



Governor Brad Little

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April 23, 2025

Stacey Jensen, Director
Division of Oceans, Wetlands, and Communities
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW,
Washington DC 20460

Subject: Comments Docket ID No. EPA-HQ-OW-2025-0093, WOTUS Notice: The final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations

Dear Ms. Jensen,

Please find attached the comments drafted by Idaho's Departments of Transportation, Agriculture, and Environmental Quality regarding the proposed rulemaking on the definition of "waters of the United States" (WOTUS) under the Clean Water Act. These comments are submitted in response to your March 2025 request for stakeholder input, particularly in light of the Supreme Court's decision in *Sackett v. EPA*.

The State of Idaho has long been engaged in the discussions surrounding the definition of WOTUS and has consistently advocated for a clear, predictable, and administratively implementable rule. Our participation in every major rulemaking over the past decade underscores the significance of this issue for our state.

The consistent and effective implementation of the Clean Water Act is a priority for the State of Idaho. However, the persistent regulatory instability surrounding the definition of WOTUS creates significant implementation burdens for our state environmental agency. Clear federal guidance and standardized criteria are essential to ensure efficient and consistent jurisdictional determinations.

Idaho believes that a durable WOTUS rule must be grounded in the principles of cooperative federalism, respecting the role of states in managing their waters. We urge the EPA and the Corps to work closely with state and local regulators to develop a predictable and uniform approach that effectively balances environmental protection with regulatory clarity.

Thank you for the opportunity to provide these important comments. We look forward to continued engagement as you move forward in this rulemaking process.

Sincerely,

A handwritten signature in blue ink, appearing to read "Brad Little".

Brad Little
Governor of Idaho



April 23, 2025

EPA Docket Center
Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue NW,
Washington DC 20460

Subject: Comments Docket ID No. EPA–HQ–OW–2025–0093, WOTUS Notice: The final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations

Idaho, through its Departments of Transportation, Agriculture, and Environmental Quality, respectfully submits the following comments in response to the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (Corps) March 2025 request for stakeholder input regarding the definition of “waters of the United States” (WOTUS) under the Clean Water Act (CWA), particularly in light of the Supreme Court’s decision in *Sackett v. EPA*, 598 U.S. 651 (2023).

I. Background and Regulatory History

The determination of which waters are jurisdictional under the Clean Water Act (CWA) has long been a point of legal, scientific, and administrative uncertainty. Idaho has actively engaged in every major rulemaking affecting WOTUS over the past decade, consistently urging the agencies to adopt a definition that is:

- Clear and predictable,
- Administratively implementable by States,
- Consistent with the statutory text and Supreme Court precedent, and
- Cognizant of regional hydrology, land use, and infrastructure.

Idaho supported the 2020 Navigable Waters Protection Rule (NWPR) because it provided much-needed clarity on key jurisdictional issues, including the treatment of ditches, ephemeral streams, and artificial features. In February 2022, Idaho submitted formal comments endorsing the NWPR and voicing concerns about the ongoing regulatory uncertainty caused by the repeated repeal and replacement of the WOTUS rules. This persistent cycle of regulatory shifts continues to hinder the state’s ability to effectively implement CWA programs and creates significant uncertainty for landowners, developers, and other regulated entities who must navigate a constantly changing legal landscape.

II. Concerns with the Amended 2023 Rule

Under the prior Administration, the agencies revisited WOTUS to alter the definition and scope in response to *Sackett* (the “Amended 2023 Rule”). While the Amended 2023 Rule attempts to conform to *Sackett*, it falls short in multiple areas:

- **Unclear application of the “relatively permanent” standard:** The rule applies this standard to a broad category of waters—including tributaries, intrastate waters, and wetlands—without offering clear, objective criteria for field implementation. This is a repeat of the ambiguity the State previously flagged in the “significant nexus” standard.
- **Omission of “indistinguishability” requirement:** As noted by the Supreme Court in *Sackett*, jurisdictional wetlands must be “indistinguishable” from covered waters. The Amended Rule fails to include this as a necessary criterion for adjacent wetlands, leading to uncertainty and a broader-than-appropriate scope of regulation.
- **Lack of clarity on impoundments:** The Rule leaves unresolved questions about how to assess impoundments that may have originally been created in a jurisdictional water but are now isolated. There is no clear “backstop” to determine when historical status no longer confers jurisdiction. This omission creates implementation burdens and legal uncertainty.
- **Absence of a promised durable Phase II rule:** Despite EPA’s prior statements that the Amended Rule was a first step toward a durable definition, no roadmap has been shared regarding next steps, compounding regulatory instability.

III. Recommendations on Key Issues Raised in the Federal Register Notice

A. “Relatively Permanent” Waters

The agencies should define “relatively permanent” waters narrowly and clearly. Idaho recommends:

- Limiting the term to waters with continuous flow at least seasonally (typically three months).
- Excluding ephemeral features and those that flow only in response to precipitation.
- Requiring traceable, demonstrable surface connectivity to a jurisdictional water as a condition of jurisdiction.
- Avoiding speculative or historical determinations regarding the condition of a waterbody at the time of impoundment.

