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**Julia Anastasio**

1725 I Street, NW, Ste. # 225,  
Washington, DC 20006

TEL: 202-756-0600

WWW.ACWA-US.ORG

January 5, 2026

Ms. Stacey Jensen  
Office of Water  
Oceans, Wetlands, and Communities Division  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., NW  
Washington, DC 20460

Mr. Milton Boyd  
Assistant Secretary of the Army for Civil Works  
Department of the Army  
108 Army Pentagon  
Washington, DC 20310-0104

Re: Updated Definition of “Waters of the United States”, Docket ID No. EPA-HQ-OW-2025-0322

Dear Ms. Jensen and Mr. Boyd,

On behalf of the members of the Association of Clean Water Administrators (ACWA), we appreciate the opportunity to comment on the U.S. Environmental Protection Agency (EPA) and U.S. Department of the Army, Corps of Engineers’ (USACE) proposed rule, “Updated Definition of ‘Waters of the United States’” (“proposed rule”), revising the definition of “Waters of the United States” (WOTUS) under the federal Clean Water Act (CWA).

ACWA is the independent, nonpartisan national organization of state, interstate, and territorial water program managers who serve as co-regulators with EPA and USACE in implementing the CWA. States have a unique and substantial interest in any federal regulatory updates or policy positions that define terms central to CWA jurisdiction. The WOTUS definition—long the subject of litigation, federal rulemakings, and judicial interpretation—establishes the outer bounds of federal authority and directly affects permitting, compliance, restoration, and infrastructure planning functions carried out by state surface water programs. A durable, clear, and workable WOTUS definition is essential to the consistent, lawful, and efficient administration of clean water programs nationwide.

State clean water regulators therefore appreciate the agencies’ efforts to develop a durable definition grounded in the Supreme Court’s decision in *Sackett v. EPA*<sup>1</sup> and structured to promote transparency, predictability, and consistency in jurisdictional determinations. We also appreciate the agencies’ early and proactive engagement with state and territorial clean water regulators through Executive Order 13132 (*Federalism*) consultation, dedicated state listening sessions, and opportunities for technical input.

<sup>1</sup> *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023).

In response to the proposed rule, ACWA provides the agencies with the following comments and recommendations:

1. **Revised Definitions – “Relatively Permanent” and “Wet Season”:** The proposed rule defines “relatively permanent” waters as those that are standing or continuously flowing year-round or, at minimum, during a predictable “wet season”— which may include extended periods in which average monthly precipitation exceeds average monthly evapotranspiration. Under this framework, ephemeral streams that flow solely in direct response to precipitation events would not qualify as relatively permanent and therefore would fall outside federal CWA jurisdiction. States note that the proposed definition has significant implications for hydrologically variable regions and will require clear, technically workable criteria for conducting “wet season” analyses, including flows from snowmelt.

**ACWA Recommendation:** ACWA supports including a definition of “relatively permanent” that focuses on waters that are standing or continuously flowing year-round or, at minimum, during extended periods of predictable, continuous surface hydrology occurring in the same geographic feature year after year in response to the wet season. The agencies should provide additional detail on the criteria and hydrologic indicators used to conduct a “wet season” analysis. State regulators would benefit from clear parameters for identifying extended periods of predictable, continuous surface water hydrology within the same water feature over multiple years.

2. **Revised Definition – “Tributary”:** The proposed rule defines “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.” ACWA supports defining “tributary” in a way that encompasses permanent and relatively permanent waters that meet specific hydrologic requirements.

**ACWA Recommendation:** The agencies should identify and prioritize the hydrologic and geomorphic criteria most relevant to the tributary analysis and share these criteria with states for discussion prior to finalizing the rule. Such engagement will help ensure the definition is implementable and scientifically defensible.

3. **Treatment of Interstate Waters:** The proposed rule removes interstate waters as an independent category of jurisdictional waters. Interstate waters would now be jurisdictional only if they meet another WOTUS category, such as being a traditional navigable water, a relatively permanent tributary, or an adjacent wetland.

**ACWA Recommendation:** States request further explanation in the preamble regarding how interstate waters should be evaluated under the remaining categories and how the agencies intend to ensure national consistency in these determinations. This clarification would help ensure national consistency while recognizing statutory and judicial constraints.

4. **Excluded Ditches:** The proposed rule revises and clarifies the ditch exclusion. Non-navigable ditches excavated entirely in dry land are excluded from WOTUS, even when they exhibit relatively permanent flow and connect to jurisdictional waters. Conversely,

ditches excavated in wetlands or other jurisdictional waters are not categorically excluded.

ACWA Recommendation: States recommend additional guidance regarding how to evaluate ditches where historical construction conditions are uncertain or where physical evidence has been altered by maintenance, erosion, or longstanding land use. The agencies should address, in the rule's preamble, the circumstances and examples under which certain ditches may require further analysis or could be considered jurisdictional. This will help states apply the rule consistently, particularly in agricultural and transportation contexts.

