January 5, 2026

The Honorable Lee Zeldin
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW, Suite 1101A
Washington, DC 20460

Lt. General William H. "Butch" Graham, Jr.
Chief of Engineers and Commanding General
U.S. Army Corps of Engineers
441 G Street NW
Washington, DC 20314-1000

Submitted Electronically via Regulations.gov

Re: Comments of the State of North Dakota on "Updated Definition of 'Waters of the United States'" (Docket No. [EPA-HQ-OW-2025-0322; FRL 11132.1-01-OW])

Dear Administrator Zeldin and General Graham:

North Dakota appreciates the Agencies' efforts to define the "waters of the United States" in a way that complies with the Constitution, our federal system, and the text of the Clean Water Act. *See Updated Definition of "Waters of the United States*," 90 Fed.Reg. 52498 (Nov. 20, 2025).

North Dakota supports the Agencies' proposed revisions. As Governor Armstrong recently put it, "[t]he Biden-era WOTUS rule was an existential crisis for North Dakota. It represented massive federal overreach that would have been catastrophic for North Dakota's farmers and ranchers, energy producers and small businesses."[1] The Constitution, the plain text of the Clean Water Act, and the principles of federalism that undergird them both do not support the breathtakingly expansive—yet simultaneously vague and inscrutable—definitions previously promulgated by the Biden and Obama Administrations. The multi-state comment letter submitted by West Virginia thoroughly addresses those points as well as several areas for further improving the proposed rule, and North Dakota joins those comments in full. North Dakota also writes separately to highlight some unique concerns with how WOTUS is defined and to provide a few additional suggestions for even further improvement.

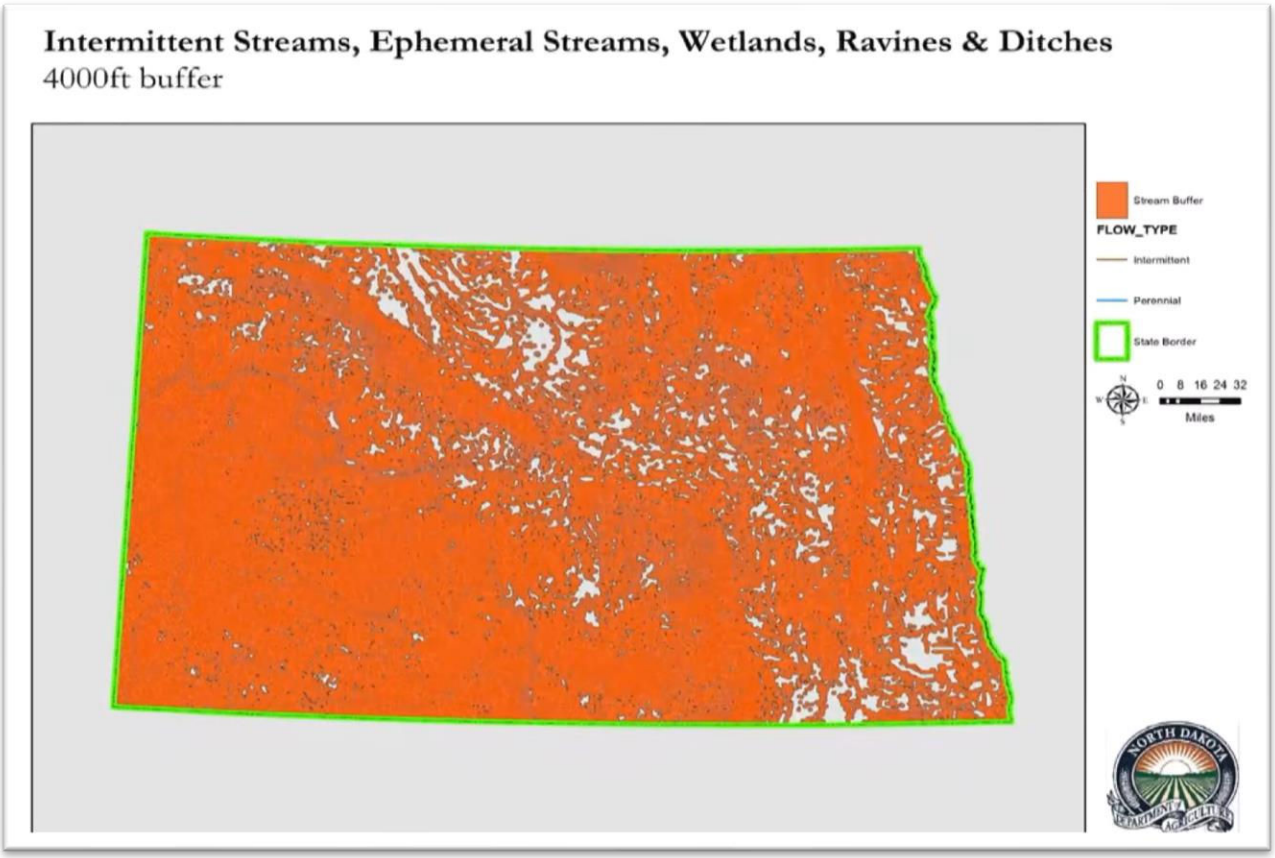
I. North Dakota's Interest in Properly Defining WOTUS

