U.S. Environmental Protection Agency
EPA Docket Center, Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue, N.W
Washington, D.C. 20460

Submitted via www.regulations.gov

Re: Updated Definition of "Waters of the United States," Supplemental Notice of Proposed Rulemaking, 91 Fed. Reg. 57,284 (Sep. 9, 2026), Docket No. EPA-HQ-OW-2025-0322

GPA Midstream Association ("GPA Midstream") appreciates the opportunity to provide comments to the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers (the "Corps") (collectively, the "Agencies") on the supplemental notice of proposed rulemaking concerning the definition of "waters of the United States" ("WOTUS") (the "Supplemental Notice").[1]

GPA Midstream has served the U.S. energy industry since 1921 and represents approximately 45 domestic corporate members that directly employ 57,000 employees engaged in the gathering, transporting, processing, treating, storage, and marketing of natural gas, natural gas liquids, crude oil and refined products, commonly referred to as "midstream activities." The work of our members indirectly creates or impacts an additional 470,000 jobs across the U.S. economy. In 2024, GPA Midstream members had an economic impact of $191 billion through operating 502,900 miles of gas gathering pipelines, gathering more than 91 billion cubic feet per day of natural gas, and operating more than 342 natural gas processing facilities that delivered pipeline quality gas into markets across a majority of the U.S. interstate and intrastate pipeline systems.

Midstream infrastructure is linear and geographically dispersed, and projects often must be developed quickly to keep pace with upstream production and downstream demand. A single project may cross numerous aquatic features and multiple Corps districts. Uncertainty about whether the Clean Water Act ("CWA") applies—or delay in obtaining a reliable jurisdictional determination—can require redesign, alter construction sequencing, increase costs, and postpone needed infrastructure. A durable WOTUS rule therefore should establish not only a legally sound jurisdictional boundary, but one that can be applied consistently and efficiently in the field.

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[1] Updated Definition of "Waters of the United States," 91 Fed. Reg. 57,284 (Sep. 9, 2026),

On January 5, 2026, GPA Midstream submitted comments on the Agencies' November 20, 2025 proposal.[2] Consistent with the Agencies' direction that commenters need not resubmit comments addressing portions of the November 2025 proposal that have not been supplemented, GPA Midstream incorporates those comments by reference and focuses here on the additional alternatives presented in the Supplemental Notice. The January 2026 GPA Midstream comments are attached in an appendix for ease of reference.

Executive Summary

GPA Midstream supports the Supplemental Notice's alternative approaches for defining "relatively permanent" waters as perennial bodies of water and requiring a perennial surface-water connection for wetlands. Those alternatives provide a clearer and more readily administrable jurisdictional boundary than the "wet season" approach in the November 2025 proposal. They also better reflect the Supreme Court's description of covered waters in *Sackett v. EPA*, 598 U.S. 651 (2023), and the plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). Furthermore, these alternatives substantially advance the principles GPA Midstream identified in its January 2026 comments to the Agencies, including that relatively permanent waters should generally have consistent, year-round flow and that wetlands should be jurisdictional only where the requisite continuous surface connection to a jurisdictional water exists.

GPA Midstream recommends that the Agencies adopt the proposed alternatives along with several clarifications to ensure that they are implemented with clarity and certainty. In particular, the WOTUS final rule should:

- Require the perennial status of a water to be determined based on each particular reach (i.e., rather than extrapolating from another portion of the water system or discounting differences among reaches of a system);

- Define the required wetland connection in terms of perennial surface water and codify *Sackett's* standard for determining wetlands based on those that are indistinguishably part of a jurisdictional body of water;

- Establish straightforward evidentiary principles for applying the perennial standard, including that year-long monitoring is not required and that neither indirect hydrologic indicators nor artificial or operationally controlled flows can, standing alone, establish perennial status;

[2] *See* GPA Midstream Comments, Updated Definition of "Waters of the United States," 90 Fed. Reg. 52,498 (Nov. 20, 2025), Docket No. EPA-HQ-OW-2025-0322.

- Provide consistent and administrable transition rules that clarify the treatment of pending and existing approved jurisdictional determinations ("AJDs") and permit verifications.

