

**REPORT OF THE
CHIEF LEGISLATIVE ANALYST**

DATE: March 2, 2026

TO: Honorable Members of the Rules, Elections, and Intergovernmental Relations Committee

FROM: Sharon M. Tso 
Chief Legislative Analyst

Council File No. 25-0002-S91
Assignment No: 26-01-0047

SUBJECT: Resolution to Oppose Federal Action Redefining “Waters of the United States” Resulting in Removed Wetlands Protections

CLA RECOMMENDATION: Adopt Resolution (Park – Nazarian) to include in the City’s 2025-2026 Federal Legislative Program, opposition to any action by the United States Environmental Protection Agency and the Army Corps of Engineers to redefine “Waters of the United States” which would eliminate Clean Water Act protections for over 80 percent of the nation’s wetlands and numerous streams.

SUMMARY

Resolution (Park – Nazarian), introduced December 5, 2025, asserts that the City’s commitment to protecting water quality, public health, and environmental resources for residents. The Resolution describes wetlands and small waterways as providing key services like flood control, water filtration, groundwater recharge, wildlife habitat, and climate resilience. It then outlines that a proposed federal redefinition of “Waters of the United States” would sharply reduce Clean Water Act protections, leaving most wetlands and many streams without federal oversight, especially in states lacking their own protections.

The Resolution emphasizes that Southern California’s intermittent and seasonal waters are particularly at risk, which could increase pollution, flooding, and infrastructure costs and shift regulatory burdens onto state and local agencies. The Resolution also states that clean water and healthy ecosystems are fundamental to public health, environmental justice, and quality of life, especially for communities already burdened by pollution.

Therefore, the Resolution requests that the City oppose any action by the United States Environmental Protection Agency and the Army Corps of Engineers to redefine “Waters of the United States” which would eliminate Clean Water Act protections for over 80 percent of the nation’s wetlands and numerous streams.

BACKGROUND

In November, 2025, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) proposed redefining “Waters of the United States” (WOTUS) under the Clean Water Act to be dramatically narrower. WOTUS is the jurisdictional trigger that determines

which water bodies—rivers, streams, wetlands, lakes—are subject to federal regulation under the Clean Water Act. The proposed rule, if finalized, would remove Clean Water Act protections from an estimated 80% or more of the nation’s mapped wetlands and numerous streams. Key proposed revisions include:

- **"Continuous surface connection" defined:** A wetland must physically abut (touch) a jurisdictional water and hold surface water at least during the "wet season" year after year to qualify as WOTUS.
- **"Relatively permanent" defined:** Standing or continuously flowing bodies of surface water that persist year-round or at least during the wet season.
- **Narrower "tributary" definition:** Tributaries must convey relatively permanent flow and maintain a connection to a downstream traditional navigable water. They must also have identifiable "bed and banks".
- **Groundwater exclusion:** A new explicit exclusion for groundwater from WOTUS.
- **Interstate waters removed as a category:** Interstate waters would no longer automatically be jurisdictional simply by crossing state lines. Historically, interstate waters have been one of the standalone categories of waterbodies automatically covered by the Clean Water Act simply because they cross a state boundary.

The Clean Water Act & WOTUS

The Clean Water Act of 1972 is the principle federal statute governing water pollution in the United States. It’s stated purpose is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” The Act achieves this through permitting programs—notably the dredge-and-fill permits and pollutant discharge permits—that regulate discharges into “navigable waters,” which the statute defines as “the waters of the United States, including the territorial seas.” Critically, the Clean Water Act itself does not further define the term “waters of the United States,” leaving that task to the EPA and USACE through rulemaking and the courts through litigation.

The WOTUS definition has been revised at least six times since 2015, making it one of the most litigated regulatory definitions in American environmental law. The current proposed rule is rooted in the Supreme Court’s decision in *Sackett v. Environmental Protection Agency* (2023). The Court established a two-part test for wetland jurisdiction under the Clean Water Act:

1. The adjacent body of water must itself constitute “waters of the United States,” meaning a “relatively permanent body of water connected to traditional interstate navigable waters.”
2. The wetland must have a “continuous surface connection” to that water, such that it is “indistinguishable” from the jurisdictional water (i.e., it is difficult to determine where the water ends and the wetland begins).

Impact on the City of Los Angeles & California’s Porter-Cologne Water Quality Control Act

California runs its own parallel (an in many ways broader) water-quality regime, so state law both backstops and goes beyond the federal WOTUS definition. California’s core water-quality law is the Porter-Cologne Water Quality Control Act. It applies to all “waters of the state” which includes

surface water, groundwater, wetlands, and both point and nonpoint sources—a broader definition than the federal WOTUS. It requires water quality control plans (“basin plans”) with beneficial uses and water quality objectives; these effectively function as state water quality standards. The law also authorizes the State Water Resources Control Board (State Board) and nine Regional Boards (e.g., Los Angeles Regional Board) to issue and enforce permits and “waste discharge requirements” to protect all waters of the state.

