WESTERN ENERGY ALLIANCE

October 9, 2026

Administrator Lee Zeldin
Environmental Protection Agency
Mail Code 28221T
1200 Pennsylvania Avenue NW
Washington, DC 20460
Submitted via www.regulations.gov

RE: Updated Definition of Waters of the United States, Docket ID No. EPA-HQ-OW-2025-0322

Dear Administrator Zeldin and Acting Secretary Telle:

Western Energy Alliance (the Alliance) is the leader and champion for independent oil and natural gas companies in the western United States. Working with a vibrant membership base for over 50 years, the Alliance stands as a credible leader, advocate, and champion of industry. Alliance members engage in all aspects of environmentally responsible exploration and development of oil and natural gas. Our expert staff, active member committees, and committed board members form a collaborative and welcoming community of professionals dedicated to abundant, affordable energy and a high quality of life for all.

The Alliance appreciates the opportunity to comment on the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers' supplemental notice of proposed rulemaking (SNPRM) to revise the definition of "waters of the United States" (WOTUS). The Alliance strongly supports the updated proposed definition, which is consistent with statutory authority and U.S. Supreme Court precedent.

As we noted in our comments on the proposed regulatory text published in the *Federal Register* on November 20, 2025, the agencies' proposed reliance on a "wet season" concept to define "relatively permanent" waters was not consistent with the Supreme Court's decisions in *Rapanos v. United States* and *Sackett v. EPA.* The updated proposal, which revises definitions for "relatively permanent" and "continuous surface connection" while adding a definition of the term "perennial," is appropriately tailored in light of those court decisions and the agencies' underlying Clean Water Act authority.

The Alliance greatly appreciates the agencies' SNPRM and the changes to the proposed definition in response to our letter from January 5, 2026, which is attached. Our comments below respond to several questions posed in this supplemental rulemaking, but as a general matter, we urge the agencies to move forward with finalizing this rulemaking and adopting the updated WOTUS definition as now proposed.

Definitions of "Relatively Permanent" and "Perennial"

In the SNPRM, the agencies request feedback on a definition of "relatively permanent," as quoted below:

> [T]he agencies are now seeking comment on a supplemental option to define "relatively permanent" that would generally deem a water to be jurisdictional only if it is perennial (*i.e.,* has standing or continuously flowing water every day of the year during ordinary conditions), with certain exceptions affecting year-round flow, such as the occurrence of certain non-anomalous events resulting in a temporary interruption (*e.g.,* low tide or a regularly occurring dry spell) or anomalous events resulting in extraordinary circumstances (*e.g.,* drought) that disrupt a perennial water's year-round flow.

The Alliance supports this change, which improves the definition of "relatively permanent" by tying it to the perennial nature of water rather than a "wet season" concept as initially proposed. As we noted in our January comments, the latter approach would have flipped the *Rapanos* analysis on its head by including features that flow only episodically, rather than focusing on waters that are ordinarily present.

We also support the agencies' introduction of a definition for "perennial," as it would provide further clarity regarding the scope of the definition of "relatively permanent." The SNPRM seeks comment on two alternative definitions for "perennial" - option 1 being "having standing or continuously flowing water every day of the year during ordinary conditions" and option 2 being "surface water flowing continuously year-round," as it was defined in the 2020 Navigable Waters Protection Rule. The Alliance is generally supportive of both definitions and believes either would be sufficient. However, for purposes of being responsive to the question, the Alliance suggests the agencies select option 1.

If the agencies select option 1, we ask that the final rule include or be followed separately by guidance on how the phrase "every day of the year during ordinary conditions" will be applied in administering the rule. For example: does a day without flow at any point count as an interruption day, and how will "ordinary conditions" be established?

Anomalous v. Non-Anomalous Events

The agencies also request comment on the duration threshold for temporary interruptions caused by non-anomalous events. The SNPRM notes that "under this proposed definition, any non-anomalous temporary interruption exceeding a single period of up to 30 consecutive days in any given year would preclude a waterbody from being considered 'relatively permanent.'"

The Alliance supports the 30-day threshold and believes it is consistent with the framework established by *Rapanos* and *Sackett.* One consistently occurring interruption that lasts less than a month is an appropriate level for determining relative permanence, as anything that exceeds this threshold would indicate a lack of continuity. We also support the "single period"

qualifier that ties the relative permanence of a body of water to whether it is interrupted more frequently than once annually, even if the total interrupted days do not combine to exceed 30 days. This is a reasonable and appropriate threshold in informing the definition of "relative permanence," and it aligns with the relevant Supreme Court decisions.

The Alliance further recommends that the 30-day threshold should be measured over a rolling 12-month period. A single dry period that runs across a calendar-year boundary should count as one period, rather than resetting the clock to zero arbitrarily at the start of a new calendar year. Finally, dated field observations, photos, gauge data, and time-stamped aerial imagery should each be accepted on their own as evidence of an interruption.

