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U.S. Environmental Protection Agency
EPA Docket Center, Water Docket (Mail Code 288221T)
1200 Pennsylvania Avenue NW
Washington, DC 20460

Department of the Army
Office of the Assistant Secretary of the Army for Civil Works
108 Army Pentagon
Washington, DC 20310-0104

**Re: WUWC Comments on the Proposed Rule regarding the Updated Definition of
“Waters of the United States,” 90 Fed. Reg. 52498 (Nov. 20, 2025); Docket ID No.
EPA-HQ-OW-2025-0322**

The Western Urban Water Coalition (WUWC)¹ appreciates the opportunity to submit comments on the U.S. Environmental Protection Agency’s (EPA) and the Department of the Army’s (collectively, the Agencies) proposed rule that revises key aspects of the definition of “waters of the United States” (WOTUS) to clarify the scope of federal jurisdiction under the Clean Water Act (CWA).

WUWC is a coalition of twenty-one of the largest western water utilities formed more than 30 years ago to address the unique water supply and water quality challenges facing the western United States. Our members provide reliable urban drinking water supplies for over forty million consumers in major metropolitan areas in eight western states. WUWC has been active in the regulatory initiatives to define what constitutes a jurisdictional water under the CWA and administrative efforts to implement a WOTUS definition. We have provided testimony to congressional committees and Members of Congress, as well as submitted comments on various

¹ WUWC consists of the following members: **Arizona** (Central Arizona Project, City of Phoenix and Salt River Project); **California** (East Bay Municipal Utility District, Eastern Municipal Water District, the City of Los Angeles Department of Water and Power, The Metropolitan Water District of Southern California, San Diego County Water Authority, Santa Clara Valley Water District, and City and County of San Francisco Public Utilities Commission); **Colorado** (Aurora Water, Colorado Springs Utilities, and Denver Water); **Idaho** (City of Boise); **Nevada** (Las Vegas Valley Water District, Southern Nevada Water Authority, and Truckee Meadows Water Authority); **New Mexico** (Albuquerque Bernalillo County Water Utility Authority); **Utah** (Salt Lake City Public Utilities and Washington County Water Conservancy District); and **Washington** (Seattle Public Utilities).

rulemakings and guidance documents.² Over the past decade, WUWC has engaged with the Agencies on multiple occasions to address technical considerations related to the WOTUS definition and its implications for large utilities operating in the diverse climates of the West.

WUWC members possess unique expertise to address the complex hydrology and water management challenges of the West. The arid and semi-arid climate, highly variable precipitation, and prevalence of ephemeral and intermittent streams create circumstances distinct from those in other regions of the country. Our members' on-the-ground experience operating municipal water systems that navigate the intersection of federal, state, and local water law provides critical insight into how federal regulations impact both water quality and quantity in the West. Decades of practical experience with the region's unique hydrologic regimes informs WUWC's technical input in this proceeding and those preceding it. This expertise is essential to ensuring that federal rules are workable and appropriately tailored to the realities of western water management.

For this rulemaking, WUWC member utilities are concerned with the regulatory definition and categorical exclusion of ditches; the need for clear, predictable boundaries and definitions within the rule; the groundwater exclusion's treatment of point source pollution; adding an artificial water supply infrastructure exclusion; and clarifying the treatment of waters under the Waters Transfers Rule.

A. WUWC supports the proposed alternatives concerning the categorical exclusion of ditches.

Many western municipalities and water districts incorporate ditches into their water delivery systems, often with perennial or seasonal flows. Drinking water providers may also encounter ditches during infrastructure construction, which can require Section 404 permits. Additionally, some water utilities use ditches for stormwater management. As a result, whether these ditches are classified as WOTUS substantially affects water utility operations.

The Agencies' proposed rule introduces significant revisions to the regulation of ditches under the CWA by establishing a formal regulatory definition and clarifying that ditches constructed or excavated entirely in dry land are categorically excluded from the definition of WOTUS. In response to the Agencies' request for input on alternative approaches, the following comments address the practical implications of these proposed changes and offer recommendations to ensure the final rule supports effective, function-based water management in the West.

