BAYOU CITY WATERKEEPER®

October 9, 2026

Via the Federal eRulemaking Portal: https://www.regulations.gov/
U.S. Environmental Protection Agency
U.S. Department of the Army

Re: Updated Definition of "Waters of the United States"; Supplemental Notice of Proposed Rulemaking, Docket ID No. EPA-HQ-OW-2025-0322

To the U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Army:

Bayou City Waterkeeper submits these written comments as the U.S. Environmental Protection Agency ("EPA") and Department of Defense, Department of the Army, Corps of Engineers' ("Corps") (jointly the "Agencies") revise the "waters of the United States" definition, once again.

These supplemental comments incorporate by reference Bayou City Waterkeeper's January 5, 2026 comments[1] on the Agencies' November 2025 proposed rule and address the additional alternatives presented in the September 2026 Supplemental Notice of Proposed Rulemaking.

Overview

Since 1972, the Clean Water Act has protected waterbodies and wetlands across the United States, dramatically improving water quality nationwide. Bayou City Waterkeeper has relied on the Clean Water Act to drive billions of dollars of investment in sanitary sewer infrastructure in Houston and Baytown, keeping sewage out of our neighborhoods and bayous. The Clean Water Act has also been a critical tool for BCWK in mobilizing communities to challenge or modify development proposals that would harm wetlands and increase flood risk.

The new rule, including the additional alternatives presented in the Supplemental Notice, will dramatically limit BCWK's ability to protect water bodies and unnecessarily constrain jurisdiction to the detriment of the greater Houston-Galveston region's waters and communities. The supplemental alternatives could have significant impacts across our region because they would further restrict jurisdiction based on perennial flow and perennial surface-water conditions that do not reflect the variable hydrology of the Upper Texas Gulf Coast. In Texas, where water and wetland protection depends heavily on the scope of federal jurisdiction, these changes could reduce the wetlands and waters subject to Clean Water Act §404 permitting and the associated avoidance, minimization, and compensatory mitigation requirements. When a project no longer requires a federal §404 permit, Texas also loses the federal-permit trigger for §401 water-quality certification review. Texas does not maintain an independent state dredge-and-fill permitting program that replaces federal Clean Water Act protections for freshwater wetlands that fall outside federal jurisdiction. The loss of these protections in hydrologically complex states like

[1] Bayou City Waterkeeper's January 5, 2026 comments are attached as Exhibit A.

Texas will undermine our state's ability to protect water quality, ensure reliable water supply, and manage catastrophic flood risk. We urge the federal government not to adopt these alternatives without addressing the following concerns:

Comments

1. *A perennial-only relatively permanent waters standard does not reflect the variable hydrology of the Upper Texas Gulf Coast*

In the Supplemental Notice, the Agencies propose an alternative under which "relatively permanent" waters would be limited to waters that are perennial. Under the proposed definition, "perennial" waters must contain standing or continuously flowing surface water every day of the year during ordinary conditions, subject to a single interruption of no more than 30 consecutive days caused by a non-anomalous event. Multiple interruptions during ordinary conditions would not satisfy this exception. In practical terms, a water that stops flowing for more than 30 consecutive days during otherwise ordinary seasonal low-flow conditions would not qualify as perennial under this alternative, even if flow returns later in the year. This alternative is substantially narrower than the November proposal, which included waters with relatively permanent flow during at least the wet season.[2]

A perennial-only standard does not adequately account for the variable flow conditions documented across the Upper Texas Gulf Coast. Texas experiences substantial variation between periods of low flow and intense rainfall, and regional streamflow records demonstrate that some waterways can reach extremely low or zero-flow conditions. The U.S. Geological Survey, in cooperation with the City of Houston and the Houston-Galveston Area Council, studied low-flow conditions in southeast Texas and estimated a minimum 7-day, 2-year discharge of zero cubic feet per second at study sites on Little Caney Creek, Mustang Bayou, and Oyster Creek. Other study sites, including Hunting Bayou, Cedar Bayou, Garners Bayou, and Carpenters Bayou, had estimated low-flow discharges of less than one cubic foot per second.[3] During periods when flow resumes, these waterways can again convey water and pollutants through the watershed to downstream jurisdictional waters; the absence of year-round flow does not eliminate that downstream hydrologic connection.

