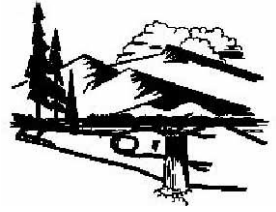




# Department of Environmental Quality

To protect, conserve and enhance the quality of Wyoming's environment for the benefit of current and future generations.



Mark Gordon, Governor



Todd Parfitt, Director

April 23, 2025

Mr. Lee Zeldin, Administrator  
United States Environmental Protection Agency  
EPA Docket Center  
Office of Water Docket  
Mail Code 28221T  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

Submitted online via <https://www.regulations.gov>

**Re: Document ID No. EPA-HQ-OW-2025-0093 - WOTUS Notice: The Final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations**

Administrator Zeldin,

Please accept the following feedback in response to the U.S. Environmental Protection Agency and the U.S. Department of Army, Corps of Engineers (hereafter the agencies), March 24, 2025, Federal Register (FR) notice of listening sessions and solicitation of stakeholder feedback for defining Waters of the United States (WOTUS) consistent with the Supreme Court's decision in *Sackett v. Environmental Protection Agency* regarding the scope of federal Clean Water Act (CWA) jurisdiction.

As a co-regulator in implementing the CWA, the Wyoming Department of Environmental Quality (WDEQ) is responsible for the implementation of the NPDES program under Section 402; adoption of state water quality standards, water quality assessments, and TMDLs under Sections 303 and 305; water quality certifications under Section 401; and addressing nonpoint source pollution under Section 319, in addition to implementing state water quality requirements under the Wyoming Environmental Quality Act.

WDEQ appreciates the agencies' outreach and commitment to state co-regulator engagement in shaping the definition of WOTUS. WDEQ remains steadfast in advocating for a clear, consistent, durable, and objective definition of WOTUS that recognizes the limits of federal authority and is easily understood by the public. Below you will find our detailed recommendations and comments, which have been organized to follow the order of the agencies' request for feedback outlined in the March 24, 2025 FR Notice.

**The scope of “relatively permanent” waters and to what features this phrase applies**

Consistent with our comments provided during previous WOTUS rulemakings, the WDEQ recommends that “relatively permanent” for perennial waters be defined as “surface water flowing continuously during a typical year”. Perennial waters that contribute flow to a traditional navigable water in a “typical year” would be considered WOTUS. Additionally, we recommend 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.” This flow duration component aligns with both the plurality and concurring opinions in *Rapanos v. United States*, is consistent with long-standing federal agency practice under the 2008 Rapanos Guidance, and quantifies the “relatively permanent flow” necessary to establish a continuous surface connection with a navigable water that clearly delineates which intermittent waters fall under federal jurisdiction.

As noted in our recommended definitions, we suggest the term “typical year” and its associated definition that was used in the 2020 Navigable Waters Protection Rule (NWPR) be reincorporated into the definitions of perennial and intermittent for any proposed new WOTUS rule. To align with our past comments, we also advocate for the incorporation of quantitative criteria in the definition of “typical year.” We advise the agencies to use the 30-year precipitation normals developed by the National Oceanic and Atmospheric Administration (NOAA) that are, for all intents and purposes, the “national standard” for climate normals. NOAA’s 30-year climate normals are robust products that can be used at different geographic scales and are updated every ten years. We also suggest using the broader and more conventional interquartile range of 25th to 75th percentiles, which better captures “typical” precipitation events while excluding periods of drought and extreme floods.

Under our recommended definitions, intermittent waters with continuous flow for less than three consecutive months, as well as all ephemeral streams, would be categorically excluded from the CWA. However, in states like Wyoming, where water quality standards apply to all surface waters regardless of their status as a WOTUS, the exclusion of ephemeral and some intermittent waters from federal jurisdiction does not eliminate water quality protections. Instead, it reinforces Congress’ intent, as outlined in CWA Sections 101(b) [33 U.S.C. § 1251] and 303 [33 U.S.C. § 1313], which affirms states’ primary responsibilities to protect water quality within their borders through the promulgation and implementation of state water quality standards.