Porter-Cologne is how the state implements many Clean Water Act regulations, but it can go further. For federally regulated discharges to WOTUS, the state issues National Pollutant Discharge Elimination System (NPDES) stormwater and wastewater permits that satisfies both federal Clean Water act and state Porter-Cologne requirements. For discharges to non-WOTUS waters (or to land/groundwater), the Regional Boards issue waste discharge requirements (WDRs) under state law, even if no federal NPDES permit is required. If the federal WOTUS definition is narrowed, the Regional Board can still require WDRs for activities affecting wetlands, ephemeral channels, or groundwater within California’s borders.

Despite *Sackett* and the new WOTUS proposal, federal rollbacks would not weaken California’s own wetlands protections. For municipal stormwater and wastewater, Municipal Separate Storm Sewer System (MS4) permits in California would still be issued by Regional Boards under Porter-Cologne. The California Supreme Court has confirmed that water boards may impose requirements more stringent than federal law in MS4 permits, so long as they consider state-law factors under Water Code § 13241 – the Regional Water Quality Control Plans. Even if fewer upstream waters are federally classified as WOTUS, LASAN and LADWP still face state-driven obligations to meet basin plan standards, Total Maximum Daily Load requirements, and local water-quality objectives under Porter-Cologne.

Adoption of this Resolution would align with the City’s established policy priorities associated with environmental sustainability.

Metropolitan Water District of Southern California

The Metropolitan Water District of Southern California has commented on this proposed redefining of WOTUS. They are particularly concerned about the potential of interstate waters no longer being a standalone category of protected waters under the Clean Water Act.

DEPARTMENTS NOTIFIED

Department of Public Works, Bureau of Sanitation
Department of Water and Power

CD Fields

Christopher Fields
Analyst

- Attachment: 1. Resolution (Park – Nazarian)
2. Letter from the Metropolitan Water District of Southern California

RESOLUTION

WHEREAS, any official position of the City of Los Angeles with respect to legislation, rules, regulations, or policies proposed to or pending before a local, state, or federal government body or agency must have first been adopted in the form of a Resolution by the City Council; and

WHEREAS, the City of Los Angeles is committed to protecting water quality, public health, and environmental resources for all residents; and

WHEREAS, wetlands and small waterways provide essential ecosystem services including flood control, water filtration, groundwater recharge, habitat for fish and wildlife, and climate resilience; and

WHEREAS, the U.S. Environmental Protection Agency and the Army Corps of Engineers have proposed a new definition of "Waters of the United States" that would dramatically reduce Clean Water Act protections, leaving only 19 percent of wetlands in the contiguous U.S. subject to federal oversight; and

WHEREAS, the proposed rule would require wetlands to have continuous surface water connection to relatively permanent waterways during wet seasons, ignoring scientific evidence about subsurface hydrological connections and intermittent water flows; and

WHEREAS, approximately half of states lack adequate state-level wetland protection programs, meaning the proposed federal rule would leave most wetlands in these states completely unprotected; and

WHEREAS, the proposed rule also narrows protection for streams by requiring "bed and banks," potentially eliminating Clean Water Act jurisdiction over numerous headwater streams and ephemeral waterways that contribute to drinking water supplies; and

WHEREAS, Southern California's unique hydrology includes many intermittent and seasonal streams and wetlands that could lose federal protection under this proposal, despite their critical importance to regional water quality and ecosystem health; and

WHEREAS, reduced federal oversight would increase regulatory burdens on state and local agencies to fill protection gaps with limited resources, as weakened wetland protections threaten to increase pollution, flooding risks, and infrastructure costs for the City; and

WHEREAS, clean water and healthy ecosystems are fundamental to public health, environmental justice, and quality of life for all Angelenos, particularly communities already burdened by environmental pollution;

NOW, THEREFORE, BE IT RESOLVED, that by the adoption of this Resolution, the City of Los Angeles hereby includes in its 2025-2026 Federal Legislative Program opposition to any action by the United States Environmental Protection Agency and the Army Corps of Engineers to redefine "Waters of the United States" which would eliminate Clean Water Act protections for over 80 percent of the nation's wetlands and numerous streams.

PRESENTED BY: Traci Park
TRACI PARK
Councilwoman, 11th District

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DEC 05 2025

of

SECONDED BY: Adri Aguirre

ORIGINAL



THE METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA

January 5, 2026

SUBMITTED ELECTRONICALLY

<https://www.regulations.gov>

Stacey Jensen
Oceans, Wetlands and Communities Division
Office of Water (4504-T)
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Milton Boyd
Office of the Assistant Secretary of the Army for Civil Works
Department of the Army
108 Army Pentagon
Washington, DC 20310-0104

Dear Stacey Jensen and Milton Boyd:

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

The Metropolitan Water District of Southern California (Metropolitan) appreciates the opportunity to comment on the U.S. Environmental Protection Agency (EPA) and the Department of the Army, Corps of Engineers, Department of Defense's (Corps) (collectively, Agencies) proposed rule, Updated Definition of "Waters of the United States" (WOTUS). The definition of WOTUS is central to the implementation of the Clean Water Act (CWA) and has significant implications for Metropolitan's day-to-day operations and source water protection efforts. The objective of the CWA is to prevent, reduce, and eliminate pollution in the nation's waters in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." (33 U.S.C. § 1251(a), CWA § 101(a).) As both a regulated entity and an environmental steward of the region's imported water supplies, Metropolitan shares the Agencies' desire to make a lasting rule that provides greater regulatory certainty and increases CWA program predictability and consistency.