"Regulation of land and water use lies at the core of traditional state authority." *Sackett v. EPA*, 598 U.S. 651, 679 (2023); *see also Martin v. Lessee of Waddell*, 41 U.S. 367, 410 (1842) ("[W]hen

[1] Office of the Governor, North Dakota, *Armstrong voices support for revised "Waters of the U.S." definition as good for ND ag, energy, businesses* (Dec. 12, 2025), https://www.governor.nd.gov/news/armstrong-voices-support-revised-waters-us-definition-good-nd-ag-energy-businesses.

the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government."). And Congress duly recognized that principle of state sovereignty when it passed the Clean Water Act, declaring: "[i]t 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 … of land and water resources[.]" 33 U.S.C. § 1251(b).

Nonetheless, previous WOTUS rules weaponized water features to assault state authority. As Senator Cramer has observed, "more than 80% of North Dakota's landmass would have been under federal jurisdiction because of our vast presence of prairie potholes and ephemeral features."[2] In North Dakota, the absurdity of those previous WOTUS rules is strikingly captured below—with the surface lands that would have been treated as federal "waters" shown in orange:



Previous administrations seem to have promulgated WOTUS definitions with the tacit presumption that if the federal government did not protect waters and water features, then nobody

[2] Joey Harris, *New federal water regulations draw North Dakota, industry praise; environmental groups concerned*, The Bismarck Tribune, (Dec. 14, 2025), https://www.inforum.com/news/north-dakota/new-federal-water-regulations-draw-north-dakota-industry-praise-environmental-groups-concerned#:~:text=%22Debates%20over%20whether%20something%20is,D.

would. But at least in North Dakota, nothing could be further from the truth. North Dakota has a robust and effective regulatory regime to protect its waters, with multiple State agencies—including the Department of Water Resources, the Department of Environmental Quality, and the Department of Agriculture—having significant authority and enforcement powers to manage and protect the waters in North Dakota. Those state agencies are also more experienced, more knowledgeable, and more accountable when it comes to managing and protecting North Dakota's local waters than the federal government could ever hope to be. North Dakota therefore applauds the current effort to rein in the WOTUS definition to something that is constitutionally sound and consistent with the Clean Water Act, and it remains ready to manage, regulate, and protect its own in-state waters without the odious federal overreach of the past.

II. Additional Changes to Further Strengthen the Proposed WOTUS Rule

As noted above, the multi-state comment letter submitted by West Virginia provides several suggestions for further improving the proposed WOTUS rule, and North Dakota joins those suggestions in full. North Dakota also offers the following suggestions for the Agencies' consideration as further ways to improve upon and tighten the proposed rule.

1. Codify the Presumption Against Federal Jurisdiction

> **33 C.F.R. § 328.4(c); 40 C.F.R. § 120.2(d) (new provisions):** "Waters are presumed non-jurisdictional unless the agencies establish jurisdiction by clear and convincing evidence."

The Agencies are absolutely right to note in the Proposed Rule's preamble 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." 90 Fed.Reg. at 52515. It is entirely appropriate to place the burden of establishing federal jurisdiction on the federal government in the first instance, rather than allowing the federal government to declare water features to be jurisdictional unless another party proves otherwise.

