LEAGUE OF WOMEN VOTERS® OF THE UNITED STATES

December 24, 2025

Administrator Lee Zeldin
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20004

Submitted electronically via regulations.gov
Re: Updated Definition of "Waters of the United States"
Docket Number: EPA-HQ-OW-2025-0322

Dear Administrator Zeldin,

These comments are provided by the League of Women Voters of the United States (The League), in response to the US Environmental Protection Agency's (EPA's) and the US Department of the Army's ("the agencies") proposed rule to revise the regulations defining the scope of waters that are jurisdictional under the *Federal Water Pollution Control Act*, as amended, also known as the *Clean Water Act* (CWA), in light of the US Supreme Court's (SCOTUS') 2023 decision in *Sackett v. Environmental Protection Agency*.[1] The League opposes key elements of the agencies' proposed rule, which will significantly impair water quality protections throughout the US and are contrary to public interest.

The League recognizes the complexities of balancing the costs and benefits of regulatory action, as well as the importance of regulatory clarity and predictability. However, the proposed rule fails to reach its stated goals to provide "regulatory certainty" and to implement the CWA's objective to "restore and maintain the quality of the Nation's waters."[2] Among other things, the proposed rule excludes groundwater and some interstate waters from CWA jurisdictional authority and undercuts the CWA-required cooperative federalism framework. The proposed narrower definitions of waters of the United States (WOTUS) are contrary to the legislative intent of the CWA and the principles of hydrology.

The League and Clean Water

The League is a 105-year-old nonpartisan, nonprofit organization committed to ensuring that everyone is represented in our democracy. We are a grassroots group of more than one million members and supporters across more than 800 local and state Leagues nationwide. The League

[1] Updated Definition of "Waters of the United States." Federal Register, 90 (222), 52498-52546 https://www.federalregister.gov/documents/2025/11/20/2025-20402/updated-definition-of-waters-of-the-united-states
[2] Ibid

focuses on advocacy, education, litigation, and organizing to empower voters and defend democracy.

The League's long history of successfully advocating for the protection of America's water resources began in earnest in the 1950s, and the League's citizen activists helped pass the CWA in 1972.[3] The League supports maximum protection of public health and the environment, policies that reflect the interrelationships between groundwater and surface water, the protection of watersheds and groundwater recharge areas, and measures to protect lakes and wetlands. The League also believes that the federal government should have a major role in setting standards for environmental protection.[4]

The *Clean Water Act*

In 1948, Congress passed the bipartisan *Federal Water Pollution Control Act* to address severe water pollution resulting from rapid post-war industrialization and urban growth. It authorized the Surgeon General to create programs to reduce pollution in interstate waters and their tributaries, provided funding and technical assistance, and supported interstate cooperation. As water pollution continued to increase, in 1965, Congress passed the bipartisan *Water Quality Act*, which required states to set water quality standards. When these laws proved ineffective at stopping water pollution and protecting water quality and human health, in 1972, Congress passed the *Clean Water Act* with bipartisan support.

The CWA recognized the need for a strong federal framework and regulatory enforcement because the states were unable to work cooperatively and effectively to address sources of water pollution. The legislative history of the CWA, developed to address the failures of previous legislation, informed the lengthy inquiry conducted by Congress in the late 1960s and early 1970s. The final, overwhelmingly bipartisan-supported act to "restore and maintain the chemical, physical and biological integrity of the Nation's waters" reflected fiscal concerns and concessions, as well as fundamental findings regarding basic hydrology and how water moves through this connected system. While the CWA has been amended by Congress and challenged in court, its original intent and goals remain unchanged.

Most recently, the US Supreme Court in the *Sackett* decision articulated a two-part inquiry to address the narrow question of when wetlands qualify as WOTUS. The Court held that a wetland is jurisdictional when it has a "continuous surface connection" to a "relatively permanent body of water," but it did not define those two terms, leaving their interpretation and application to the agencies. In response to the *Sackett* decision, in September 2023, the agencies issued a rule to amend the definition of WOTUS to conform with the SCOTUS ruling. The agencies now contend that this proposed rule is needed to further clarify the *Sackett* decision. While additional clarity regarding the Supreme Court's holding may be worthwhile, addressing issues not raised in the *Sackett* case, including jurisdictionally of groundwater and interstate waters, is reaching beyond what the Court required.

