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January 5, 2026

The Honorable Lee Zeldin
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, DC 20460

The Honorable Adam Telle
Assistant Secretary for Civil Works
U.S. Army Corps of Engineers
441 G Street NW
Washington, DC 20314-1000

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

Dear Administrator Zeldin and Assistant Secretary Telle:

The 46 undersigned organizations and individuals are dedicated to public health, public safety, and the quality of our waterways. We span the state of Massachusetts and beyond, working closely with communities large and small to protect our water resources and to ensure a climate-resilient environment for future generations.

We are concerned about the Proposed Rule as it is inconsistent with the purpose of the Clean Water Act, does not reflect the scientific consensus, and is not required by the Supreme Court's decision in *Sackett v. EPA.* We urge the Environmental Protection Agency ("EPA") to not alter the definition of the Waters of the United States ("WOTUS") or to amend the proposed Updated Definition as outlined below.

I. Healthy Wetlands, Tributaries, and Ephemeral Streams Protect Public Health, Support a Thriving Economy, and Feed Iconic Rivers.

Wetlands and streams are valuable resources that provide essential fish and wildlife habitats, prevent flooding, filter out harmful pollution, store carbon, and protect clean drinking water vital to public health. They are also the source of drinking water for tens if not hundreds of millions of Americans. Additionally, these waters are key to ensuring the health of watersheds more broadly. Major rivers and lakes cannot be effectively protected from pollution if the small streams that

flow into them are unprotected; and wetlands are the kidneys of the watershed, filtering out pollution.

Healthy headwaters – including tributaries and ephemeral streams – are vital to the health of Massachusetts' ecosystems and economy. Fish and wildlife populations only thrive with the clean, cool flows provided by healthy wetlands and headwater streams. Tributary streams contribute over 60% of discharge from drainage areas, making them an essential part of the biogeochemical process.[1] Ephemeral streams dramatically affect interstate waters, including between states with varying standards of water quality. Massachusetts is also home to four federally designated Wild & Scenic River systems. It is crucial that the small streams and tributaries in the headwater regions of these watersheds remain protected to ensure that these nationally significant rivers continue to thrive, especially amidst a changing climate and growing development pressures.

In Massachusetts, healthy wetlands and waterways protected by the Clean Water Act contribute to our state's $13.2 billion annual recreation economy and our $11 billion commercial fishery. The undersigned organizations represent members and stakeholders that rely on water resources of all kinds, including wetlands, for recreational, agricultural, water supply, and business activities that contribute to the health and wealth of our state, as well as others.

Although far less arid than the western United States, Massachusetts still experiences severe drought, and our rivers, drinking water supply, agricultural industry, and ecosystems have suffered as a result. We need to ensure our drinking water supplies are protected, as climate change brings more frequent and more severe droughts to our region.

The Clean Water Act has broad public support – 94% of Americans say that protecting the water in our nation's lakes, streams, and rivers is important.

II. Wetlands, Ephemeral Streams, and Tributaries Need to Be Protected at the Federal Level.

As we well know in the small states of New England, water does not respect political boundaries; it is interconnected. The Merrimack River flows for over sixty miles in New Hampshire before crossing into Massachusetts, and the Taunton, Blackstone, and Ten Mile Rivers all originate in Massachusetts but end in Rhode Island's Narragansett Bay. Similarly, the state's largest river, the Connecticut, enters Massachusetts from Vermont and New Hampshire, and continues into Connecticut. The interstate nature of our waterways necessitates strong federal protections that ensure no state suffers poor water quality due to another's policy shortcomings. Disparate state approaches make states downstream of more lax states vulnerable to reduced drinking water protection and weakened flood control.

Federal protection is necessary for the preservation of water quality for streams passing between states, especially for states with varying standards of regulation.

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[1] *See* Laurie C. Alexander, *Science at the Boundaries: Scientific Support for the Clean Water Rule*, Freshwater Sci. 1588, 1588-94.

