



January 5, 2026

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**Mr. Milton Boyd**

Office of the Assistant Secretary of the Army  
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Department of the Army  
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Washington, DC 20310-0104

Provided to the Docket via Regulations.gov

<https://www.regulations.gov/document/EPA-HQ-OW-2025-0322-0001>

Re: Updated Definition of “Waters of the United States” Proposed Rule; Docket ID No. EPA-HQ-OW-2025-0322; FRL 11132.1-01-OW

Dear Director Jensen and Acting Deputy Boyd,

The Nevada Division of Environmental Protection (NDEP) and the Nevada Division of Natural Heritage (NDNH), hereafter referred to jointly as “the Divisions”, thank the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (USACE), hereafter referred to as “the Agencies”, for the opportunity to provide comment on the proposed regulatory definition of Waters of the United States (WOTUS) under the Federal Water Pollution Control Act, 33 U.S.C. §1251 (“Clean Water Act”). The Divisions acknowledge the intent of this rulemaking is to clarify the definition of WOTUS to align with the *Sackett v. EPA*<sup>1</sup> decision by the U.S. Supreme Court thereby providing greater regulatory certainty and increasing Clean Water Act program predictability and consistency. NDEP has regularly engaged in state-federal coregulator opportunities related to redefining WOTUS and is available to continue such discussions as the Agencies work toward a Final Rule. As future implementers of the Rule, states are uniquely positioned to provide practical perspectives on how the proposal can be implemented and have a vested interest in helping to ensure the new definition achieves the clarity and durability the Agencies are seeking.

The Clean Water Act clearly recognizes the importance of cooperative federalism and the role of states and tribes as the primary authority over regulating water quality. “It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter” 33 U.S.C. § 1251(b). The coregulator approach to managing water quality is inherent in the development of multiple Clean Water Act programs which enables states and tribes to

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<sup>1</sup> *Sackett et ux. v. Environmental Protection Agency et al.* 598 U. S. \_\_\_\_ (2023)

regulate water quality within their respective jurisdictions such as Section 303 (water quality standards and total maximum daily loads), Section 401 (water quality certifications), and Section 402 (pollutant discharge permits). The definition of WOTUS determines the extent to which the Clean Water Act provides protection over water bodies for these programs.

A narrowly defined scope of WOTUS changes the landscape of regulatory systems that States and EPA have had in place through Clean Water Act programs. While Nevada already has broad protection authority over waters of the State, under this proposed Rule NDEP may need to revisit its project permitting role and scope (please see additional comments below regarding the *Implementation Approach and Timeline for the Final Effective Date*). In the process of amending the definition of WOTUS, the Divisions seek to have the Agencies ensure that all the tools needed for successful implementation are in place *prior to Rule finalization*. Existing federal and state funding sources may be insufficient for NDEP to carry out water quality protection responsibilities, especially if jurisdictional roles are unclear or tools and guidance are inadequate. While the documentation for the proposal discusses cost saving effects from the federal perspective, a funding analysis will still be needed to ensure water quality protection responsibilities continue as a new WOTUS definition is adopted and various shifts in responsibilities occur.

The Divisions support the intent of the proposed Rule to promote regulatory consistency, certainty, and simplification. The Divisions also appreciate federal action on prior comments made by Nevada and others, resulting in improvements such as inclusion of a clear groundwater exclusion and clarity on agricultural issues. While not expressly part of the revised definition, the preamble does provide clarity that agricultural and water conservation practices conducted “for any period of time” do not constitute “abandonment” of prior converted cropland (page 52536). Agricultural producers need clear, practical rules that protect water quality while allowing them to continue producing food, fuel, and fiber. By ensuring a more predictable and consistent application of the Clean Water Act, farmers and ranchers in Nevada will face fewer barriers when addressing restoration and rehabilitation efforts. Coordination will take place at the state level rather than the federal level, safeguarding Nevada’s specific needs. It is critical to ensure that actions on agricultural cropland, including previously converted cropland, are maintained, and the proposed Rule will codify that authority.

