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Powering Strong Communities

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Submitted electronically via https://www.regulations.gov.

Honorable Lee Zeldin
Administrator, U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Mr. Adam Telle
Assistant Secretary of the Army (Civil Works)
Department of the Army
108 Army Pentagon
Washington, D.C. 20310

RE: Comments of the American Public Power Association on the Proposed Updated Definition of "Waters of the United States" (Docket ID No. EPA–HQ–OW–2025–0322)

Dear Administrator Zeldin and Assistant Secretary Telle,

On behalf of the American Public Power Association (APPA), thank you for the opportunity to submit comments regarding the U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' Proposed Updated Definition of "Waters of the United States" (WOTUS), published at 90 Fed. Reg. 52,498 (November 20, 2025).

APPA is the national voice of not-for-profit, community-owned utilities that power 2,000 towns and cities across the United States. Our members serve more than 49 million Americans and employ 96,000 people, providing reliable, affordable electricity and strengthening their communities through superior service and engagement.

We appreciate the Agencies' efforts to clarify and strengthen the WOTUS definition, and we support the overall direction of the Proposed Rule. As detailed in our attached comments, APPA offers several recommendations to clarify the definition, align it with the Clean Water Act and U.S. Supreme Court precedent, and facilitate effective implementation. Our comments emphasize the importance of clear, predictable, and workable federal regulations that balance environmental protection with the operational needs of public power utilities.

Key recommendations include:

- Clarifying the scope of traditional navigable waters (TNW), removing "interstate waters" as an independent category, and refining the definition of "tributary" to require relatively permanent flow and direct connection to a TNW.

- Supporting the proposed "relatively permanent" definition and the use of tools such as the Antecedent Precipitation Tool (APT) and Web-based Water Budget Interactive Modeling Program (*Web*WIMP) for wet-season determinations.
- Support the definition of "continuous surface connection" for adjacent wetlands, ensuring only physically connected wetlands are regulated.
- Strongly supporting exclusions for ditches, waste treatment systems, and groundwater with recommendations for clear documentation and evidence-based implementation.
- Recommending the establishment of predictable timeframes for issuing approved jurisdictional determinations to avoid project delays and regulatory uncertainty.

We believe these targeted clarifications will promote consistent implementation, reduce unnecessary permitting burdens, and provide long-term regulatory certainty for public power utilities and other stakeholders.

Thank you for your consideration of APPA's comments. We look forward to continued engagement with the Agencies and stand ready to support the implementation of a clear, durable, and legally sound definition of WOTUS.

Please contact me at 202-467-2900 or CSlaughter@PublicPublic.org should you have any questions regarding our comments.

Sincerely,

Carolyn Slaughter
Senior Director, Environmental Policy
American Public Power Association

Cc: Stacy Jensen, Oceans, Wetlands and Communities Division, Office of Water, EPA
Milton Boyd, Office of the Assistant Secretary of the Army for Civil Works

RE: American Public Power Association Comments on the U.S. Environmental Protection Agency's and U.S. Army Corps of Engineers' Proposed Updated Definition of "Waters of the United States" (90 Fed. Reg. at 52,498; November 20, 2025) Docket ID No. EPA–HQ–OW–2025–0322.

Dear Administrator Zeldin and Assistant Secretary Telle:

The American Public Power Association (APPA or Association) appreciates the opportunity to submit the following comments in response to the U.S. Environmental Protection Agency's (EPA) and the U.S. Army Corps of Engineers' (the Corps) (together, the Agencies) proposed rule titled, *Updated Definition of "Waters of the United States*" (WOTUS).[1] While APPA supports the Proposal overall, we respectfully submit several recommendations as discussed below to further strengthen and clarify its implementation.

APPA is the voice of not-for-profit, community-owned utilities that power 2,000 towns and cities nationwide. We represent public power before the federal government to protect the interests of the more than 49 million people that public power utilities serve, and the 96,000 people they employ. Our association advocates and advises on electricity policy, technology, trends, training, and operations. Our members strengthen their communities by providing superior service, engaging citizens, and instilling pride in community-owned power.

APPA supports the Agencies' efforts to revise the WOTUS definition to better reflect the legal standards set forth in *Sackett* v. *Environmental Protection Agency (Sackett),* while emphasizing clarity, simplicity, and durable improvements that provide long-term certainty.[2] Clear, predictable, and workable federal environmental regulations are essential to APPA's mission, as uncertainty in foundational definitions like WOTUS can materially impede infrastructure development, increase compliance costs, delay maintenance and reliability projects, and ultimately raise electricity costs for millions of customers. By strengthening and clarifying this definition, the Agencies can both uphold environmental protections and ensure that public power utilities continue to deliver affordable, reliable service to their communities.

