

**BEFORE THE
Environmental Protection Agency and
the United States Army Corps of Engineers**

EPA-HQ-OW-2025-0322; FRL-11132.1-01-OW

Updated Definition of “Waters of the United States”

**COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS
AND THE AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION**

The Association of American Railroads (“AAR”) and the American Short Line and Regional Railroad Association (“ASLRRA”) (jointly, “the Associations”), on behalf of themselves and their member railroads, respectfully submit the following comments in EPA’s and the U.S. Army Corps of Engineers’ (“USACE”) (collectively “the Agencies”) November 17, 2025, Notice of Proposed Rulemaking on Updated Definition of “Waters of the United States” (the “Proposal”).¹

AAR is a non-profit industry association whose membership includes freight railroads that operate 83 percent of the line-haul mileage, employ 95 percent of the workers, and account for 97 percent of the freight revenues of all railroads in the United States. AAR also represents passenger railroads that operate intercity passenger trains and provide commuter rail service. ASLRRA is a small non-profit trade association representing the interests of the Nation’s 600 Class II and III railroads, commonly referred to as short lines and regional railroads. Short lines operate nearly 50,000 route miles in the United States, or approximately 30% of the national freight network, serving customers who otherwise would be cut off from the national railroad network.

Railroads are critical to the national and global supply chains and play a crucial role in the supply chain and the nation’s infrastructure. This underscores the importance of continuing to maintain and improve the efficiency, safety, and resiliency of rail networks. As such, the Associations’ member railroads have a significant interest in clarifying the jurisdiction of the federal government under the Clean Water Act. Of particular interest to the rail industry is the Agencies’ treatment of railroad ditches under any clarification of the definition of waters of the United States (“WOTUS”). The nation’s railroads operate over 137,000 miles of right-of-way. Ditches are necessary for drainage of those rights-of-way

¹ 90 Fed. Reg. 52498 (Nov. 20, 2025).

and are essential for safe and reliable railroad operations.

The US government has spent the better part of 50 years attempting to define/refine the definition of WOTUS. In the absence of clear, concise and easily implemented definitions of terms such as “relatively permanent” permit requirements for rail projects remain open to interpretation. Significant resources are spent each year to determine jurisdiction and applicability of the Clean Water Act to our projects. Thus, this revised definition of WOTUS and the permitting obligations attendant to it will dramatically improve railroad operation nationwide.

The Associations support the proposed revision to the definition of WOTUS but urges the Agencies to include a blanket exclusion for railroad right-of-way drainage ditches in the final rule. Furthermore, to avoid uncertainty, the Associations urge the Agencies to exclude “wet season” from the definition of “relatively permanent.”

I. Regulatory Certainty and Predictability are Critical to Maintain and Meet the Needs of the Nation’s Infrastructure and Supply Chain Demands.

To maintain the extensive rail networks and meet current and future demand, railroads must be able to plan and complete infrastructure and expansion projects in a timely and predictable manner. The railroads continually invest in replacing aging infrastructure that, if not upgraded or replaced, can potentially cause safety, reliability, and environmental concerns. Because most rail maintenance, replacement, and expansion projects require an assessment to determine whether a WOTUS is present, a clear, predictable, and consistent rule is fundamental to planning and permitting these critical projects. The Proposal provides long-term regulatory certainty and is crafted such that capital-intensive industries, like rail and its customers, can make investment and planning decisions.

The Associations support this clear and predictable, common-sense approach to regulating features such as WOTUS, and requests an express, general exclusion for railroad ditches.

II. Railroad Ditches Should be Categorically Excluded as Non-Jurisdictional.

Both law and public policy considerations support categorically excluding railroad ditches from the definition of WOTUS. Railroad ditches, which extend alongside railroad tracks and railyards, are man-made features specifically designed and constructed to facilitate the drainage of stormwater from tracks. These ditches are necessary for the safe and reliable operation of railroads—providing drainage and thereby preventing flooding and damage to rail beds and tracks.