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[3] https://www.lwv.org/sites/default/files/2018-05/impact_on_issues_2016-2018_natural_resources.pdf
[4] https://www.lwv.org/sites/default/files/2024-12/ImpactOnIssues_2024-FINAL-DIGITAL.pdf

The Proposed Rule

The agencies' proposed rule creates a new categorical exclusion for groundwater, effectively removes some interstate waters from CWA's jurisdictional reach, and undercuts the CWA-required cooperative federalism framework. These new definitions and exclusions are contrary to the legislative history of the CWA and the basic principles of hydrology.[5]

Exclusion of Groundwater from CWA Jurisdictional Authority

The agencies' categorical exclusion of groundwater from CWA jurisdictional waters contradicts congressional intent, potentially conflicts with the SCOTUS *County of Maui v. Hawaii Wildlife Fund* decision, and fails to address discharged groundwater.

In 1972, Congress found that "water moves in hydrologic cycles and does not respect political boundaries."[6] As defined by the United States Geological Survey, the "water [hydrologic] cycle describes the continuous movement of water on, above, and below the surface of the Earth."[7] Groundwater is the water that moves below the Earth's surface, connecting with surface waters. Thus, as per congressional intent, groundwater is an integral part of our nation's waters.

In the proposed rule, in order to justify the exclusion of groundwater, the agencies argue that the 2020 Navigable Waters Protection Rule (NWPR) interpreted the WOTUS not to include groundwater. However, the 2020 NWPR was vacated by two district courts because it failed to adequately consider the statutory objective of the CWA and the effect of the rule on the nation's waters. It was replaced by the agencies' January 2023 rule, which was amended in September 2023 to conform with the *Sackett* decision.[8]

In 2020, SCOTUS affirmed groundwater's importance as a conduit of pollutants that can be subject to CWA jurisdiction in *Maui*.[9] By categorically excluding groundwater, the agencies are creating a potential loophole to the *Maui* decision.

Additionally, the groundwater exclusion impedes the ability to address polluted groundwater discharged into WOTUS. In many irrigated areas, groundwater can discharge to the surface and enter or be pumped into jurisdictional waters, bringing along pollutants such as salts, pesticides, and nutrients (e.g. natural or engineered groundwater drainage such as tile drainage systems in agricultural areas). This drained groundwater must be subject to discharge and treatment requirements. The proposed rule fails to address the circumstances for assessing discharged groundwater as relatively permanent waters for jurisdictional assessment.

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[5] H.R. Rep. No. 92-911 (1972) (pg 77) and Senate Report No. 92-414

[6] Senate Public Works Committee. Senate Report No. 92-414, pg. 77 (1971), reprinted in Legislative History of the Water Pollution Control Act Amendments of 1972 https://www.epa.gov/sites/default/files/2017-08/documents/clean-water-act-legislative-history-1972.pdf

[7] US Geological Survey, The Water Cycle, https://www.usgs.gov/special-topics/water-science-school/science/water-cycle

[8] https://www.epa.gov/wotus/final-rule-navigable-waters-protection-rule

[9] *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020), holding in part, holding that the CWA regulates discharges of pollution into groundwater that emerge in surface water if "functionally equivalent" to direct surface water discharges

Finally, the agencies undermine their argument to exclude groundwater by admitting that "under certain circumstances, pollutants released to groundwater can reach surface water resources."

Removal of "Interstate Waters" from CWA Jurisdictional Authority

The agencies' removal of "interstate waters" from CWA jurisdictional waters is antithetical to the CWA's core purpose. Congress enacted the CWA in response to the states' demonstrated inability to address interstate water pollution through state-level regulation alone.[10] Congress' finding that water "does not respect political boundaries" and that "existing State and local programs have failed to control pollution because upstream sources are often beyond the reach of downstream States" provided a key rationale for asserting federal jurisdiction over the nation's waters.[11] The agencies' proposal to require waters that cross interstate boundaries to first satisfy their new definition of WOTUS before asserting federal jurisdiction under the CWA reverses the jurisdictional inquiry and shifts primary responsibility to the states—exactly the opposite of what Congress intended in enacting the CWA.