I. Executive Summary

APPA supports the Agencies' efforts to clarify and strengthen the WOTUS definition, emphasizing the need for clear, predictable, and workable federal regulations that balance environmental protection with the operational needs of public power utilities. APPA supports the Agencies' approach to conform the WOTUS definition to the U.S. Supreme Court's decisions in

[1] 90 Fed. Reg. at 52,498 (November 20, 2025) (Proposed Rule).
[2] *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023) (*Sackett*).

Sackett and *Rapanos*, which limit federal jurisdiction to relatively permanent, standing, or continuously flowing bodies of water and adjacent wetlands with a continuous surface connection.

The Proposed Rule offers the regulatory certainty that APPA members need, helping to end the cycle of shifting definitions with each new administration. In the past, frequent changes to WOTUS have created confusion, increased costs, delayed projects, and discouraged investment. Clear and consistent rules will allow for better project planning and more effective environmental protection. When APPA members can reliably identify jurisdictional waters early, they can design projects to avoid impacts, target mitigation, and proceed without fear of later changes to jurisdictional determinations. This predictability benefits both regulated entities and the environment by reducing unnecessary disputes and focusing resources on real environmental priorities.

As detailed below in these comments, APPA offers several recommendations to provide additional clarity, further align the proposed definition with the CWA and U.S. Supreme Court precedent, and aid implementation of the rule:

- **Traditional Navigable Waters (TNWs):** APPA supports clarifying the scope of traditional navigable waters (TNWs), removing "interstate waters" as an independent category, and refining the definition of "tributary" to require relatively permanent flow and a direct connection to TNWs.
- **Relatively Permanent Standard:** APPA agrees with defining "relatively permanent" as waters that flow year-round or at least during the wet season, excluding features with only intermittent or rain-driven flow. The use of tools such as the Antecedent Precipitation Tool (APT) and Web-based Water Budget Interactive Modeling Program (*Web*WIMP) is supported for determining wet-season conditions.
- **Adjacent Wetlands:** APPA supports the proposed definition of "continuous surface connection" for adjacent wetlands, ensuring only those wetlands physically connected to jurisdictional waters during the wet season are regulated.
- **Exclusions:** APPA strongly supports maintaining and clarifying exclusions for ditches, waste treatment systems, and groundwater, which are critical for utility operations. The Association urges clear documentation and evidence-based approaches for implementing these exclusions.
- **Timely Jurisdictional Determinations:** APPA recommends establishing predictable timeframes for issuing approved jurisdictional determinations (AJDs) to avoid project delays and regulatory uncertainty.

II. Background

The Clean Water Act (CWA or Act) was designed to restore and maintain the integrity of the nation's waters through both non-regulatory programs and targeted federal permitting for

certain pollutant discharges into "navigable waters," defined as "waters of the United States, including the territorial seas."[3] Congress intended for states to play a primary role in administering many CWA provisions, such as developing water quality standards, managing permitting programs, and overseeing waters outside the federal definition of navigable waters.[4] States and federal agencies work together to manage water resources under this statutory framework. [5]

The Act also provides technical and financial assistance to states, municipalities, and other agencies to improve water quality, extending beyond federally regulated waters. These programs include grants for pollution control, waste treatment, and research on water quality improvement.

Federal regulatory authority under the CWA is limited by Congress's constitutional powers, specifically the Commerce Clause. U.S. Supreme Court decisions, including *SWANCC*[6] and *Sackett*, have emphasized that federal jurisdiction extends only to "relatively permanent, standing or continuously flowing bodies of water," commonly understood as streams, rivers, lakes, and oceans. Wetlands are only covered if they are indistinguishably part of such waters, with a continuous surface water connection. Mere proximity or abutment is not enough; there must be no clear boundary between the water and the wetland.

The Courts also clarified that the term "navigable" is central to the statute, and the CWA does not cover all features with water, such as isolated ponds. The Agencies must avoid overly broad interpretations that infringe on state authority or create regulatory uncertainty. Any definition of WOTUS must respect state primacy, give proper weight to the term "navigable," and avoid extending federal jurisdiction beyond what Congress intended.

The recent *Sackett* decision reinforces that federal jurisdiction under the CWA is limited to clearly defined waters and wetlands that are indistinguishable from those waters, upholding the balance between federal oversight and state authority. The *Sackett* decision makes clear that the test for federal jurisdiction under the CWA, as articulated by the *Rapanos* plurality and clarified by *Sackett*, is now the controlling standard.[7] As a result, any definition of WOTUS must follow these core principles:

- **Jurisdiction is Limited:** Only those water features that independently qualify as "waters of the United States"—meaning they are indistinguishably part of a water body that itself meets the statutory definition—are covered.

[3] 33 U.S.C§ 1251(a)-(b).
[4] 90 Fed. Reg. at 52,502-03.
[5] *Id*.
[6] *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC), 531 U.S. (2001).
[7] *Rapanos v. United States*, 547 U.S.715,739(2006) (Scalia, J., plurality opinion).

