proposal that having surface water at least during the wet season is sufficient to demonstrate relative permanence, as discussed above. We object, however, to the proposed requirement that the wetland literally abut a WOTUS and that only the portion of a wetland that does so will be considered "adjacent," and believe it results in more limited coverage of adjacent wetlands than the Supreme Court actually required. Actual abutment should not be required, not the least because of the implementability and resource concerns discussed below; if a portion of a wetland meets the test, the entire wetland should be covered. The Agencies themselves acknowledge that this test might result in few qualifying wetlands in the arid West, *id*., and state that mosaic wetlands will not be considered as a single entity so that only the portion of such wetlands that meets these two criteria will be defined as a jurisdictional wetland.

The NTWC has two other concerns with this proposed definition. First, establishing a two-part adjacency test presents many obstacles for field staff. If, to be covered by the CWA, a wetland must be "indistinguishable" from the WOTUS it abuts, field staff will have difficulties due to an internal logical conflict. Wetland delineation is required before an agency may establish whether a wetland area is a WOTUS. Delineation is the process of identifying and mapping the precise borders of wetlands on a property based on their hydrology, soils, and vegetation. In effect, wetland demarcation separates the marsh area from the uplands. If a wetland must be "indistinguishable" from its adjacent water, no wetland would be jurisdictional once delineated. The NTWC recommends that the Agencies instead provide a single test for

wetland adjacency, so that when a wetland has a continuous surface connection to a WOTUS, it is considered indistinguishable from that water and so it is adjacent. A single test would be consistent with *Sackett* and much more easily executed.

The NTWC also objects to the proposal to break up mosaic wetlands into distinct segments despite previously being considered a single, hydrologically connected wetland. This proposal would greatly impact jurisdictional determinations in Alaska because it would result in permafrost wetlands, which are common mosaic wetlands in Alaska, being excluded from the definition of "adjacent" wetland, thereby eliminating regulation for the overwhelming majority of wetlands in the state. The resulting impact to Alaska Natives would be severe, since they depend on seasonal wetlands, especially as permafrost melts, as sources of drinking water, for subsistence activities, and for the preservation of cultural traditions. The NTWC expresses significant concern that thaw-related waters, which hold crucial ecological and cultural significance, might be excluded from the WOTUS definition due to their intermittent or subterranean nature. The NTWC advises that the Agencies adopt alternative protection measures that consider the unique hydrological, ecological, and cultural importance of mosaic wetlands to various regions of the country.

However, the NTWC supports the Agencies' proposal that "culverts do not inherently sever the continuous surface connection when the culvert serves to extend the relatively permanent water such that the water directly abuts a wetland, consistent with current implementation of the 2025 Continuous Surface Connection Guidance." *Id*. at 52,529. The Agencies explain "This would be demonstrated by relatively permanent water flow being present through the culvert as well as an ordinary high-water mark within the culvert which provides the lateral limits of a tributary extending through the culvert. This proposed approach would not include the culvert itself as a jurisdictional feature; however, the relatively permanent tributary flowing within the culvert would be jurisdictional, with the wetland abutting the tributary also jurisdictional." *Id*. The NTWC also supports an approach under which culverts that connect wetland areas on either side of a road do not sever the connection if they carry relatively permanent water, and that the wetland areas on either side should be considered one wetland. *Id*.

d. Exclusions

The Proposed Rule revises three existing exclusions from the definition of WOTUS and adds groundwater to the list of exclusions on the ground that these changes "will enhance implementation clarity." *Id*. at 52,534. The Proposed Rule does not, however, provide any evidence of past confusion regarding these terms, but on the contrary explains they have been excluded "for decades" and are based on "the case law and the agencies' long-standing practice and technical judgment." *Id*. The NTWC believes past practices were sufficient and there is no need to revise the existing exclusions. Moreover, the Agencies state it is generally accepted that groundwater is not regulated by the CWA, making an explicit exclusion for groundwater unnecessary. Further comments on these proposed revisions are provided below.