Undercutting the CWA's Cooperative Federalism Framework

Under a cooperative federalism framework, the federal, state, and tribal governments share responsibility for achieving national policy goals established by the federal government. Under the CWA, this framework requires EPA, a federal agency, to establish minimum regulatory standards, and to provide financial and technical assistance to states and tribes for their implementation.

For this system of cooperative federalism to function, the definition of WOTUS must reflect actual hydrology and hydrologic connectivity to ensure that the CWA's jurisdictional framework is administrable by the states and tribes. It also requires meaningful federal support for state and tribal implementation of environmental laws.[12] As a significant number of states and tribes have been unable to develop or maintain comprehensive and effective regulatory programs due to a combination of legal, fiscal, and administrative constraints, the federal government has failed to provide the necessary support for implementation.

Further, while the proposed rule declares that "States and Tribes retain authority to implement their own programs to protect the water in their jurisdiction more broadly and more stringently

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[10] S. Rep. No. 92-414, at 77 (1971) (Conf. Rep. accompanying the Federal Water Pollution Control Act Amendments of 1971) (explaining that Congress found existing state and federal programs inadequate to protect water quality and that comprehensive federal regulation was necessary to address the nation's water pollution problems)

[11] H.R. Rep. No. 92-911, at 76 (1972); S. Rep. No. 92-414, at 77 (1971)

[12] The Administration has taken positions that undermine "the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" (Clean Air Act § 101(a)(3)) including challenges to CAA "Good Neighbor" provision to prohibit upwind states from emitting air pollutants in amounts that "contribute significantly" to nonattainment of air quality standards in downwind states. This provision reflects Congress's recognition that interstate pollution cannot be effectively addressed by individual states acting alone.

than the Federal Government," tribal authority under the CWA is not coextensive with state authority. Tribes must obtain federal approval for "Treatment As a State" status to be able to exercise regulatory authority over land and water resources. To date, very few tribes have been granted authority to implement even some portions of the CWA, and none have the authority to implement all portions that are commonly delegated to states.

The Definitions Do Not Reflect US Hydrology

Many of the proposed rules' definitions do not reflect advancements in science, technology, and commerce, nor the diverse hydrologic conditions across the nation. See the attached appendix for further details addressing these concerns.

Conclusion

The agencies' newly proposed exclusions, exemptions, and narrow definitions are not required by the Supreme Court's decision in *Sackett v. Environmental Protection Agency*; rather, they reflect a policy choice by the agencies to narrow federal jurisdiction in a manner that abdicates responsibilities Congress assigned to them under the *Clean Water Act*.

Appendix

Many of the proposed definitions and approaches for which the agencies seek input do not correctly represent the hydrology of much of the western US, as noted in the comment below.

1. "**Navigable" Water** – The proposed rule fails to recognize advancements in technology that have changed how to define navigable waters. The regulation should be "extend[ed] to waterways susceptible to navigation through improvements that facilitated modern navigation" for purposes of transportation and commerce.[13] As examples, airboats and hovercraft make large areas of wetlands and swamp navigable, and smaller boats (e.g., inflatables like Zodiacs) are used for numerous commercial activities on rivers, streams, and lakes and ponds (e.g., recreational business, suction dredge mining, commercial fishing and aquaculture, etc.). What constitutes interstate or foreign commerce has changed.

2. **Relatively Permanent Waters** (RPWs) – The proposed rule preamble does not provide clear definitions and has many ambiguous words (e.g., bolded words in this paragraph). RPWs are defined as "Standing or continuously flowing year-round or at least during **the wet season**," with the latter "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." Subsequent sentences say, "surface hydrology would be required to be continuous throughout the entirety of the wet season," and "the temporal component for wet season is intended to be an extended period where there is continuous surface hydrology resulting from predictable seasonal precipitation patterns year after year." And states that the definition is consistent "with the Rapanos plurality's intent to avoid excluding **seasonal waters**," "while not capturing features that are **ephemeral**."

