

WATER QUALITY

WOTUS/State Comments

On April 23, the public comment period closed for providing feedback on the definition of Waters of the United States (WOTUS). The Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE), collectively referred to as “the Agencies,” requested stakeholder feedback on implementing WOTUS following the Supreme Court’s *Sackett* decision. Specifically, the agencies requested feedback regarding the scope of the terms “relatively permanent” and “continuous surface connection,” what features these phrases apply to, tools and techniques for determining features in the field, and the scope of jurisdictional ditches. See Docket [EPA-HQ-OW-2025-0093](#).

Alaska

The Alaska Department of Environmental Conservation (ADEC) highlighted its vast water resources and wetlands, prior congressional carve-outs and exemptions, and unique climatic conditions. ADEC advocated for significant curtailment of the scope of federal jurisdiction, regionalized definitions and tools, categorical exclusion of permafrost wetlands, and the exclusion of jurisdictional ditches from the definition of WOTUS. They recommended that: (1) “relatively permanent” waters must have measurable flow or seasonal standing water, contribute flow directly to a WOTUS, and have a defined bed/bank with an ordinary high water mark (OHWM) or high tide line; (2) permafrost wetlands must be specifically excluded; (3) use of litter or debris must be eliminated from the OHWM definition; (4) the *Sackett* two-part test must be used for “continuous surface connection;” (5) non-tidal wetlands abutting a traditional navigable water are only a relatively permanent surface water connection if they have a permanently flooded water regime; (6) “adjacent” must equate to “abut;” and (7) upland ditches draining only uplands with less than perennial flow must be excluded.

ADEC recommended that the term “seasonal” refer to extended periods of standing or continuously flowing water occurring in the same geographic feature year after year, except in times of drought. It should not include tributaries with flowing or standing water for only a short duration in direct response to precipitation. The OHWM should be defined as “that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, or change vegetation susceptible to permanent flooding as defined by existing wetland characterization methods.”

ADEC agreed with the Agencies’ March 12 Field Memo that a “continuous surface connection” refers to a wetland which directly abuts a WOTUS without being separated by uplands, berms, or dikes. They emphasize that only non-tidal wetlands with a permanently flooded water regime meet the “relatively permanent” standard and reject the idea of connecting jurisdictional waters across uplands.

ADEC said that jurisdictional ditches should meet the same criteria as WOTUS tributaries: continuous seasonal flow, existing beyond rain events and feeding into navigable waters. Ditches built solely to manage precipitation and lacking “relatively permanent” flow should be excluded from WOTUS. Rules should clarify that ditches draining uplands are not jurisdictional along the upland-excavated portions.

California

The California State Water Resources Control Board, in conjunction with the California Regional Water Quality Control Boards, highlighted the CWA’s vital role in protecting the state’s water resources and supporting a wide range of uses. The State urged that future federal actions strengthen the CWA’s effectiveness, especially in tackling new challenges like harmful algal blooms and non-point source pollution. California called for the retention of the 2023 WOTUS Rule. Alternatively, California emphasized that any proposed changes must be regionally appropriate and accommodate the hydrology of the arid West. They advised against basing jurisdictional criteria on flow rates, timing, or similar characteristics, warning they would be “unlikely to accommodate” the variable hydrology of the arid West. California’s precipitation is highly variable and is expected to intensify in coming years. They urged the Agencies to work closely with all States if they pursue any revisions.

Idaho

The Idaho Departments of Agriculture and Environmental Quality advocated for a clear, predictable, and administratively implementable rulemaking. They stressed the importance of cooperative federalism and strongly supported the 2020 Navigable Waters Protection Rule (NWPR), basing their proposed definitions on the previous rulemaking.

Idaho recommended defining “relatively permanent” narrowly and clearly by limiting the term to waters with continuous flow at least seasonally (typically three months), excluding ephemeral features (those flowing only in direct response to precipitation), and requiring traceable, demonstrable surface connectivity. They recommended avoiding “speculative or historical determinations regarding the condition of a waterbody at the time of impoundment.”

