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Governor

December 30, 2025

STATE OF NEBRASKA

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Via Electronic Submission to Regulations.gov

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

RE: Docket ID No. EPA–HQ–OW-2025-0322
Comments on the Updated Definition of “Water of the United States” Proposed Rule

Dear Administrator Zeldin,

On November 20, 2025, the U.S. Environmental Protection Agency (“EPA”) and U.S. Department of the Army, Corps of Engineers, published a proposed rule, entitled “Updated Definition of “Waters of the United States,” 90 Fed. Reg. 52,498 (Nov. 20, 2025) (hereinafter “Proposed Rule”). Alongside my agencies, the Nebraska Department of Water, Energy, and Environment and the Nebraska Department of Agriculture, I appreciate the opportunity to provide comments on EPA’s Proposed Rule.

Nebraska’s most important resources are its people and its water. Nebraska has nearly 80,000 miles of rivers and streams and innumerable lakes and ponds. These water features are diverse and are used to provide a variety of beneficial uses to the State, including agriculture, power generation, drinking water, and recreation. As steward of its resources, Nebraska is in the best and most knowledgeable position to regulate and balance the use of its waters.

The definition of “waters of the United States” impacts Nebraskans and their water and so it is important that “waters of the United States” be updated to provide clear, bright line rules that align with *Sackett v. EPA* and that respect the Nebraska’s sovereign authority over its natural resources as recognized in the Clean Water Act.

As explained in the Proposed Rule, the agencies are proposing to revise the definition of “Waters of the United States” (hereinafter “WOTUS”) in a way that will:

[A]dhere faithfully to the Supreme Court’s direction, respect the Act’s careful balance between Federal authority and State responsibilities over waters, and carry out Congress’ overall objectives to restore and maintain the integrity of the nation’s waters in a manner that preserves the traditional sovereignty of States over their own land and water resources pursuant to the cooperative federalism framework predicated by the Act.

90 Fed. Reg. at 52,499. In doing so, the Proposed Rule removes intrastate and interstate waters as standalone categories from the definition of WOTUS. The Proposed Rule also intends to

provide “clarity and predictability for Federal agencies, states, Tribes, the regulated community, and the public,” by adding definitions for “relatively permanent” and “continuous surface connection,” and reestablishing definitions for “ditch,” “tributary,” “prior converted cropland,” and “waste treatment system.” *Id.*

While the Proposed Rule goes a long way toward providing those clear and bright line rules and respecting States’ traditional sovereign authority, we request that EPA provide better clarity, explanation, and predictability on certain aspects of the Proposed Rule.

- 1. Definitions for “Relatively Permanent” and “Wet Season”:** The Proposed Rule defines “relatively permanent” as “standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season.” 90 Fed. Reg. at 52,517. The Proposed Rule explains the phrase “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.” *Id.* at 52,518. Ephemeral streams that flow only in direct response to precipitation events would not be “relatively permanent.” *Id.*

Recommendation: We support including a definition of “relatively permanent,” but more clarity and predictability is needed especially on how to determine what constitutes a “wet season.” For example, how many years of standing or continuously flowing surface water are necessary to be “year-round” especially in periods of drought. How is “wet season” determined in those regions that experience variable precipitation, *i.e.*, varying periods of drought and periods of abnormal precipitation, and for states, like Nebraska, where climate, weather, geographic features, and hydrology vary across the state.

- 2. Definition for “Tributary”:** The Proposed Rule defines “tributary” as “a body of water with relatively permanent flow, and a bed and bank, that connects to a downstream traditional navigable water or the territorial seas, either directly or through one or more waters or features that convey relatively permanent flow.” 90 Fed. Reg. at 52,521.

Recommendation: We request the agencies identify and prioritize the hydrologic and geomorphic criteria most relevant to the tributary analysis and engage the states on these appropriate criteria. Although “features” are limited to those that convey relatively permanent flow, the list provided in the Proposed Rule includes both natural and artificial features with no limiting principle. *Id.* at 52,522. Although examples are provided for both natural and artificial features, illustrative examples may help provide better clarity.

- 3. Definition of “Continuous Surface Connection” and “Wet Season”:** The Proposed Rule defines “continuous surface connection” as “having surface water at least during the wet season and abutting (*i.e.*, touching) a jurisdictional water.” 90 Fed. Reg. at 52,527.

Recommendation: We similarly request more clarity and predictability on how to determine what constitutes a “wet season” for the same reasons mentioned above when the phrase is used in the definition of “relatively permanent.”

4. **Exclusions for Prior Converted Cropland, Waste Treatment Systems, and Groundwater:** The Proposed Rule keeps the longstanding exclusions for prior converted cropland and waste treatment systems but intends to provide more clarity and predictability. The Proposed Rule also excludes groundwater from being WOTUS.


Recommendation: We support these exclusions, but request that the agencies provide illustrative examples of prior converted cropland and waste treatment systems to provide clarity and ensure consistent implementation for states. Additionally, the agencies should explain how the exclusion for groundwater is consistent with the Supreme Court’s decision in *County of Maui v. Hawaii Wildlife Fund*.

5. **Definition of and Exclusion of “Ditches”:** The Proposed Rule defines “ditch” as “a constructed or excavated channel used to convey water.” 90 Fed. Reg. at 52,539. The Proposed Rule excludes ditches that are “constructed or excavated entirely in dry land,” including roadside ditches, from being WOTUS.


Recommendation: We request additional guidance on how to determine if a ditch is excluded when there is a lack of historical evidence or the ditch has been changed through land use, development, and erosion. Illustrative examples would help with clarity and consistent implementation.

The Proposed Rule’s updated definition of WOTUS is a good start and provides better clarity and predictability. We ask that additional clarity and predictability be provided before a final rule is issued.

Sincerely,



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Governor of the State of Nebraska



Jesse Bradley, Director
Nebraska Department of Water, Energy, and Environment



Sherry Vinton
Director, Nebraska Department of Agriculture