Other areas of the Proposed Rule still need work. The Divisions respectfully submit the following comments to assist the Agencies in achieving the stated objectives for updating the definition of WOTUS as published in the Federal Register.

### **Definition and Scope of Relatively Permanent Waters**

The proposed Rule would define *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” (page 52517) which would also apply to tributaries, lakes, and ponds. Under the proposed Rule, waters without standing or flowing water for the entirety of the wet season will no longer meet the definition of WOTUS. The Divisions recognize prior exclusion of ephemeral streams that flow only in direct response to discrete

precipitation events and are supportive of the Agencies’ statement that a stream is not required to be perennial to be considered relatively permanent.

Of critical concern is the new criterion “for the duration of a wet season” which would likely exclude significant intermittent waterbodies in which sustained flow may not commence until well into the wet season due to snowmelt. Hydrologic variability is a defining characteristic of the arid West, and the proposed Rule would likely limit the applicability of the Clean Water Act across many relatively permanent waters throughout the State. During prolonged drought conditions, hydrologic connectivity within Nevada’s major tributary systems may be substantially reduced. Nevertheless, these tributaries maintain the capacity to convey surface water and transport pollutants to downstream jurisdictional waters and thus warrant inclusion in the definition of WOTUS. For similar reasons, the Divisions do not support the strict alternative approaches of limiting the definition of “relatively permanent waters” to only “perennial” waters or the approach that “waters of the United States” “would [solely] encompass traditional navigable waters, tributaries that directly flow into these waters, and wetlands with a continuous surface water connection to such waters.” Such alternative approaches do not work well in the arid West.

The proposed Rule adopts a regionalized framework for defining the wet season, which the Divisions support in concept. However, the proposed Rule also considers the implementation of fixed temporal thresholds for determining a wet season (e.g., 90 days), which fails to account for the significant variability in the timing and duration of seasonal precipitation patterns. The onset and duration of flow is controlled by climate, snow persistence, antecedent conditions (i.e., groundwater storage), precipitation type and timing, temperature, evapotranspiration, topography, basin characteristics, and geological factors. For these reasons, specific timeframes of 90 or 120 days, or a requirement that flow duration is equivalent to the *duration* of the wet season, are problematic. The Agencies acknowledge the concept of precipitation-runoff lag and the variety of factors that influence flow duration but then do not incorporate the concept fully in the proposed definition. This concept is particularly important in the arid West and the Divisions propose an alternative definition of *relatively permanent* as:

“(8) *Relatively permanent* means standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during, **or as a result of,** the wet season.” [**bold underline** emphasis added for requested additional text].

The Divisions recommend this alternative definition because the Agencies interpret “at least during the wet season” to be where indicators of hydrology must occur in response to the wet season for a period that demonstrates relative permanence of the waterbody. This alternative definition aligns with the *Sackett* decision, which limits jurisdiction to “geographic[al] features that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes’” and to adjacent wetlands that are “indistinguishable” from those bodies of water due to a continuous surface connection while more effectively accounting for regional climatological differences and other variable factors that control lag time between snowmelt and runoff as well as streamflow duration experienced throughout arid areas of the western United States.

### **Definition and Scope of Tributary**

The Agencies propose that the presence of “bed and banks” are required for a tributary to meet the definition of WOTUS. The Divisions have significant concerns with the introduction of the “bed and banks” requirement because it will create confusion in its implementation and potentially result in the removal of waters that could impact the quality of downstream jurisdictional waters. The Agencies recognize that bodies of water “forming geographic[a] features’ [...] described in ordinary parlance as ‘streams, oceans, rivers, and lakes’” and that have relatively permanent flow and connected to jurisdictional waters are also jurisdictional. The Agencies also state that a) lakes and ponds may be considered a tributary consistent with the Agencies’ current implementation if they meet the proposed definition, and b) lakes, ponds, and impoundments that contain standing or continuously flowing water year round or at least during the wet season, would be considered to be a “body of water with relatively permanent flow” under the proposed Rule. However, the Agencies feel the need to clarify that “Generally, lakes and ponds do have a bottom, or bed, as well as side slopes, or banks” and that “these may look different than the bed and banks of more channelized versions of streams which are tributaries.”