To further clarify what constitutes a “relatively permanent” water, the WDEQ recommends the interstate water category be removed from the definitions at § 120.2(a)(1). The term “interstate” is a relic of the original Water Pollution Control Act of 1948 that was subsequently replaced with the term “navigable waters” in the 1972 CWA amendments. The term “navigable waters” is not constrained by political boundaries. Retention of the interstate category only adds confusion and unnecessarily extends federal authority to waters that may not have “relatively permanent” flow to another WOTUS in their own right.

Regarding the identification of “relatively permanent” waters in the field, WDEQ recommends the use of observed or modeled stream flows rather than field indicators as the basis for determining whether a

water exhibits “relatively permanent flow.” Routine monitoring or modeling can help verify that a water maintains at least 90 consecutive days of continuous flow, while also reducing inconsistencies associated with field indicators, which may vary in diagnostic reliability across the United States.

Finally, to further support the identification of waters with “relatively permanent” flow, we advocate for the geospatial mapping of WOTUS. The WDEQ encourages the development of integrating publicly available, national geospatial mapping tools through federal-state partnerships, as we proposed during the development of the 2020 NWPR. While technical and procedural challenges exist, a phased approach to generating a WOTUS map is not only feasible, but also practical. 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. Such mappings would improve regulatory certainty, consistency, and transparency, while also reinforcing the principles of cooperative federalism. To maintain effectiveness and scientific accuracy, these 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.

#### **The scope of “continuous surface connection” and to which features this phrase applies**

In *Sackett*, the Supreme Court held that “adjacent” wetlands are “those that have a ‘continuous surface connection’ to a requisite jurisdictional water.”<sup>1</sup> We recommend that a “continuous surface connection,” within the context of a wetland, is a feature that physically abuts to or has a direct “relatively permanent” hydrologic connection to a requisite jurisdictional water during a “typical year.” Moreover, WDEQ recommends that “physically abut” and “physically adjacent” are synonymous. As we recommended previously, the incorporation of the term “typical year” allows the definition of WOTUS to be resilient to changes in surface water hydrology over time. Our proposed definition of “continuous surface connection,” within the context of a wetland, as a feature that physically abuts or has a direct “relatively permanent” hydrologic connection to a requisite jurisdictional water during a “typical year”, is clear, removes ambiguity within the current WOTUS Conforming Rule, and aligns with the Supreme Court’s 2023 holding in *Sackett*.

#### **The scope of jurisdictional ditches**

To further support the 2020 NWPR’s classification of ditches as “tributaries” under federal jurisdiction<sup>2</sup>, WDEQ recommends clarifying that a ditch must have “relatively permanent” flow in a “typical year.” This definition would align with the 2020 NWPR and would provide a reasonable balance in light of the Supreme Court’s 2023 decision in *Sackett*.

The WDEQ further recommends building on the 2020 NWPR’s definition of ditch<sup>3</sup> as “a surface water conveyance constructed for the sole purpose of directing and delivering water from one point to another

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<sup>1</sup> 598 U.S. at 684.

<sup>2</sup> 85 FR 22250, 22297 (Apr. 21, 2020).

<sup>3</sup> 85 FR 22250, 22340 (Apr. 21, 2020).

for purposes of road or field drainage; supplying water for irrigation, stockwater or municipal uses; or transporting goods and services.” Strengthening this definition will allow further clarification, durability, and consistency in objective decision making when determining if a ditch is a WOTUS.

According to our recommended definition, ditches that lack “relatively permanent” flow or originate or terminate in uplands, would be categorically excluded from the CWA.

**Closing Remarks**

The WDEQ appreciates the agencies’ efforts to engage with state co-regulators while pursuing a balanced federal-state collaboration in the protection of the nation’s waters in accordance with cooperative federalism. We are optimistic that a collaborative approach will aid in implementing a clear, consistent, durable and, objective definition of WOTUS now and into the future. Thank you for the opportunity to comment, and we look forward to working alongside EPA and other state co-regulators during the upcoming listening sessions and other engagement opportunities.

Sincerely,



Todd Parfitt  
Director  
Department of Environmental Quality

TP/JZ/DHW/JJT/CAH

cc: Jennifer Zygmunt, Administrator, Water Quality Division Administrator  
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