I. The Agencies Should Adopt the Perennial-Water Alternatives in the Supplemental Notice.

The Supplemental Notice presents alternatives for defining both "relatively permanent" waters and the "continuous surface connection" required for wetlands. GPA Midstream supports the Agencies' use of perennial surface water as the organizing principle for both inquiries. A perennial standard offers greater clarity and administrability, while more closely tracking the jurisdictional test and limitations recognized in *Sackett* and *Rapanos*. The Agencies should adopt that approach for both relatively permanent waters and wetlands and provide clear, nationally consistent principles for its implementation.

A. "Relatively Permanent" Waters Should Be Limited to Perennial Surface Waters.

GPA Midstream supports the Supplemental Notice's alternative defining "relatively permanent" to mean "perennial bodies of water," with "perennial" defined as "having standing or continuously flowing water every day of the year during ordinary conditions."[3] The perennial standard provides a more objective and administrable jurisdictional boundary than the "wet season" formulation in the November 2025 proposal.[4] It would help reduce the need for landowners, project proponents, consultants, and regulators to make subjective judgments regarding, for example, precipitation levels, geographically disparate wet seasons, whether flow is sufficiently continuous throughout a particular season, and whether field observations were made during representative conditions.

The perennial alternative is consistent with both Supreme Court precedent and the position GPA Midstream previously presented to the Agencies. *Sackett* held that the CWA's use of "waters" encompasses "only those relatively permanent, standing or continuously flowing bodies of water" forming geographic features commonly described as "streams, oceans, rivers, and lakes."[5] Consistent with that limitation, GPA Midstream's January 2026 comment letter explained that the *Rapanos* plurality adopted a workable definition of relatively permanent waters as "continuously present, fixed bodies of water" with "a continuous flow of water in a permanent channel," while recognizing that otherwise permanent waters may occasionally dry during extraordinary circumstances.[6] GPA Midstream therefore recommended that "relatively permanent" waters generally include waters with consistent, year-round flow and exclude ephemeral features that merely convey runoff during or immediately after precipitation. The perennial alternative provides a clear regulatory means

[3] 91 Fed. Reg. at 57,288–92, 57,301.
[4] *See* 90 Fed. Reg. at 52,524.
[5] 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739).
[6] *Rapanos*, 547 U.S. at 732–33 & n.5.

of implementing that principle while accounting for the Court's recognition that otherwise qualifying waters do not necessarily lose their character because of unusual droughts or other temporary interruptions.[7]

A practical example illustrates the importance of this distinction. Across the Northeast, including forested upland areas of the Appalachian region, small headwater drainage channels may carry flowing water for days following a storm event while remaining dry for substantial portions of the year. The presence of flow immediately following precipitation should not, without more, be sufficient to characterize such a feature as a perennial water.

The Agencies should, however, clarify in the final rule that the perennial standard applies on a reach-specific basis. The November 2025 proposal recognized that changes in flow duration may create separate reaches.[8] The final rule, preamble, and/or accompanying implementation guidance should carry that principle forward expressly under the perennial alternative. The relevant inquiry should focus on the particular reach crossed, affected, or otherwise at issue, rather than aggregate different hydrologic regimes within a longer stream system.

Thus, the presence of perennial surface water in a downstream reach should not transform an upstream or intervening ordinarily dry reach into a perennial water. Likewise, where surface flow disappears and later reappears downstream, the intervening reach should independently satisfy the regulatory definition before being treated as jurisdictional. This would also resolve an ambiguity GPA Midstream identified in its January 2026 comments regarding the jurisdictional status of portions of a water that lose surface flow and later regain it downstream.

In addition, the Agencies should also clarify that "perennial" means perennial *surface water*. The proposed definition of "perennial" refers to "standing or continuously flowing water," while the proposed definition of "relatively permanent" refers to "perennial bodies of water."[9] To eliminate potential ambiguity, the final definition should specify "standing or continuously flowing *surface* water." That language would conform the definition to the surface-water limitation underlying the Supplemental Notice, aid in determining jurisdiction based on the visible connectivity of waters, and make clear that saturated soils, groundwater, or subsurface flow do not themselves satisfy the perennial requirement.