The Divisions identify the requirement for “bed and banks” as ambiguous and potentially a significant source of confusion and error in a jurisdictional determination. The Divisions encourage the Agencies to reconsider the addition of the requirement for “bed and banks” or, alternatively, clarify that this applies only to “channelized version[s] of streams.” For the same reasons, the Divisions have significant concerns with the introduction of the “bed and banks” requirement concurrently with the proposal to remove the definition of (a)(5) Lakes and Ponds. Please refer to the section Lakes and Ponds Assessed Under Paragraph (a)(5) of these comments for details.

The Divisions seek clarification regarding the proposed definition of ‘Tributary,’ specifically the requirement that the presence of bed and banks would be used for jurisdictional determinations only, and not for the delineation of the tributary itself. The current standard practices for the delineation of geographic features, such as streams and rivers, make use of other equally important characteristics and factors.

The proposed Rule would define tributary as “a body of water with relatively permanent flow, and a bed and banks, 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” (page 52546). The proposed implementation of the definition of “tributary” would require knowledge of whether there are any non-relatively permanent features downstream of the review area that would sever jurisdiction. The proposed Rule states that “[t]he Agencies recognize that there are implementation challenges with the proposed approach as it may be difficult to ascertain if there are downstream wetlands located at any point in the tributary’s path to a traditional navigable water and whether those wetlands have relatively permanent flow through them.” Jurisdictional determinations would then require watershed-scale analysis of relatively permanent waters and non-relatively permanent reaches. This level of analysis would take longer to complete and thus would be counter to the goal of simplifying the determination process, likely adding

additional time to the permitting process. The Divisions recommend that the Agencies seek necessary levels of resources, support, and tools for this level of analysis.

Additionally, “[t]he Agencies also seek comment on the proposed treatment of natural and man-made features regarding the jurisdictional status of upstream waters, including whether these features can connect tributaries downstream when they convey relatively permanent flow or if they should sever downstream jurisdiction in all cases other than as part of a water transfer.” The Divisions seek the adoption of a Rule that discourages the intentional construction of features within tributary networks designed to restrict, limit, or prevent relatively permanent flow or would otherwise sever upstream jurisdiction. The proposed Rule states, “[t]he Agencies recognize the Supreme Court has stated that even when a barrier between a wetland and a water of the United States would ordinarily remove that wetland from Federal jurisdiction, a property owner may not carve out wetlands from Federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the Clean Water Act.” This position aligns with the recommendation that artificially constructed features should not be used to disrupt or sever jurisdiction over upstream or adjacent waters. Likewise, jurisdiction over WOTUS should not be considered severed solely due to the conveyance of a channel segment through a culvert or similar hydromodification structure.

#### **Definition and Scope “Continuous Surface Connection” and Wetlands Delineation**

The Agencies do not propose to revise the definition of “adjacent” for wetlands, which means “having a continuous surface connection.” However, the proposed Rule would define “continuous surface connection” to mean “having surface water at least during the wet season and abutting (i.e., touching) a jurisdictional water.” The proposed Rule preamble identifies the approach for determining jurisdiction over adjacent wetlands, as well as the method for delineating the portions of a wetland that fall under such jurisdiction.

#### Use of “During the Wet Season”

The Divisions appreciate and support the intent of the proposed Rule to identify a regionalized approach; but as described in the comments regarding “Relatively Permanent Waters”, the use of “during the wet season” falls short in recognizing the variability in hydrology across the country and the hydrologic conditions and cycles that are characteristic of Nevada and the arid West. The Divisions refer to that section of the comments for the rationale, and propose an alternative definition of “Continuous Surface Connection” as:

“(3) *Continuous surface connection* means having surface water at least during, **or as a result of,** the wet season and abutting a jurisdictional water.” [**bold underline** emphasis added for requested additional text].