Idaho defined “continuous surface connection” to explicitly require the wetland to abut or be indistinguishable from a jurisdictional water. They urged clarification that connections via ditches, culverts, or swales do not satisfy this requirement, and the establishment of field-ready criteria for assessing “indistinguishability.”

They suggested strengthening the exclusion for ditches used solely for agricultural return flows. They supported keeping the NWPR’s clear exclusion of ditches that are entirely in uplands, do not have relatively permanent flow, and are artificial conveyances not originating in jurisdictional waters. The State also urged reinstating exclusions from the 1986 guidance and NWPR – such as prior converted croplands, artificially irrigated lands that return to dry status, and man-made conveyances without permanent flow. Idaho addressed the need for straightforward exclusions for highway and roadside ditches.

Nevada

The Nevada Division of Environmental Protection (NDEP) supported creating a durable WOTUS rule but stressed the need for user-friendly tools -- including a national mapping system, reliable hydrologic data, and transparency in resources used to make jurisdictional determinations -- to help the public identify jurisdictional waters and make informed permitting decisions.

NDEP emphasized cooperative federalism and warned that unclear federal rules could force States to create equivalent programs, increasing costs for regulated entities. To strengthen co-regulator partnerships, NDEP made the following recommendations: “(1) The Corps needs to actively solicit state involvement and provide the state with a meaningful role when making [Jurisdictional Determinations] JDs; (2) JDs made by one of the agencies (i.e., USACE) should apply to other applications of the [CWA] (i.e., §402); and (3) Case-by-case JDs should remain in place for longer than 5 years.... Enabling approved JDs (AJDs) to remain in place until they are revisited, updated, or challenged would improve Rule durability and provide greater certainty to both the regulator and stakeholder communities.” They recommended a recourse mechanism for States and Tribes to challenge incorrect jurisdictional determinations

NDEP asserted that political boundaries should factor into WOTUS definitions when interstate waters are impaired, as federal oversight is crucial in resolving cross-state water quality issues. “Nevada values EPA oversight and partnership as a co-regulator in restoration of waterbodies that cross state lines and believes issues would be resolved more readily if federal jurisdiction over these waters is maintained.”

NDEP opposed using a single, nationwide definition of “relatively permanent” waters, arguing it fails to reflect the hydrologic variability of arid regions. They advocated for a hydrology-based approach that considers environmental variability and avoids excluding ecologically important waters from federal oversight. They urged the Agencies by rule to account for regional hydrologic differences and to clearly maintain the exemption of groundwater, including shallow subsurface flow, from WOTUS definitions.

NDEP recommended evaluating characteristics such as flow regime, seasonality, hydroperiod, vegetation, and soil and emphasized the need to account for regional differences in land use, ecology, and climate. NDEP suggested using federal tools such as the U.S. Geological Survey's (USGS) National Hydrography Dataset, EPA's ecoregions framework, U.S. Department of Agriculture's Land Resource Regions, USACE's Delineation Manual, the National OHWM Field Delineation Manual for Rivers and Streams, and the regionally-developed supplements to the delineation manual. They highlighted the Streamflow Duration Assessment Models (SDAMs) as a tool that enables rapid assessment of stream flow duration, "one of the most ecologically important aspects of a stream's hydrology."

They argued that streams, wetlands, and lakes that dry up due to drought or seasonal variation should still qualify as WOTUS if they materially contribute to the chemical, physical, or biological integrity of downstream waters. Physical traits like a defined bed, bank, and course should be included in assessments of relative permanence in arid areas.

NDEP stated that wetlands should be considered abutting a WOTUS if they materially contribute to its chemical, physical, or biological integrity, and that evaluations should consider the natural state of aquatic systems before human alteration to support future beneficial uses. NDEP emphasized that temporary interruptions in surface connectivity are common in many regions and should not automatically sever jurisdiction. They criticized the Agencies' March 12 Field Memo interpretation that discrete features (like berms or roads) can sever a continuous surface connection. Functional and environmental significance should take precedence over strict adjacency when determining WOTUS jurisdiction. "The permanent loss of these features could not have been considered in light of these new parameters during USACE's historic permitting decisions, nor were they necessarily subject to compensatory mitigation requirements when USACE authorized the structures severing jurisdiction."