Groundwater that emerges and becomes actual surface water may be evaluated from the point of surface expression. But groundwater or another subsurface pathway should not itself establish that a feature contains perennial surface water. The November 2025 proposal

[7] *See Sackett*, 598 U.S. at 678; *Rapanos*, 547 U.S. at 732 n.5.
[8] *See* 90 Fed. Reg. at 52,541.
[9] 91 Fed. Reg. at 57,301.

similarly recognized that groundwater is not itself surface water and retained an express groundwater exclusion.[10]

B. Wetlands Should Be Jurisdictional Only Where Perennial Surface Water Makes Them Indistinguishably Part of a Jurisdictional Water.

GPA Midstream also supports the Supplemental Notice's proposed definition of "continuous surface connection" as "perennial surface water in a wetland that is continuously connected with the surface water in the jurisdictional water such that it is difficult to determine where the jurisdictional water ends and the wetland begins."[11] The Agencies further explain that only the portion of a wetland that is indistinguishably part of the jurisdictional water would itself be jurisdictional.[12] GPA Midstream supports both principles.

This approach appropriately implements *Sackett's* holding that a wetland must be "as a practical matter indistinguishable from waters of the United States."[13] A wetland does not become indistinguishable from a covered water merely because it is nearby, shares groundwater or subsurface hydrology, or performs similar ecological functions. Rather, the party asserting jurisdiction must establish the surface-water condition that makes it difficult to determine where the covered water ends and the wetland begins.[14]

GPA Midstream therefore recommends that the Agencies adopt the additional alternative described in the Supplemental Notice that would remove "adjacent" and "abutting" as independently operative jurisdictional concepts and revise paragraph (a)(4) to encompass wetlands that are "indistinguishably part" of a jurisdictional water.[15] Physical proximity or abutment may describe the location of a wetland, but neither can substitute for the perennial surface-water condition required for the wetland itself to constitute WOTUS. Using the Supreme Court's "indistinguishably part" formulation directly in the regulatory text would also reduce the risk that broader pre-*Sackett* concepts of adjacency could re-enter the jurisdictional analysis through differences in implementation.

This approach is also consistent with GPA Midstream's prior comments, which supported a continuous-surface-connection requirement and emphasized that the jurisdictional inquiry should turn on whether there remains a discernible boundary between a wetland and the jurisdictional water.

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[10] *See* 90 Fed. Reg. at 52,541–42 (discussing *County of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165 (2020)).
[11] 91 Fed. Reg. at 57,294, 57,301.
[12] *Id.* at 57,294–95.
[13] 598 U.S. at 678.
[14] *Id.* at 678–79.
[15] *See* 91 Fed. Reg. at 57,295.

Lastly, the final rule should codify the limitation that only the portion of a wetland satisfying the continuous-surface-connection test is jurisdictional. The Supplemental Notice repeatedly describes this limitation, but proposed paragraph (c)(3) does not itself expressly state it.[16] The Agencies should place the limitation in the operative regulatory text so that jurisdiction does not extend across a larger delineated wetland merely because one portion has the requisite perennial surface-water connection. Areas separated from the covered water by a discernible boundary and lacking the required perennial surface-water connection should not become jurisdictional solely because they form part of a larger delineated wetland.

C. The Agencies Should Establish a Simple and Nationally Consistent Framework for Applying the Perennial Standard.

To provide consistency, the perennial alternatives should be accompanied by a straightforward, nationally applicable method for applying them. This issue is particularly important to GPA Midstream members because, for example, a single linear infrastructure project may cross numerous aquatic features and more than one Corps district. A clear national regulatory standard would provide limited practical benefit if individual districts developed materially different evidentiary standards for determining whether a feature is perennial. The following principles should be applied in developing a consistent framework.

First, the Agencies should not require landowners or applicants to "prove a negative" through daily monitoring of water flows. The Agencies stated in the November 2025 proposal that the Agencies bear the burden of demonstrating jurisdiction and that a water will be found non-jurisdictional where the Agencies lack adequate information to establish that the regulatory standard is satisfied.[17] Neither the final rule nor implementation guidance should require landowners or AJD applicants to install gauges, collect daily observations for a full year, or undertake an equivalent year-long hydrologic study simply to establish that a feature is *not* perennial.

