



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

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April 23, 2025

The Honorable Benita Best-Wong, Deputy Assistant Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

The Honorable Robyn S. Colosimo, SOPDO, Deputy Assistant Secretary of the Army
U.S. Department of Defense
108 Army Pentagon
Washington, DC 20310

RE: Docket No. EPA-HQ-OW-2025-0093

Dear Deputy Administrator Best-Wong and Deputy Assistant Colosimo:

The Washington State Department of Ecology (Ecology) appreciates the opportunity to provide comments to the U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (USACE), known collectively as the Agencies, in response to “WOTUS Notice: The Final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations” published in the Federal Register on March 24, 2025. The Agencies have requested feedback and recommendations for interpreting whether a particular stream, river, wetland, lake, pond or other water body is considered “waters of the United States” – or WOTUS – and protected under the federal Clean Water Act.

As Washington’s water quality authority, Ecology implements the state’s Water Pollution Control Act (RCW 90.48) and is responsible for administering federal water pollution control laws. This includes issuing National Pollutant Discharge Elimination System (NPDES) permits and Clean Water Act Section 401 certifications for activities that may discharge to waters of the United States (WOTUS). Narrowing the definition of WOTUS would limit our regulatory oversight, allowing some discharges to bypass NPDES permitting and increasing the risk of unregulated pollution or circumvent Section 401 certification, increasing the risk of unregulated pollution and long-term degradation of Washington’s aquatic resources.

We feel obligated to provide our thoughts and perspectives to the Agencies as they consider drafting a proposed rule to redefine “waters of the United States.” While we support the Agencies’ goal of simplifying how to identify jurisdictional waters, this effort should not exclude broad categories of waters with a connection to downstream traditionally navigable waters.

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Such broad exclusions would reduce the scope of the federal Clean Water Act, potentially cause harm to Washington's waters, and threaten the health and well-being of the state's residents and environmental health.

As the Agencies move forward with drafting a WOTUS Rule, we request that the Agencies engage in cooperative federalism by consulting closely with states regarding specific elements of a draft rule and its implementation. States are not general members of the public—they are co-regulators in implementing the Clean Water Act, with critical roles and unique authority. As such, we hope to see continued cooperation and collaboration between the Agencies and states.

In response to the specific requests for feedback and recommendations, Ecology provides the attached comments.

Sincerely,



Casey D. Sixkiller
Director

Washington State Department of Ecology

Docket No. EPA-HQ-OW-2025-0093

Detailed comments

In response to the Federal Register notice FRL-12683-01-OW, the Washington State Department of Ecology provides the following comments.

Relatively Permanent

The Agencies have requested recommendations regarding whether certain water body features or characteristics should be used to determine the scope of “relatively permanent” waters.

We recommend that “relatively permanent” waters include perennial and intermittent tributaries, lakes, and ponds that connect to a traditionally navigable water based on 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. Further, including both perennial and intermittent tributaries, lakes and ponds will protect sources of water for wetlands and downstream segments. These are important for maintaining hydrologic processes that affect water quality, which in turn affects human health and wildlife habitat. 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.

We advise against the Agencies relying on specific flow durations or numeric flow criteria to determine seasonal surface connections. These metrics are difficult to apply universally as they do not lend themselves to the nation’s varied hydrologic networks. The state of Washington, for example, contains coastal climates, temperate forests, and arid regions. All require different management approaches based on region-specific data. We strongly suggest the Agencies use tools like the USACE’s Antecedent Precipitation Tool to determine whether normal precipitation conditions exist. To define flow regimes, we recommend developing and using regional tools to determine ephemeral, intermittent, and perennial waters. We also recommend using tools such as the Oregon Streamflow Duration Method¹ to account for regional, climate, and geological differences.

The Agencies also requested feedback about how to identify “relatively permanent” tributaries in the field. We suggest using these characteristics:

- A bank, bed, and ordinary high-water mark (OHWM), as determined regionally, and
- Contribution of flow to a downstream traditionally navigable water.

The terms “bank,” “bed,” and “OHWM” are well-known terms, and facilitate easier identification of relatively permanent tributaries in the field. Regional methods should be used to delineate the OHWM since multiple states, including Washington, have an established method for determining this characteristic.

¹ *Oregon Streamflow Duration Assessment Method*, Publication Number EPA 910-R-11-002, November 2011, https://www.oregon.gov/dsl/WW/Documents/sdam_final_manual.pdf.

Further, when calculating whether a tributary is “relatively permanent,” the Agencies should use a year within the normal range of precipitation. Relative permanence should not be based on precipitation levels during annual dry cycles or drought periods.

Finally, there are a wide range of office tools and information sources that can help inform whether a water body is relatively permanent. These include U.S. Geological Survey topographic maps, aerial photography, LIDAR, satellite imagery, National Hydrography Dataset, National Wetland Inventory maps, fish presence maps, and stream gauge data.

Continuous Surface Connection

The Agencies requested feedback and guidance regarding the phrase “continuous surface connection,” and the features that should apply to this determination. As a starting point, continuous surface connections should include both hydrologic and hydric soil connections. The term should apply to adjacent wetlands, lakes, and ponds.

Additionally, the definition of “continuous surface connection” 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 federal Clean Water Act merely because they flow through uplands, a pipe, a ditch, or another discrete feature. These man-made features are important because they often maintain preexisting hydrologic connections between waters and the wetlands. Thus, excluding these features would strip upstream wetlands and streams of water quality protections and result in the degradation of downstream waters of the United States.