III. EPA's Proposed Definitions of "Relatively Permanent Waters" and "Wet Season" Are Insufficiently Protective of Water Resources and Therefore Are Inconsistent with the Clean Water Act.

EPA's definition of WOTUS must be consistent with the purpose of the Clean Water Act, namely, "restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters."[2] EPA must follow the recent U.S. Supreme Court decision *EPA v. Sackett*. However, going beyond *Sackett* to strip Clean Water Act protections from additional waterways without the direction of Congress or the courts is neither a reasonable interpretation of the Clean Water Act nor consistent with its goals of protecting the health of the Nation's waters.

In *Sackett*, the Supreme Court narrowed the waters protected by the Clean Water Act to "only those relatively permanent, standing or continuously flowing bodies of water forming geographical features that are described in ordinary parlance as streams, oceans, rivers, and lakes."[3] EPA's 2023 rule accounted for this narrowed definition. EPA's Proposed Rule further attempts to define "Relatively Permanent," "Continuously Flowing," and related terms.[4]

The Proposed Rule would define "Relatively Permanent" as "[s]tanding or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season."[5] Similarly, it would limit Clean Water Act jurisdiction to just those wetlands that have a continuous surface connection, which it defines as "having surface water at least during the wet season and abutting (*i.e.*, touching) a jurisdictional water."[6]

The Proposed Rule does not include a definition for "Wet Season," but it says that "'at least during the wet season' is intended to include 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."[7]

However, EPA's proposed definitions and description of the wet season are not supported by the scientific consensus, not consistent with the purpose of the Clean Water Act and not required by *Sackett*. The 2015 rule had also already adequately defined tributary streams to include ephemeral streams protected within WOTUS, while providing preservation of WOTUS.[8]

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[2] 33 U.S.C.A. § 1251; *see*, *e.g., City and County of San Francisco v. EPA*, 604 U.S. 334, 355 (2025) (The courts "are not obligated to accept administrative guidance that conflicts with the statutory language it purports to implement."); *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1477 (2020) (rejecting reading of Clean Water Act that would have "consequences that are inconsistent with major congressional objectives").

[3] *Sackett v. Env't Prot. Agency*, 598 U.S. 651, 671 (2023)(internal quotation marks omitted).

[4] *See Updated Definition of "Waters of the United States,"* proposed rule, 90 Fed. Reg. 52498 (Nov. 20, 2025) (to be codified at 33 C.F.R. pt. 328 and 40 C.F.R. pt. 120), "Relatively permanent flow" is 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.") [hereinafter *Proposed Rule*], https://www.govinfo.gov/content/pkg/FR-2025-11-20/pdf/2025-20402.pdf.

[5] *Proposed Rule* at 52517.

[6] *Proposed Rule* at 52527.

[7] *Proposed Rule* at 52518.

[8] *See* Alexander, *supra* note 1(Ephemeral streams count as tributaries, which were first defined in 2015. A "tributary" in the 2015 rule was defined as a water "that contributes flow directly or through another water" to (a)(1) all traditional navigable waters, (a)(2) all interstate waters, including interstate wetlands,

A. EPA Should Modify the Proposed Rule's Definition of Relatively Permanent to Follow Hydrogeological Science.

Surface waters do not fall neatly into "permanent" or "non-permanent" categories, including water with perennial, intermittent, and ephemeral flows.[9] Rather, "[a]ll tributary streams, regardless of size or flow regime, are physically, chemically, and biologically connected to downstream rivers." The permanence of surface water will vary but the waterbody—and its impacts—will continue even after the initial precipitation has ended.[10]

Furthermore, the permanence of waterbodies cannot be determined only from observations of the surface alone or measurements of precipitation, as EPA proposes to do.[11] The interactions between the waterbody and the subsurface water must also be studied (some ephemeral waterbodies are fed by groundwater).[12] Intermittent and ephemeral streams are inextricably connected to the water table aquifer, with most intermittent streams functioning as the surface expression of the water table.[13]

EPA's definition of Relatively Permanent waters should be revised in accordance with the current scientific understanding of ephemeral waterbodies and their interactions with surface water and groundwater.