#### Delineation of Jurisdictional Wetlands

The Agencies’ proposed Rule and supporting documentation contain conflicting statements in relation to how the Agencies would determine the jurisdiction of wetlands. The Agencies do recognize that

“**Before** determining if a wetland is jurisdictional, the Agencies must **first** determine if the wetland in question meet the regulatory definition of “wetlands.” The Agencies are not proposing to change the longstanding definition of “wetlands” [...]. Field work is often necessary to confirm the presence of a wetland and **to accurately delineate its boundaries** [...]. **Once a feature is identified** as a wetland, [...] the Agencies assess whether it is adjacent to a traditional navigable water, the territorial seas, a jurisdictional impoundment, or a jurisdictional tributary” (page 52530, emphasis added). The Agencies appear to indicate that wetland delineation should precede the jurisdictional determination process; a sequencing that the Divisions support. However, the Agencies also state that “Under this proposed approach, 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” (page 52527). The Agencies assert that they are “not proposing to change their longstanding implementation of the lateral limits of jurisdiction, which states that when adjacent wetlands are present, “jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands” implying that jurisdictional determinations and wetland delineations follow an identical approach. The Divisions concur with the Agencies’ interpretation of the *Sackett* decision that, in order for an adjacent wetland to be jurisdictional, there must be a “continuous surface connection” (i.e., the “indistinguishable” criterion). However, the Divisions maintain that the Agencies’ potential interpretation—that a “continuous surface connection” must be present across the entire extent of a wetland to exert jurisdiction—lacks support in the U.S. Supreme Court’s decisions.

The Divisions recommend that the delineation of a jurisdictional wetland should not be based solely on the extent of the continuous surface connection to jurisdictional waters. Rather, it should reflect the integral boundaries of the delineated wetland and adhere to established standards and practices that are currently in place and effective. A more practical bright-line approach—which the Agencies are seeking—would be to adopt the full extent of a delineated wetland as defined by the existing USACE methodology. Clarity and practicality of this approach have been demonstrated as the methods are well-established, widely understood, and are likely to be less subjective and resource-intensive than the proposed or other approaches. By contrast, implementation of the Agencies’ proposal to identify the portions of a wetland that have continuous surface connection at least during the wet season, rather than delineated wetlands, would be complex and resource intensive. Hydrology is the most variable component within the Agencies’ long-standing three-parameter wetland characterization framework, as both the extent and duration of surface water presence can fluctuate significantly from year to year. Delineation based on hydrology alone, without concurrent evaluation of vegetation and soil characteristics, would be inaccurate and inconsistent. Retaining the existing USACE wetland delineation methodology acknowledges that a) hydrological integrity of a wetland is preserved when jurisdictional extent reflects the extent of a delineated wetland, and b) regional differences are considered in the delineation of jurisdictional wetlands. This approach would also be consistent with the Agencies’ statement that “The Agencies are also not proposing to change their longstanding implementation of the lateral limits of jurisdiction, which states that when adjacent wetlands are present, “jurisdiction extends beyond the ordinary high water mark to the limit of the adjacent wetlands.” 33 CFR 328.4.

### **Culvert Connecting Wetlands**

The Agencies request comment on the interpretation that culverts connecting wetland areas on opposite sides of a road do not inherently sever jurisdiction, provided the culvert conveys relatively permanent water. The Divisions support this approach and support the consideration of such wetland portions as “one wetland” which is consistent with the concept of a continuous surface connection under *Rapanos*<sup>2</sup> and *Sackett*. However, the Divisions refer to our comments and recommendations on the definition of “relatively permanent waters” and the use of “wet season” to provide a regional approach that fits hydrological characteristics in the arid West.

