Holland & Hart



David Chung

Partner
202.654.6919
Washington, DC
DYChung@hollandhart.com



Ashley Peck

Partner
801.799.5913
Salt Lake City
aapeck@hollandhart.com



Melissa Reynolds

Partner
801.799.5875
Salt Lake City
melreynolds@hollandhart.com

New WOTUS Proposal Would Further Shrink Federal Jurisdiction Over Streams and Wetlands

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Key Takeaways

- **Jurisdiction Over Stream Channels:** Federal regulatory agencies proposed a new definition of "relatively permanent" waters that would eliminate Clean Water Act ("CWA") jurisdiction over many, if not most, intermittent streams. Ephemeral streams were arguably already excluded from CWA jurisdiction under *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023) and *Rapanos v. United States,* 547 U.S. 715 (2006), though the current definition leaves that vague. The agencies anticipate the greatest impact would occur in the arid West.
- **Jurisdiction Over Wetlands:** The agencies propose replacing the "wet season" and "abutting" concepts in their prior proposed rulemaking with a requirement that wetlands have perennial surface water that is continuously connected with surface water in another jurisdictional water, except that time-limited temporary interruptions in surface water can occur for anomalous events like droughts or non-anomalous events like dry spells. The preamble emphasizes that only the portion of a wetland that is indistinguishably part of the jurisdictional water would itself be jurisdictional.
- **Public Comment:** The public may submit comments on the supplemental proposal until October 9, 2026, after which the Agencies will consider whether to issue a final rule amending the definition of waters of the United States.

Background & Context

On September 9, 2026, the U.S. Environmental Protection Agency and the Department of the Army, Corps of Engineers (collectively, "the agencies") published a Supplemental Notice of Proposed Rulemaking ("SNPRM") proposing additional regulatory options for revising the definition of "waters of the United States" ("WOTUS") in 33 C.F.R. § 328.3 and 40 C.F.R. § 120.2. *See* 91 Fed. Reg. 57,284 (Sept 9, 2026). This SNPRM supplements the agencies' November 2025 Notice of Proposed Rulemaking ("NPRM") to further revise the current definition of WOTUS in light of the Supreme Court's May 25, 2023 decision in *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023). The SNPRM leaves in place other aspects



Jennifer Scheller Neumann

Of Counsel
202.654.6903
Washington, DC
jsneumann@hollandhart.com



Paul Babbitt

Associate & Director of Federal Affairs
202.289.3490
Washington, DC
PJBabbitt@hollandhart.com

of the November 2025 NPRM.

The regulatory definition of WOTUS, which determines the scope of federal authority under the CWA, has caused significant uncertainty for decades. And while the Supreme Court has weighed in on aspects of the definition on four separate occasions, most recently in *Sackett,* there are still numerous unresolved questions about the scope of federal regulatory authority under the Act. Interest remains high; since publishing the November 2025 NPRM, the agencies have received over 200,000 public comments. The agencies' SPNRM is certain to draw scores of additional comments.

Proposed Changes

The SNPRM proposes additional regulatory options for defining two key terms in the existing regulations—"relatively permanent" and "continuous surface connection"—and proposes a new definition of "perennial."

"Relatively Permanent." The agencies propose to define "relatively permanent" to mean "perennial bodies of water," which departs from the NPRM's wet season concept.

The proposal explains that:

> 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. 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 such as low tide or a regularly occurring dry spell.

91 Fed. Reg. at 57,296.

The qualifier, a single period of up to 30 consecutive days, means that if any single interruption of flow lasts longer than 30 days, or if flow is interrupted by a non-anomalous event on more than one occasion in a one-year period, regardless of the length of each interruption, the waterbody would not be considered relatively permanent.

Similarly, an anomalous event would not cause an otherwise perennial body of water to become non-jurisdictional unless the anomalous event lasts longer than five years, in which case the anomalous condition would become part of the baseline and the waterbody would become non-jurisdictional if it dried up for more than one 30-day period in a year.

"Perennial." The agencies propose to define "perennial" as "having standing or continuously flowing water every day of the year during ordinary conditions." The agencies also seek comment on whether

"perennial" should instead be defined consistent with the 2020 Navigable Waters Protection Rule as "surface water flowing continuously year-round."

"Continuous Surface Connection." The SPRNM proposes to define "continuous surface connection" as "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."

Consistent with the proposed new definition of "relatively permanent," the definition of "continuous surface connection" makes it clear that "temporary interruptions in the surface water connection may occur as the result of anomalous events such as drought or dry spell" and "[a] temporary interruption in the surface water connection lasting 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."

The agencies are also seeking comment on whether the terms "adjacent" or "abutting" should be removed from the definition.

Significant Issues & Implications

Narrowing of Jurisdictional Scope. If finalized, the supplemental options would significantly narrow CWA jurisdiction by generally limiting jurisdiction to perennial waters and wetlands that have perennial surface water that is continuously connected to another jurisdictional water. Most seasonal waters would not meet the narrower definition of "relatively permanent," nor would wetlands that abut jurisdictional waters but have only a seasonal, continuous surface water connection to the jurisdictional water.

Disproportionate Regional Impact. The agencies state that they anticipate the greatest impact in the arid West, where intermittent streams drive much of the hydrology and "most intermittent streams would not satisfy the requirements [under] the supplemental option." 91 Fed. Reg. at 57,298.

State and Tribal Gap-Filling. Waters falling outside the narrower federal definition could still be subject to State and Tribal regulation under their own authorities.

Section 404 Permitting. The agencies state that they anticipate that the CWA Section 404 program would see the most significant programmatic changes, with projected reductions in required permits and compensatory mitigation relative to the status quo.

Ease of Administration. The agencies state that the perennial-focused standard would be easier for landowners and regulators to implement than the previously proposed "wet season" concept, as it establishes a bright-line threshold that should be observable without expert consultation. Similarly, the 30-day temporal threshold for non-anomalous interruptions and the five-year drought cap are intended to promote regulatory certainty

without the need to consult experts.

What Comes Next?

The comment period will remain open until October 9, 2026, after which the Agencies will consider whether to issue a final rule redefining WOTUS.

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