- **Definition of "Waters":** The term "waters" refers specifically to relatively permanent, standing, or continuously flowing bodies of open water, such as streams, rivers, lakes, and oceans.
- **Connection Requirement:** The CWA applies only to relatively permanent water bodies connected to traditional navigable waters, and to wetlands that are so closely linked to those waters that they are practically indistinguishable. Mere proximity or abutment is not enough; "adjacent" wetlands must be part of the covered waters.
- **Continuous Surface Connection:** Wetlands meet the "continuous surface connection" standard only when there is no clear boundary between the water and the wetland, though temporary breaks (like droughts or low tides) do not necessarily disqualify them. A physical barrier, unless illegally constructed, removes a wetland from federal jurisdiction.
- **Importance of "Navigable":** The statutory term "navigable" must be given effect, reflecting Congress's intent to focus on waters that are or could be used for navigation.
- **Limits on Coverage:** The term "waters" does not include all features with water present, such as isolated ponds, as this would conflict with U.S. Supreme Court precedent and the CWA's policy of preserving state primacy over water resources.
- **Due Process and Clarity:** The Agencies must avoid overly broad interpretations of WOTUS, as significant penalties can result from even inadvertent violations. Clear definitions are necessary to prevent arbitrary enforcement.
- **No Ecological Basis Alone:** Jurisdiction cannot be based solely on ecological importance, nor can the Agencies or courts alter the balance of authority between federal and state governments.

After *Sackett*, the Agencies sought to conform the 2023 WOTUS rule to the Court's ruling. [8] However, the Conforming Rule was met with numerous stakeholder concerns that it did not fully conform to the U.S. Supreme Court's holding and lacked the clarity necessary for consistent implementation. Stakeholders emphasized that without clear standards, regulated entities face uncertainty that can delay projects, increase compliance costs, and undermine reliability.[9] The Proposed Rule seeks to address those stakeholder concerns by filling key gaps, correcting ambiguities, and ensuring alignment with the U.S. Supreme Court's direction. APPA agrees that the Proposed Rule is a good step toward achieving a clear and workable definition of WOTUS and supports finalization with the refinements described below.

[8] 88 Fed. Reg. at 3,004 (January 18, 2023) (2023 WOTUS Rule).
[9] 88 Fed. Reg. at 61,964 (September 8, 2023) (Conforming Rule).

III. APPA's Comments on the Proposed Jurisdictional Categories of WOTUS

A. Traditional Navigable Waters (TNWs)

The Proposed Rule does not seek to change the scope of paragraph (a)(1), addressing traditional navigable waters (TNWs).[10] However, the Agencies are considering clarifications to the scope of the TNW provision in a future rulemaking or administrative action.[11] Traditional navigable waters are currently defined as: "[t]he territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide."[12] TNWs include large rivers and lakes and tidally-influenced waterbodies used in interstate or foreign commerce. APPA members often site electric generation facilities next to TNWs to facilitate access to water to withdraw for cooling and other purposes. These facilities also typically discharge into nearby TNWs in compliance with National Pollution Discharge Elimination Systems (NPDES) permits.

APPA recommends that the Agencies amend the proposed regulatory text for the (a)(1) category to state:

> "Waters which are currently used, were used in the past, or may be susceptible to use to **transport goods** in interstate or foreign commerce, including the territorial seas and waters subject to the ebb and flow of the tide."

This revised language more faithfully reflects the statutory text.[13] It ensures that the term "navigable" retains the significance intended by Congress when it enacted the Clean Water Act under its "commerce power over navigation."[14] Accurately defining the scope of the (a)(1) traditional navigable waters category is essential, as both the *Rapanos* plurality and the *Sackett* decision emphasize that federal jurisdiction over non-navigable waters depends on their connection to a TNW. According to the *Rapanos* plurality, a non-navigable water is only jurisdictional if it is a "relatively permanent body of water connected to a [TNW]."[15] The *Sackett* decision reaffirmed this principle, clarifying that a wetland is jurisdictional only if it is adjacent to a "relatively permanent body of water connected to traditional interstate navigable waters" and maintains a "continuous surface connection" with that water.[16] Therefore, any ambiguity or

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[10] 90 Fed. Reg. at 52,515.
[11] *Id*.
[12] 33 C.F. R. §328.3(a)(1)(i).
[13] See 33 U.S.C. § 1344(g) (specifying that the federal government must retain authority over Section 404 permitting for discharges into "waters which are presently used, or are susceptible to use in their natural condition or by reasonable i**mprovement as a means to transport interstate or foreign commerce** shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto") (emphasis added).
[14] *SWANCC*, 531 U.S. at 168 n.3.
[15] 547 U.S. at 742.
[16] 598 U.S. at 678.

unwarranted expansion of the traditional navigable waters category could have significant consequences for the overall jurisdictional framework of the CWA.