### **Tools for Determining Wet Season**

The Agencies propose to rely on the Web-based Water-Budget Interactive Modeling Program (WebWIMP) and the Antecedent Precipitation Tool (APT) as the primary tools for identifying the “wet season.” WebWIMP defines wet season as periods “when precipitation exceeds evapotranspiration,” yet it remains unclear whether the proposed tools are appropriate, accurate, or properly calibrated for the arid West. In this region, the timing of precipitation and the timing of runoff often diverge, undermining the validity of a simple precipitation-evapotranspiration comparison as a proxy for hydrologic cycles.

WebWIMP’s underlying algorithm uses a “modified form of the Thornthwaite scheme (Thornthwaite 1948) [which] calculates estimates of monthly average potential evapotranspiration (PET) using average monthly surface air temperature.” However, the USACE Research and Development Center’s paper on APT and WebWIMP, states that “Penman-Montheith, or other radiation-based means of estimating PET, are generally preferred over temperature-based approaches, such as Thornthwaite.” The Center further cautions that WebWIMP’s spatial and temporal resolution is relatively coarse, limiting its effectiveness during transitional periods between the wet season and dry season (Gutenson et al., 2023<sup>3</sup>).

Given these limitations, the proposed method for determining ‘wet season’ does not align with the best available science and appears overly coarse to reliably identify wet seasons for the purpose of defining WOTUS. The simplified approach - precipitation exceeding evapotranspiration - fails to capture the timing of runoff, regional hydrologic and climatic variability, or the substantial influence of human activities on flow persistence. Groundwater pumping, diversions, drainage infrastructure, and the exercise of surface water rights can significantly alter runoff timing and duration. Reductions in water tables or surface water presence resulting from anthropogenic activities should not be construed as diminishing the relative permanence of aquatic resources within the landscape, even when the proposed ‘wet season’ criterion is not met. Such resources remain capable of contributing flow and conveying pollutants to navigable waters when flows occur.

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<sup>2</sup> *Rapanos v. United States*, 547 U.S. 715 (2006)

<sup>3</sup> Antecedent Precipitation Tool (APT) Version 2.0: Technical and User Guide. June 2023.  
(<https://bwsr.state.mn.us/sites/default/files/2024-12/ERDC-TN%20WRAP-23-2.pdf>)

An alternative, regionally tailored tool the Agencies should consider is the New Mexico Hydrology Protocol<sup>4</sup>, a field-based observation protocol developed to assess relative permanence to distinguish ephemeral, intermittent, and perennial streams and rivers in New Mexico. This methodology integrates a comprehensive suite of geomorphological, hydrological, and biological indicators to generate a composite score corresponding to a specific waterbody type or hydrological classification. The protocol has been successfully applied within the State of Nevada and may serve as a viable framework for regionally classifying relatively permanent waters.

Significant limitations with use of the “wet season” approach are demonstrated above, along with several viable alternatives that remedy the issues. However, if the Agencies proceed with the proposed approach, the Divisions strongly recommend the Agencies develop a clear, scientifically supported, and formal definition of the term “wet season.” Establishing such a definition is critical to ensuring transparency, consistency, and predictability in the application of the proposed Rule across diverse geographic and climatic regions. Without a standardized definition, determinations of jurisdiction could vary significantly among regions and field offices, leading to inconsistent implementation and regulatory uncertainty. Furthermore, to promote transparency, the Divisions request that the Agencies clearly identify the methods that would be utilized to monitor and assess those portions of wetlands that retain standing water during the wet season.