These data do not establish that any particular water would fail the supplemental definition of "perennial," which requires a fact-specific evaluation of flow during ordinary conditions. They do, however, demonstrate that very low and zero-flow conditions are part of the hydrologic record of waterways in our region. A jurisdictional standard tied exclusively to year-round surface water does not adequately account for these regional conditions or the role waterways with variable flow can play in conveying water and pollutants downstream.

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[2] Updated Definition of "Waters of the United States," Supplemental Notice of Proposed Rulemaking, 91 Fed. Reg. 57,284, 57,288–89 (Sept. 9, 2026).

[3] Jeffery W. East, Estimation of Minimum 7-Day, 2-Year Discharge for Selected Stream Sites, and Associated Low-Flow Water-Quality Data, Southeast Texas, 1997–98, U.S. Geological Survey Fact Sheet 122–99 (1999), https://pubs.usgs.gov/publication/fs12299

One example of why changes to upstream federal jurisdiction matter in our region is Little White Oak Bayou. Little White Oak Bayou flows from north to south for 12 miles, passing through Houston's Acres Homes, Northline, Near Northside, Independence Heights, and Woodland Heights neighborhoods before spilling into White Oak Bayou at Woodland Park.[4] The northern reach of Little White Oak Bayou north of Interstate 610 is relatively deep, has remained in its natural state, and is less prone to coming out of its banks during heavy rain events, which has protected communities in the area from flooding.

As it flows downstream, Little White Oak Bayou passes in and out through stormwater tunnels, designed to accommodate the construction of highways and other roads, before ultimately feeding White Oak Bayou, Buffalo Bayou, and Galveston Bay.[5] TCEQ's 2024 Integrated Report identifies Little White Oak Bayou as impaired for depressed dissolved oxygen and bacteria associated with recreation use.[6] The impairment itself does not determine Clean Water Act jurisdiction, but it illustrates why the treatment of upstream waters matters in a watershed where receiving waters already experience documented water-quality challenges.

The Agencies must not adopt a perennial-only relatively permanent waters standard without accounting for the variable hydrologic conditions of Texas waters.

2. ***Requiring perennial surface water for a continuous surface connection would exclude wetlands with documented hydrologic connections to downstream waters***

Across the hurricane-prone greater Houston area, wetlands are a critical part of our flood protection. But wetlands across this region continue to disappear. From 1992 to 2010, Harris County lost approximately 15,853 acres, or 29 percent, of its freshwater wetlands.[7] Alongside this development and wetland loss, communities have experienced increased flooding from storms, including Hurricane Harvey, which made national news and which some residents are still recovering from 8 years later, as well as unnamed storms with more localized yet still devastating impacts.

Historically, the Clean Water Act allowed protections to wetlands with a "significant nexus" to other water bodies, a scientifically-based approach that recognized the ecological relationship between tributaries and their adjacent wetlands, and their closely linked role in protecting the chemical, physical, and biological integrity of downstream traditional navigable waters.[8]

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[4] Harris County Flood Control District, F-09 Little White Oak Bayou Channel Conveyance Improvements, https://www.hcfcd.org/LittleWhiteOak (last visited Oct. 5, 2026).
[5] Personal knowledge and experience, Kristen Schlemmer, Bayou City Waterkeeper
[6] Texas Commission on Environmental Quality, 2024 Texas Integrated Report, Segment 1013A, AU 1013A_01.
[7] John S. Jacob et al., Houston-Area Freshwater Wetland Loss, 1992–2010, Texas A&M AgriLife Extension & Texas Sea Grant 12–13 (2014),https://repository.library.noaa.gov/view/noaa/43588 .
[8] US EPA, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States (2007), available at https://www.epa.gov/sites/default/files/2016-04/documents/rapanosguidance6507.pdf (last visited Oct. 5, 2026).