3. **Wet Season** - The Implementation section (V.C.5.) states that a **wet season** is calculated in WebWIMP to correspond to **when precipitation exceeds evapotranspiration**.[14] However, in large areas of the southwest, an average annual water deficit is common, meaning the potential for evaporation is substantially larger than the average annual rainfall. Would this mean there is no "wet season" for waters in those areas, and thus no waters are jurisdictional? Text states "the agencies recognize that the WebWIMP outputs reported in APT may not have complete functionality in certain territories." Does this refer specifically to some or all of the US Territories or more generally to areas of the country?

   Several other tools and sources that could be used for the determination of "**wet seasons**" are identified, potentially creating conflict between allowable tools and sources.

   If "the temporal component for wet season is intended to be an extended period where there is continuous surface hydrology resulting from predictable seasonal precipitation

[13] Federal Register, 90 (222), at 52501

[14] The later parts of section V.C.2 state "the Agencies intend to use the metrics from the Web-based Water-Budget Interactive Modeling Program (WebWIMP)…as the primary source for identifying the wet season" at a given location

patterns **year after year,**" in the event of a multi-year drought, when is a waterbody no longer an RPW, and thus no longer jurisdictional?

The alternative that allows the wet season to not be coincident with the flow duration period but for "a proportionate amount of time" "may better account for climatological differences in certain regions, such as the arid West." Requiring the wet season duration to be coincident with the flow period is not representative of arid areas with significant lags and delays to flow, nor does it account for sources of flow from other areas (e.g., from inter-basin transfers).[15]

4. The terms "**normal**" and "**typical**" are used numerous times (e.g., "the Corp must determine whether the observations made… represent normal climatic conditions, in other words, what is typical for the time of year", and "the Corps would utilize various types of tools, data, and methodologies to determine whether conditions are normal"). The terms "normal" and "typical" must be defined and should reflect current conditions, as climatic conditions are continually changing, and are demonstrably different from even recent decades.

5. The provision under the proposed rule that hydraulic regime shifts from relatively permanent to non-relatively permanent flow would "sever jurisdiction of upstream reaches" under the CWA is flawed. The Implementation section (V.C.5) proposes to evaluate tributaries on a **"reach" basis**, "where reach would mean a section of a stream or river along which similar hydrologic conditions exist." Reaches are used in other aspects of the CWA, including assessment of water quality (as threatened or impaired relative to water quality standards), and for developing Total Maximum Daily Loads for impaired reaches, and should not differ between CWA programs. Determining hydraulic regime reaches could be a significant amount of work, and determinations would be vulnerable to litigation. Further, determining a reach to be non-relatively permanent could break up waters and watersheds addressed by other sections of the CWA.

6. **Brightline measures** are perhaps easy but crude and prone to challenge. For example, section V.C.3 states "If members of the public see that waters dry up on a regular basis other than in times of drought, they would know those waters are not jurisdictional simply by observation…" However, this would not be true in many cases, addressed below.

   While the agencies are not defining "relatively permanent" using "only physical indicators of flow," they are proposing "indicators of flow to be appropriate for defining "tributary." This is inconsistent and problematic.

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[15] Duan, K., Qu, S., Liu, N., Dobbs, G. R., Caldwell, P. V., & Sun, G. (2023). Evolving efficiency of inter-basin water transfers in regional water stress alleviation. *Resources, Conservation and Recycling*, *191*, 106878. https://doi.org/10.1016/j.resconrec.2023.106878. (also available at ttps://www.srs.fs.usda.gov/pubs/ja/2023/ja_2023_sun_003.pdf)

For determining seasonality, better options than brightline thresholds such as minimum flow duration or volume measures are the pre-2015 framework, which explicitly incorporates the "**seasonal**" term and gives agencies the flexibility to determine what seasonally means in a specific case (Section V.C.3 and footnote 52), and the Rapanos plurality that stated… "streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought," or "seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months" are to be included as jurisdictional waters.