The Agencies also request recommendations related to what it means to “abut” a federally protected or jurisdictional water body and whether wetlands behind a natural berm or other landform are considered “abutting.” In our view, a wetland should be considered abutting a jurisdictional water when it touches or has a connection with relatively permanent water. Again, the term “abutting” should include wetlands connected to relatively permanent waters through a discrete feature such as a pipe, culvert, or ditch. These features help connect and maintain connections between wetlands and relatively permanent water bodies. As such, these features should not sever jurisdictions.

In a similar manner, natural berms do not preclude a continuous surface connection to relatively permanent waters. Wetlands behind natural berms are typically linked hydrologically to adjacent waters, and the water regularly overtopping a berm should be considered a continuous surface connection under the Clean Water Act. Thus, the presence of berms alone should not result in a water becoming non-jurisdictional.

Additionally, the Agencies ask whether certain features such as flood and tide gates, pumps, or similar artificial features remove a wetland from being considered “adjacent.” In our view they do not. Flood gates, tide gates, and pumps manage the flow of water between wetlands and the adjacent tributary or traditionally navigable water, maintaining the continuous surface connection between the two. Salmon and other aquatic life use these features to access adjacent wetland habitats located upstream of a gate or pump, so protecting waters on both sides of the feature is critical.

Other artificial features, such as shallow buried water conveyances, like pipes, should also be treated as maintaining federal jurisdiction and protection. For decades, streams and other water courses were rerouted using buried piping to maintain connections between the upstream and downstream waters. Daylighting these piped streams to “restore” a surface connection is expensive and often cost-prohibitive. 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.

Finally, the Agencies request feedback about the interpretation and implementation of language in the *Sackett v. Environmental Protection Agency* decision indicating that “temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells.” The Supreme Court’s use of this phrase in *Sackett* does not indicate that such interruptions render a surface connection discontinuous. Certainly, a temporary lack of hydrologic connection should not sever the jurisdiction of adjacent wetlands. Low tides happen twice daily, but this “interruption” and the otherwise continuous surface connection are predictable. Similarly, while any water may experience “dry spells,” the level of continuous connection that can be expected during a normal water year can be determined using tools like the Antecedent Precipitation Tool. The normal water year should be the basis for jurisdictional determinations, and not any temporary lack of hydrologic connection resulting from abnormal dry spells.

The Scope of Jurisdictional Ditches

The Agencies requested comment on how to delineate when ditches qualify as “Waters of the United States.” The Agencies also ask whether they should use prior definitions and historical approaches when determining whether a ditch retains jurisdictional protection.

Since jurisdiction over ditches will be challenging to determine in the field, we believe it would be best, and simplest, to only categorically exclude ditches excavated in upland areas to drain them. We also recommend that jurisdiction over ditches containing channelized streams or constructed in wetlands should be determined using the historical approach, rather than categorically. The historical approach would reduce confusion and can be readily implemented using the tools described below.

If ditches are placed in a separate category, there will be assumptions that many ditches, which would otherwise be considered jurisdictional because they contribute downstream flow to a covered water, are automatically excluded from protection. This lack of clarity would likely lead to litigation at the state and federal levels. We are also concerned that a categorical approach, while attempting to provide clarity, will cause landowners to underestimate the importance of ditches and the likelihood of their coverage under the Clean Water Act. This would result in more confusion, more water quality violations, and adverse impacts to fish and wildlife.

When evaluating whether an individual ditch is jurisdictional, we support using bed, bank, and OHWM characteristics, and connections to downstream waters to determine their status. Science does not support excluding ditches based solely on their purpose, e.g., for roadways, stormwater, irrigation, or drainage. Rather, the key factor for jurisdiction should be a ditch’s connection to waters of the United States. Similarly, while tributaries can be relocated into road, drainage, and irrigation ditches, the tributaries themselves should remain jurisdictional regardless of whether they flow through ditches.

The Agencies asked what tools can be used to help identify whether a ditch is constructed in an upland area, or in a tributary or adjacent wetland. They also asked what features constitute evidence that a ditch was constructed in an upland area or in a tributary or adjacent wetland. At a coarse level, historic Geologic Land Office survey maps can be helpful for making this determination. In addition, National Wetland Inventory Maps, LIDAR, historical aerial photography, satellite imagery, and National Hydrography Dataset all provide important information for helping determine whether a ditch either contains a tributary or was constructed in a wetland.

Further, the Agencies requested comment regarding whether biological criteria should be an indicator of whether a ditch is jurisdictional. In our opinion, they should not. While the presence of fish often indicates the presence of a tributary, and therefore a jurisdictional water, a lack of fish does not mean a ditch is automatically non-jurisdictional. The connections between water bodies need to be carefully considered. Again, the standard should be whether a ditch's flows contributes to jurisdictional water.

In short, we see no good reason to categorically define ditches in federal rule. We believe ditches excavated in upland areas that contain a tributary should be jurisdictional unless constructed to drain the area. Otherwise, jurisdictional determinations for ditches should be made on a case-by-case basis. This is consistent with current and past practices, and it is most protective of water quality, wildlife habitat, and human health.

Conclusion

We appreciate the opportunity to provide input and recommendations to the Agencies as they prepare a draft rule defining WOTUS and look forward to continued collaboration on developing a definition that protects our waters and environment.