However, North Dakota encourages the Agencies to affirm that spot-on principle in more than just the preamble. Including that principle in the body of the regulatory text in the Code of Federal Regulations, in addition to the preamble language in the *Federal Register*, will provide greater clarity and emphasis—ensuring that this highly important principle is not overlooked or intentionally disregarded in the future.

2. Jurisdictional Determinations Based on Field-Observable Surface Indicators

> **33 C.F.R. § 331.2 (amended definition):** "*Basis of jurisdictional determination* is a summary of the indicators that support the Corps approved JD. Indicators supporting the Corps approved JD are limited to objective, field-observable surface indicators under ordinary conditions ~~can include, but are not limited to: indicators of wetland hydrology, hydric soils, and hydrophytic plant communities; indicators of ordinary high water marks, high tide lines, or mean high water marks; indicators of adjacency to navigable or interstate~~

~~waters; indicators that the wetland or waterbody is of part of a tributary system; or indicators of linkages between isolated water bodies and interstate or foreign commerce~~."

The Agencies' proposal to make jurisdictional determinations based on the "weight of evidence" risks recreating the expert-heavy regime that *Sackett* explicitly rejected. That case-by-case approach would involve the enigmatic use of topographic maps, aerial imagery, high-resolution elevation data, soil types, hydrography datasets, FEMA maps, slope or curvature metrics, specialized software, and other assessment tools—all subject to varying expert analyses and inconsistent interpretations by government and commercial hydrologists, water resource engineers, and others.

Re-importing all those evaluation tools through a "weight of evidence" standard will inevitably invite field offices to default to a highly complicated multi-factor balancing test that, in practice, strongly resembles the discarded significant-nexus test—while stretching jurisdictional determinations out for months or years and once again placing exorbitant and unnecessary costs onto landowners and developers.

The better route is to simply use field-observable indicators rather than complex hydrological tools. The Agencies should avoid determinative frameworks that, in practice, require "call[ing] out your local friendly agent and he'll tell you, yes or no[.]" Transcript of Oral Argument at *98, *Sackett v. EPA*, 598 U.S. 651 (2023) (No. 21-454), 2022 WL 22297224 (Gorsuch, J.). Using only field-observable indicators to make jurisdictional determinations would be much more understandable and workable to a reasonable landowner, and it would mitigate against the possibility that simply moving dirt on the surface of a dry farmland could cause a landowner to incur $25,000-a-day fines and possible prison time. *See Sackett*, 598 U.S. at 669 ("the CWA can sweep broadly enough to criminalize mundane activities like moving dirt"); *see also* 33 U.S.C. § 1319(c)(1)(A)–(B).

With such potential criminal consequences, a "weight of the evidence" standard that will inevitably rely on expert examinations and highly complex hydrological tests unavailable to the average landowner is cold comfort. Due process requires defining penal consequences "with sufficient definiteness that ordinary people can understand what conduct is prohibited" and "in a manner that does not encourage arbitrary and discriminatory enforcement." *McDonnell v. United States*, 579 U.S. 550, 576 (2016) (quoting *Skilling v. United States*, 561 U.S. 358, 402–403 (2010)). Given the criminal penalties at stake, and to be consistent with the logic of *Sackett*, the Agencies must adopt a WOTUS definition that provides clear, bright-line rules that would be understandable to reasonable landowners.

To provide that clarity, the Agencies must have the burden of establishing that a water feature is jurisdictional and they must do so in a way that a reasonable landowner of ordinary intelligence could understand—by pointing to objective surface indicators that are readily apparent in the field.

3. Definition of "Ordinary Conditions"

> **33. C.F.R. § 328.3(c); 40 C.F.R. § 120.2(c) (new definition):** "*Ordinary conditions* means conditions that are representative of normal climatic and hydrologic regimes, excluding temporary anomalies such as droughts, floods, or atypical precipitation events."

The multi-state letter comment being submitted by West Virginia calls for using the concept of "ordinary conditions" in the definitions of "continuous surface connection" and "relatively permanent." North Dakota fully supports that change. However, to prevent inconsistent or malicious application of the phrase, it encourages the Agencies to also expressly include a definition of that term that is consistent with the reasoning and holdings in *Rapanos* and *Sackett*.