Waste Treatment System - The Proposed Rule would define waste treatment systems as "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)." *Id*. at 52,534. The exclusion would be expanded to apply not only to waste treatment systems constructed

pursuant to CWA requirements but also to waste treatment systems constructed before 1972, when the modern CWA was enacted. No reason is given for this expansion, and the NTWC thinks it is safer not to exclude these old systems as they may be less efficient at treating discharges. In addition, the NTWC is concerned about the phrase "designed to either convey or retain," which could include streams located above the treatment facility that might carry pollutants, potentially being incorporated into the treatment design and classified as exempt. The NTWC recommends that the design for wastewater treatment should not incorporate streams or other water bodies that are utilized to transport pollutants to the treatment system, and these water bodies should not be considered as part of the excluded wastewater treatment facility.

Prior Converted Cropland – The Proposed Rule would make it much less likely for prior converted cropland (PCC) to ever be considered a WOTUS. The proposal would require the cropland to be "abandoned (*i.e.,* the cropland has not been used for or in support of agricultural purposes for a period of greater than five years) *and* the land has reverted to wetlands." Moreover, the definition of "agricultural purposes" is very broad; it includes "land use that makes the production of an agricultural product possible, including, but not limited to, grazing and haying. This Proposed Rule also would clarify that cropland that is left idle or fallow for conservation or agricultural purposes for any period or duration of time remains in agricultural use." *Id*. at 52,536. The NTWC understands the definition of "agricultural purpose" to expand PCC lands. The earlier definition included PCC that produces an agricultural commodity, along with specific land use that supports agriculture. It also would remove the U.S. Department of Agriculture from the determination of agricultural use, leaving that to EPA and the Corps.

Finally, the cropland would still need to be an adjacent wetland, as discussed above, to become a WOTUS.

Ditches – The proposed rule aims to clarify which ditches are exempt from WOTUS jurisdiction. It defines a ditch as being constructed or excavated channel used to convey water. The proposed regulation underlines that ditches, especially those along roadsides, which are entirely constructed or excavated on dry land do not qualify as WOTUS. Even if the ditch maintains a relatively permanent flow and connects to a jurisdictional waterway. The proposed language is largely identical to existing exclusion provisions in existence since 2008, with one notable exception – it removes the requirement that an excluded ditch be excavated entirely on dry land and drain exclusively dry land. The proposal would allow an excluded ditch to drain non-dry land, which could potentially drain wetlands or other bodies of water, making this exclusion much broader.

The NTWC contends that ditches exhibiting a relatively permanent flow ought to be classified as WOTUS, regardless of their construction location or method, including whether the ditch was fully excavated in dry land. Secondly, the NTWC recommends that the Agencies maintain the 2008 regulatory language which specifies "and drain only dry land." Omitting this component would significantly widen the scope of the proposed ditch exclusion. For example, if a constructed ditch comes to proximity or abuts a wetland, it may be drained. In this situation, the wetland-ditch boundary could erode, draining the wetland and classifying it as non-jurisdictional, making this exclusion far more expansive.

Groundwater - The Proposed Rule states that groundwater has never been considered WOTUS, noting that groundwater is naturally non-navigable, and asserts that its regulation "is most appropriately addressed by other Federal, State, Tribal, and local authorities." *Id*. at 52,541.

Since this point is not debated, the NTWC submits there is no reason to add groundwater to the list of exclusions. Moreover, there are situations when groundwater is subject to CWA jurisdiction, including "surface expressions of groundwater," including when groundwater emerges from the ground and contributes to baseflow in a relatively permanent stream, *id*., and situations like the one described in *Hawaii Wildlife Fund v. Maui*, 590 U.S. 165 (2020), where pollutants released to groundwater are shown to reach surface water. See 90 Fed. Reg. at 52,504 n. 8.

e. Proposed Removal of Interstate Waters and Intrastate Lakes and Ponds from the List of WOTUS Categories

The Agencies propose to eliminate "interstate waters" from the existing five-part definition of WOTUS, explaining the term may include "bodies of water that are not relatively permanent, standing, or continuously flowing or that are not themselves connected to a downstream traditional navigable water or the territorial seas, either directly or through one or more waters or features that convey relatively permanent flow," *id*. at 52516 and so may include waters that are not WOTUS under *Sackett*. The Agencies also contend that the proposed deletion is necessary to "address persistent litigation over this category." *Id*.