B. EPA's Inclusion of "Wet Season" In Its Proposed Definition of Relatively Permanent is Unworkable in Much of The U.S. and Would Create Additional Regulatory Burden.

Some regions, including New England, lack a "wet season" and instead experience relatively constant levels of precipitation year-round. For these regions, a "Wet Season" defined by "when average monthly precipitation exceeds average monthly evapotranspiration," as EPA proposes,

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and (a)(3) the territorial seas. "Tributaries can be natural, altered, or man-made and include rivers, streams, canals, and ditches that are not specifically excluded").

[9] *Alexander, supra* note 1 at 1589 ("All tributary streams, regardless of size or flow regime, are physically, chemically, and biologically connected to downstream rivers."), https://www.journals.uchicago.edu/doi/full/10.1086/684076.

[10] *See* Craig B. Brinkerhoff *et al.*, *Ephemeral Stream Water Contributions to United States Drainage Networks*, 384 Science 1476, (2024) , https://www.science.org/doi/10.1126/science.adg9430.

[11] *Alexander, supra* note 1 at 1593 ("Groundwater interacts with surface water in nearly all landscapes, ranging from small streams, lakes, and wetlands in headwater areas to major river valleys and seacoasts."); *Id.* Hydrologically they are not distinct—to protect surface water, groundwater must also be protected, https://www.journals.uchicago.edu/doi/full/10.1086/684076.

[12] *Id.*

[13] *See* Brinkerhoff, *supra* note 10; Robin Kaule and Benjamin S. Gilfedder, Groundwater Dominates Water Fluxes in a Headwater Catchment During Drought, 3 Frontiers in Water 706932 (2021), https://www.frontiersin.org/journals/water/articles/10.3389/frwa.2021.706932/full; Edisson A. Quichimbo et al., Characterising groundwater-surface water interactions in idealised ephemeral stream systems, 34 Hydrological Processes 3792 (2020), https://singer.eri.ucsb.edu/assets/pdfs/publications/Quichimbo_etal_2020.pdf; Thomas C. Winter, Relation of streams, lakes, and wetlands to groundwater flow systems, 7 Hydrogeology 28-45 (1999), https://link.springer.com/article/10.1007/s100400050178.

would be arbitrary and vary year-to-year. Furthermore, by only counting precipitation when it falls, this definition would exclude crucial ephemeral waterbodies formed by snowmelt, a significant category of spring waterbodies in New England.

We are also concerned that the definition would require that ephemeral waterbodies have continuous flow for the entire period of the Wet Season. Some ephemeral waterbodies may be important to their ecosystems and the downstream waters despite not experiencing flow for the entirety of an arbitrarily defined Wet Season. The *Sackett* court acknowledges that "temporary interruption in surface connections may sometimes occur because of phenomena like low tides or dry spells;" the same analysis applies to Wet Seasons.[14] Such a requirement would also be inordinately burdensome to administer, as it would require continuous monitoring of the waterbody for a period of months using remote tools. Even EPA acknowledges that relying on minimum flow volume is impractical and "is challenging to measure directly, in particular in a stream where flow is not always present and may require multiple field-based measurements that can make implementation inefficient and result in delays in making a jurisdictional determination."[15]

EPA's Proposed Definition could also result in the same waterbodies being classified differently year-to-year depending on changes in annual rainfall levels. Such inconsistency and uncertainty would be burdensome for both regulators and affected neighbors. Rather than creating a consistent bright line rule, EPA has instead proposed a shifting and difficult-to-predict system that requires considerable monitoring and investment.[16]

Instead, EPA could define Wet Season as the duration of a hydroperiod, or "the amount of time a wetland holds water during an annual hydrological cycle."[17] Hydroperiods can be measured without visible surface water, allowing more reliable determination of Wet Seasons. Wet Seasons are dynamic events requiring greater information than provided simply through visible observations. In its definition, EPA should also account for the different periods of hydroperiods, each of which support different species.[18]

C. EPA's Proposed Definitions of "Tributary" Insufficiently Protects Water Resources and Therefore Is Inconsistent with the CWA.