The agencies proposed approach that allows for regional variation is preferred to proposed brightline approaches rely on generalizations and unsupported thresholds, including: "a duration threshold for which an abutting wetland, lake or pond must have surface water in order to be considered jurisdictional," a continuous surface connection "where surface water must persist throughout the wet season without interruption," reliance on what a wetland "during the west season may …look like", or for wetlands to be "limited to a certain length from the jurisdictional water to the abutting wetland."

7. **Tributaries** – The agencies' proposed definition of 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… dam, tunnel, or similar artificial feature… if such feature does not convey relatively permanent flow" (Section V.C.4.). This definition of tributaries is problematic, particularly where such non-relatively permanent stream reaches are caused by water management systems; dams and other similar features that contribute flow to downstream jurisdictional waters do not necessarily contribute concurrent with criteria that meets the definition of relatively permanent flow (e.g., during the wet season), but may be operated on other timeframes and/or for various other purposes (hydroelectric generation, flood control, irrigation, etc.). The definition should be clarified to include all waters that connect currently designated jurisdictional waters, regardless of the timing, purpose of flow, or mechanism (passing through non-surface features, a dam, tunnel, or similar artificial feature, or wetlands). This clarification would support adopting an approach similar to the NWPR approach "whereby a tributary does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water through a channelized non-jurisdictional surface water feature, through a subterranean river, through a culvert, dam, tunnel, or other similar artificial feature, or similar natural feature." This supports the US Supreme Court statement that Federal jurisdiction may not be severed by constructing a barrier on waters otherwise covered by the CWA[16]. And this appropriately avoids "incentivizing the construction of certain features within the tributary network to prevent relatively permanent flow through the features with the intent to sever upstream jurisdiction" (Section V.C.4.). This is also "consistent with longstanding practice, [that] streams that have been altered or relocated can be tributaries under the proposed rule" (Section V.C.5). The proposed rule appropriately determines that "upstream tributaries would retain their jurisdictional status

[16] Federal Register, 90 (222), at 52523 "The agencies recognize, however, that the Supreme Court has stated that even when a barrier between a wetland and a water of the United States would ordinarily remove that wetland from Federal jurisdiction, a property owner may not carve out wetlands from Federal jurisdiction by illegally constructing a barrier on wetlands otherwise covered by the *Clean Water Act*. *Sackett*, 598 U.S. at 678 n.16."

as waters of the United States" to ensure the protection of WOTUS and necessary water management practices.

8. The agencies' proposal describes **grassed waterways** as not being jurisdictional tributaries. A clear definition of grassed waterways is needed; current text does not clearly differentiate waters that have grasses growing in them from "grassed waterways" that may have relatively permanent flow and many still connect to a traditional navigable water or the territorial seas, but "do not have bed or banks." A common implementation practice to improve water quality in waters is to encourage the growth of grasses to create conditions that help settle out sediments and particulates and reduce nutrients, thus improving the quality of water transported downstream. Further, it is common for lakes and ponds supporting continuously flowing water (at least during the wet season) to have grasses growing in them. These waters may be similar to lentic or "still" systems that "still contribute flow downstream at the point that they outlet to the tributary network" and so the agencies should have similarly "concluded it is appropriate to consider such waters [grassed waterways] to be tributaries" (Section V.C. 4). A definition of grassed waterways is needed to clearly differentiate waters with grasses growing in them from a grassed area with water flowing over it.

9. **"Continuous Surface Connection**" – The agencies are defining this to mean "having surface water at least during the wet season and abutting (i.e., touching) a jurisdictional water," and intend the definition "to include wetlands that have at least semipermanent surface hydrology that is persistent surface water hydrology uninterrupted throughout the wet season except in times of extreme drought" (Section V.D.1). And the wet season would be applied in the same manner as described under the proposed relatively permanent definition section of the preamble.