² Our previously submitted comments include the following: Comments on the Proposed Rule to Clarify the Definition of "Waters of the United States" under the Clean Water Act, Docket ID No. EPA-HQ-OW-2011-0880 (Nov. 14, 2014); Clarification Sought on Final Rule to Clarify the Definition of "Waters of the United States" under the Clean Water Act (Aug. 7, 2015); Comments on the Proposed Rule to Re-Codify the Pre-Existing Definition of "Waters of the United States," Docket ID No. EPA-HQ-OW-2017-0203 (Sept. 27, 2017); Comments on the Proposed Rule to Add Applicability Date to 2015 Clean Water Rule, Docket ID No. EPA-HQ-OW-2017-0644 (Dec. 13, 2017); Comments on the Proposed Rule on the Revised Definition of "Waters of the United States," Docket ID No. EPA-HQ-OW-2018-0149 (Apr. 15, 2019); Comments on Notice of Public Meetings Regarding "Waters of the United States," Docket ID No. EPA-HQ-OW-2021-0328 (Sept. 3, 2021); Comments on the Proposed Rule on the Revised Definition of "Waters of the United States," Docket No. EPA-HQ-OW-2021-0602 (Feb. 7, 2022); Comments on WOTUS Notice: The Final Response to SCOTUS, Docket ID No. EPAHQ-OW-2025-0093 (Apr. 23, 2025).

WUWC appreciates the Agencies' proposal to add a regulatory definition of "ditch" and to clarify the ditch exclusion by categorically excluding ditches constructed or excavated entirely in dry land. WUWC also acknowledges the proposal's focus on jurisdictional setting, including the new definitions for "relatively permanent," and the clarification that ephemeral features are not jurisdictional. These steps respond to previous WUWC requests for clearer boundaries and provide predictability for basic utility planning and maintenance.

That said, WUWC recommends that the Agencies' exclusion focus on the function, nature and purpose of the ditch, rather than location alone. Waters found in ditches engineered as man-made conveyances to meet water-supply needs or control stormwater have been removed from the natural system and should not fall under WOTUS jurisdiction any more than would waters in municipal distribution systems, artificial lakes or ponds, or stormwater control features. Thus, regardless of a potential interface with jurisdictional water, like at an intake or outfall, a ditch should be categorically exempt from treatment as WOTUS if its primary purpose is to capture, control, and place waters to beneficial use under state law (urban or agricultural supply) or to control and convey stormwater run-off.

In response to the Agencies' direct solicitation for input on ditch rulemaking alternatives, WUWC recommends adoption of the second proposed alternative, which categorically excludes all non-navigable irrigation and drainage ditches. This approach is the most function-based and best aligned with how western water providers have designed and operated engineered conveyances to deliver municipal and agricultural supplies and manage stormwater. A categorical, purpose-driven exclusion would ensure that essential infrastructure is not brought under federal jurisdiction simply because it connects with jurisdictional water at an intake or outfall. This approach would reduce unnecessary permitting burdens while still maintaining protection for downstream water quality. Most importantly, it would provide clear and durable regulatory boundaries that the arid regions of the West need to support predictable planning, construction, and operations.

If the Agencies do not adopt the second alternative, WUWC would support the first proposed alternative in the proposed rule as a strong second-best solution if the Agencies could add an explicit exclusion for "water supply and delivery infrastructure," which would apply to facilities used to capture, convey, store, treat, or deliver water for beneficial uses. A hydrology-based focus—excluding ditches with less than relatively permanent flow—paired with a function-based exclusion addresses real-world conditions rather than construction location alone. This is paramount for infrastructure in the arid West that operates seasonally, where conveyances often only carry water during the wet season.

B. WUWC advocates for regulations and informed guidance that account for the arid West in defining key terms like "relatively permanent," "wet season," and "ephemeral."

The proposed rule revises the regulatory framework for determining federal jurisdiction under the CWA by introducing a new definition of "relatively permanent," which is tied to the presence of continuous surface flow during a "wet season." Ephemeral waters are partially defined as those with surface water flowing or standing only in direct response to precipitation. The proposed rule contemplates the use of regional or climatological benchmarks to define "wet season" and invites comment on the appropriate duration and indicators for establishing relatively permanent flow.

