

'Waters of the United States' May Shrink Even Further

By David G. Mandelbaum | **October 8, 2026** | The Legal Intelligencer

The stream of rulemaking to define regulatory jurisdiction under the federal Clean Water Act took another meander on Sept. 4, 2026, when the Environmental Protection Agency and the Army Corps of Engineers issued a supplemental notice of proposed rulemaking. That proposal appeared in the Federal Register the following week. See 91 Fed. Reg. 57,284 (Sept. 9, 2026). If adopted, the proposal would limit the regulatory ambit of the Clean Water Act to traditionally navigable waters (TNW), “relatively permanent waters” (RPW) that flow or display standing water every day of the year (with limited exceptions) that are themselves connected to a TNW, and wetlands that have a surface water connection to an adjacent TNW or RPW. Wetlands that have groundwater that saturates soil in the root zone but that do not display water at their surface (either from inundation or groundwater rising) would not be subject to federal regulation. That would represent a contraction of federal jurisdiction by even more than was proposed last year. See 90 Fed. Reg. 52,498 (Nov. 20, 2025).

One might not try to make sense of these proposed changes. Wetlands are wetlands and serve important water quality and ecological functions whether they have continuous surface connections to relatively permanent waters or not. Perhaps this is just de-regulation.

On the other hand, one can also understand this rulemaking as an effort to flesh out a division of responsibility by Congress between states and the federal government. In *Sackett v. Environmental Protection Agency*, 143 S. Ct. 1322 (2023), the court read the Clean Water Act to preserve states’ primary responsibility “to plan the development and use ... of land and water resources.” See 143 S. Ct. at 1338 (quoting 33 U.S.C. Section 1251(b)). The court seemed to regard wetland regulation as a form of land use regulation. Most of it, therefore, should be done by state and local authorities and not the federal government. The court explicitly rejected the argument that wetlands are characterized by the presence of water, and therefore the regulation of wetlands impacts is a form of water pollution regulation, not land use regulation.

On this reading, Congress established a sphere of federal regulation that does not comprehend all wetlands or even all wetlands that matter to the environment. Instead, it only authorized federal regulation that is part and parcel of regulation of the “navigable waters” defined to be the “waters of the United States.” That is, in the court’s view an effort to define the waters of the United States to include all the environmentally significant wetlands would overreach. The court holds that Congress intended states to do the protecting of many wetlands and only some wetlands would be regulated under the Clean Water Act.

The court’s guidance for crafting the limits of federal jurisdiction begins with the core of federal regulatory concern: protection of “traditionally navigable waters.” In order to protect, TNWs, the court read the statute to authorize federal regulation of tributaries to those TNWs that are not themselves traditionally navigable, provided they are “relatively permanent.” Wetlands are subject to regulation if they are “adjacent” to a TNW or a RPW connected to a TNW, which requires them to have a “continuous surface connection to one of those bodies of water” so that they are ‘indistinguishable’ from those waters.” See 143 S. Ct. at 1344 (quoting *Rapanos v. United States*, 547 U.S. 715, 756 (2006)).

The agencies have also adopted a regulation to put a gloss (or a further gloss) on the statutory definition of federal jurisdiction. See 33 C.F.R. pt. 328. It has gone through many iterations, each one the subject of litigation. The agencies intended the 2025 proposal to result in final language for a new turn of the WOTUS Rule that would effectuate the court's decision in Sackett and the positions of the then-new administration, but they decided they needed to supplement.

The agencies have been trying to define what makes a water “relatively permanent.” The 2025 proposal defined “relatively permanent” to mean “standing or continuously flowing year-round or at least during the wet season.” That proposal would exclude streams that dry up between wet weather events but would include streams that dry up during a dry season. Of course, that definition raised the question of what constitutes the “wet season.”

The new supplemental proposal suggests that the definition be made less subject to dispute by requiring standing or flowing water every day of the year; the water must be “perennial.” However, a water retains its “relatively permanent” character if it dries up due to an anomalous event like a drought, but it would have to be a drought that does not persist for more than five years. The water also remains “relatively permanent” if it dries up for no more than one period of no more than 30 consecutive days due to a “nonanomalous event” such a low tide or a “regularly occurring dry spell.” It would allow a water to remain “relatively permanent” if it dried up for a few weeks each August, for example. This definition would essentially remove from jurisdiction any water that dries up on any two days separated by more than a month in any 365-day period.

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The agencies also struggled with what counts as a “continuous surface connection” that makes a wetland “adjacent” to a traditionally navigable or relatively permanent water. Without that connection, the wetland would not be subject to federal jurisdiction.

The Supreme Court required the continuous surface connection “so that” the wetlands “are indistinguishable” from the TNW or RPW. Many argued—including some lower courts—that only continuous surface connections that made the wetland and the surface water indistinguishable counted. However, the agencies in the 2026 supplemental proposal reject that position. Indistinguishability follows from a continuous surface connection and is not a separate criterion.

But that still requires a definition of “continuous surface connection.” Importantly, the agencies now propose to require that connection to be a continuous surface water connection. The wetland would have to have water at the surface that connects to the TNW or RPW. And the surface water connection would have to be “continuous.” Continuousness is judged on the same standard as relative permanence. The connection would have to exist every day of the year except for anomalous events or one nonanomalous event lasting no more than 30 days in a year. That would significantly constrict federal jurisdiction over wetlands. Many wetlands experience saturated soil conditions but do not have surface water every day of the year. If the groundwater never intercepts the surface, there cannot be a continuous surface connection to a TNW or RPW.

This all makes sense if you regard it as an allocation of regulatory responsibility between the federal and state or local governments and you like that allocation. One might say that it does not matter which government makes a reasoned wetlands and water protection decision, so long as one of them does. Others would say that a federal minimum standard of protection is necessary. One can be confident that

this supplemental notice will generate a lot of comment. How quickly the agencies can make a final decision, whether it survives any challenge, and whether the proposal will in fact make individual wetland development decisions easier to make remain to be seen. As always, stay tuned.

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