When defined consistent with *Rapanos* and *Sackett*, use of the term "ordinary conditions" keeps the teeth of the "relatively permanent" and "continuous surface connection" requirements while also allowing for "temporary interruptions in surface connection [that] may sometimes occur because of phenomena like low tides or dry spells," *Sackett*, 598 U.S. at 678; *see also Rapanos v. United States*, 547 U.S. 715, 733 n.5 (2006) ("By describing 'waters' as 'relatively permanent,' we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought."). North Dakota therefore encourages the Agencies to expressly include a definition for what would constitute "ordinary conditions."

4. Lakes and Ponds Category Limited to Navigable Waters

> **33 C.F.R. § 328.3(a)(5); 40 C.F.R. § 120.2(a)(5):** "Lakes and ponds that are themselves traditional navigable waters identified in paragraph (a)(1) ~~through (4) of this section that are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to the waters identified in paragraph (a)(1) or (a)(3) of this section~~.

Defining lakes and ponds as WOTUS when they are not navigable waters has the potential to lead to future federal overreach. North Dakota and other states in the prairie pothole region provide a prime example of the potential for the lakes and ponds category to be abused. Unfortunately, in the hands of a future administration that does not respect state sovereignty, the currently proposed definition may act as a hook to pull prairie potholes and similar water features into federal jurisdiction if they could potentially overfill with water just one week of the year.

Such a sweeping jurisdictional grab is what led to over 80% of North Dakota being shown as orange on the map above. That map illustrates why navigability is not only the textually and historically correct tool for confining the reach of WOTUS, but it is also an effective tool at preventing such absurd and overreaching results.

North Dakota submits that limiting the lakes and ponds category to navigable waters is the much better path, and the one most likely to reduce opportunities for mischief or exploitation by future administrations that may be keen to push beyond the limits of their authority. Such an approach also better reflects the Supreme Court's recognition "that 'the waters of the United States'

principally refers to traditional navigable waters." *Sackett*, 598 U.S. at 673 (citing *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 168–69 (2001)).

5. Further Tighten the Definition of Tributary

> **40 C.F.R. § 120.2(c)(10):** "*Tributary* means a body of water with relatively permanent flow, with a bed and banks and an ordinary high-water mark, 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[3] surface flow. Ephemeral and intermittent channels are not tributaries. A tributary does not include a body of water that contributes surface water flow to a downstream jurisdictional water through a feature such as a channelized non-jurisdictional surface water feature, subterranean river, groundwater (including subsurface hydrologic exchange), culvert, dam, tunnel, pipe, pump, tide gate, spillway, or similar artificial feature, or through a debris pile, boulder field, wetland, or similar natural feature, if such feature does not convey relatively permanent flow. When a tributary is part of a water transfer (as that term is applied under 40 CFR 122.3), and the transfer conveys relatively permanent surface flow, the tributary does not lose its jurisdictional status solely due to conveyance through the transfer infrastructure."

Further tightening the definition of tributary may also be warranted, as *Sackett* itself demonstrated. *See* 598 U.S. at 662–63 (describing how EPA used a tributary to claim the Sacketts' land was WOTUS). Consider, for example, closed basin lakes that are entirely intrastate, like Devil's Lake in North Dakota. Such closed basin lakes lack a "relatively permanent" flow into interstate waters and thus are non-jurisdictional.

However, an overbroad application of the "tributary" definition could risk transforming such closed basin lakes into WOTUS if they have overflow outlets that exist to control flooding and provide an ephemeral flow out of the lake in response to extraordinary rain events, even though such intermittent and ephemeral streams are clearly disqualified under *Rapanos* and *Sackett. See Rapanos*, 547 U.S. at 733–34 ("exclud[ing] channels containing merely intermittent or ephemeral flow also accords with the commonsense understanding of the term."); *Sackett*, 598 U.S. at 671. North Dakota therefore encourages the Agencies to tighten the definition for tributary even further to make it clear beyond any future peradventure that intermittently used overflow outlets and similar features do not constitute tributaries that could cause an entire basin to be WOTUS.

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[3] **Note:** This definition depends on a fix to the definition of "relatively permanent" as discussed in the multi-state comment being submitted by West Virginia.

North Dakota thanks the Agencies for their efforts over the past year to return the scope of the WOTUS definition to a more proper balance of federal and State authorities. The proposed rule is in many ways a very strong stride in that direction, and North Dakota hopes that the changes proposed in this comment will further help the Agencies to achieve their laudable goals.

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State of North Dakota