The determination of whether a waterbody qualifies as a TNW is rooted in the U.S. Supreme Court's interpretation of "navigability" under the Rivers and Harbors Act, particularly as set forth in *The Daniel Ball* and later cases like *Appalachian Electric Power Co*.[17] The *Rapanos* plurality recognized that the CWA adopted the term "navigable waters" from these earlier statutes, intending to apply the historical definition. According to this precedent, TNWs are waters that are either navigable-in-fact (or can be made so) and, together with other waters, serve as waterborne highways for transporting commercial goods in interstate or foreign commerce.[18]

Over time, the Agencies have broadened the scope of the TNW category under the CWA to include waterways that are simply used in commerce, rather than being specifically used for the transportation of goods in interstate commerce. The current (a)(1)(i) category diverges from the standard set by *The Daniel Ball* and related cases by omitting the second essential element of the traditional TNW definition—the requirement that the waterway, together with other water bodies, forms a continuous highway for transporting commercial goods across state or national boundaries. While the regulatory language for TNWs uses terms that resemble this traditional requirement, it now encompasses waters that are, were, or could be used for any type of interstate commerce, not just those that serve as part of a continuous route for waterborne commercial transport. In practice, this has led to the classification of many waters as TNWs for CWA purposes—such as inland lakes—based solely on their impact on interstate commerce through activities like tourism, even when they have little or no role in the actual transport of goods in interstate or foreign commerce, as is the case for waters regulated under the Rivers and Harbors Act.

B. Interstate Waters

The Proposed Rule would remove "interstate waters" as an independent category of "WOTUS to ensure consistency with the U.S. Supreme Court's decision in *Sackett* and the Act.[19] The U.S. Supreme Court in *Sackett* held that WOTUS must be "relatively permanent, standing or continuously flowing bodies of water forming geographic features described in ordinary parlance as streams, oceans, rivers, and lakes." The Court further clarified that a WOTUS must be a relatively permanent body of water connected to traditional interstate navigable waters or a wetland with a continuous surface connection to such waters.

[17] 547 U.S. at 734.
[18] *See* The Daniel Ball, 77 U.S. at 563; *Leovy v. United States*, 177 U.S. 621, 630 (1900) (relying on The Daniel Ball's definition of navigable waters in interpreting the RHA); Econ. Light & Power Co. v. United States, 256 U.S. 113, 121-22 (1921) (same); *Appalachian Electric Power Co*., 311 U.S. at 406-09 (same).
[19] 90 Fed. Reg. 52,516.

Nothing in *Sackett* or the *Rapanos* plurality suggests that Congress intended to regulate interstate waters that do not meet this test separately. Regulating all interstate waters—regardless of their connection to navigability—would "impermissibly read the term 'navigable waters' out of the statute.[20]

The Water Pollution Control Act of 1948 regulated "interstate waters," but the 1972 amendments replaced this with the term "navigable waters," defined as "waters of the United States." Congress intentionally dropped the definition of "interstate waters" as an operative term for federal jurisdiction, signaling a shift in focus. [21]

The legislative history and subsequent U.S. Supreme Court cases (e.g., *SWANCC*) confirm that Congress' authority for the CWA is rooted in its traditional jurisdiction over navigable waters, not all interstate waters.

The Agencies found that, in practice, very few waters have been identified as jurisdictional solely because they are interstate. Most interstate waters are also jurisdictional under other categories (e.g., as traditional navigable waters or tributaries).

Removing the interstate category addresses persistent litigation and aligns the rule with the U.S. Supreme Court's direction, ensuring the definition is both legally sound and administratively workable. APPA supports the elimination of the interstate water category based on the U.S. Supreme Court's interpretation that only relatively permanent, navigable, or connected waters fall under federal jurisdiction, the legislative history of the CWA, and the need for legal and administrative clarity.

C. Tributary

The Agencies propose to define "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.''[22] This revised definition provides stakeholders with much-needed clarity, helping to distinguish which waters qualify as tributaries under the CWA. The proposed definition also aligns closely with guidance from *Rapanos* and *Sackett*. It requires relatively permanent flow and a direct or indirect connection to a downstream traditional navigable water, reflecting the Court's recognition in *Rapanos* that jurisdiction extends to ''relatively permanent bod[ies] of water connected to traditional interstate navigable waters.'' [23] Additionally, by requiring tributaries to have a defined bed and banks, the Agencies create a clear, objective standard that excludes features such as grassed waterways. While some grassed waterways may

[20] See 598 U.S. at 672; see also *Georgia v. Wheeler*, 418 F. Supp. 3d 1336, 1359 (S.D. Ga. 2019)..
[21] Compare Water Pollution Control Act, ch. 758, 62 Stat. 1155, 1156 (1948) (the pollution of "interstate waters" is a public nuisance subject to abatement), and Pub. L. No. 87-88, 75 Stat. 204, 208 (1961) (the pollution of "interstate or navigable waters" is subject to abatement), with 33 U.S.C. § 1362(7) (defining "navigable waters" as waters of the United States).
[22] 90 Fed. Reg. at 52,521.
[23] *Rapanos*, 547 U.S. at 742.