I. BACKGROUND

Metropolitan is a regional water wholesaler that delivers water to 26 member agencies, which in turn, directly or through their customers, provide water to nearly 19 million people in Los Angeles, Orange, Riverside, San Bernardino, San Diego, and Ventura counties. Metropolitan imports water from the Colorado River and northern California and is the largest distributor of treated drinking water in the United States. To supply Southern California with reliable and safe

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water, Metropolitan owns and operates an extensive water system, including the Colorado River Aqueduct, nine open-water reservoirs, five water treatment plants, 15 hydroelectric facilities, and 830 miles of large-scale pipes.

As a steward of Southern California's imported water supply, Metropolitan supports CWA amendments and regulations that protect current and future water quality for both surface water bodies and groundwater basins that serve as drinking water sources. The watersheds for Metropolitan's water sources span California and the Colorado River Basin, which includes the states of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming. Protection of these source waters and watersheds is of paramount importance. As such, any potential for source water degradation through insufficient oversight in areas proximate to rivers and tributaries is an issue of concern.

Metropolitan strongly supports the stated objectives of the CWA to restore and maintain the quality of the nation's waters while respecting the primary responsibilities and rights of states and tribes over their land and water resources. In this regard, Metropolitan appreciates that the Agencies intend for the proposed rule "to implement the overall objective of the Clean Water Act to restore and maintain the quality of the Nation's waters while respecting State and Tribal authority over their own land and water resources." (Updated Definition of "WOTUS," 90 Fed. Reg. 52498, 52498 (proposed Nov. 20, 2025) (to be codified at 28 C.F.R. pt. 328 and 40 C.F.R. pt. 120).) Metropolitan respectfully submits the following comments, which are explained in more detail below, to help clarify and/or implement these objectives:

- 1. Retain the category of "interstate waters."**
 - a. Retention of "interstate waters" is supported by the Agencies' own analysis.
 - b. Removal of the category of "interstate waters" could lead to demonstrable harm.
 - c. The Agencies previously admitted that removing the category of interstate waters is inconsistent with the CWA.
 - d. Deleting the interstate waters category would be inconsistent with the Supreme Court's decision in *Sackett*.
 - e. The Agencies should identify interstate waters found to be jurisdictional to date.
 - f. The proposed removal of "intrastate" from paragraph (a)(5) is inextricably linked to the proposed deletion of interstate waters and is not ministerial.
- 2. Add an express exclusion and definition for artificial water supply infrastructure.**
- 3. Modify and clarify the revised definition of "relatively permanent waters."**
- 4. Clarify the exclusion for "waste treatment systems."**
- 5. Include a reference to the *County of Maui v. Hawaii Wildlife Fund* factors in the groundwater exclusion.**
- 6. Retain jurisdictional status of tributaries part of a water transfer.**
- 7. Consider the consequences on Endangered Species Act implementation of reducing CWA coverage.**

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II. COMMENTS

1. Retain the Category of “Interstate Waters”

The proposed rule would remove the category of interstate waters from the definition of WOTUS. The Agencies explain that “[b]ecause this category can encompass bodies of water that are not relatively permanent, standing, or continuously flowing or that are not themselves connected 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, its removal would ensure consistency with the *Sackett*¹ decision as well as the Clean Water Act.” (Updated Definition of “WOTUS,” 90 Fed. Reg. at 52516.)

a. Retention of “Interstate Waters” is Supported by the Agencies’ Own Analysis

Metropolitan asks that the Agencies keep the category of interstate waters in the WOTUS definition. As explained below, the Agencies’ proposal to remove the longstanding category of interstate waters from the definition of WOTUS could negatively impact the quality of the nation’s waters, which would be inconsistent with the overall goal of the CWA, Supreme Court precedent, and the Agencies’ established interpretation of the term “navigable waters.” As mentioned above, the Colorado River Watershed spans seven states across the arid Southwest—fed by myriad streams, tributaries, estuaries, and rivers that may span state lines. Each of these interstate waters may serve as a conduit for contaminants within the Colorado River Watershed. As such, Metropolitan asks that the Agencies do not remove the category of interstate waters from the definition of WOTUS. This conclusion is supported by the Agencies’ own analysis that the “language of the CWA is clear that Congress intended the term ‘navigable waters’ to include interstate waters, and the agencies’ interpretation, promulgated contemporaneously with the passage of the CWA, is consistent with the statute and legislative history”:²

- “The CWA was enacted in 1972. EPA’s contemporaneous regulatory definition of ‘waters of the United States,’ promulgated in 1973, included interstate waters. The definition has been EPA’s interpretation of the geographic jurisdictional scope of the CWA for approximately 40 years. Congress has also been aware of and has supported the Agency’s longstanding interpretation of the CWA.”³

¹ See *infra*, Comment Section 1.d.

² U.S. ENV’T PROT. AGENCY & U.S. ARMY CORPS OF ENG’RS, TECHNICAL SUPPORT DOCUMENT FOR THE CLEAN WATER RULE: DEFINITION OF WATERS OF THE UNITED STATES 197 (2015) [hereinafter TECHNICAL SUPPORT DOCUMENT FOR THE CLEAN WATER RULE] (https://www.epa.gov/sites/default/files/2015-05/documents/technical_support_document_for_the_clean_water_rule_1.pdf).