WUWC appreciates the Agencies' effort to anchor jurisdiction in "relatively permanent" flow and to anchor jurisdiction in hydrologic continuity during a "wet season." The proposed definition would help provide consistency for water utilities by conforming to the *Sackett* holding and pre-2015 regulatory standards. To further this consistency important for drinking water utilities, the Agencies should continue to follow previously published guidance to help establish the relatively permanent standard. These resources, like *A Field Guide to the Identification of the Ordinary High-Water Mark (OHWM) in the Arid West Region of the Western United States: a Delineation Manual*,³ the Agencies' *Rapanos Guidance*,⁴ and U.S. Army Corps of Engineers' *Regulatory Guidance Letter No. 05-05*,⁵ all assist in making consistent jurisdictional findings related to the relatively permanent standard.

As we have commented previously, dry ephemeral and intermittent drainages are very common in the western United States. To ensure predictable, field-ready implementation, WUWC requests that the final rule formally define "ephemeral" and "intermittent" streams using the U.S. Army Corps of Engineers' longstanding definitions and clarify that such features lie outside the scope of "relatively permanent." The proposed rule partially defines ephemeral waters as "those with surface water flowing or standing only in direct response to precipitation (e.g. rain or snow fall)," which is a helpful but incomplete definition. 90 Fed. Reg. at 52517-518. The Army Corps definitions are:

- "An ephemeral stream has flowing water only during and for a short duration after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow."⁶
- "An intermittent stream has flowing water during certain times of the year, when groundwater provides water for stream flow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow."⁷

To ensure regulatory clarity, the Agencies should work with the regulated community and federal agencies with hydrological expertise like NOAA and USGS to develop implementation guidance of what constitutes a 'wet season' in the arid West. This approach will provide durable, uniform

³ Robert W. Lichvar and Shawn M. McColley, *A Field Guide to the Identification of the Ordinary High Water Mark (OHWM) in the Arid West Region of the Western United States: A Delineation Manual*, No. ERDC/CRREL TR-08-12 (2008), https://www.spk.usace.army.mil/Portals/12/documents/regulatory/pdf/Ordinary_High_Watermark_Manual_Aug_2008.pdf.

⁴ EPA, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008) at 1, https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.

⁵ U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 05-05: Ordinary High Water Mark Identification, <https://www.nap.usace.army.mil/Portals/39/docs/regulatory/rgls/rgl05-05.pdf>.

⁶ See, e.g., U.S. Army Corps of Engineers, Definition of Terms, "Ephemeral Stream," <https://www.nap.usace.army.mil/Missions/Regulatory/Definitions/> (last visited Jan. 5, 2026).

⁷ See, e.g., *id.*, "Intermittent Stream."

guidance to permit writers and project proponents, reduce the need for multi-year hydrologic studies, and ensure predictable determinations across diverse western physiographic provinces.

C. WUWC advocates for clarifying the groundwater exclusion to reference the functional equivalency standard from *County of Maui, Hawaii v. Hawaii Wildlife Fund*.

The Agencies are proposing to explicitly codify the exclusion of groundwater, reaffirming that groundwater itself is not WOTUS. When creating this groundwater exclusion, the Agencies acknowledged that pollutants released to groundwater can reach surface water resources but did not explicitly discuss the role of groundwater as a point source for pollution and its interaction with Section 402 permitting. Elsewhere in the proposed rule, the preamble notes that there “may be other contextual factors that define the reach of a particular Clean Water Act program or provision,” specifically citing the Section 402 permit program that regulates discharges whether the pollutants reach jurisdictional waters directly or indirectly. 90 Fed. Reg. at 52504 & n.8.