Drought Conditions

For purposes of determining when a lengthy drought would result in a determination that a normally jurisdictional body of water is no longer considered "relatively permanent," the agencies propose and request feedback on a five-year timeframe, beyond which the drought would no longer be considered an anomalous event.

While the Alliance appreciates that this timeframe matches existing guidance, we suggest that five years is overly expansive and the agencies should consider shortening this timeframe. At the same time, we support the agencies' suggested approach of using the U.S. Drought Monitor and including only D3 (extreme) and D4 (exceptional) droughts as anomalous conditions that can interrupt the perennial nature of a waterflow.

The Alliance recommends a three-year limit. A D3 or D4 drought that persists for three years is more likely to reflect a change in long-term conditions than a temporary anomaly. Regardless of whether a shorter limit is chosen or the agencies retain five years to align with the effective period of an approved jurisdictional determination, the limit should be codified, should begin when D3/D4 conditions begin in the area, should not reset as conditions move between D3 and D4, should end when conditions return to D2 or below, and should not allow consecutive droughts to be combined.

We also request the agencies remove "dry spell" as an example of an anomalous event. The proposed rule lists "dry spell" as anomalous and "regularly occurring dry spell" as non-anomalous, which blurs the two exceptions and undercuts the objective D3/D4 test.

Finally, we support the use of supplemental tools such as the Corps' Antecedent Precipitation Tool, but only to support, not override, site-specific observations and data, and they should be validated for use with the proposed duration thresholds.

Potential Reliance Interests

The SNPRM appropriately notes that state agencies are prepared to regulate non-jurisdictional waters within their boundaries, and we note that western states have already been doing so as

the definition of WOTUS has been in flux for the past decade. Colorado's dredge-and-fill program under HB24-1379 and Regulation 87 is an example of how states will regulate these waters, and New Mexico is developing a similar program through its Draft Amendments to the State Standards for Ground and Surface Water Protection Rule. It is therefore unnecessary to impose an overly expansive definition of covered waters, in light of the role that states can and should fill moving forward, as intended in the Clean Water Act.

Definition of Continuous Surface Connection

The Alliance supports the alternative definition of continuous surface connection being proposed in the SNPRM, which would incorporate the term "perennial" into the definition and remove "adjacent" and "abutting" from the definition. The agencies' discussion of the *Sackett* decision and adjacent versus indistinguishable wetlands captures why the latter is the correct approach to a "continuous surface connection."

We agree that the use of the term "perennial" in the definition is consistent with the definition of "relatively permanent" and removing "adjacent" and "abutting" improves clarity in the definition of "continuous surface connection." Finally, we echo our comments above on the establishment of a thirty-day threshold, the tools that the agencies can use, and the potential reliance interests in light of the changing definition of "continuous surface connection."

Conclusion

EPA should move forward with finalizing this proposed rule, which properly aligns the definition of waters of the United States with statutory authority and the Supreme Court's decisions in *Rapanos* and *Sackett*. Thank you for your time and consideration of these comments. Please do not hesitate to contact me if you have any questions or would like additional information.

Sincerely,

Melissa Simpson
President, Western Energy Alliance

WESTERN ENERGY ALLIANCE

January 5, 2026

Submitted via Regulations.gov

Lee Zeldin
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Docket ID No. [EPA–HQ– OW–2025–0322] RIN 2040–AG44
Comments on Proposed Rule for Updated Definition of "Waters of the United States"

Dear Administrator Zeldin:

The Western Energy Alliance (Alliance) is a leader and champion for independent oil and natural gas companies in the western United States. Working with a vibrant membership base for over 50 years, the Alliance stands as a credible leader, advocate, and champion of the industry. Alliance members engage in all aspects of environmentally responsible exploration and development of oil and natural gas. Our expert staff, active committees, and committed board members form a collaborative and welcoming community that is dedicated to a high quality of life, and abundant, affordable energy.

I. The Definition of "Relatively Permanent" Is the Central Legal Defect in the Proposed Rule

The Alliance's comments focus primarily on the proposed definition of "relatively permanent," as that definition drives the remainder of the rule, including whether tributaries and adjacent wetlands are regulated as waters of the United States. If the definition of "relatively permanent" is inconsistent with Supreme Court precedent or unworkable in practice, the remainder of the regulatory framework necessarily fails as well.

The agencies' proposed reliance on a "wet season" concept to define "relatively permanent" waters is not consistent with *Rapanos v. United States*, and is even further removed from *Sackett v. EPA*, which is now the controlling interpretation of the Clean Water Act.

II. The Proposed "Wet Season" Definition Conflicts with Rapanos

In *Rapanos*, the plurality drew a clear distinction between waters that are "relatively permanent" and channels that convey water only occasionally, intermittently, or ephemerally. The plurality consistently described "relatively permanent" waters as those that flow

continuously except during extraordinary circumstances such as drought or dry months—not features that flow only during a wet season.