³ *Id.*

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- “Where ‘an agency’s statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.’ *North Haven Board of Education v. Bell*, 102 [sic] 456 U.S. 512, 535 (1982) (quoting *United States v. Rutherford*, 442 U.S. 544[, 554] n. 10 (1979) (internal quotes omitted)).”⁴
- When the Corps adopted EPA’s WOTUS definition in 1977, the Corps described why they included the category of interstate waters:
 - “The affects [sic] of water pollution in one state can adversely affect the quality of the waters in another, particularly if the waters involved are interstate. Prior to the FWPCA amendments of 1972, most federal statutes pertaining to water quality were limited to interstate waters. We have, therefore, included this third category consistent with the Federal government’s traditional role to protect these waters from the standpoint of water quality and the obvious effects on interstate commerce that will occur through pollution of interstate waters and their tributaries.”⁵
- In 2015, the Agencies explained in detail how the plain language of the CWA, the statute as a whole, and the legislative history demonstrate Congress’ clear intent to include interstate waters as “navigable waters” subject to the CWA.⁶ For example:
 - “While the term ‘navigable waters’ is ambiguous, interstate waters are waters that are clearly covered by the plain language of the definition of ‘navigable waters.’ Congress defined ‘navigable waters’ to mean ‘the waters of the United States, including the territorial seas.’ Interstate waters are waters of the several States and, thus, the United States.”⁷
 - “In section 303(a), Congress clearly intended for existing federal regulation of interstate waters to continue under the amended CWA. . . . It would contravene Congress’ clearly stated intent for a court to impose an additional jurisdictional requirement on all rivers, lakes, and other waters that flow across, or form a part of, state boundaries (‘interstate waters’ as defined by the 1948 Act, § 10, 62 Stat. 1161), such that interstate waters that were previously protected were no longer protected because they lacked a

⁴ *Id.*

⁵ *Id.*, at 215–16 (quoting Final Rules, 42 Fed. Reg. 37122, 37127 (July 19, 1977)) (alteration in original) (emphasis added).

⁶ TECHNICAL SUPPORT DOCUMENT FOR THE CLEAN WATER RULE, at 197–207.

⁷ *Id.*, at 199.

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connection to a water that is navigable for purposes of federal regulation under the Commerce Clause.”⁸

- “There is no evidence that Congress intended to exclude interstate waters which were protected under federal law if they were not water that is navigable for purposes of federal regulation under the Commerce Clause or connected to water that is navigable for purposes of federal regulation under the Commerce Clause.”⁹
- Moreover, the Agencies showed how United States Supreme Court precedent supports CWA jurisdiction over interstate waters without regard to navigability.¹⁰ Thus, the Agencies should not be concerned now that “regulating all interstate waters—from isolated ponds to ephemeral washes—regardless of their connection to navigability would impermissibly ‘read[] the term “navigable waters” out of the statute.’”¹¹

b. Removal of the Category of “Interstate Waters” Could Lead to Demonstrable Harm

Protection of source water quality is of paramount importance to Metropolitan. The Agencies have previously recognized that removing the “interstate waters” category could harm downstream states’ water quality. For example, in response to the 2020 Navigable Waters Protection Rule (NWPR),¹² which removed “interstate waters” as a WOTUS category, commenters pointed out that the 2020 NWPR’s removal of interstate waters as an independent basis for jurisdiction “could have contributed to interstate water pollution because many upstream states have laws preventing the adoption of stricter water pollution controls than the minimum standards required under the CWA.”¹³ In their response to this comment, the Agencies admitted:

“[T]he net effect of the 2020 NWPR was deregulatory because many states match the protections of the Clean Water Act and do not currently have authority to enact more protective regulations. Further, the federalism approach used in developing the economic analysis for the 2020 NWPR concluded that states and tribes would address the

⁸ *Id.*, at 200–01.

⁹ *Id.*, at 218.

¹⁰ *Id.*, at 207–15.

¹¹ See Updated Definition of “WOTUS,” 90 Fed. Reg. at 52516 (“The agencies propose that regulating all interstate waters—from isolated ponds to ephemeral washes—regardless of their connection to navigability would impermissibly ‘read[] the term “navigable waters” out of the statute.’”).

¹² The NWPR: Definition of “Waters of the United States,” 85 Fed. Reg. 22250 (Apr. 21, 2020).

¹³ U.S. ENV’T PROT. AGENCY & U.S. ARMY CORPS OF ENG’RS, REVISED DEFINITION OF “WATERS OF THE UNITED STATES” RESPONSE TO COMMENTS DOCUMENT, SECTION 4 – NAVIGABLE WATERS PROTECTION RULE (2020 NWPR) at 8 (2022) [hereinafter RESPONSE TO COMMENTS DOCUMENT, SECTION 4], https://www.epa.gov/system/files/documents/2022-12/04_2022_NWPR_RTC.pdf.