Following *Sackett v. EPA*, federal jurisdiction over adjacent wetlands requires a continuous surface connection with covered waters such that it is difficult to determine where the water ends and the wetland begins. The Supplemental Notice considers an even narrower alternative that would require a wetland to contain perennial surface water continuously connected to perennial surface water in a jurisdictional water. The Agencies themselves recognize that most wetlands do not contain perennial surface water and that, under this alternative, a majority of adjacent wetlands currently subject to Clean Water Act jurisdiction may no longer satisfy the continuous surface connection requirement.[9]

That approach does not reflect the hydrology of Upper Texas Gulf Coast wetlands, where surface-water connections can be intermittent, seasonal, and driven by rainfall rather than continuously expressed throughout the year. Requiring perennial surface water as the measure of connection risks excluding wetlands because of when their surface connection is visible, even where those wetlands repeatedly convey water downstream.

Texas coastal prairie wetlands provide a regional example of why a perennial surface-water requirement does not adequately reflect wetland hydrology. The Texas coastal prairie wetlands, which "were formed thousands of years ago by ancient rivers and bayous and once occupied almost a third of the landscape around Galveston Bay," are found "[a]long the Gulf of Mexico from western Louisiana to south Texas" and "occur as a mosaic of depressions, ridges, swales, intermound flats, and mima mounds."[10] These wetlands serve as "the headwaters for virtually all of the water bodies feeding into Galveston Bay"[11] and therefore "are a critical part of the aquatic integrity of our regional bayous and bays" that constitute navigable waters.[12]

Field research on Texas Gulf Coast depressional wetlands demonstrates that the absence of continuous surface water does not mean the absence of a recurring surface-water connection. A 45-month field study of a depressional wetland complex on the Texas Gulf Coast documented intermittent but recurring surface runoff from the wetlands. The researchers found that surface runoff occurred when precipitation exceeded wetland storage capacity and coincided with increased runoff in adjacent waterways. Over the study period, the wetlands discharged more than 17 percent of precipitation falling within the wetland watershed as surface runoff, although annual runoff varied substantially. The researchers concluded that these shallow depressional

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[9] Updated Definition of "Waters of the United States," Supplemental Notice of Proposed Rulemaking 91 Fed. Reg. 57,284, 57,298 (Sept. 9, 2026) https://www.epa.gov/system/files/documents/2026-09/wotus_snprm_9-2026_0.pdf (last visited Oct. 5, 2026).

[10] EPA & Corps, Technical Support Document for the Clean Water Rule: Definition of Waters of the United States, at 348 (May 27, 2015), Docket no. EPA-HQ-OW-2011-20869.

[11] John S. Jacob et al., Houston-Area Freshwater Wetland Loss, 1992–2010, Texas A&M AgriLife Extension & Texas Sea Grant 12–13 (2014),https://repository.library.noaa.gov/view/noaa/43588 .

[12] John S. Jacob, et al, Upper Texas Gulf Coast Pothole Wetlands: New Research shows Significant and Profound Hydrologic Connections to Galveston Bay and other Area Waters, at 3 (Texas Coastal Watershed Program, Texas A&M Agrilife Extension, July 2011), available at https://agrilifelearn.tamu.edu/s/product/upper-texas-gulf-coast-pothole-wetlands-new-research-shows-significant-and-profound-hydrologic-connections-to-galveston-bay-and-other-area-waters/01t4x000004OfhaAAC (last visited Dec. 18, 2025).

wetlands are not closed systems and can discharge water downslope when their storage capacity is exceeded.[13]

A perennial surface-water requirement does not account for this hydrologic behavior. A wetland can lack continuously present surface water while still repeatedly storing, conveying, and releasing water into the surrounding watershed. The timing of that connection does not eliminate its hydrologic function or its relationship to downstream waters.

