April 23, 2025

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Environmental Protection Agency
1200 Pennsylvania Avenue, W
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Mr. Milton Boyd
Office of the Assistant Secretary of the Army for Civil Works
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Re: "WOTUS Notice: The Final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations" (Docket # EPA–HQ–OW–2025–0093)

Via: Jensen.Stacey@epa.gov, Milton.w.boyd.civ@army.mil

Dear Ms. Jensen and Mr. Boyd:

The National Association of Wetland Managers (NAWM) and the Association of State Floodplain Managers (ASFPM) submit the following comments in response to the request from the U.S. Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) for written feedback as the agencies revise the definition of "waters of the United States" (WOTUS), and as part of federalism discussions.

NAWM is a national 501(c)(3) professional organization that supports the use of sound science, law, and policy in development and implementation of state and Tribal wetland and aquatic resource protection programs. Since 1983, our organization and our member

states and Tribes have had longstanding positive and effective working relationships with federal agencies. As an association representing state and Tribal co-regulators tasked with implementation of regulations implementing the Clean Water Act (CWA), NAWM understands the complexity of the CWA and the implementation challenges the Act poses. We have worked together with federal agencies in the implementation of regulatory and non-regulatory programs designed to protect WOTUS, such as challenges in determining the jurisdictional status of wetlands and other waters as WOTUS, CWA section 404 permit program for dredged or fill material, state and Tribal water quality standards for wetlands, and CWA section 401 water quality certification of federal licenses and permits.

The Association of State Floodplain Managers (ASFPM), along with its 38 state chapters, represents nearly 22,000 professionals encompassing flood hazard specialists from various sectors, including local, state, and federal government, research, insurance, engineering, hydrology, emergency management, and community planning. Our members are dedicated to mitigating flood-related losses and minimizing taxpayer burdens associated with flooding incidents. ASFPM has long worked with both EPA and the Corps of Engineers to help manage and reduce the nation's burgeoning flood losses and to help protect wetlands and natural floodplain functions, which absorb and attenuate floodwaters and help filter contaminants from the nation's runoff.

The CWA regulates discharges to "navigable waters," defining the term to mean "the waters of the United States, including the territorial seas."[1] This single definition of jurisdictional boundaries applies to all regulatory provisions of the Act, as acknowledged in the WOTUS Notice. Whether a particular waterbody is jurisdictional as a WOTUS is a key threshold question for determining whether a discharge into that water will require a permit or otherwise be regulated under the CWA. As such, the scope of WOTUS has been subject to considerable litigation, including four U.S. Supreme Court decisions, and several definitional rulemakings and implementation guidances by EPA and the Corps (collectively referred to hereafter as "the Agencies"). The last regulatory definition promulgated was the Conforming Definition of "Waters of the United States" finalized in September 2023. NAWM and ASFPM submit this letter to assist the Agencies in development of administrative clarification on specific aspects of the definition of WOTUS.

Importance of Working with States and Tribes to Define WOTUS.

The CWA uses a cooperative federalism approach to achieve its goal of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters. For example, the statute authorizes states (and Tribes with Treatment in a Manner Similar as a

[1] 33 U.S.C. § 362(7), CWA § 502(7).

State (TAS) authority) to implement the section 402 and 404 permitting programs. The CWA likewise establishes a role for states and Tribes with TAS in implementing several other programs that are central to achieving the Act's objective, such as administering the water quality standards program and impaired waters and total maximum daily loads program under section 303. Section 401 provides states and authorized Tribes with authority to review proposed federal permits and licenses that may result in a discharge into WOTUS, and certify whether the proposed authorizations would be consistent with water quality standards and certain other CWA and state or Tribal provisions. As a result, under the CWA states and Tribes have a co-regulator relationship with the federal agencies and therefore a very strong interest in how WOTUS is defined.

Changes in the definition of WOTUS and scope of federal jurisdiction have significant direct and indirect impacts on states and Tribes. Direct impacts arise because a changed WOTUS definition alters the extent of federal protection of vital clean water resources. Also, states and Tribes have repeatedly faced the task of aligning their laws and regulatory programs with each new WOTUS regulatory definition, needing to revisit and potentially revise their program to conform with a new definition of protected waters. Such revisiting can consume substantial state and Tribal administrative resources. Indirect impacts occur when the changed WOTUS definition alters the existing relationships among multiple state, Tribal, federal, and local authorities that protect an array of public resources while minimizing overlap and delay of necessary permit processes.