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regulatory gap, which they did not. ... Moreover, by eliminating interstate waters as an independent basis for Clean Water Act coverage, the 2020 NWPR did not address the potential for interstate harm from the degradation of waterbodies spanning more than one state. The agencies agree that, for the reasons set forth by the commenters, the 2020 NWPR reduced the ability of downstream states and tribes to control their water quality.¹⁴

Metropolitan has these same concerns regarding the Agencies' current proposal to remove the category of interstate waters from WOTUS. The proposed rule would significantly narrow the scope of waters subject to federal jurisdiction, and therefore, it would reduce the number of facilities and projects subject to federal permitting requirements under CWA sections 402 and 404. This means that the proposed rule would limit critical oversight of mining, hydraulic fracturing, and other industrial projects that can span multiple states and may impact water quality and downstream users across state boundaries. These deregulatory and water quality impacts would be more significant in regions such as the arid west, where ephemeral, interstate, or otherwise intermittent waters were previously considered jurisdictional.

As a water agency in California, a downstream state that receives water from the Colorado River, this is a significant concern for Metropolitan. In fact, the California State Water Resources Control Board has predicted: "As a downstream state, California will likely face the adverse effects of more wetlands being filled in upstream states and increases in unregulated discharges of pollutants in upstream states. As one example, the mainstem of the Colorado River, one of California's most important water supplies, will continue to be afforded federal protection. But the intermittent streams that feed the Colorado River and the wetlands in the semi-arid Colorado River watershed, many of which are in states that lack independent state law protection, are at risk of losing federal protection."¹⁵ Consequently, Metropolitan asks that the Agencies retain the category of interstate waters to prevent the potential for interstate harm from the degradation of waters spanning more than one state.

c. The Agencies Previously Admitted that Removing the Category of Interstate Waters is Inconsistent with the CWA

Some commenters argued that the 2020 NWPR lacked sufficient justification for eliminating categorical protections for interstate waters and that the Agencies' failure to protect all

¹⁴ *Id.*, at 8–9 (emphasis added).

¹⁵ STATE WATER RES. CONTROL BD., FREQUENTLY ASKED QUESTIONS REGARDING THE U.S. SUPREME COURT'S RULING IN *SACKETT V. EPA*, hypo.3 (2023) [hereinafter *SACKETT V. EPA* FAQ] (emphasis added), presented at the State Water Resources Control Board's Water Quality Coordinating Committee October 23, 2023 Meeting, (https://www.waterboards.ca.gov/water_issues/programs/cwa401/docs/sackett-faq-external.pdf).

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interstate waters in the 2020 NWPR “was an abdication of a core premise of the Clean Water Act’s cooperative federalism.”¹⁶ In response to these comments, the Agencies agreed that “the 2020 NWPR’s elimination of the categorical protection of interstate waters is inconsistent with the text of the Clean Water Act and the historical context in which it was enacted.”¹⁷ Accordingly, Metropolitan asks that the Agencies reconsider their proposal to remove the category of interstate waters.

d. Deleting the Interstate Waters Category Would Be Inconsistent With *Sackett*

In the preamble to the proposed rule, the Agencies explain that they removed “interstate wetlands” from the 2023 Rule “to conform with the decision in *Sackett* [*v. EPA*, 598 U.S. 651 (2023)]. The Supreme Court in *Sackett* examined the Clean Water Act and its statutory history and found the predecessor statute to the Clean Water Act covered and defined ‘interstate waters’ as ‘all *rivers, lakes, and other waters* that flow across or form a part of State boundaries.’ 598 U.S. at 673 (citing 33 U.S.C. 1160(a), 1173(e) (1970 ed.)) (emphasis in original). The Court concluded that the use of the term ‘waters’ refers to such ‘open waters’ and not wetlands. *Id.* As a result, under *Sackett*, the provision authorizing the assertion of Clean Water Act jurisdiction over wetlands simply because they are interstate is invalid. 88 FR 61966.”¹⁸

Although the *Sackett* Court found that WOTUS does not include “interstate wetlands,” it did not decide that WOTUS does not include “interstate waters.” In fact, as demonstrated by the language quoted above, the Court relied on the category of “interstate waters” to conclude that WOTUS does not include wetlands. Thus, given this reliance, it would be inconsistent with *Sackett* for the Agencies to remove the interstate waters category.

The Agencies also point to the *Sackett* Court’s holding that a WOTUS “must be ‘a relatively permanent body of water connected to traditional interstate navigable waters’ or ‘wetland[s] [with] a continuous surface connection with that water.’ *Id.* at 678 (citing *Rapanos*, 547 U.S. at 742, 755); see section IV.A of this preamble. Nothing in *Sackett* or the *Rapanos* plurality opinion suggests that Congress intended to separately regulate interstate waters that do *not* meet this test.”¹⁹ But this interpretation would be an overreading of *Sackett* and *Rapanos*. The Supreme Court in *Sackett* removed certain wetlands from the (a)(1)(iii) category of interstate waters but did not eliminate the (a)(1)(iii) interstate waters category itself. And in *Rapanos*, the Supreme Court did not specifically address the status of interstate waters. As a result, *Sackett* and *Rapanos* do not support the Agencies’ proposal to remove the interstate waters category.

¹⁶ RESPONSE TO COMMENTS DOCUMENT, SECTION 4, at 14.