These hydrologic connections also matter for flood protection and water quality. Regional research identifies freshwater wetlands as providing stormwater detention, erosion control, water storage, and water-quality functions. Wetlands do not need to remain wet throughout the year to perform these functions.[14] In the Houston region, where thousands of acres of freshwater wetlands have already been lost to development, further narrowing federal protection based on perennial surface-water conditions risks removing Clean Water Act review from wetlands that continue to perform important watershed functions. Conditioning federal jurisdiction on perennial surface water does not account for the episodic hydrology through which Gulf Coast wetlands store and convey stormwater. Excluding these wetlands from federal review risks the loss of natural flood-storage and water-quality functions and can undermine local and state investments in flood protection and water infrastructure.

The Agencies already modified the WOTUS rule to bring its protections for wetlands into compliance with *Sackett v. EPA*. They should not further narrow the continuous surface connection requirement through a perennial surface-water standard that does not reflect the documented hydrology of Texas coastal prairie wetlands.

3. ***Further narrowing federal jurisdiction will reduce Clean Water Act permitting and water-quality review for wetlands and waters in Texas***

The Supplemental Notice acknowledges that the proposed alternatives could significantly reduce the number of waters subject to Clean Water Act jurisdiction and that the §404 program would experience some of the greatest programmatic changes. Where waters or wetlands are no longer jurisdictional, projects affecting those resources may no longer require a federal §404 permit and the associated review of avoidance, minimization, and compensatory mitigation. The Agencies themselves identify avoided permitting and mitigation costs as consequences of reducing federal jurisdiction.[15]

These consequences are especially important in Texas because §404 permitting also provides a

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[13] Wilcox, B.P., Dean, D.D., Jacob, J.S. et al. Evidence of Surface Connectivity for Texas Gulf Coast Depressional Wetlands. Wetlands 31, 451–458 (2011). https://doi.org/10.1007/s13157-011-0163-x

[14] John S. Jacob, et al, Houston-Area Freshwater Wetland Loss, 1992–2010, at Summary (Texas A&M University System, May 2014). The full article is available at https://share.google/cr9l1E58xNRH69Kvi (last visited October 5, 2026).

[15] Updated Definition of "Waters of the United States," Supplemental Notice of Proposed Rulemaking, 91 Fed. Reg. 57,284, 57,298 (Sept. 9, 2026). https://www.epa.gov/system/files/documents/2026-09/wotus_snprm_9-2026_0.pdf

trigger for state water-quality review. TCEQ conducts Clean Water Act §401 water-quality certification for projects requiring federal §404 permits. When a water or wetland falls outside federal jurisdiction and a project no longer requires a federal §404 permit, Texas also loses the federal-permit trigger for §401 certification review.[16]

The Houston-Galveston region is already experiencing substantial development pressure and historical wetland loss. The Houston-Galveston Area Council projects that the region's population will grow from approximately 7 million people in 2020 to 10.7 million by 2050.[17] This projected growth does not itself establish future wetland loss, but it demonstrates the scale of development pressure facing a region where Harris County alone lost approximately 29 percent of its freshwater wetlands between 1992 and 2010.[18] Narrowing federal jurisdiction under these conditions would reduce the circumstances in which development affecting wetlands and waters receives federal review, avoidance and minimization analysis, and compensatory mitigation.

The Agencies should account for these regulatory consequences before adopting alternatives that would further narrow federal jurisdiction in Texas.

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Thank you for the opportunity to provide this feedback. If you have any questions, want to discuss these comments, or would like copies of any of the resources cited in this letter, please contact Alenka Cardenas at alenka@bayoucitywaterkeeper.org.

Thank you,

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[16] Texas Commission on Environmental Quality, State Water Quality Certification of Section 404 Permits (Apr. 10, 2024) https://www.tceq.texas.gov/downloads/permitting/wastewater-assessments/401-dredge-fill-reviews/401cov.pdf
[17] Houston-Galveston Area Council, 2024 Regional Growth Forecast. https://www.h-gac.com/regional-growth-forecast
[18] Jacob et al., supra note 6, at 12–13.

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