NDEP supported explicitly excluding agricultural ditches from the WOTUS definition and recommended the rule clarify this exclusion. They emphasized that this should not conflict with existing exemptions for agricultural stormwater and irrigation return flows, and noted that ditches are not naturally considered "waters." NDEP described ditches that divert from and do not return to WOTUS as "distributaries" and endorsed the NWPR's definition of ditches, but urged that ditches be evaluated based on their use.

New Mexico

The New Mexico Environment Department, Department of Game and Fish, Interstate Stream Commission, and Energy, Minerals and Natural Resources Department advocated for the continued protection of as many waters as possible that "feed and influence the chemical, physical, and biological character" of downstream traditional navigable waters. They recommended that agencies either implement regionally appropriate definitions or allow flexibility in implementation. They noted that 97% of New Mexico's streams are characterized as ephemeral or intermittent but still deliver significant quantities of water, sediment, nutrients, and woody debris to jurisdictional waters. Ephemeral and intermittent streams can significantly impact downstream navigable waters – especially in the Southwest – and should be included in WOTUS where regionally appropriate. For ephemeral waters, New Mexico proposed using alternative criteria like watershed area, stream order, or sediment load to determine jurisdiction.

New Mexico stressed the importance of genuine consultation with States and Tribes throughout the rulemaking process, and recommended the Agencies explicitly "codify the importance of recognizing regional differences in [WOTUS] determinations and definitions to signal an intent to work through these approaches in collaboration with state and tribal co-regulators." They highlighted the need for the Agencies to use any new rulemaking as an opportunity to build long-term federal investment in water quality programs. They called for direct funding to States and Tribes with financial need, ensuring that they can implement pollution control and water management programs effectively.

New Mexico advised against defining "seasonality" as a fixed three-month duration, arguing that hydrologic patterns vary regionally. Instead, they recommended defining "relatively permanent" waters to include perennial streams, intermittent streams, prominent ephemeral streams, and wetlands –

excluding those that flow solely in response to precipitation, without needing to specify flow duration or sources.

New Mexico said the Agencies and JDs should rely on the best available science – including biological, geomorphological, and hydrological indicators – to identify “relatively permanent” tributaries and wetlands in the field. New Mexico also highlighted EPA’s Streamflow Duration Assessment Methods (SDAMs), arguing that they offer consistent, scientifically valid ways to classify streamflow duration (perennial, intermittent, ephemeral) based on observable indicators in a single site visit. Guidance for identifying “relatively permanent” waters should undergo peer review and include robust public participation. To ensure efficient, predictable implementation and avoid permitting delays, the federal workforce must be sufficiently staffed and trained to carry out field determinations. They also highlighted USGS NHDPlus HR, and USFWS NWI as resources which should inform decisions about surface connection and adjacency.

New Mexico said “continuous surface connection” determinations should be based on connections under natural, undisturbed conditions, even if surface flow is temporarily dry or occurs as shallow subsurface flow, as this still maintains ecological and hydrological connectivity. Definitions of “adjacent” and “abut” should consider surface and shallow subsurface connections under natural conditions. New Mexico recommended defining “adjacent” as “bordering, continuous, or neighboring,” and suggested this could be further refined by physical distance or hydrologic connection. They also said that wetlands separated by barriers like dikes, levees, or roads should still be considered adjacent and jurisdictional in western states because they are functionally linked to nearby waters. They emphasized that natural or artificial disruptions (e.g., sediment plugs, log jams, flood gates) should not sever jurisdictional connectivity, especially in arid environments where flow may temporarily shift subsurface during drought.

New Mexico recognized the importance of shallow subsurface connections in the exchange of water, nutrients, and organic matter which are essential to the health of the stream system. Narrowing the scope of federal jurisdiction would lead to a loss of benefits provided by wetlands such as flood control and attenuation, pollution control, resistance to wildfires, wildlife habitat, and recreation. Droughts or dry spells should be treated as temporary interruptions, not disqualifiers for jurisdiction. Instead, surface and shallow subsurface connections should be evaluated under “normal” conditions, which, in arid areas, may naturally include periods of dryness. The Agencies should consider historical hydrologic data when assessing these connections, particularly in light of the ongoing megadrought in the Southwest since 2000.