The evidentiary framework should also recognize an important distinction between evidence that water is present and evidence sufficient to establish perennial flow. A single observation that a feature contains water demonstrates only that water was present at that time; it does not establish that surface water is present every day of the year during ordinary conditions. Conversely, a reliable observation that a feature is dry during ordinary conditions is directly relevant to whether the feature satisfies the perennial definition, unless the Agencies establish that the observation occurred during one of the specifically permitted temporary interruptions.

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[16] *See id.* at 57,294–95, 57,298, 57,301.
[17] *See* 90 Fed. Reg. at 52,515.

Second, the Agencies should address the *type* of evidence that directly bears on determining surface-water duration. Relevant evidence may include representative field observations, reliable gauge records where available, time-stamped photographs or videos, repeated aerial or satellite imagery, site and maintenance records, and relevant State or local records. By contrast, indirect indicators such as National Hydrography Dataset ("NHD") or National Wetlands Inventory ("NWI") mapping, ordinary high water marks, bed-and-bank indicators, soil characteristics, or Streamflow Duration Assessment Methods may indicate that water is present at some point or provide useful corroborating information, but they should not be considered to establish independently that a feature contains standing or continuously flowing surface water every day of the year during ordinary conditions.

This distinction is important to avoid recreating through implementation the type of complicated, multi-factor jurisdictional inquiry that the perennial alternative is designed to replace. GPA Midstream's prior comments emphasized the costs and uncertainty created when jurisdiction depends on numerous physical, biological, and hydrologic indicators requiring expert interpretation.

Third, the Agencies should clarify the treatment of artificial or operationally controlled flows. The November 2025 proposal stated that relatively permanent flow need not arise from a particular source and identified groundwater, upstream contributions, effluent, and snowmelt as potential sources.[18] The Agencies should clarify how that principle applies under a standard requiring perennial surface water. Important clarifications include:

- An otherwise nonperennial ditch, channel, swale, or other feature should not become jurisdictional solely because water is supplied by an operationally controlled discharge or one that relies on human operating discretion. Jurisdiction should be determined based on the ordinary hydrologic character of the asserted water rather than fluctuate based on whether a facility happens to be operating or routing water through the feature. Otherwise, the jurisdictional status of the same physical feature could change based on operational decisions unrelated to the factors for identifying WOTUS.

- The same principle applies to shorter-term artificial additions of water, such as construction dewatering, hydrostatic-test or pipeline-maintenance water, and similar temporary project discharges. Those activities ordinarily should not produce perennial flow, but the Agencies should make clear that temporary project activities and such artificial additions do not alter the underlying jurisdictional character of a feature.

Fourth, the 30-day allowance should remain a narrow exception to the perennial requirement. The Supplemental Notice would preserve perennial status where standing or

[18] *See id.* at 52,524.

flowing water—or a wetland's qualifying surface-water connection—is interrupted once for no more than 30 consecutive days in a given year because of a non-anomalous event such as low tide or a regularly occurring dry spell. The Agencies explain that the relevant "year" need not correspond to a calendar year and also explain that two separate ordinary interruptions would mean the feature does not satisfy the proposed definition even if the total number of dry days is fewer than 30.[19] GPA Midstream supports an objective outer limit of this type, provided the final rule makes clear that it is a narrow exception and not a general allowance for intermittent flow.

The Agencies should also require sufficient evidence that the feature otherwise satisfies the perennial standard before invoking the temporary-interruption exception. The exception should not reverse the jurisdictional inquiry by presuming that a feature is perennial and then requiring a landowner to prove that a period without surface water falls outside the exception. Rather, the Agencies should first establish that the feature otherwise contains standing or continuously flowing surface water every day of the year during ordinary conditions and then determine whether a demonstrated interruption falls within the narrow regulatory allowance.