The Proposed Definition of tributaries, which only encompasses those waterbodies with "bed and banks and an ordinary high-water mark" and which "contribute surface water flow…in a

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[14] *Sackett* at 678 ("We also acknowledge that temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells.").
[15] *Proposed Rule* at 52519.
[16] *Proposed Rule* at 52520 (defining period of relatively permanent surface water "where surface water inundation would be required for at least 90 days or 270 days as opposed to ''surface water at least during the wet season,'' as proposed"); *Proposed Rule* at 52518 ("The agencies acknowledge" that the wet season may have differing times and hydrology based on area, such as snowpack or delayed surface hydrology from transition of dry to wet season).
[17] Joel W. Snodgrass, Mark J. Komoroski, Bryan A. Lawrence & Joanna Burger, *Relationships among Isolated Wetland Size, Hydroperiod, and Amphibian Species Richness: Implications for Wetland Regulations*, 14 Conserv. Biol. 414, 414–19 (2000), https://doi.org/10.2307/2641607.
[18] See Snodgrass, *supra* note 17 (defining how hydroperiods vary for different species).

typical year," is inconsistent with the scientific literature.[19] The hydrogeologic consensus does not define tributaries in a way that requires a continuous surface connection.[20] Connecting waters are still functionally connected to downstream waters, even without continuous surface flow.[21] It is therefore scientifically inappropriate to exclude ephemeral and intermittent flow based on the absence of a continuous surface connection. The 2015 rule, which considered the cumulative effect of ephemeral streams and variation of degree of connectivity, better defined tributaries in a way that was supported by peer reviewed studies.[22]

D. The Proposed Definition of Continuous Surface Connection Does Not Accurately Reflect the Interaction of Intermingling Waterbodies.

The Proposed Rule's definition of continuous surface connection is more restrictive than envisioned by the Supreme Court in *Sackett.* The *Sackett* court explicitly acknowledged wetlands should still be considered to have a continuous surface connection to waters of the United States, despite "temporary interruptions in surface connection . . . because of phenomena like low tides or dry spells."[23] Requiring an unbreaking connection between wetlands and surface waters for the entirety of a Wet Season is inconsistent with the fact-specific and contextual inquiry imagined in *Sackett.* Instead, EPA should adopt a definition of continuous surface connection that only requires wetlands to abut jurisdictional waters rather than also requiring surface water flow between them of a specific duration.[24]

The Proposed Definition would also incorrectly exclude scientifically defined wetlands that lack a surface connection as well as those portions of adjacent wetlands that do not directly abut jurisdictional waters.[25] EPA ignores the fact that surface water flows and mixes with other water in a body of water, making such a definition untenable. As the Supreme Court reasoned in *Riverside* (and approvingly quoted in *Sackett*): "the transition from water to solid ground is not necessarily or even typically an abrupt one."[26] In other words, determining exactly where a