New Mexico stated that ditches transport water and should therefore be considered jurisdictional if they meet specific criteria. They recommended evaluating flow regime, physical characteristics, location (e.g., upland vs. natural channel), and biological indicators (like the presence of aquatic life) to distinguish jurisdictional from non-jurisdictional ditches. They also noted that the ditch’s type or use could help inform these determinations. They specifically support the current scope of jurisdiction over acequias and other irrigation ditches that divert from and are directly connected to wet areas where aquatic species use them as habitat.

North Dakota (et al.)

Attorneys General (AGs) from eighteen States, including North Dakota, Montana, Nebraska, and Oklahoma joined in a letter in support of a definition that “recognizes state authority over intrastate waters and that presumes waters are not WOTUS unless it is affirmatively established that they are.” They stressed that state primacy in managing diverse water features – such as prairie potholes, mountain streams, and marshes – cannot be replaced with one-size-fits-all federal rules. They urged the Agencies to use the *Sackett* ruling as a turning point to restore the proper balance of federal and state power in CWA implementation. They outlined overarching legal principles that should inform the Agencies’ rulemaking. They said WOTUS must be defined with clear and bright-line rules, centered on navigability. They emphasized a high standard of indistinguishability that may exclude certain impoundments and wetlands.

The AGs urged the Agencies to adopt a bright-line rule that limits federal jurisdiction to water features with naturally occurring, continuous, year-round flow (not dependent on rainfall or temporary events). They recommended excluding small streams and tributaries from federal jurisdiction by default,

unless and until established otherwise. They approved of the NWDR's use of "perennial" and "ephemeral" as stream categories, but rejected the rule's use and definition of "intermittent," then meaning "surface water flowing continuously during certain times of the year and more than in direct response to precipitation." They said, "Any definition of WOTUS that classifies such 'intermittent' streams as constituting WOTUS is too vague to be workable, not capable of being understood by a reasonable landowner, and should be rejected by the Agencies.... The Agencies should not define WOTUS to include ephemeral waters or those that flow only intermittently.... Permanent does not mean intermittent. Permanent means permanent. And a relatively permanent water feature is one that has a naturally occurring, flow of water year-round, excepting only for 'temporary interruptions in surface connection [that] may sometimes occur because of phenomena like low tides or dry spells.'"

The AGs defined "continuous surface connection" as water that flows from one feature to the other so that they are "indistinguishable" under normal conditions. Natural landforms like berms do not automatically break the connection if the natural landforms evidence a continuous surface connection.

The AGs urged the agencies to abandon the term "abut," and return to Congress's use of the term "adjacent." They interpreted adjacent to mean "separated by no more than one geologic feature, such as a naturally occurring berm, which still leaves the features, 'as a practical matter indistinguishable' from one another." The AGs argued that artificial structures like flood gates or pumps should only make a wetland "adjacent" to a WOTUS if there is a real, consistent surface water connection under normal conditions. If the connection only occurs during irregular precipitation or unusually wet periods, it should not trigger federal jurisdiction. They also urged the Agencies to exclude the "catch-all" category included in the 2023 Rule.

The AGs urged the Agencies to eliminate "jurisdictional ditches" as a separate WOTUS category and instead apply the same criteria to both artificial and natural water features when determining federal jurisdiction. If the category is kept, they asked the Agencies to confirm that ditch determinations will follow the same standards as those for natural waterways, noting that applying the standard WOTUS tests to artificially created ditches would naturally exclude ditches that purely serve an irrigational or drainage purpose.

Oregon

The Oregon Attorney General signed onto a letter with the Attorneys General of New York, Illinois, Massachusetts, and Michigan. The AGs expressed concern that limiting the scope of the CWA creates risk for uncontrolled pollution. They opposed "any attempt to further limit [CWA] protections beyond the limits under the *Sackett* decision." They argued that the strong science demonstrating the functional connectivity of small streams and wetlands to larger waters indicates a need to "strengthen, not weaken, clean water protections for all Americans." They urged the agencies "not to take any action to further limit the vital protections afforded by the [CWA]."