convey relatively permanent flow and eventually connect to traditional navigable waters, they do not constitute ‘‘bodies of water forming geographic features’’ - such as streams, rivers, or lakes - that the U.S. Supreme Court recognized as WOTUS in *Rapanos* and *Sackett*. [24] Finally, this definition preserves states' rights to plan and manage land and water resources within their borders, consistent with the principles emphasized in *Rapanos* and *Sackett*. [25]

APPA is generally supportive of the approach the agencies have taken to define tributaries. Electric utilities are often located near tributaries and withdraw water for cooling and other purposes, and discharge to tributaries in compliance with their NPDES permits. In addition, utilities construct transmission and distribution lines that cross tributaries requiring a CWA § 404 permit. Thus, a clear and appropriate framework for the tributary category is important to APPA members.

1. New Definition of Relatively Permanent

The Agencies propose to define ‘‘relatively permanent’’ to mean ‘‘standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or *at least during the wet season*.’’ [26] The Agencies explain that "at least during the wet season" is intended to include "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." [27] The Agencies also clarify that to satisfy the relatively permanent standard, surface water must be "continuous throughout the entirety of the wet season." [28]

APPA generally supports the proposed definition of relatively permanent; it provides essential clarity and predictability for jurisdictional determinations, giving regulated entities greater confidence in planning and compliance. Importantly, it aligns with the U.S. Supreme Court's guidance in *Rapanos* and *Sackett* by recognizing the concepts of "relatively permanent" and "seasonal," while appropriately excluding ephemeral features. In line with the U.S. Supreme Court's reasoning in the *Rapanos* plurality and *Sackett* decisions, the absence of a more precise definition for "relatively permanent" leaves room for the agencies to interpret the term further. The Court acknowledged that jurisdiction could extend to streams, rivers, or lakes that may occasionally dry up under extraordinary conditions, as well as to seasonal rivers that flow continuously for substantial periods, such as 290 days.[29] This approach indicates that the Agencies retain discretion to clarify the scope of "relatively permanent" through future rulemaking or guidance. *Rapanos* made it clear that only water bodies with consistent, year-round or wet-season flow should be considered "waters of the United States." The Court repeatedly emphasized that channels with only intermittent or occasional flow—like those that

[24] *Sackett*, 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739).
[25] *Rapanos*, 547 U.S. at 738 (Scalia, J., plurality); *Sackett*, 598 U.S. at 674.
[26] 90 Fed. Reg. at 52,517.
[27] *Id*. at 52,517-18.
[28] *Id.* at 52,518.
[29] *Rapanos*, 547 U.S at 732 n.5 (plurality).

are usually dry and only fill after rain—do not meet the standard for federal jurisdiction. Instead, "waters" must be continuously present, not just temporary or short-lived.[30] The Clean Water Act itself treats channels and ditches with intermittent flow as "point sources," not as "waters of the United States."[31] Because *Sackett* endorsed this interpretation, the Agencies' proposed definition rightly includes only features that flow throughout the wet season and excludes those with unpredictable, rain-driven flow.

The Agencies' wet season concept is flexible and practical. It uses a clear test—average monthly precipitation must exceed average monthly evapotranspiration—to determine when the wet season occurs, while accounting for differences in climate and region. Even if some water features in dry areas, like the arid West, do not meet the "relatively permanent" standard, this does not undermine the Agencies' approach.

The U.S. Supreme Court's decisions in *Rapanos* and *Sackett* support this standard. They say that rivers or streams with predictable, seasonal flow—even if not year-round—can qualify as WOTUS, but features that only have water occasionally after rain (like dry washes) do not.

The Agencies also recognize that some water features may not show surface water exactly during the wet season months, due to delays like snowmelt or slow-rising water tables. To account for this, it's recommended that the "relatively permanent" standard be met if a water feature has standing or flowing water for the same length of time as the wet season, even if the flow starts later. For example, the definition could be revised to say: "standing or continuously flowing year-round or at least as long as the duration of the wet season."

2. Implementation of Relatively Permanent Requirement

The Agencies are seeking input on methods for applying the "relatively permanent" standard. To assess whether a water feature meets this definition, landowners should first identify the months that constitute the wet season, and then verify that surface water is present—either standing or continuously flowing— during the wet season.

APPA supports the Agencies' proposal to use the Antecedent Precipitation Tool (APT) as the primary tool for identifying wet season conditions.[32] The Web-based Water Budget Interactive Modeling Program (*Web*WIMP), the data source underlying APT, has been employed by the Corps for many years; as such, landowners and consultants would seem to be sufficiently familiar with it. APPA suggests that the Agencies clarify that the "wet season" referenced in the Proposed Rule does not simply correspond to the months with the highest rainfall. In fact, periods with greater precipitation can still experience high evapotranspiration—such as during the growing season or warmer months—which may result in little or no surface water flow. As a

[30] *Id*. at 732 n.5
[31] *Id*. at 735-36 (emphasis in original; cleaned up).
[32] 90 Fed. Reg. at 52,520.

result, these months may still be classified as dry according to *Web*WIMP metrics used in the APT.