The NTWC opposes removing "interstate waters" from the listed categories in the WOTUS definition. The 2023 post-*Sackett* revisions to the 2023 rule already eliminated "interstate wetlands" from the WOTUS definition and therefore this proposed additional deletion would have no impact on the jurisdictional status of interstate wetlands. Instead, it may cause confusion and uncertainty, not the clarity that the Agencies profess to seek. It will add to the implementation burdens on EPA and the Corps and will make it harder for states and tribes with waters that cross jurisdictional lines to enforce their water quality protection laws.

The Agencies also recommend deleting intrastate lakes and ponds from the listed WOTUS categories. Previously this category was included when such waterbodies supported uses connected with interstate commerce, *see, e.g., id*. at 52,507-08, and currently the category is included provided those waterbodies meet the relatively permanent and continuous surface connection tests. The Agencies define the proposed deletion as a "ministerial change," *id*. at 52,533, but we believe it aids with implementation to acknowledge this category and helps ensure these intrastate waters will be considered under the WOTUS test rather than being automatically excluded.

3. Regulatory Impact Analysis

The NTWC considers the Regulatory Impact Analysis, as summarized in Section VI.A of the Proposed Rule, *id*. at 52,542, insufficient and incomplete. It completely ignores the negative consequences associated with decreased protection of wetlands and tributaries for both tribes and states across the country. Wetlands and tributaries serve as natural barriers, slowing down extreme hydrologic events like flooding. They serve as floodplains, retaining and controlling major storm surges. In his concurrence in *Sackett*, Justice Kavanaugh disagreed with the 'rewriting of "adjacent" to mean "adjoining"' because its narrowing of covered wetlands would lead to such negative consequences, noting, for example, "the Mississippi River has a large levee system to prevent flooding." Under the Court's "continuous surface connection" test, the presence of those levees (the equivalent of a dike) would seemingly preclude Clean Water Act

coverage of adjacent wetlands on the other side of the levees, even though the adjacent wetlands are often an important part of the flood-control project.' 598 U.S. at 725-26.

Instead, the Regulatory Impact Analysis focuses on costs to entities subject to the WOTUS rule and finds they would enjoy cost savings. *Id*. at 52,542. It acknowledges the Proposed Rule "would result in an increase in non-jurisdictional findings," *id*., but does not examine the impacts on WOTUS or on tribes and states left carrying this burden in their efforts to protect water quality.

The NTWC recognizes the vital need for flood protection and the importance of protecting natural systems that ensure the safety of tribal communities and infrastructure. It has been well documented by EPA, the U.S. Geological Survey, the National Oceanic and Atmospheric Administration (NOAA), numerous universities, and other scientific organizations that the long-term effects of a changing climate include an increase in heat waves and heavy precipitation events, resulting in increased flooding risks for certain regions such as the southeast United States and decreases of water resources in semi-arid areas. According to NOAA there were 115 weather and climate disasters in the United States from 2020 to 2024 that resulted in losses exceeding $1 billion. During that period, the United States experienced an average of 23 weather and climate disasters annually. In 2024 alone the United States experienced 27 billion-dollar disasters. These impacts are completely overlooked in the regulatory impact analysis, which is not only inappropriate but unscientific and misleading.

Wetlands also can mitigate impacts resulting from a changing climate by acting as carbon sinks. This benefit is due to the anaerobic nature of wetland soils, which limit the microbial processes that break down organic materials. In contrast, aerobic soils allow these microbial processes to proceed, resulting in respiration of carbon dioxide. NOAA, its National Oceans Service, and numerous universities have published information showing that mangrove and salt marshes remove carbon from the atmosphere at a rate approximately ten times greater than tropical forests. None of these benefits provided by wetland areas or the inevitable loss of these benefits under the Agencies updated definition of adjacent wetlands are accounted for in the Regulatory Impact Analysis.