Utah

Utah strongly advocated for a narrower, more precise definition of WOTUS in alignment with the Supreme Court's *Sackett* decision, and preserves state authority over the majority of water resources. The State advocated for a definition that limits federal jurisdiction, emphasizes state authority over water resources, and reduces permitting burdens on rural communities and essential land uses such as agriculture, mining, and housing development. "A broader definition expands federal permitting requirements to a larger number of water bodies. Conversely, a narrower definition grants the State greater flexibility in establishing its mechanisms to protect Utah's waters consistent with the State's goals and management objectives." Utah recommended simplifying the process for States to assume CWA Section 404 permitting authority. They requested that the agencies provide more categorical exclusions "essential to Utah's farmers, ranchers, and rural communities."

Utah proposed a Clean Water Rule that defines WOTUS as: (1) navigable-in-fact interstate waters used or usable in commerce, including territorial seas; (2) relatively permanent streams, rivers, and lakes

with an indistinguishable surface connection to such waters; and (3) adjacent wetlands that are permanent and continuously connected to those waters. It explicitly excludes groundwater, intermittent or ephemeral channels, and manmade structures used mainly for agriculture, flood control, or stormwater.

Utah's proposed rule defines "relatively permanent" waters as those waters whose "normal status quo state is year-round – or at a minimum 290 days per year – presence or existence, and for which non-existence (i.e. drying up) during its typical period of presence or existence is an extraordinary circumstance and have an indistinguishable surface connection with navigable-in-fact waters." Utah proposed including only "those adjacent wetlands that are a relatively permanent body of water and have a continuous surface connection with and are indistinguishable" from navigable-in-fact interstate waters. "Indistinguishable means that the waters have merged, so there is no clear demarcation between the two." They defined "adjacent" as "having a continuous aquatic surface." Utah would explicitly exclude ditches, conveyances, and other structures, manmade or otherwise, used primarily for agricultural, or flood abatement or storm-water control purposes.

Washington

The Washington Department of Ecology said that narrowing the definition of WOTUS would limit regulatory oversight, potentially causing harm to Washington's waters and threatening public and environmental health by allowing unregulated pollution or circumvention of CWA Section 401 certification. While supportive of the Agencies simplification goals, they said "the effort should not exclude broad categories of waters with a connection to downstream traditionally navigable waters." The State supported a definition that includes intermittent and relatively permanent waters, adjacent wetlands (even when connected through features like pipes or ditches), and jurisdictional ditches based on hydrologic connectivity – not solely on their purpose or structure. Washington urged the Agencies to collaborate closely with States as co-regulators under the CWA and to use regionally appropriate tools and methods for determining jurisdiction. The State favors a flexible, science-based approach that accounts for diverse hydrologic conditions, avoids overly rigid numeric flow criteria, and maintains strong protections for water resources.

Washington recommended defining "relatively permanent" waters to include perennial and intermittent tributaries, lakes, and ponds that connect to traditionally navigable waters during a normal water year. "We include intermittent connections because flows naturally vary over the course of a year. We view this as consistent with a continuous surface connection.... We urge the inclusion of a provision that is 'based on a normal water year' to account for changes resulting from an annual drought period, a dry year, or flood conditions." The State advised against rigid flow duration metrics, urging the use of regional tools like the USACE Antecedent Precipitation Tool and the Oregon Streamflow Duration Method to assess flow regimes. It also suggested field identification rely on physical features like banks, beds, and OHWM, as well as contribution to flow of a downstream traditionally navigable water, determined regionally. Evaluations should be based on normal precipitation years, supported by diverse data sources such as USGS topographical maps, aerial photography, Light Detection and Ranging (LIDAR), satellite imagery, National Hydrography Dataset, National Wetland Inventory maps, fish presence maps, and streamgage data.

Washington said continuous surface connections should include both hydrologic and hydric soil connections, applying to adjacent wetlands, lakes, and ponds. The definition should include discrete features such as ditches, culverts, pipes, and tide gates that maintain a hydrologic connection to a relatively permanent water. "In other words, a wetland, pond, lake or tributary should not lose regulatory protection under the [CWA] merely because they flow through uplands, a pipe, a ditch, or another discrete feature."