When determining whether a water feature meets the "relatively permanent" standard—specifically, whether it contains surface water or flow for the duration of the wet season—the Agencies correctly recognize that many landowners can make this assessment themselves. Direct observations, such as data from stream gauges, game cameras, or other real-time monitoring equipment, are the most reliable means of verifying relatively permanent flow.

However, when such direct evidence is unavailable, it is appropriate for the Agencies to use a "weight of the evidence" approach. This means considering multiple indicators, data points, and sources of information to make a well-supported determination. The Agencies should consider establishing a hierarchy of implementation tools, prioritizing the most current and reliable sources. Additionally, providing detailed examples of how the Agencies will conduct this step-by-step analysis—and what data sources will be used—would help clarify the process for stakeholders and ensure consistency in applying the relatively permanent standard.

To preemptively provide clarity to said landowners and consultants, APPA encourages the Agencies to offer additional details regarding geographic areas where *Web*WIMP functionality may be limited, so that stakeholders understand when supplemental tools or data sources may be needed.[33] While direct visual observations over time or data from stream gauges offer the most reliable evidence, these sources are often unavailable. In their absence, regulators frequently rely on national datasets such as the National Hydrography Dataset (NHD) or the National Wetlands Inventory (NWI). As the Agencies acknowledge, these tools contain errors of omission and commission and were not designed for regulatory determinations. Similarly, Streamflow Duration Assessment Methods (SDAMs) can be useful for distinguishing between perennial and ephemeral features, but they were not developed to implement a wet-season-based standard and may not yield consistent results. Clear guidance on how these tools should - and should not - be used would greatly improve implementation.

As the Agencies consider new tools and methods for implementing or updating the definitions, it's important that they do so openly and with opportunities for public input. If decisions about jurisdiction rely on tools that can change over time, there's a risk that those tools could be adjusted to produce certain outcomes. Also, when different agencies use different data sources or definitions—like what counts as the wet season—analyses and decisions can become inconsistent and unpredictable. How the Agencies apply the new definitions is just as important as the definitions themselves. To ensure scientific accuracy and legal compliance, the process must be consistent, predictable, and transparent, with strong stakeholder involvement throughout.

[33] *Id*.

D. Adjacent Wetlands

1. Definition of Continuous Surface Connection

The Agencies are not proposing any changes to the definition of "adjacent," which remains tied to the concept of a "continuous surface connection." [34] However, for the first time, they are specifically defining "continuous surface connection" as having surface water present at least during the wet season and physically touching a jurisdictional water.[35] While the Agencies are not altering their longstanding regulatory definition of wetlands, they are clarifying that only those portions of a wetland that meet this new definition of continuous surface connection will be considered jurisdictional, regardless of the overall delineated area of the wetland. APPA generally supports this proposed definition, as it aligns with the U.S. Supreme Court's decisions in *Sackett* and the *Rapanos* plurality.

This definition provides much-needed clarity for stakeholders, making it easier to determine which wetlands are jurisdictional. *Rapanos* and *Sackett* recognized that the Act covers wetlands that are "adjacent" to surface waters only if they are indistinguishably part of a body of water that itself constitutes "waters" under the Act. [36] The U.S. Supreme Court has defined the scope of adjacent wetlands to include only those with a continuous surface connection to jurisdictional surface waters. By adopting this standard, the Agencies provide both a legally defensible and practically implementable approach.

The *Sackett* decision clarified that federal jurisdiction under the Act applies only to wetlands that are essentially indistinguishable from adjacent WOTUS. Specifically, the U.S. Supreme Court adopted a two-part test: a wetland must (1) be directly next to a body of water that qualifies as WOTUS, and (2) have a continuous surface water connection with that water, making it difficult to tell where the water ends and the wetland begins. The Court recognized that temporary breaks in this connection—such as during droughts or low tides—do not necessarily disqualify a wetland, as long as the connection is through surface water.

Importantly, the Court emphasized that "adjacent" means physically abutting, and that only wetlands with actual surface water—rather than just saturated soils or a high water table—can be considered indistinguishable from WOTUS. This means a wetland must have standing or flowing water across its surface for the required duration (year-round or at least during the wet season) to meet the standard.

APPA agrees with the Agencies' interpretation: mere abutment is not enough. There must be a true surface water connection, not just proximity or soil saturation, for a wetland to be considered jurisdictional under *Sackett*. This approach is consistent with both *Sackett* and earlier

[34] *Id*. at 52,527.
[35] *Id*.
[36] *Rapanos*, 547 U.S. at 741 (Scalia, J., plurality opinion); *Sackett*, 598 U.S. at 676 (citing 33 U.S.C. 1344(g)(1)).

U.S. Supreme Court decisions, ensuring that only wetlands with a clear, practical connection to WOTUS are regulated.