For ditches to function effectively, they must be maintained regularly. In fact, the

Federal Railroad Administration (“FRA”) requires drainage features, including ditches, to be maintained, kept free of obstruction, and able to accommodate the amount of water expected for the area concerned.² If any railroad ditch is deemed jurisdictional under the Clean Water Act, the ability of a railroad to maintain, deepen, or otherwise modify that ditch to satisfy FRA’s regulatory safety requirements and/or accommodate an increased amount of stormwater would be impaired. In addition, from time to time, railroads must add, relocate, or remove railroad ditches to meet safety and other operational obligations. In these circumstances, the classification of railroad ditches as jurisdictional would have dramatic safety and transportation impacts, delaying essential safety projects and disrupting rail service.

The Associations urge the Agencies to provide a blanket exclusion for railroad right-of-way drainage ditches, which would exclude ditches along railroad tracks and rail yards. This exclusion will prevent future inappropriate assertions of Clean Water Act jurisdiction by USACE Districts or other permitting authorities—for example, a USACE District finding that a railroad created a new jurisdictional wetland by allowing tall grasses to grow in ditches as part of an environmental sustainability project. Further, it would provide private landowners, states, and municipalities with absolute certainty on whether their railroad ditches are federally regulated as WOTUS.

An exclusion for railroad right-of-way drainage ditches is logical because they are safety features that assure stormwater drainage from the track structure and ballast. Proper drainage is essential to prevent distortion of the track gauge or washout of the substructure, which can cause train derailments. This is why, under FRA track safety standards, railroads are required to maintain ditches and other drainage structures in a manner that will accommodate expected flows.³ Roadside ditches are a parallel example in that they are ubiquitous safety features across our nation’s roadways—along with proper grading, ditches prevent stormwater from collecting in roadways and causing automobile accidents.⁴

In situations where railroads need to move or maintain railroad ditches, designation as WOTUS could compromise their ability to maintain ditches for safe operation and to adjust ditch capacity or flow to manage stormwater. This is because designation as WOTUS may trigger Section 404 permitting requirements for such activities involving transportation right-of-way drainage ditches, if not otherwise exempted by

² See 49 C.F.R. § 213.319.

³ See 49 C.F.R. § 213.33.

⁴ See, e.g., Maintenance of Drainage Features for Safety, A Guide for Local Street and Highway Maintenance Personnel, Federal Highway Administration Report, July 2009 (available at: https://safety.fhwa.dot.gov/local_rural/training/).

regulation. In turn, this could trigger the National Environmental Policy Act review process, Endangered Species Act consultation, National Historic Preservation Act reviews, and other federal and state requirements—all adding uncertainty, cost for railroads and cash-strapped governments, and delays to essential safety projects.

III. The Definition of Relatively Permanent Flow Should Focus on Average Flow Over the Course of a Year, Not an Undefined “Wet Season.”

Railroad ditches constructed wholly in upland areas are man-made and designed to drain water away from rail tracks. They are meant by design to carry water from its point source and in most cases do not fall under the definition of a perennial or intermittent flow regime but may transport water consistently throughout any given wet season depending on the location within the United States.

Prior to the 2023 Amended Rule and the *Sackett II* decision, individual USACE districts generally viewed ditches, including railroad ditches excavated in and draining only uplands, as excluded from jurisdiction. Since 2023, the USACE has considered these same ditches to be potentially jurisdictional if they carry a “relatively permanent flow of water,” however the definition of “relatively permanent flow has been applied inconsistently across USACE districts.

The Proposal defines “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.”⁵ “Wet season” is defined in the preamble as “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.”⁶ The actual text of the rule itself does not define the term.

Unfortunately, how to determine the beginning and ending of a “wet season” is a complex question. It will vary by location and is likely to change over time, resulting in the very uncertainty that the Agencies seek to avoid. The Associations respectfully request that the Agencies revise the definition of “relatively permanent” to exclude references to “wet seasons” and instead focus simply on average flow over the course of a year.

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⁵ 80 Fed. Reg. 52517 (Nov. 20, 2025).

⁶ *Id.* At 52518.

The Associations appreciate this opportunity to provide comments on the Agencies' proposed revised definition of "waters of the United States." Please feel free to contact us with any questions.



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Respectfully submitted,



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