#### **Lakes and Ponds Assessed Under Paragraph (a)(5)**

The proposed Rule would eliminate the term “intrastate” from paragraph (a)(5) of the WOTUS definition. Based on the elimination of “interstate” waters as a defining element, the elimination of “intrastate” in (a)(5) is generally logical. The proposal then observes that there is then little difference between the definition of (a)(5) Lakes and Ponds and (a)(3) Tributaries, and the Agencies seek feedback on elimination of (a)(5) in deference to inclusion of other (relatively permanent and continuously connected) Lakes and Ponds merely as (a)(3) Tributaries. While this proposal for streamlining does appear to potentially follow to such a logical conclusion, other portions of the proposed Rule that seek to amend the definition of Tributaries, or at a minimum asks for input on alternative language proposals, makes a simple analysis for elimination of (a)(5) unavoidably complex.

As discussed above regarding the “Definition and Scope of Tributary,” the Agencies seek comment on introduction of “bed and banks” as defining features of tributaries, as well as other important questions about natural or manmade features which could sever jurisdiction. For purposes of this discussion regarding elimination of (a)(5), it is unclear if such a lake or pond would potentially not meet the definition of Tributary if the Agencies incorporate “bed and banks” into the definition and an (a)(5) water did not have such a characteristic. The Divisions also express concern over a new definition of Tributary that inherently encourages construction of features that would sever jurisdiction through elimination of flowing water from

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<sup>4</sup> State of New Mexico Water Quality Management Plan & Continuing Planning Process – Appendix C: Hydrology Protocol for the Determination of Uses Supported by Ephemeral, Intermittent, and Perennial Waters. Revised October 2020. (<https://www.env.nm.gov/wp-content/uploads/sites/25/2019/11/WQMP-CPP-Appendix-C-Hydrology-Protocol-20201023-APPROVED.pdf>)

a lake or pond. Therefore, unless and until a solid definition of Tributary resolves differences between “Tributaries” and other “lakes and ponds not identified in (a)(1) through (4)”, then section (a)(5) should remain.

### **Ditch Exclusion from the Definition of “Waters of the United States”**

The Divisions support the Agencies in retaining “their longstanding position that the channelization or relocation of a tributary does not modify the jurisdictional status of that water” (page 52539). The Divisions also support the Agencies’ position that tributaries contributing flow to a downstream paragraph (a)(1) water through a ditch that is proposed to be excluded under paragraph (b)(3) does not sever jurisdiction upstream under the proposed Rule, so long as the ditch has relatively permanent flow. However, the Agencies also state that a tributary that “is modified through water diversions or through other means, then it remains jurisdictional under the proposed rule as long as it continues to satisfy the conditions in the proposed definition of “tributary”” (page 52539). If flow is being modified through water diversions the requirement for relatively permanent flow, currently proposed with the definition of “tributary,” may not be satisfied in the relocated tributary. The Divisions seek clarification on this apparent contradictory language and support finalizing a Rule that does not incentivize intentional relocation of a water resource into a ditch to sever jurisdiction.

The Divisions have an additional concern regarding a change in the ditch exclusion. Prior definitions of ditches included language such as being, “wholly in uplands and draining only uplands.” While the scope of ditches is expanding to encompass more than those “draining uplands”, the Divisions are concerned that the proposed definition has the potential to allow for excavation of a ditch in dry land for the purpose of draining a waterbody. This could allow waters to be converted into dry land, and then potentially filled in, without a federal permitting requirement. The Divisions ask that the Agencies carefully consider such a scenario and either amend the definition to address this concern, or address the concern in the final Rule preamble to ensure clarity.

### **Additional Concerns and Considerations**

#### ***Burden of Proof***

The proposed Rule states that the Agencies would now bear the burden of proof in demonstrating that an aquatic resource meets the requirements to be federally jurisdictional or excluded under the proposed Rule. The proposed Rule also states that “if the Agencies do not have adequate information to demonstrate that a water meets the jurisdictional standards to be a “water of the United States”, the Agencies would find such a water to be non-jurisdictional” (page 52515). However, jurisdictional determination requests have historically been supported by documentation prepared by landowners, project proponents, or consultants. The extent of a project proponent’s future involvement to ascertain federal jurisdiction or obtain a permit becomes unclear under the proposed Rule. Furthermore, the implications for statutory permitting timelines under such a shift in burden remain uncertain, raising questions about how permitting processes and compliance obligations will be affected. Delay in the timeline for project research and Agency action may result in a project proponent’s inclination to proceed

with the project without full investigation of jurisdictional status; setting up the process to be more enforcement-driven if federal jurisdiction is determined retroactively, versus a proactive compliance-focused approach.