B. “Continuous Surface Connection”

Idaho urges a clearer definition of “continuous surface connection”. Idaho urges the agencies to:

- Define “continuous surface connection” as requiring the wetland to abut or be indistinguishable from a jurisdictional water, consistent with *Sackett*.
- Clarify that connections via ditches, culverts, or swales do not satisfy this requirement.
- Provide field-ready criteria for evaluating whether a wetland is “indistinguishable” from the adjacent water.

This interpretation supports both clarity and legal defensibility.

C. Jurisdictional Ditches

Idaho continues to support the NWPR’s clear exclusion of ditches that:

- Are excavated wholly in and drain only uplands,
- Do not carry a relatively permanent flow, and
- Are artificial conveyances not originating from a jurisdictional water.

These exclusions should be retained in any revised rule and codified clearly. A narrow, function-based definition of “ditch,” as was used in the NWPR, will assist with efficient implementation.

Idaho also recommends reinstating the exclusions from jurisdiction found in both the 1986 and 2020 rules, including prior converted croplands, artificially irrigated areas that revert to dry land, and other man-made conveyances that do not carry relatively permanent flow. These exclusions improved clarity and implementation consistency and should be codified in any future rule.

It is important that the federal agencies provide a clear, broad and administratively non-burdensome exclusion from WOTUS regulation for highway and other roadside ditches. Definitions that leave doubt as to the exclusion of roadside ditches, or that would require significant documentation, or require highway authorities such as the Idaho Transportation Department to obtain a dredge and fill permit to excavate or maintain an existing or new roadside ditch, must be avoided.

Highway and other roadside ditches are tremendously important to ensuring public safety and the longevity of highways. For example, such ditches help prevent pooling of water on traveled roads by receiving water runoff, thereby making the road surface safer for the traveling public. Further, by accepting and diverting roadway water, such ditches help to protect the roadway base and provide space for snow storage.

D. Types of Water Features

Idaho recommends agencies include guidance that clearly identifies diverse water features such as rivers, man-made channels, standing waters, wetlands, coastal zones, underground systems, and seasonal/ice-related waters to improve clarity and comprehensiveness.

IV. Implementation Burden on States

Revisions to the WOTUS definition directly impact Idaho’s Pollutant Discharge Elimination System (IPDES) and Section 401 certification programs. Without a well-defined and consistently applied standard, industries and developers may struggle to determine whether an IPDES permit is required, leading to delays and increased litigation. These changes increase administrative workload, legal complexity, and public confusion. As described in IDEQ’s 2023 Declaration filed in *Texas v. EPA*, IDEQ must continuously adjust resources, train staff, and address public uncertainty as federal jurisdiction shifts, undermining the effectiveness of Idaho’s environmental programs.

Idaho continues to face serious implementation challenges due to the persistent regulatory whiplash of the last decade. The regulated community—rural landowners, municipalities, agricultural producers, and developers—has struggled to make informed decisions due to unclear definitions and the absence of jurisdictional maps. Idaho previously emphasized, and reaffirms here, that a durable rule must be accompanied by field-deployable tools and nationally consistent criteria. Without them, landowners are left with untenable options: retain costly consultants or face noncompliance.

V. Cooperative Federalism and Legal Foundation

Idaho reaffirms that any WOTUS rule must be grounded in the Clean Water Act’s foundational recognition of cooperative federalism. As previously noted in Idaho’s 2022 comment letter, the Navigable Waters Protection Rule appropriately respected the role of states in managing their waters. The agencies must avoid embedding aspirational or speculative goals into jurisdictional rules that expand beyond the Clean Water Act and Supreme Court precedent. The *Sackett* ruling has provided needed clarity, and the agencies should codify a stable, narrow, and legally defensible rule in close collaboration with states, who bear primary implementation responsibilities.

VI. Conclusion

Provide Clear Federal Guidance on WOTUS Determinations: In the absence of timely determinations from the U.S. Army Corps of Engineers or the EPA, Idaho is often left to make its own determinations regarding WOTUS. This creates delays and confusion, particularly when agencies lack consistent and transparent guidance for assisting landowners in identifying WOTUS features.

Develop and Disseminate Standardized Criteria: Idaho would benefit from federally developed guidance that clearly outlines the parameters, data requirements, and documentation standards necessary for making jurisdictional determinations. This guidance should be made accessible to relevant stakeholders to empower them to make informed and consistent decisions regarding WOTUS identification.

Idaho recommends that EPA and the Corps:

- Codify a durable, narrow definition of WOTUS consistent with *Sackett*,

- Provide clear implementation guidance on “relatively permanent” and “continuous surface connection” thresholds.
- Exclude features that lack demonstrable, surface-based connectivity to navigable waters.
- Stabilize the regulatory framework to allow states to administer programs effectively.
- Work closely with state and local regulators to develop a more predictable and uniform approach that balances environmental protection with regulatory clarity.
- Explicitly exclude highway and other roadside ditches so as to improve safety for the traveling public and to preserve transportation infrastructure.

We appreciate the opportunity to provide these comments and request ongoing engagement as the agencies consider future administrative action.