II. The Agencies Should Provide Clear Transition Rules for AJDs and Permit Verifications.

The Supplemental Notice acknowledges that the definition of WOTUS has changed repeatedly and expressly requests comment regarding potential reliance interests implicated by the supplemental alternatives.[20] These issues are important to GPA Midstream members, whose projects may span several years, numerous water crossings, and multiple Corps districts. Changes in the jurisdictional standard can affect not only pending and existing federal determinations and authorizations, but also State and programmatic permitting processes that rely on those determinations. The Agencies should provide, in an appropriate format (e.g., in the final rule, preamble to the final rule, and/or a contemporaneous policy memorandum), clear and nationally consistent direction concerning how the final rule applies to pending requests, existing AJDs, and existing permit verifications, and how those determinations should be coordinated with related permitting processes.

That direction should also account for State and programmatic permitting frameworks that rely on federal jurisdictional determinations, including regional general permit programs such as Pennsylvania's State Programmatic General Permit. The Agencies should seek to ensure that implementation of the final WOTUS definition does not result in inconsistent treatment of the same feature across federal and State review processes or unnecessary

[19] *See* 91 Fed. Reg. at 57,288–89.
[20] *See id.* at 57,296.

duplicative jurisdictional review and permitting requirements. Against that backdrop, the Agencies should address the following transition issues.

- Pending determinations and permit reviews should apply the final rule without restarting the review process. AJD requests, pre-construction notifications, and individual permit applications pending on the final rule's effective date should be evaluated under the final definition. Applicants should be permitted to supplement an existing administrative record as necessary to address the new standard without losing their place in the review queue or being required to submit a new request.

- Existing non-jurisdictional AJDs should remain reliable. The final rule should not unsettle an existing AJD concluding that a feature is non-jurisdictional under a broader prior jurisdictional regime. Such determinations should remain valid for their stated term absent materially changed site conditions. Treating the adoption of a narrower jurisdictional standard as a reason to reopen an existing non-jurisdictional determination would undermine the reliance function of AJDs without advancing the purposes of the rule.

- Holders of affirmative jurisdictional AJDs should have a streamlined means of obtaining reconsideration under the final rule. Where an existing AJD found a feature jurisdictional under a broader definition, the landowner or project proponent should be permitted to request an expedited superseding AJD under the final rule without waiting for the prior AJD to expire. The Corps should establish a streamlined process allowing that applicant to rely on the existing delineation and administrative record and provide supplemental material only to the extent necessary to address the final rule's perennial-flow and continuous-surface-connection standards. A project proponent that previously accepted a preliminary jurisdictional determination should likewise remain free to seek an AJD applying the final rule.

- Existing Nationwide Permit ("NWP") verifications should not be automatically reopened. NWP 12 is important to the construction, maintenance, repair, and removal of oil and natural gas pipelines and associated facilities.

    - Once a district engineer verifies an activity's compliance with an NWP, 33 C.F.R. § 330.6(a)(3)(iv) provides procedures governing modification, suspension, or revocation of that authorization under 33 C.F.R. § 330.5. The Agencies should confirm that a change in the WOTUS definition does not, standing alone, automatically reopen an existing verification, require submission of a new pre-construction notification, or render ongoing work inconsistent with an existing authorization.

    - At the same time, permittees should have an optional and streamlined mechanism to conform an existing verification to the final jurisdictional

standard. If a crossing or wetland area is no longer jurisdictional under the final rule, the permittee should be permitted to seek appropriate modification of conditions, impact acreage, or compensatory mitigation obligations tied solely to that feature without reopening unrelated aspects of the authorization. The Corps should also explain how this process applies where an existing NWP verification was based on a preliminary rather than approved jurisdictional determination.

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Conclusion

GPA Midstream appreciates the Agencies' continued efforts to establish a clear, durable, and administrable definition of WOTUS consistent with the CWA and the Supreme Court's decision in *Sackett*. The perennial-water alternatives presented in the Supplemental Notice would provide greater certainty than the "wet season" approach in the November 2025 proposal and substantially advance the principles GPA Midstream identified in its prior comments. GPA Midstream further encourages the Agencies to accompany these standards with clear, nationally consistent implementation principles and transition procedures so that the certainty provided by the regulatory text is not lost through inconsistent evidentiary requirements or district-level implementation.

GPA Midstream appreciates the opportunity to provide these comments and stands ready to answer any questions the Agencies may have regarding our recommendations.