Consistent with APPA's earlier comments on the "relatively permanent" standard, it is recommended that the Agencies revise the definition of "continuous surface connection" to recognize that surface water may not always appear exactly at the start or end of the wet season. Instead, the presence of surface water should be considered sufficient if it is driven by the wet season and occurs predictably each year for a period equal to the duration of the wet season. This approach would ensure that features meeting these criteria satisfy the requirement for a continuous surface connection, even if there is a lag between precipitation and the appearance of surface water.

IV. The Agencies Should Retain and Revise the Codified Exclusions

APPA supports keeping clear exclusions and exemptions in the WOTUS rule because they help define which waters are not federally regulated, reducing unnecessary regulatory burdens that have resulted from previous, overly broad rules. APPA believes that explicitly listing non-jurisdictional waters is essential for regulatory clarity and requests that the Agencies continue to exclude waters and features that have not historically been subject to federal oversight.

Although the Agencies are considering whether some exclusions are still needed—since the new, narrower WOTUS definition may already exclude certain waters—APPA urges that all previous exclusions and exemptions be retained. Even if some exclusions (like those for ephemeral waters) might seem redundant, their presence provides stability and certainty for regulated entities and stakeholders. Knowing which situations are not covered by WOTUS, regardless of how they are classified under new tests, is valuable for planning and compliance.

APPA generally supports the Proposed Rule but recommends further modifications and clarifications to specific provisions. Our detailed recommendations for each exemption and exclusion are provided below.

A. APPA Supports the Proposed Ditch Exclusion

Under the Proposed Rule, the Agencies propose to maintain the ditch exclusion, with the added clarification that ditches - including roadside ditches - constructed or excavated entirely in dry land are not considered WOTUS. The rule also clarifies that "ditch" at paragraph (c)(4) includes "a constructed or excavated channel used to convey water." [37]

Maintaining this exclusion is critical for public power utilities since ditches play a vital role in operating and maintaining electric generation facilities, transmission and distribution lines, and other energy infrastructures. These man-made conveyances are frequently constructed for drainage, flood control, or right-of-way maintenance. Treating them as jurisdictional waters

[37] 90 Fed. Reg. at 52,538.

would impose excessive permitting obligations on electric utilities, potentially requiring permits for routine maintenance or repairs.

Maintaining this exclusion also aligns with the precedent outlined in *Sackett* and *Rapanos*. Under *Sackett*, ditches should generally be excluded from jurisdiction because they are not bodies of water described in ordinary parlance as streams, oceans, rivers, and lakes. Moreover, as the *Rapanos* plurality explained, "on its only natural reading, such a statute that treats 'waters' separately from 'ditches, channels, tunnels, and conduits,' thereby distinguishes between continuously flowing 'waters' and channels containing only an occasional or intermittent flow."[38] Thus, regulating ditches as WOTUS risks undermining the statutory focus on being "navigable." The Agencies' clarifications - particularly the explicit inclusion of roadside ditches within the exclusion - provide important clarity on the exclusion's scope and ensure greater consistency in its application.

The Agencies also seek comments on the implementation of the ditch exclusion.[39] Implementation of the ditch exclusion requires a careful, evidence-based approach that uses multiple data sources to determine the construction history and landscape context. Agencies must clearly document their findings, and excluded ditches may still be regulated as point sources. APPA supports requiring Agencies to demonstrate jurisdiction, including providing evidence of the historical status of features proposed for exclusion—such as proving whether a ditch was constructed initially or excavated in something other than dry land. For these reasons, APPA strongly supports the Agencies' proposed approach and urges prompt finalization of the clarified ditch exclusion.

Finally, APPA recommends that the Agencies clarify the meaning of "dry land" in the final rule, as the terms "dry land" and "upland" have been used interchangeably in past regulations and guidance. For example, the Agencies have previously stated that non-tidal ditches built in uplands (historically called "dry land") are not jurisdictional, and have used both terms to describe areas generally considered non-jurisdictional.[40]

To provide certainty, APPA suggests defining "dry land" as any area that, under normal circumstances, does not meet all three wetland criteria (hydrology, hydrophytic vegetation, and hydric soils) and is not below the ordinary high-water mark or high tide line of a jurisdictional water. This definition would ensure that ditches remain eligible for exclusion even if constructed on land with one or two wetland characteristics, as long as the area is not actually a wetland. APPA believes this approach is consistent with the Agencies' longstanding interpretation of "dry land" and "upland".

[38] *Rapanos*, 547 U.S. at 736 n.7.
[39] 90 Fed. Reg. at 52,540.
[40] 85 Fed. Reg. at 22,297.

B. APPA Supports the Waste Treatment System Exclusion and Recommends Additional Clarifications

The Agencies should finalize the proposed clarifications regarding the waste treatment systems (WTS) exclusion and make clear that permit documentation is not required to claim the exclusion.