¹⁷ *Id.*, at 14 (emphasis added).

¹⁸ Updated Definition of “WOTUS,” 90 Fed. Reg. at 52512.

¹⁹ *Id.*, at 52516 (emphasis in original).

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e. The Agencies Should Identify Interstate Waters Found to be Jurisdictional to Date

In the preamble to the proposed rule, the Agencies say, “Based on an analysis of data associated with approved jurisdictional determinations finalized by the Corps between August 28, 2015, and September 18, 2025, a total of 15 waters were found to be jurisdictional as interstate waters during that time frame.”²⁰ Metropolitan asks that the Agencies identify the 15 waters found to be jurisdictional between August 28, 2015, and September 18, 2025, as “interstate waters.” Metropolitan also asks the Agencies to identify how many and which waters were found to be jurisdictional as interstate waters before August 28, 2015.

f. The Proposed Removal of “Intrastate” from Paragraph (a)(5) Is Inextricably Linked to the Proposed Deletion of Interstate Waters and Is Not Ministerial

“With the proposed deletion of the interstate waters category and the proposed deletion of ‘intrastate’ from paragraph (a)(5), the (a)(5) category under the proposed rule would include both interstate and intrastate lakes and ponds not identified in paragraphs (a)(1) through (4) that are relatively permanent, standing or continuously flowing bodies of water with a continuous surface connection to a traditional navigable water, the territorial seas, or a paragraph (a)(3) tributary. As such, the agencies believe deleting ‘intrastate’ from paragraph (a)(5) would be a ministerial change due to the proposed elimination of the interstate waters category under paragraph (a)(1)(iii) of the Amended 2023 Rule.” (Updated Definition of “WOTUS,” 90 Fed. Reg. at 52533.)

The deletion of “intrastate” from paragraph (a)(5) is inextricably linked with the removal of interstate waters from the definition of WOTUS and the significant potential impacts set forth above. Given this connection, the removal of “intrastate” is not merely ministerial and should not be made without independent justification.

2. Add an Express Exclusion and Definition for Artificial Water Supply Infrastructure

Metropolitan recommends adding water supply infrastructure to the list of express exclusions in 40 C.F.R. § 120.2(b) and defining it in 40 C.F.R. § 120.2(c) as follows:

“Water supply infrastructure” means all constructed infrastructure necessary for the supply, transportation, storage, treatment, and delivery of water for municipal, agricultural, and industrial beneficial uses, including canals, siphons, pipelines, tunnels, off-stream reservoirs, groundwater recharge basins, dewatering structures, water treatment plants, and pumping plants. “Water supply infrastructure” does not include constructed infrastructure that channelizes, impounds, or replaces a naturally occurring body of water that would qualify in

²⁰ *Id.*, at 52516.

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its unaltered state as a water of the United States under this rule. Conveyance of waters of the United States through “water supply infrastructure” would continue to be classified as a water transfer, as that term is applied under 40 C.F.R. § 122.3.

Excluding artificial water supply infrastructure from the definition of WOTUS would be consistent with the purpose and text of the CWA, Justice Scalia’s plurality opinion in *Rapanos v. United States*,²¹ and the logic supporting the exclusion of waste treatment systems. For water management agencies, such an exclusion and definition, coupled with a clear statement that waters conveyed through these facilities in a manner consistent with the requirements of the Water Transfers Rule would continue to be exempt from NPDES requirements, would provide clarity and certainty regarding the jurisdictional status of these critical facilities.

For additional comments related to the Water Transfers Rule, please see Comment 6 below.

3. Modify and Clarify the Revised Definition of “Relatively Permanent Waters”

“In this proposal, the agencies define ‘relatively permanent’ to mean ‘standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season.’ Consistent with the *Sackett* decision, ephemeral waters (i.e., those with surface water flowing or standing only in direct response to precipitation (e.g., rain or snow fall)) are not jurisdictional because they are not relatively permanent. The phrase ‘at least during the wet season’ is intended to include extended periods of predictable, continuous surface hydrology occurring in the same geographic feature year after year in response to the wet season, such as when average monthly precipitation exceeds average monthly evapotranspiration.” (Updated Definition of “WOTUS,” 90 Fed. Reg. at 52517–18.)

“Under the proposed rule, relatively permanent tributaries include rivers, streams, lakes, ponds, and other standing or continuously flowing bodies of surface water that are standing or continuously flowing year-round or at least during the wet season, that have a bed and banks, and connect 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.” (Updated Definition of “WOTUS,” 90 Fed. Reg. at 52524–25.)

The proposed definition of “relatively permanent” conforms to the *Sackett* decision and the pre-2015 regulatory regime. However, Metropolitan suggests that the Agencies continue to follow the Corps’ FIELD GUIDE TO THE IDENTIFICATION OF THE ORDINARY HIGH-WATER MARK (OHWM) IN THE ARID WEST REGION OF THE WESTERN UNITED STATES: A DELINEATION

²¹ See *Rapanos v. United States*, 547 U.S. 715, 736 n.7 (2006) (plurality opinion) (“[H]ighly artificial, manufactured, enclosed conveyance systems...and the ‘mains, pipes, hydrants, machinery, buildings, and other appurtenances and incidents’...likely do not qualify as ‘waters of the United States,’ despite the fact that they may contain continuous flows of water...” (citations omitted)).