5. **Burden of Proof for Jurisdictional Determinations for Ditches:** The proposed rule shifts the burden of proof from project proponents to state and federal regulators to demonstrate that a ditch was not constructed or excavated in dry land. Where historical data are insufficient to resolve construction conditions, the proposed rule would default to treating the ditch as non-jurisdictional. Several states have expressed concerns regarding the potential effects of this regulatory change to CWA program implementation. Additional guidance will be necessary to ensure states and federal agencies apply the demonstrative standard consistently, particularly in regions where historical records are limited or where landscape conditions have changed substantially.

ACWA Recommendation: ACWA recommends that the agencies clarify in the preamble how the burden of proof should be applied when making jurisdictional determinations under the proposed framework, particularly in data-limited settings common in many states (*e.g.*, what data and information are sufficient for a determination? Is the burden of proof substantial or modest?). Clear expectations will support consistency across regions and between state and federal regulators.

6. **Prior Converted Cropland / Waste Treatment Systems / Groundwater:** The proposed rule preserves the longstanding exclusion for prior converted cropland (PCC) and returns to a simplified definition intended to provide greater predictability for landowners and producers. Under the proposal, land retains its PCC status unless it has been abandoned for agricultural use for more than five years and has reverted to a wetland that meets the WOTUS definition. The proposed rule also clarifies the exclusion for waste treatment systems by providing a formal definition that encompasses all components designed to convey, store, or treat wastewater. The proposed rule also expressly excludes groundwater from the definition of WOTUS, including groundwater drained through subsurface drainage systems.

ACWA Recommendation: ACWA generally supports greater definitional clarity for “prior converted cropland,” “waste treatment systems,” and groundwater. The agencies should provide illustrative examples for each exclusion to clarify the agencies’ intent and facilitate consistent implementation among the states. Specifically, ACWA recommends that the agencies:

- Clarify that prior converted cropland only loses its exclusion when abandoned and reverts to wetlands;
- Provide details on systems that qualify as “waste treatment systems”; and

- Ensure that this exclusion of groundwater from WOTUS remains consistent with the Supreme Court’s decision in *County of Maui v. Hawaii Wildlife Fund*<sup>2</sup> and preserve the applicability of NPDES requirements for discharges through groundwater that are determined to be the functional equivalent of a direct discharge to a WOTUS.

7. **Funding for States Implementation:** Changes to the WOTUS definition will have significant implications for state program workloads and budgets.

ACWA Recommendation: ACWA encourages the agencies to identify and pursue adequate funding mechanisms - through both existing and new sources - to support states as they implement the finalized rule, especially where reductions in federal jurisdiction may shift permitting, monitoring, or enforcement responsibilities to state programs.

8. **“Alternate Approaches”:** States have expressed concerns regarding the proposed rule’s numerous references to “alternative approaches” – and the inherent ambiguity this would create - regarding the agencies’ intended regulatory structure of CWA programs.

ACWA Recommendation: Where the agencies plan to adopt “alternative approaches”, the proposed rule should expressly direct the adoption of alternative approaches that prioritize the most resource-protective alternatives allowable within the scope of *Sackett* and other legal precedent. This could help to achieve a more balanced share of state and federal responsibilities for water quality protection.

9. **Implementation, Guidance, and Technical Assistance:** States will require timely, coordinated implementation support in response to any new WOTUS definition. Some states have expressed concern that a narrower federal definition of WOTUS may limit EPA’s ability to assist with enforcement actions in circumstances where violations involve waters that fall outside the proposed federal jurisdiction but remain fully regulated as “waters of the state.” While the narrowed scope of federal jurisdiction does not restrict a state’s independent authority to regulate discharges to state waters, states request clarification regarding how EPA intends to address enforcement coordination, technical support, and compliance assistance involving activities that may involve both state and federal interests.

ACWA Recommendation: ACWA encourages the agencies to work closely with states to develop:

- Technical guidance, field methods, and decision tools;
- Training for state and federal field staff; and
- Clear processes for resolving jurisdictional questions early and consistently. Early collaboration will help prevent inconsistent interpretations and reduce regulatory uncertainty.

ACWA’s comment development process seeks to capture the diverse perspectives of states, territories, and interstates that implement CWA programs. The agencies should give substantial

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<sup>2</sup> *County of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165 (2020)

1725 I Street, NW, Ste. # 225, Washington, DC 20006  
TEL: 202-756-0600

consideration to comments submitted directly by individual state, interstate, and territorial agencies. We appreciate the opportunity to provide these recommendations and look forward to continued collaboration as the rulemaking proceeds. Please contact ACWA Executive Director Julia Anastasio at [janastasio@acwa-us.org](mailto:janastasio@acwa-us.org) or (202) 756-0600 with any questions regarding these comments.

Sincerely,

A handwritten signature in black ink that reads "Shelly Lemon". The signature is fluid and cursive, with "Shelly" on the top line and "Lemon" on the bottom line.

Shelly Lemon  
President  
Association of Clean Water Administrators