The Agencies propose to maintain the long-standing WTS exclusion, providing a regulatory definition clarifying which water features qualify as part of a WTS. APPA generally supports the proposed definition of waste treatment system, although we recommend two revisions:

> "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 **or used** 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)." [41]

Maintaining the WTS exclusion is critical for electric utilities in their efforts to provide reliable and affordable electricity across the country. The electric utility industry relies on many water features, such as stormwater sedimentation ponds, cooling ponds, and associated conveyances to and from those features, to handle various types of wastewaters. The purpose of these industrial features is to contain, control, and treat waste streams to make productive use of internal features and to prevent pollution from entering external waters. WTS features often dissipate heat and control total dissolved solids before wastewater reaches the facility's NPDES-permitted discharge into WOTUS.

The added definitions and clarifications, consistent with the language previously outlined in the Navigable Waters Protection Rule (NWPR), provide explicit guidance to stakeholders on which waters and features qualify as part of a WTS and should therefore be excluded.

The proposal provides key clarifications:

- Cooling and settling ponds are water treatment systems;
- WTS features all components of the system, including ditches and conveyances connecting treatment ponds; and
- Treatment can be active or passive (and therefore can include features where pollutants settle out.

The Agencies also clarify that the exclusion applies solely to WTSs built in compliance with the Act, as well as to those constructed before the 1972 CWA amendments. They are also requesting feedback on whether to keep a provision from the prior WTS exclusion, which specifies that only features "designed to meet the requirements of the CWA" should qualify as WTSs. This language has created uncertainty about which documentation is required to satisfy

[41] 90 Fed. Reg at 52,535.

this requirement, especially for features built before the Act was passed. Components of the WTSs built after the 1972 amendments—but before 404 permits were required for certain discharges - still qualify as WTSs because they were constructed in line with the CWA requirements at the time. Since permits weren't needed then, APPA believes that permit documentation should not be required to claim the WTS exclusion. The Agencies should finalize the proposed changes for the WTS exclusion with this additional clarification.

C. Groundwater

The Agencies propose to clearly exclude "groundwater, including groundwater drained through subsurface drainage systems," from the definition of WOTUS.[42] They explain that WOTUS has never included groundwater, and this rule continues that practice by making the exclusion explicit. APPA supports this approach, as it aligns with the CWA's text, agency history, and court decisions confirming that groundwater is not WOTUS.

However, there is still confusion about the difference between groundwater and shallow subsurface water connections. To make things more straightforward, APPA recommends that the Agencies revise the rule's language to say:

> "groundwater, including diffuse or shallow subsurface flow and groundwater drained through subsurface drainage systems,"

So, it is clear what is excluded from federal jurisdiction under proposed paragraph (b)(9).

V. The Agencies Should Develop a Framework to Set a Timeframe for Decisions on Jurisdictional Determinations

APPA recommends that the Agencies adopt a framework establishing reasonable and predictable timeframes for issuing approved jurisdictional determinations (AJDs). For public power utilities, timely permitting is critical: delays in AJDs can ripple through project schedules, hinder infrastructure modernization, slow maintenance and storm response efforts, and ultimately threaten grid reliability. Without predictable timelines, utilities face increased costs, prolonged regulatory uncertainty, and potential interruptions in service delivery. By setting clear, achievable timeframes for AJDs, the Agencies would enhance transparency, foster greater stakeholder confidence, and allow utilities to plan and execute projects more efficiently. A structured framework would also help avoid unnecessary disputes, reduce administrative burdens, and ensure that the benefits of the rule - clarity and regulatory certainty - are fully realized in practice.

VI. Grandfathering AJDs

The Agencies should clarify that AJDs remain effective for their full five-year term. Consequently, if an AJD was issued under the 2023 WOTUS rule and has not yet expired, the

[42] 90 Fed. Reg at 52541

Corps is authorized to base permit dec*isions* on that AJD, should the applicant opt to proceed in this manner. In consideration of Sackett, the Agencies should confirm that all AJDs—whether issued independently or in connection with pending permit applications—granted during the period when the 2023 WOTUS Rule was operative are valid for their full five-year terms, and that the Corps may appropriately rely on these AJDs when making permit determinations.

VII. Conclusion

APPA appreciates the Agencies' work to develop a Proposed Rule that meaningfully reflects the U.S. Supreme Court's direction in *Sackett* while providing clearer, more predictable jurisdictional boundaries. With the targeted clarifications described above - particularly regarding relatively permanent waters, the use of the term "wet season," and the implementation of crucial exclusions - the Proposed Rule will promote consistent implementation, reduce unnecessary permitting burdens, and provide long-term regulatory certainty for public power utilities and other stakeholders.

APPA looks forward to continued engagement with the Agencies and stands ready to support implementation of a clear, durable, and legally sound definition of WOTUS. Please contact Ms. Carolyn Slaughter at 202-467-2900 or email CSlaughter@publicpublic.org should you have any questions regarding the enclosed comments.