WUWC appreciates the exclusion of groundwater from the definition of WOTUS, aligning with longstanding regulatory practice and judicial precedent. To further align the exclusion with precedent and avoid misunderstanding in implementation, the final rule and preamble should explicitly reaffirm the “functional equivalency” standard found in the Supreme Court’s *County of Maui, Hawaii v. Hawaii Wildlife Fund* holding.⁸ The Supreme Court ruled that a CWA permit is needed if point source pollution reaches navigable water through groundwater in a way functionally equivalent to a direct discharge. The Supreme Court identified seven factors for assessing functional equivalency: “(1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, [and] (7) the degree to which the pollution (at that point) has maintained its specific identity.”⁹

Given the need to protect source water quality, WUWC supports regulating discharges that meet *County of Maui*’s functional equivalency standard, even if transported through groundwater. This approach is further supported by EPA draft guidance published on November 27, 2023, which clarifies the application of the *County of Maui* holding within the CWA Section 402 National Pollutant Discharge Elimination System (NPDES) permit program.¹⁰ The guidance provides regulatory certainty by outlining how the functional equivalency analysis should be applied, ensuring that discharges to excluded features like groundwater are still subject to permitting requirements when pollutants ultimately reach jurisdictional waters. By supporting this regulatory framework, WUWC seeks to protect the integrity of drinking water supplies and downstream water quality, while also promoting consistent and transparent implementation of the CWA across states and regions.

⁸ 590 U.S. 165, 184–5 (2020).

⁹ *Id.*

¹⁰ EPA, Draft Guidance, Applying the Supreme Court’s *County of Maui v. Hawaii Wildlife Fund* Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program to Discharges through Groundwater (Nov. 27, 2023), <https://www.epa.gov/system/files/documents/2023-11/maui-draft-guidance.pdf>.

Consistent with CWA Section 502(14), the Agencies should additionally clarify that whether a conduit or feature qualifies as a “point source” is a case-by-case determination. The Agencies should further confirm that discharges to excluded features—such as groundwater—may still trigger NPDES obligations when pollutants reach jurisdictional waters under the *County of Maui* factors, notwithstanding groundwater’s overall exclusion from WOTUS. This approach protects downstream source-water quality and respects delegated-state implementation.

The proposed rule expressly refers to the *County of Maui* opinion as a basis for the categorical groundwater exclusion. To ensure fidelity to the case’s holding, the Agencies should formally codify the functional equivalence standard and incorporate the pertinent guidance to clarify its application in NPDES determinations. In the arid West, groundwater and surface water frequently operate as a coupled system with close connection between groundwater and surface water. Given this hydrology, clear implementation consistent with the Supreme Court’s *County of Maui* functional equivalence standard is essential to protect downstream drinking water supplies: when a discharge routed through groundwater is, in practical terms, equivalent to a direct discharge to WOTUS, NPDES permitting should apply based on the *County of Maui*’s factors, even as groundwater remains excluded under paragraph (b)(9).

D. WUWC advocates for an artificial water supply infrastructure exclusion from WOTUS and clarifying the treatment of waters under the Waters Transfers Rule.

As discussed in Section A above, the proposed rule would exclude ditches constructed or excavated entirely in dry land from the definition of WOTUS. To build on the proposed rule’s treatment of ditches, WUWC recommends extending the same clarity and exclusionary logic to a broader, function-based category for artificial water-supply infrastructure.

WUWC recommends that the Agencies adopt an express exclusion for artificial water supply infrastructure and clarify the treatment of waters conveyed under the Water Transfers Rule. Specifically, the rule should exclude “water supply infrastructure” with a definition that includes constructed facilities necessary for the supply, transportation, storage, groundwater recharge, treatment, and delivery of water for municipal, agricultural, and industrial beneficial uses.

Relatedly, the conveyance of WOTUS through such infrastructure should be expressly recognized as a water transfer exempt from NPDES permitting under 40 C.F.R. § 122.3, preserving existing operations that protect source water quality and public health. Consistent with the proposal, WUWC appreciates the Agencies’ retention of jurisdictional status in the proposed rule for tributaries that are part of currently operating water transfers, even where non-relatively permanent waters intervene. This targeted exclusion and clarity on transfers would deliver durable, predictable implementation while respecting state water allocation authority and maintaining CWA protections for receiving waters.

Thank you for the opportunity to provide these comments. If you have any questions regarding these comments, please contact me at (951) 203-2804 or Walshj@emwd.org.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Jolene Walsh".

Jolene Walsh
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Senior Director Policy and Governmental Affairs
Eastern Municipal Water District