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[19] *See Proposed Rule* at 52525, 52510 (Definition for Tributaries).
[20] *See* Alexander*, supra* note 1 ("All tributary streams, regardless of size or flow regime, are physically, chemically, and biologically connected to downstream rivers.").
[21] *Id.* at 1590 (Ephemeral, intermittent, and perennial flows influence fundamental biogeochemical processes by connecting channels and shallow groundwater with other landscape elements).
[22] *Id.* at 1592 (The 2015 rule defined tributaries as waters that "contribute flow directly or through another water" and included "perennial, intermittent, or ephemeral streamflow".), 1591 (Noting that "low frequency, low-duration streamflows caused by flash floods can have important downstream effects when they transport large amounts of water and materials," and incremental effects of individual streams and wetlands are cumulative across entire watersheds and, therefore, must be evaluated in context with other streams and wetlands.").
[23] *Sackett* at 678.
[24] *See Proposed Rule* at 52530 (The agencies also request comment on whether ''continuous surface connection'' is best interpreted to mean simply abutting, i.e., touching, consistent with the approach under the March 2025 Continuous Surface Connection Guidance currently being implemented.").
[25] *See Proposed Rule* at 52538 (EPA argues "[n]ot all water features that meet the agencies' definition of ''wetlands'' would meet the test of having surface water at least during the wet season, however"), 52527 (EPA proposes the limitation that "only those portions of a wetland with continuous surface hydrology at least during the wet season, and that are abutting, would be jurisdictional as adjacent wetlands, no matter the full delineated scope of the wetland.").
[26] *Sackett* at 677 (*quoting United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 132 (1985)).

continuous surface connection ends or how much of a wetland has such a connection is an expensive and laborious undertaking. Requiring property owners to determine whether the surface water will be specifically affected by other sources creates an unnecessary burden, and the *Sackett* court cautioned against requiring extensive testing of properties to determine if they are subject to regulation.[27]

E. Groundwater Cannot be Entirely Excluded From WOTUS

Within hydrological science, there is little distinction between surface water and groundwater. This is especially true on Cape Cod, where 93% of all groundwater recharge discharges to waters of the United States.[28] On Cape Cod, there is a direct and quick relationship between groundwater recharge locations. Pollutants that enter groundwater outflow into streams, the ocean, as well as the public water supply.[29] Most groundwater in Cape Cod and Southeastern Massachusetts is in sand and gravel aquifers that are shallow and susceptible to contamination from anthropogenic sources and saltwater intrusion. Continued land development and population growth in these areas have created concerns that potable water will become less available and that the quantity and quality of water flowing to natural discharge areas such as ponds, streams, and coastal waters will continue to decline."[30]

The Supreme Court acknowledged the close relationship between discharges to groundwater and discharges to surface water in *County of Maui v. Hawaii Wildlife Fund.* The *Maui* decision holds that a discharge (even discharge to groundwater) is subject to the Clean Water Act when it is the functional equivalent of a direct discharge to waters of the United States.[31]

By proposing to expressly exclude groundwater from the definition of waters of the United States, EPA threatens to muddle the Supreme Court's holding in *Maui*. The current Clean Water Act regulatory regime around groundwater is sufficiently clear and in line with Supreme Court precedent; an exclusion is unnecessary and could confuse the regulatory landscape. The proposed changes will endanger communities with similar hydrogeology to Cape Cod across the country.

IV. Conclusion

We are deeply concerned about the Proposed Rule as it is inconsistent with the purpose of the Clean Water Act, does not reflect the scientific consensus, and is not required by the Supreme Court's decision in *Sackett v. EPA*. We urge EPA to not alter the definition of the Waters of the United States or to amend the proposed Updated Definition as outlined above.

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[27] *Sackett* at 681 ("This freewheeling inquiry provides little notice to landowners of their obligations under the CWA. Facing severe criminal sanctions for even negligent violations, property owners are left to feel their way on a case-by-case basis.")(internal citations omitted).

[28] *See* Jeffrey R. Barbaro, John P. Masterson & Denis R. LeBlanc, *Science for the Stewardship of the Groundwater Resources of Cape Cod,* Massachusetts*, U.S. Geological Survey Fact Sheet 2014-3067* (2014), https://pubs.usgs.gov/publication/fs20143067#:~:text=Abstract,for%20more%20than%2050%20years.

[29] *Id.* (noting the close relationship between groundwater and outflow streams.).

[30] *Id.*

[31] *Cnty. of Maui, Hawaii v. Hawaii Wildlife Fund*, 590 U.S. 165, 183 (2020).

Thank you for considering our comments.

Sincerely,

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