Sincerely,



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APPENDIX

January 5, 2026

U.S. Environmental Protection Agency
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Submitted via regulation.gov

Re: Updated Definition of "Waters of the United States," 90 Fed. Reg. 52,498 (November 20, 2025), Docket No. EPA-HQ-OW-2025-0322

GPA Midstream Association ("GPA Midstream") appreciates the opportunity to provide comments to the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps") (collectively, "the Agencies") on the Updated Definition of "Waters of the United States" ("proposed rule").

GPA Midstream is composed of approximately 50 corporate members that directly employ over 57,000 employees that are engaged in the gathering, transportation, processing, treating, storage and marketing of natural gas, natural gas liquids (NGLs), crude oil, and refined products, commonly referred to in the industry as "midstream activities." In 2024, GPA Midstream members operated more than 500,000 miles of pipelines, gathered nearly 91 Bcf/d of natural gas, and operated more than 340 natural gas processing facilities. Our members are an invisible link between raw natural gas and crude oil produced at the wellhead and the distribution of products to consumers for heating, electricity production, transportation, steelmaking, fertilizer production, plastics, high-tech devices, cosmetics, pharmaceuticals, and much more.

Summary

GPA Midstream appreciates the actions the Agencies have taken in the proposed rule to implement the definition of Waters of the United States (WOTUS) in light of the Supreme Court's decision in Sackett v. EPA.

Midstream companies must keep pace with oil and gas producers by quickly building gathering lines, processing plants, and compressor stations. Lack of clarity about obtaining Clean Water Act permits — or even determining whether a permit is required — can frustrate the midstream industry's ability to keep pace.

Delays through slow permitting timeframes, unexpected changes to engineering and design or the location of midstream assets, and regulatory uncertainty can add unnecessary costs to project development and even lead to postponed or cancelled infrastructure projects.

As outlined in prior comments[1] to the agencies during WOTUS Notice: The Final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations, 90 Fed. Reg. 13,428 (Mar. 24, 2025), Docket No. EPA-HQ-OW-2025-0093, GPA Midstream recommended the following guiding principles in defining "Waters of the United States":

- The Agencies should follow the Rapanos plurality opinion in defining "relatively permanent" waters due to its common sense and clear approach.

- The Agencies should re-instate the approach to a "continuous surface connection" found in the Navigable Waters Protection Rule.

- The Agencies should also follow the Navigable Waters Protection Rule with respect to defining jurisdictional ditches.

Recommendations

1. **The Agencies are correct to implement clarity and certainty to the definition of "relatively permanent" waters, founded on the plurality opinion in *Rapanos*.**

As stated in our previous joint comments[2], GPA Midstream understands the importance of accurately defining what are "relatively permanent" waters, as the Supreme Court has made clear that phrase is one of the defining limitations of "Waters of the United States." *See Rapanos v. United States*, 547 U.S. 715, 734 (2006) ("the Act's use of the traditional phrase 'navigable waters' (the defined term) further confirms that it confers jurisdiction only over relatively *permanent* bodies of water" and not waters with "ephemeral flow"); *Sackett*, 143 S. Ct. 1322, 1336 (2023) ("we conclude that the *Rapanos* plurality was correct: the CWA's use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" (quoting *Rapanos*, 547 U.S. at 739) (alteration in original).

As noted in the *Rapanos* plurality opinion, relative permanence is a key characteristic of the traditionally navigable waters that Congress intended to regulate. GPA Midstream believes that the *Rapanos* plurality adopted a workable and common sense definition of "relatively permanent": "continuously present, fixed bodies of water" with "a continuous

[1] EPA-HQ-OW-2025-0093-0230
[2] ibid

flow of water in a permanent channel." 547 U.S. at 733. These may include "streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought" and "seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months." *Id*. at 732, n.5. Therefore, "relatively permanent" should generally have consistent, year-round flow.

What the definition should not involve is either the inclusion of ephemeral "waters" that merely convey runoff during or immediately after precipitation or the need for technical experts to assess the surrounding landscape and biota in order to render an opinion, such as in *United States v. Donovan*, 661 F.3d 174 (3d Cir. 2011). There, neither the court nor the defendant were capable of determining whether a channel was a "relatively permanent" jurisdictional tributary without expert reports discussing degrees of soil saturation, surface ponding during certain months, the "morphological conditions of the vegetation … the presence and density of plant species adapted to saturated soil conditions," and the presence of downstream culverts. *Id*. at 185 (internal quotations omitted). We believe that the characteristics of waters are rarely difficult to discern.