For example, USACE has 30 days to determine if an initial application for a General Permit is complete. If the application is incomplete, the applicant will be notified and the District Engineer can require the applicant to provide any needed data to complete a Jurisdictional Determination, and a new 45-day review period begins once the revised, complete application is received. The prospective permittee may presume their project qualifies for the general permit and may proceed if they are not otherwise notified by the District Engineer within this 45-day period. Will USACE be required to collect any and all data related to jurisdiction within 75 days or can USACE require the permittee to provide the data and/or will the review time statute be changed to allow USACE additional review time?

The Divisions are concerned and seek clarification on these aspects of the proposed Rule. The Agencies’ strategies and timelines for amending associated workflow regulations for Sections 404/401 and 402 are a critical aspect to be addressed as part of finalizing this action.

#### Alternative Approaches

The phrase “alternative approach” appears 43 times throughout the proposed Rule. Many of these alternative approaches include a substantially reduced interpretation of WOTUS. If an alternative approach is to be adopted, the Divisions support those that prioritize the most resource-protective alternatives allowable within the scope of *Sackett* and previous legal decisions. This would help to achieve a more balanced share of state and federal responsibility for water quality protection. Additionally, the inclusion of multiple alternatives throughout the proposed Rule creates ambiguity regarding the Agencies’ intended regulatory approach. The Agencies should put forward a Revised Proposed Rule that explicitly states the language they intend to adopt. This would not only help achieve the intended goal of improving clarity, transparency, and certainty associated with the Rule, but would also improve the Divisions’ ability to assess and provide meaningful feedback. To achieve the desired end goal of a *durable* Rule, publishing a Revised Proposed Rule is viewed by the Divisions as a step worth taking.

#### Interstate Waters

Interstate waters are more than just waters crossing boundaries between the 48 contiguous states, they also include State-Tribal boundaries. This is particularly relevant in Nevada where there are 28 Federally Recognized Tribes. The Divisions respect the legal analysis in the preamble for the removal of interstate waters as a defining characteristic of WOTUS but remain concerned about the loss of appropriate federal oversight that has been in place to manage potential conflicts and prevent degradation of interstate waters. The assumptions in the proposed Rule are broad-brush, indicating that this change would “likely have few practical impacts and would not undermine significant reliance interests, as the Agencies rarely identify waters as jurisdictional solely because they are interstate [...]” (page 52516). Waters in the arid West that cross State-State or State-Tribal boundaries, while limited, are important to manage effectively.

The federal government's role in managing interstate water pollution issues includes such topics as ensuring a coordinated approach, oversight of state and tribal standards, and dispute resolution. Removal of this role through narrowing of the WOTUS definition could potentially result in delays in permitting, expensive litigation to resolve interstate conflicts, inconsistent or weakened standards, increased degradation of water quality in downstream jurisdictions, increased public health risks, and increased economic losses from industry relying on clean water. Should the Agencies seek further discussion of potential solutions for these concerns in the future, the Divisions would be interested in participating.

#### Mapping Resources and Tool Finalization

Regardless of the finalized definition, it is imperative that a national mapping system be established to support public and regulatory knowledge of a waterbody's current jurisdictional status and potential change in status. Such a mapping system is key to the implementation of the proposed Rule, as well as providing a tool for landowners to access for the regulatory certainty they seek. Multiple revisions of WOTUS have occurred without the requisite understanding of the associated impacts across the country. This has resulted in confusion and uncertainty for the regulated community and state coregulators when there is a poor understanding of the aquatic resources that the federal government regulates. In the process of amending the definition of WOTUS, NDEP would seek to have the Agencies ensure that all the needed tools for successful implementation are in place prior to Rule finalization.