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MANUAL, ERDC/CRREL TR-08-12 (Lichvar and McColley 2008),²² Regional Streamflow Duration Assessment Methods, and the Agencies' *Rapanos* Guidance to identify jurisdictional tributaries and other non-wetland aquatic resources. These resources, as well as the Corps' REGULATORY GUIDANCE LETTER: ORDINARY HIGH WATER MARK IDENTIFICATION, NO. 05-05 (2005)²³, help identify the factors to be applied to identify the OHWM. These established methods were developed with nationwide experience in making jurisdictional determinations consistent with the relatively permanent standard as interpreted by the *Rapanos* Guidance.²⁴ Metropolitan recommends following the pre-2015 practice of identifying jurisdictional tributaries through physical indicators, specifically: (1) indicators of ordinary high-water mark (OHWM), and (2) connectivity to a traditional navigable waterway.

4. Clarify the Exclusion for "Waste Treatment Systems"

The Agencies propose to continue the exclusion for waste treatment systems, which has existed in EPA's regulations since 1979. However, the Agencies are also proposing to modify the exclusion, including by adding a definition of "waste treatment system." "Under the proposed rule, a waste treatment system 'includes all components of a waste treatment system designed to meet the requirements of the Clean Water Act, including lagoons and treatment ponds (such as settling or cooling ponds), designed to either convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge)." (Updated Definition of "WOTUS," 90 Fed. Reg. at 52534.)

Metropolitan appreciates the Agencies confirming that the waste treatment system discharge exclusion "would not free a discharger from the need to comply with the Clean Water Act, including any effluent limitations guidelines and new source performance standards requirements applicable to the waste treatment system, and requirements applicable to the pollutants discharged from a waste treatment system to [a WOTUS]; only discharges *into* the waste treatment system would be excluded from the Act's requirements. As such, the agencies propose to continue their longstanding practice that any entity would need to comply with the Clean Water Act by obtaining a section 404 permit for a new waste treatment system that will be constructed in [a WOTUS], and a section 402 permit if there are discharges of pollutants from a waste treatment system into [a WOTUS]."²⁵

However, Metropolitan is concerned that the more limited definition of WOTUS after *Sackett* and in the proposed rule may result in certain waste treatment systems being constructed in and/or discharging pollutants to waters that are no longer considered WOTUS but could impact source water quality. For example, as discussed above, the Agencies are proposing to remove

²² https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.

²³ <https://www.nap.usace.army.mil/Portals/39/docs/regulatory/rpls/rpl05-05.pdf>.

²⁴ Revised Definition of "WOTUS," 86 Fed. Reg. 69372, 69405 (Dec. 7, 2021).

²⁵ Updated Definition of "WOTUS," 90 Fed. Reg. at 52535 (emphasis in original).

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interstate waters from the definition of WOTUS. As a result, intermittent and ephemeral streams that cross state boundaries and feed the Colorado River (which is a major source of drinking water for Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming) would no longer be jurisdictional.²⁶

In addition, according to EPA, “Nationwide, over 117 million people receive drinking water from public drinking water systems that rely at least in part on intermittent, ephemeral, or headwater streams.”²⁷ Furthermore, in the continental U.S., “357,404 total miles of streams provide water for public drinking water systems. Of that total, 58% (207,476 miles) are intermittent, ephemeral, or headwater streams.”²⁸ Similarly, a recent study found that ephemeral streams contribute more than half of the water in larger regional river systems.²⁹

Thus, the removal of intermittent, interstate, and ephemeral waters from the definition of WOTUS would likely mean that the source water quality for millions of people might be negatively impacted. In this way, the objective of the CWA to prevent, reduce, and eliminate pollution in the nation's waters in order to “restore and maintain the chemical, physical, and biological integrity of the Nation's waters” (33 U.S.C. § 1251(a), CWA § 101(a)), could be undermined. Metropolitan asks that before finalizing the proposed rule, the Agencies consider taking steps to address the potential impacts on source water quality in the arid west of discharges from excluded waste treatment systems to waters that would no longer be jurisdictional.

5. Include a Reference to the *County of Maui v. Hawaii Wildlife Fund* Factors in the Groundwater Exclusion

“The Agencies propose to include an exclusion for groundwater under paragraph (b)(9), including groundwater drained through subsurface drainage systems. The Agencies propose adding the subsurface drainage clarification to specify that even when groundwater is channelized in subsurface systems, like tile drains used in agriculture, it would still remain subject to the exclusion. However, under the proposed rule, the exclusion would not apply to surface expressions of groundwater, such as where groundwater emerges on the surface and

²⁶ See *SACKETT v. EPA* FAQ, *supra* note 15, at hypo.3 (“[T]he intermittent streams that feed the Colorado River and the wetlands in the semi-arid Colorado River watershed, many of which are in states that lack independent state law protection, are at risk of losing federal protection.”).

²⁷ U.S. Env’t Prot. Agency, *Percentage of Surface Drinking Water from Intermittent, Ephemeral, and Headwater Streams*, (image 2009), www.epa.gov/sites/default/files/2015-04/documents/2009_10_15_wetlands_science_surface_drinking_water_surface_drinking_water_national_counties.pdf (displaying map of percentage of surface drinking water in the United States by county).