Additionally, wetlands are known to improve water quality through the uptake of nutrients that can lead to issues such as harmful algal blooms, fish kills, or hypoxic zones, like we see in the Gulf of the United States. The costs these negative impacts have throughout the United States on tourism, the recreational industry, and the fishing industry are not mentioned in the Regulatory Impact Analysis, despite the Proposed Rule's revisions resulting in vastly less coverage of wetlands and in the face of EPA's recommendations for nutrient criteria for both states and tribes to achieve in their waterbodies. Many tribes and states have been working to reduce nutrient pollution in their waterways to be able to meet their nutrient criteria, whether those criteria are proposed by EPA or by the tribes and states themselves. It is misleading to not account for this loss of water quality and resulting costs to tribes and states in the Regulatory Impact Analysis.

The Regulatory Impact Analysis also fails to account for inevitably lost cultural resources or potential violations of tribal treaties. The NTWC asserts that many cultural and ecological resources that are integral in defining tribal peoples are predominately or exclusively found in tributaries and wetlands that the Agencies propose should be non-jurisdictional. *See, e.g.*, the discussion above regarding the proposed definition of "continuous surface connection" and its

likely impacts on wetlands in Alaska. Again, no value is assigned to the loss of these resources or the potential impact and/or legal ramifications of not upholding the treaty rights of tribes within this Regulatory Impact Analysis. This is inappropriate and must be addressed by the Agencies.

Finally, the Analysis does not mention the costs associated with the inevitable degradation of waterbodies that would remain covered by the Clean Water Act, due to the proposed significant decrease in protected waterbodies and the negative impacts that would have, discussed above. There will be increased impetus for states and tribes to prioritize and protect their waters, whether they remain WOTUS or not, but these costs are not considered. The Analysis also fails to recognize recent decreases in federal funding for states and tribes to implement CWA programs, such as CWA § 106 Water Pollution Control and CWA § 319 Nonpoint Source Pollution programs, while simultaneously increasing the burdens on states and tribes to protect previously jurisdictional WOTUS. These costs must be addressed by the Agencies in the Regulatory Impact Analysis for the sake of transparency and the edification of tribal and state governments that will be left with the burden of implementing productive and effective water quality programs.

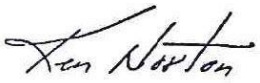
Conclusion

The NTWC is concerned that the Proposed Rule takes a drastic turn than *Sackett* dictates by removing more of the Nation's waters than necessary from coverage under the CWA. The proposal calls on states and tribes to fill the gaps, imposing an immense burden on those governments. Doing so would be especially burdensome for tribes, which have the fewest resources to devote to such a substantial undertaking. At present, no tribes have applied for authorization to manage the CWA Section 404 dredge and fill permitting program, due to their lack of resources to implement it. Yet, by removing waters from CWA coverage, the Proposed Rule would significantly decrease the issuance of CWA Section 404 permits, leaving an even larger gap for tribes to fill and an increased burden on already financially challenged tribal environmental programs. In addition, the Proposed Rule would decrease the number of CWA § 401 water quality certifications that will be required, and this is a program many tribes have successfully taken on to protect their waters.

The Proposed Rule would allow polluters to have an increased, detrimental impact on the Nation's waterways. The Agencies themselves recognize that the proposed revisions to the WOTUS definition would lead to substantial decreases in the number of waterways protected by CWA permitting. This rulemaking represents the sixth proposed change to the WOTUS definition over the last thirty years, with no end in sight to the controversy that ensues after every rule change. The EPA's 2023 rule conforming to the *Sackett* decision is the best way to approach the issue, consistent with the Supreme Court's decision and relying on the case-by-case decision-making authority of the Agencies to implement it rather than catering to polluting interests.

The NTWC appreciates the opportunity to share our concerns and comments regarding the proposed rule to update the definition of WOTUS.

Sincerely,



Ken Norton, Chair
National Tribal Water Council