#### Cost Savings Claims

While the proposed Rule places significant emphasis on cost savings for the regulated community, it does not adequately account for the increased financial and administrative burdens that would be shifted to state and local Agencies. Project proponents may receive more clarity or regulatory certainty on federal jurisdictional oversight; however, many aspects of this proposed Rule simply shift the burden of implementation to the states because the fundamental importance of water quality and natural resource protection does not change. For instance, according to the Agencies' Regulatory Impact Analysis, it is estimated that nationally, 19% of wetlands in the National Wetland Inventory (NWI) would be considered WOTUS under the proposed rule. However, the same Regulatory Impact Analysis estimates that in Nevada, less than 2% of NWI-mapped wetlands would meet the definition of WOTUS. Costs related to shifting certain regulatory functions from the Agencies to NDEP are likely to affect the regulated community. Currently, federal work products are provided at little or no cost in Nevada under the existing coregulatory approach to pollution control.

#### Implementation Approach and Timeline for the Final Effective Date

In light of the potential impacts on affected federal programs, the Divisions respectfully request that the Agencies adopt a phased or extended implementation approach; specifically, allowing at least a one-year timeframe for full implementation of the updated WOTUS definition following publication of the Final Rule. The Divisions further recommend that coordination with EPA and USACE commence immediately to

identify and review historic documentation to establish the waters determined to be fundamentally jurisdictional under the finalized WOTUS Rule.

Additionally, the federal government currently maintains tribal trust responsibilities and Historic Preservation Section 106 responsibilities that define federal agency roles and obligations. Following publication of the Final Rule, NDEP will require sufficient time to evaluate the State's role in these coordinating functions. The NDEP expects the need to develop and implement effective methods for communication and coordination with the Tribal governments, the State Historic Preservation Office, and the public regarding permitting actions within waters of the State and on waters that may affect tribal or historic resources. An extended or phased implementation approach is essential to ensure that any regulatory gaps are appropriately addressed by the State.

### **Closing**

The Divisions have a significant vested interest in the final scope of WOTUS. According to population estimates released by the U.S. Census Bureau in December 2024, Nevada is one of the fastest-growing U.S. states, ranking sixth in the nation by percentage of growth. In an arid state such as Nevada, such growth can coincide with areas that have the presence of surface water. A narrowly construed definition of WOTUS could lead to increased loss of wetlands and other aquatic resources, without compensatory mitigation to offset permanent losses; driven by rapid development activities within and adjacent to these already limited resources.

As the Agencies compile and consider the feedback received in response to the Proposed Rule, we encourage active ongoing engagement with state coregulators. This should be conducted with states directly or through the Association of Clean Water Administrators, National Association of Wetland Managers, the Western States Water Council, and the Environmental Council of the States. As future implementers of the final rule, the states have a vested interest in ensuring that the final rule achieves the clarity and durability that the Agencies seek at the end of the day.

Since the Agencies have repeatedly requested additional input on many aspects of the proposal within the Federal Register, and comments submitted to the Federal Register regarding the Proposed Rule are expected to result in further changes to the definition of WOTUS (or the preamble rationale for various changes), it is critical that states and tribes be included in the process of moving toward a Final Rule. While not common practice, a Revised Proposed Rule may be warranted to achieve the Agencies' goal of crafting a durable rule. Regardless, we take the role of coregulator seriously and will continue to engage with the Agencies.

NDEP and NDNH appreciate the Agencies' intent of the proposed rule to promote regulatory consistency, certainty, and simplification. Please feel free to reach out to further discuss the topics covered herein, or others for which the Agencies seek a western perspective. NDEP and NDNH representatives can be reached as included below.


Sincerely,



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Sincerely,



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