²⁸ *Id.*

²⁹ Brinkerhoff, et al., *Ephemeral Stream Water Contributions to United States Drainage Networks*, 384 SCI. (ISSUE 6703) 1389, 1476–82 (2024) (<https://doi.org/10.1126/science.adg9430>).

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becomes baseflow in relatively permanent streams.” (Updated Definition of “WOTUS,” 90 Fed. Reg. at 52541.)

Metropolitan concurs with the exclusion of groundwater from the definition of WOTUS. However, Metropolitan supports the concept of “functional equivalency” as found in the Supreme Court’s ruling in *County of Maui v. Hawaii Wildlife Fund (County of Maui)*, 590 U.S. 165, 183–8484, 140 S. Ct. 1462, 1476 (2020). In that case, the Supreme Court held that a CWA permit is required when a point source pollutant discharged to groundwater has the same functional equivalency as a direct discharge to a navigable water. The Supreme Court set forth seven factors that help determine functional equivalency: “(1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, (7) the degree to which the pollution (at that point) has maintained its specific identity.”³⁰ This ruling is consistent with Metropolitan’s previous comments on Docket ID Number: EPA-HQ-OW-2018-0063 — Clean Water Act Coverage of “Discharges of Pollutants” via a Direct Hydrologic Connection to Surface Water,³¹ as well as previous CWA guidance by EPA.³²

Metropolitan strongly supports regulating discharges that meet the standard of functionally equivalent to a direct discharge set forth above. The Agencies have the authority to permit such releases, and CWA permitting is the best way to protect the chemical, physical, and biological integrity of source water quality, such as in the Colorado River Basin states. Although EPA published on November 27, 2023, draft guidance on applying the *County of Maui* decision in CWA Section 402 National Pollutant Discharge Elimination System (NPDES) permit program to discharges through groundwater, EPA has not yet finalized that guidance. Nor do the Agencies mention the *County of Maui* functional equivalent analysis in the proposed rule. Metropolitan asks that the Agencies include the *County of Maui* factors in the preamble to the final rule and clarify that, despite the groundwater exclusion, discharges from point sources to groundwater that satisfy the functional equivalency test are subject to the CWA.

6. Retain Jurisdictional Status of Tributaries Part of a Water Transfer

The Agencies’ proposed definition for “tributary” includes the following caveats:

³⁰ *County of Maui*, 590 U.S. at 184–85.

³¹ See Metro. Water Dist. of S. Cal., Comment Letter on Clean Water Act Coverage of “Discharges of Pollutants” via a Direct Hydrologic Connection to Surface Water (May 23, 2018) (https://downloads.regulations.gov/EPA-HQ-OW-2018-0063-0438/attachment_1.pdf).

³² National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960, 3017 (Jan. 12, 2001).

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“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, culvert, dam, tunnel, 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 the tributary is part of a water transfer (as that term is applied under 40 CFR 122.3) currently in operation, the tributary would retain jurisdictional status.” (Updated Definition of “WOTUS,” 90 Fed. Reg. at 52545.)

Metropolitan appreciates the Agencies’ recognition of the continued importance of the Water Transfers Rule and agrees that it is essential to “ensure vital water management practices continue as currently implemented” with regard to tributaries that are part of water transfers.³³ Furthermore, the jurisdictional status of tributaries that comprise water transfers should continue to be acknowledged. Continuing to keep the jurisdictional status of these tributaries will protect the source water quality of both the upstream and downstream waters involved in such transfers, thereby lowering treatment costs, protecting public health and safety, and preserving the biological integrity of these waters.

7. Other Factors to Consider when Evaluating the Scope of the CWA

Non-federal projects that require a section 404 permit benefit from streamlined Endangered Species Act, 16 U.S.C. § 1536 (ESA) compliance through Section 7 of the ESA. Section 7 provides statutory timelines and a more efficient process for all agencies involved compared to Section 10. Under the proposed rule, the revised definition of WOTUS would result in a reduction of waters with a federal nexus, resulting in fewer opportunities for non-federal entities to participate in Section 7 consultations and requiring more projects to obtain ESA compliance through the time-consuming and expensive Section 10 process. This, in turn, could result in adverse economic impacts, including on essential water infrastructure projects in the arid west. Metropolitan therefore requests that the Agencies consider the consequences on ESA implementation of reducing CWA coverage, such that critical infrastructure projects by non-federal entities are not delayed nor face increased costs as a result.

III. CONCLUSION

The definition of WOTUS is critical to the implementation of the CWA. How WOTUS is defined has significant implications for Metropolitan’s day-to-day operations, as well as source water protection efforts. Metropolitan appreciates the Agencies’ development of a WOTUS definition that provides for the transparent, efficient, and predictable implementation of the CWA, while continuing to ensure the protection of source water quality.

³³ See Updated Definition of “WOTUS,” 90 Fed. Reg. at 52523.

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We appreciate having the opportunity to provide input to this process. If you have any comments or questions, please contact Daniel Cardoza at (213) 217-5602 or via email at dcardoza@mwdh2o.com.

Very truly yours,

DocuSigned by:

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