The plurality explicitly excluded channels through which water flows intermittently or ephemerally and rejected federal jurisdiction over features that merely provide drainage for rainfall. While *Rapanos* acknowledged that "seasonal rivers" may qualify as relatively permanent, that discussion was limited to rivers that maintain continuous flow for extended periods and then dry during dry months. The decision did not endorse regulating streams or tributaries that flow only during a wet season, nor did it suggest that a wet season-based test should define jurisdiction.

The proposed rule departs from this framework by redefining "relatively permanent" to include waters that have standing or flowing water only "at least during the wet season." That approach flips the *Rapanos* analysis on its head by sweeping in features that flow only episodically, rather than focusing on waters that are ordinarily present.

III. Sackett Adopted Rapanos Without Endorsing a Seasonal or Wet Season Expansion

In *Sackett*, the Supreme Court expressly adopted the *Rapanos* plurality's interpretation of "relatively permanent" waters. Notably, however, the Court did not include or rely upon the *Rapanos* discussion of "seasonal rivers," nor did it suggest that waters flowing only seasonally—or during a wet season—should be jurisdictional.

The agencies acknowledge this omission in the proposed rule yet nevertheless rely on the *Rapanos* footnote discussing seasonal rivers to justify a broad wet season-based approach. That reliance is misplaced. The absence of any reference to seasonal waters in *Sackett* can reasonably be read to mean that the Court intentionally declined to extend federal jurisdiction to such features.

More importantly, *Sackett* repeatedly emphasized that the Clean Water Act must be interpreted in a manner that provides clear notice to ordinary landowners, given the statute's severe civil and criminal penalties. The Court warned against interpretations that leave property owners unable to determine whether the Act applies to their land without hiring expert consultants or attorneys.

IV. The Proposed Wet Season Approach Fails Sackett's "Ordinary Landowner" Test

The agencies' proposed approach to identifying "relatively permanent" waters does not meet the clarity and predictability standards articulated in *Sackett*. Determining whether water is present "at least during the wet season" may require remote sensing tools, hydrologic data,

field indicators, or professional judgment. That level of analysis is precisely what *Sackett* sought to move away from.

Although the preamble suggests that landowners may often rely on visual observations to determine whether a feature is relatively permanent, the broader discussion makes clear that such observations are frequently insufficient under the proposed framework. This internal inconsistency undermines the agencies' claim that the rule provides regulatory certainty.

By contrast, EPA itself acknowledges that if members of the public observe that waters dry up on a regular basis outside of drought conditions, they would know those waters are not jurisdictional. The Alliance agrees that this observation-based approach reflects common sense and aligns with *Sackett*. Unfortunately, the proposed wet season framework moves away from that standard rather than embracing it.

V. EPA Should Adopt a Perennial-Only Definition of "Relatively Permanent"

The Alliance strongly supports the alternative approach discussed in the proposed rule that would define "relatively permanent" waters as **perennial waters only**. This approach is the most consistent with *Sackett*, the plain meaning of "waters," and the *Rapanos* plurality's focus on continuously present geographic features.

Limiting "relatively permanent" waters to perennial features would allow landowners to determine jurisdiction largely through direct observation and ordinary experience, without reliance on consultants or technical tools. While perennial streams are less common in the arid West, that reality reflects hydrology—not a flaw in the statute—and cannot justify expanding federal jurisdiction beyond its lawful bounds.

VI. Flow Duration as a Secondary Alternative—Without Regional Arbitrary Lines

As a secondary alternative, the Alliance supports defining "relatively permanent" using a clear flow-duration threshold, as discussed in the proposed rule. However, the Alliance opposes dividing the country into eastern and western regions with different flow-duration thresholds. Waters of the United States should be defined consistently nationwide. The fact that fewer waters meet the definition in the West does not justify altering the definition itself.

In Rapanos, a 290-day, continuously flowing stream is described as being representative of relatively permanent that is flowing except during drought. A bright-line approach based on a minimum duration of flow would provide transparency and regulatory certainty. As considered in the proposed rule, relatively permanent should be defined as perennial or

flowing at least 270 days/year, which is generally aligned with the Rapanos example of a 290-day continuously flowing stream being considered relatively permanent.

VII. The Wet Season Concept Compounds Complexity for Wetlands and Tributaries

Because the definition of "relatively permanent" drives jurisdiction over tributaries and adjacent wetlands, the flaws in the wet season concept extend throughout the rule. Applying the wet season standard to continuous surface connection determinations introduces further uncertainty and moves away from *Sackett*'s requirement that jurisdictional waters and wetlands be readily identifiable.

The agencies' reliance on modified National Wetlands Inventory concepts and extended hydrologic analysis underscores that the proposed framework remains complex, subjective, and difficult for ordinary landowners to apply.

Conclusion

For these reasons, the Alliance urges EPA to revise the proposed rule to define "waters of the United States" as **perennial waters**, consistent with *Sackett*, *Rapanos*, due process principles, and the need for clear, administrable standards.

Sincerely,

Melissa Simpson
President
Western Energy Alliance