2. **The Agencies should reinstate the approach taken in the Navigable Waters Protection Rule to define a "continuous surface connection" and the features to which this phrase would apply.**

As stated in our previous joint comments[3], the necessity of the term "continuous surface connection," and its application to wetlands, originates in *United States v. Riverside Bayview*, 474 U.S. 121 (1985). Although *Riverside Bayview* did not use the term itself, it examined when federal jurisdiction applies to wetlands, which would typically be excluded from the Clean Water Act.

> In determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs – in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of "waters" is far from obvious.

Id. at 132; *see also id*. at 133 (rejecting the notion that Congress' intended definition of "waters" could have included "wetlands"). Thus, the Court allowed Clean Water Act regulation of "adjacent wetlands" that "are inseparably bound up with 'waters' of the United States" due to "the inherent difficulties of defining precise bounds to regulable waters." *Id*. at 134.

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[3] EPA-HQ-OW-2025-0093-0230

GPA Midstream submits that the rule of *Riverside Bayview* is that wetlands are only subject to Clean Water Act jurisdiction where there are no clear means of separating a water from a wetland. Therefore, we support the approach used in the Navigable Waters Protection Rule where a continuous surface connection is required between a jurisdictional water and a wetland. Any physical separation between them, whether it be by a berm, flood gate, pump station, or any other feature, makes the wetland non-jurisdictional.[4] Where a person of ordinary prudence can see a physical separation between a jurisdictional water and a wetland, *Riverside Bayview* would no longer permit Clean Water Act jurisdiction over the wetland.

GPA Midstream understands that, in practical application, a jurisdictional water and wetland may lose an otherwise continuous surface connection during dry spells or droughts. We do not believe that an occasional drought should deprive a wetland of federal jurisdiction any more than unusual flood conditions can establish federal jurisdiction over otherwise dry land. GPA Midstream believes that, as with "relatively permanent" waters, the Agencies and land owners or right-of-way owners should look to what are the common or ordinary conditions of potentially jurisdictional wetlands.

3. **The Agencies should likewise reinstate the approach taken in the Navigable Waters Protection Rule to define "jurisdictional ditches."**

As stated in our previous joint comments[5], GPA Midstream supports reinstating the Navigable Water Protection Rule's definition of a "ditch" as a constructed or excavated channel used to convey water.

GPA Midstream strongly supports the Agencies' goals of providing clarity as to when ditches are regulated under the Clean Water Act and to limit the complexity of ditch determinations. Therefore, the Agencies should reject an approach that uses an unstructured multi-factor approach where the Agencies and the regulated community must consider variables such as flow regime, various physical features, whether the ditch lies in uplands or lowlands, different usages, biological indicators, and others. Many such issues will require landowners or right-of-way owners to employ consultants to understand whether the Clean Water Act applies to their property and many factors are both subjective and likely to be conflicting in any particular case. Further, past practices have shown that treating typically dry ditches as "tributaries" leads to absurd results that Congress never

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[4] The Agencies have taken the correct approach to explaining a "continuous surface connection" in the recent joint EPA and Corps Guidance Document, Memorandum to the Field Between the U.S. Department of the Army, U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency Concerning the Proper Implementation of "Continuous Surface Connection" Under the Definition of "Waters of the United States" Under the Clean Water Act (March 12, 2025) ("March 2025 Guidance"): a wetland is only jurisdictional when it is adjacent to a jurisdictional water and there is a "continuous surface connection to a requisite covered water making it difficult to determine where the water ends and wetland begins."

[5] EPA-HQ-OW-2025-0093-0230

intended. *See Rapanos*, 547 U.S. at 725-29 (discussing several cases leading to such absurd results).