   The requirement for "**surface water at least during the wet season**" to be jurisdictional should also allow for the alternative proposed for Relatively Permanent Waters, for "a proportionate amount of time" that allows the wet season to not be coincident with the presence of surface water, as this "may better account for climatological differences in certain regions, such as the arid West." Requiring the wet season duration to be coincident with the presence of surface water in a wetland is not representative of areas with significant lags and delays to flow, nor does it allow for sources of flow from outside areas with a different wet season (e.g., discharges or inter-basin transfers). Thus, proposed alternative approaches, including the use of NWI's semi-permanently flooded water regime that requires surface water during the growing season, are not supported, as the growing season in much of the western US is not related to the wet season with crops irrigated with various sources of water.

10. For **wetlands**, the alternative approach (V.D.3) proposing a perennial presence of surface water in a wetland could be difficult to prove and is not representative of arid areas, and so is not supported. Additionally, while *Sackett* commented that "the CWA extends to only those wetlands that are 'as a practical matter indistinguishable from the waters of the United States," this statement is problematic, as it does not identify what factor should be "indistinguishable". Wetlands, including swamps, marshes, bogs and similar areas, are clearly distinguishable from each other and from lakes, rivers and streams. Finally, the

Preamble to the Proposed Rule supports the "longstanding practice, [that waters] that have been altered … can be [wetlands] under the proposed rule" (section V.C.5). Text identified several approaches to address if a wetland has features that potentially sever continuous connections, such as berms and dikes, and ridges and hummocks in wetlands. As with tributaries, the rule should avoid "incentivizing the construction of certain features… with the intent to sever upstream jurisdiction" (Section V.C.4.). Wetland delineations are labor intensive and so should account for year-to-year variations from drought and flood, as well as land alterations from erosion, deposition, accretion and subsidence, without requiring a delineation to be redone.

11. **Culverts** – The "approach where "culverts which serve to connect wetland portions… do not inherently sever jurisdiction… when the culvert carries relatively permanent water" is preferred. As with tributaries, this approach is aligned with the NWPR approach "whereby a tributary does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water through a channelized non-jurisdictional surface water feature, through a subterranean river, dam, tunnel, or other similar artificial feature, or similar natural feature" including a culvert.

12. **Ditches and Scope of Ditch Exclusions** – The Preamble (V.F.3) states "ditches satisfying any of the conditions of a paragraph (a)(1) waters… include tidal ditches and navigable-in-fact ditches that transport people, goods, and services in interstate and foreign commerce, as those ditches – more commonly referred to as "**canals**" – can provide important commercial navigation services to the nation", and "a permanently flooded man-made ditch used for navigation is normally described, not as a 'ditch,' but a 'canal'." The proposed rule would benefit from added language to address how canals are addressed, in particular those canals that serve interstate commerce by transporting <u>water</u> from, to and between jurisdictional waters (intra- and inter-basin transfers), as water is increasingly a very important commodity in many areas of the country.

13. "**Excluded waters**" – **Groundwater drained through subsurface drainage systems** – the Proposed Rule does not address when groundwater discharge becomes a surface water subject to assessment as a WOTUS. Drained groundwater must be subject to discharge and treatment requirements. In many irrigated areas, groundwater can discharge to the surface and enter or be pumped to jurisdictional waters, bringing along pollutants such as salts, pesticides and nutrients (e.g., natural or engineered groundwater drainage such as tile drainage systems in agricultural areas). The Proposed Rule needs to clearly address the circumstances for assessing discharged groundwater as relatively permanent waters for jurisdictional assessment.

14. **Sufficient data** – For preparing approved Jurisdictional determinations (AJDs), the burden of proof is on the agencies to demonstrate that an aquatic resource meets the requirements under the proposed rule to be jurisdictional or excluded. The agencies are to rely on a weight of evidence approach, however, without adequate information to demonstrate that a water meets the jurisdictional standards to be a WOTUS, the agencies would find a water to be non-jurisdictional. Recent federal actions jeopardize many of the observational and remote tools identified to support assessment of surface water connections and wetland extent, including tools and satellites hosted by federal agencies (USFWS, USGS, US ACE, DOI) that generate needed data. **Concrete measures are**

needed to ensure the agencies have authority, resources and staff to collect data needed to make informed determinations, to avoid neutering the authority and ability to implement the proposed rule due to lack of data. At a minimum, identified data sources and systems recommended for use to implement proposed approaches should be directly supported by the federal government.