They consider "abutting" to include wetlands connected to relatively permanent waters through a discrete feature such as a pipe, culvert, or ditch, and do not believe natural berms preclude a continuous surface connection. In Washington's view, flood and tide gates, pumps, or similar artificial features do not remove a wetland from being considered adjacent as they "manage the flow of water between wetlands and the adjacent tributary or traditionally navigable water, maintaining the continuous surface connection between the two." Other artificial features, such as shallow buried water conveyances, like pipes, should also be treated as maintaining federal jurisdiction and protection. "Allowing these features to sever

jurisdiction today, even though upstream waters still flow to a jurisdictional waterbody makes no logical or ecological sense. It also defeats the purpose for which the pipes were installed.”

Washington recommended only categorically excluding ditches excavated in upland areas in order to drain them, while determining the jurisdiction of ditches with channelized streams or those built in wetlands on a case-by-case basis. They supported using physical features and downstream connections to assess whether a ditch is jurisdictional, rather than excluding ditches based on their intended use. Relocated tributaries should retain their jurisdictional status even when flowing through ditches. Biological criteria alone, such as the presence of fish, should not determine jurisdiction for ditches. The standard should be whether a ditch’s flows contribute to jurisdictional waters. They suggest using various mapping and imagery tools to determine if a ditch was constructed in an upland area or in a natural feature.

In summary, Washington suggested using Geologic Land Office survey maps to determine whether a ditch contains a tributary or was constructed in a wetland. It also highlighted National Wetland Inventory Maps, LIDAR, historical aerial photography, USGS topographic maps, fish presence maps, stream gauge data, satellite imagery, the USACE's Antecedent Precipitation Tool, regional streamflow duration methods, and National Hydrography Dataset as important tools.

Wyoming

The Wyoming Department of Environmental Quality (WDEQ) expressed support for amending the rule in favor of a clear, consistent, durable, and objective definition that recognizes the limits of federal authority and is easily understood by the public. Wyoming's state water quality standards apply to all surface waters, regardless of federal WOTUS status. WDEQ advocated for a definition that maintains balanced federal-state collaboration.

WDEQ defined “relatively permanent” for perennial waters to mean “surface water flowing continuously during a typical year.” They recommended the inclusion of intermittent waters as “relatively permanent” provided they have a continuous hydrologic connection to a traditional navigable water for at least three consecutive months (equivalent to a season) during a “typical year.” They suggested incorporating the definition of “typical year” from the 2020 NWPR as well as incorporating 30-year precipitation normals developed by the National Oceanic and Atmospheric Administration (NOAA). Wyoming recommended categorically excluding intermittent waters with continuous flow for less than three months, as well as all ephemeral streams. They suggested removing the interstate water category as the term “navigable waters” is not constrained by political boundaries.

For identifying “relatively permanent” waters in the field, WDEQ recommended using observed or modeled stream flows rather than field indicators. They advocated for the geospatial mapping of WOTUS to improve regulatory certainty and transparency. “Initial mapping efforts could focus on traditional navigable waters, territorial seas, and many of the excluded waters, followed by the more complex jurisdictional waters such as tributaries, lakes and ponds, and ultimately adjacent wetlands.... [T]hese maps could be periodically updated (e.g., every five years) to be consistent with the effective duration of jurisdictional determinations and to reflect long-term changes in the hydrology of the nation’s waters.”

WDEQ recommended that a “continuous surface connection” means the feature physically abuts or has a direct “relatively permanent” hydrologic connection to a jurisdictional water during a “typical year.” They consider “physically abut” and “physically adjacent” to be synonymous.

WDEQ recommended clarifying that a ditch must have “relatively permanent” flow in a “typical year” to be considered jurisdictional. They suggest building on the 2020 NWPR’s definition of a ditch, which describes it as a surface water conveyance constructed for specific purposes like drainage, irrigation, stockwater or municipal use, or transport. Ditches that lack “relatively permanent” flow or originate or terminate in uplands would be categorically excluded from the CWA.