If ditches should be regulated as tributaries at all, then they should meet the ordinary dictionary definition of a "tributary:" "A river or stream flowing into a larger river or stream." Webster's II New Riverside University Dictionary (1984) at 1232. GPA Midstream does not believe that any special rules should be applied to ditches. Instead, they should be treated similarly to natural tributaries, requiring a "relatively permanent" flow to a traditionally navigable water. This will provide regulatory clarity and eliminate the absurd results discussed in *Rapanos*, where the occasional trickle of water makes a roadside ditch a "water of the United States" because it can theoretically be connected to a navigable water dozens of miles away. *See Rapanos*, 547 U.S. at 726-27 (criticizing *Treacy v. Newdunn Assoc.*, 344 F.3d 407 (4th Cir. 2003), *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), and *Community Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 305 F.3d 943 (9th Cir. 2002)).

Clear, common sense rules for when ditches are subject to federal jurisdiction avoids needless costs and delays for regulated parties and greatly reduces tying up regulators in lengthy and contentious jurisdictional determinations. Further, it significantly limits the prospect of subjecting landowners or right-of-way owners to civil or criminal penalties for routine land management activities.

4. Changes to the Corps' Approved Jurisdictional Determination should be made to accomplish the goals of the proposal

In our prior joint comments, we stated our belief that "adopting procedures for speeding the jurisdictional determination process fits well within the spirit of Executive Order 14,156 and other orders emphasizing the need for reducing regulatory barriers to the orderly development of energy infrastructure."[6]

GPA Midstream shares the goals of the agencies in the proposal to produce cost savings to project proponents from avoided permitting and mitigation activities, as well as potential indirect benefits from long-term reduction in regulatory burden.

Currently project proponents must receive an Approved Jurisdictional Determination (AJD) from the Corps in order to determine the presence or absence of WOTUS. This requires field work, documentation preparation, and involves regulatory approval timelines. Additionally, under recent guidance received from the Corps, standalone AJD requests (not submitted as part of a pre-construction notice for a permit) receive no priority status for review as they are not considered "permit approvals".

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[6] EPA-HQ-OW-2025-0093-0230

Therefore, the Agencies' expectation that the proposed rule will lead to project proponents avoiding permitting and/or that their regulatory burden will be reduced is not likely to be met unless changes are made to the AJD process.

5. **Clarifications and definitions to "Relatively Permanent Waters" and "Ditch" and Scope of the (b)(3) Ditch Exclusion**

The Corps is currently considering headwater ephemeral streams as WOTUS if the stream transitions to intermittent/seasonal flow (within the same stream reach), and that section that exhibits intermittent/seasonal flow comprises more than 50% of the total stream reach length (Strahler method used to determine stream reach). This is a controversial approach for many of the reasons explained in these comments.

To correct this, the final rule should clarify that ephemeral streams cannot be considered WOTUS because ephemeral streams do not constitute "relatively permanent waters".

GPA Midstream encourages the Agencies to clarify the definition of "wet season" in the final rule and include in that definition what establishes the continuity of surface hydrology throughout the entirety of the wet season.

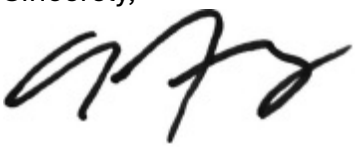
GPA Midstream also seeks clarity in the definition of a "relatively permanent water" that loses surface flow but regains flow further downstream, as there is ambiguity on WOTUS jurisdiction on the portions with a severed flow.

Under the proposed rule, ditches (including roadside ditches) that are constructed or excavated in a wetland are not excluded because they were not constructed or excavated entirely in dry land. This then creates the problem of the entirety of the length of a ditch potentially being considered jurisdictional because a small portion of the ditch was excavated through a wetland. An exception for a ditch that intersects with the wetland needs to be addressed. Only the portion that lies within the jurisdictional feature should be considered WOTUS, and if mitigating measures are taken to physically isolate the ditch, then it should remain an exception.

Conclusion

GPA Midstream is thankful to the Agencies for moving forward with common sense definitions to WOTUS that conform to the intent of Congress and decisions made by the judicial branch. We believe the changes in the proposed rule will help the Agencies conform with the President's desire to see U.S. Energy Dominance. We stand ready to answer any questions the Agencies may have regarding our recommendations.

Sincerely,



Andrew Mooney
Director of Federal Affairs
GPA Midstream Association