Input by states and Tribes to the definition of WOTUS is essential. In addition to being most familiar with existing relationships among the multiple water quality protection authorities, state and Tribal co-regulators have over fifty years of experience implementing CWA programs. As a result, state and Tribal perspectives are critical to ensure a clarified or revised definition of WOTUS is defensible, informed by science and implementation experience, and is (as the Agencies emphasize in the WOTUS Notice) a durable rule.

NAWM and ASFPM appreciate the Agencies holding a series of listening sessions to solicit recommendations from state and Tribal co-regulators as well as a diverse group of stakeholders regarding key definitional terms such as "relatively permanent," "continuous surface connection," and "ditch."

Recommendation: When moving forward with clarifying the definition of WOTUS, NAWM and ASFPM encourage EPA and the Corps to have a series of interactive working meetings with states and Tribes. Meaningful engagement means actual collaborative discussion and troubleshooting. We encourage the Agencies to reach out to state governors and Tribal leaders to invite them or their designees to participate in a future workshop or workshops focused on definitional and implementation challenges given

national differences in ecology, geography, hydrology, and legal doctrines that create challenges for water, wetlands and water quality program administration, in advance of initiating a rulemaking process.

Feedback on Key Aspects of the Definition of WOTUS

On May 25, 2023, the U.S. Supreme Court announced its decision in *Sackett vs. EPA,* establishing that the standard for determining if a water is WOTUS protected by the federal CWA is the "relatively permanent standard" from the 2006 *Rapanos* opinion by Justice Scalia.[2] Under *Sackett,* a relatively permanent body of water that is connected to traditional navigable waters is considered a WOTUS. Additionally, under *Sackett* wetlands are WOTUS only when they have a continuous surface connection to a relatively permanent water and are "indistinguishable" from the water to which they are adjacent.

The WOTUS Notice indicates the Agencies are considering taking administrative actions to clarify specific aspects of the definition of WOTUS and solicit information and recommendations regarding the scope of "relatively permanent waters," "continuous surface connection," and jurisdictional ditches.

Relatively Permanent Waters

With tributaries being WOTUS only where they are relatively permanent, a key issue is what constitutes "relatively permanent." The plurality opinion in *Rapanos* indicated that to be relatively permanent, water does not need to be present at all times:

> By describing "waters" as "relatively permanent," we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months … Streams whose flow is '[c]oming and going at intervals … [b]roken, fitful,' or 'existing only, or no longer than, a day; diurnal … short-lived, are not" [jurisdictional].[3]

Under the plurality, waters that are less than relatively permanent, such as ephemeral streams, are not WOTUS, as are waters that do not connect to a traditional navigable water (TNW).

The Agencies have defined the scope of jurisdictional tributaries differently over time. The pre-2015 regulatory regime considered "relatively permanent" tributaries as those that typically flow year-round or that have continuous flow at least seasonally ("e.g., typically

[2] *Sackett v. Environmental Protection Agency*, 598 U.S. 651, 678 (2023).
[3] *Rapanos v. United States*, 547 U.S. 715, 733 FN5 (plurality opinion),

three months").[4] The 2020 Navigable Waters Protection Rule (NWPR) defined "tributary" waters considered to be WOTUS, indicating the term includes rivers, streams, or similar naturally occurring surface water channels that contribute surface water flow either directly or indirectly to the territorial seas or traditional navigable waters in a typical year. [5] The NWPR requires a tributary to have perennial or intermittent flow in a typical year, and the rule expressly excludes ephemeral waters from jurisdiction.[6] The 2023 Rule indicates a relatively permanent tributary are those tributaries with flowing or standing water year-round or continuously during certain times of the year and more than just a short duration in direct response to precipitation.[7]

Challenges of Distinguishing Relatively Permanent and Ephemeral Tributaries

Field staff need to distinguish between intermittent tributaries and ephemeral tributaries, as is necessary after *Sackett*. Regulations and policy do not provide a clear national definition of what qualifies as a seasonal or intermittent tributary that is likely jurisdictional, and how it differs from an ephemeral tributary that is non-jurisdictional. Science suggests that intermittent streams flow regularly but not year-round and often with a groundwater component to their flow, while an ephemeral stream flows only after precipitation events such as heavy rainstorms without any groundwater contribution.

An approach under the pre-2015 regulatory regime to identify streams that flow at least seasonally, "e.g., typically three months", was not intended to establish a 12-week minimum flow and instead was intended as a general example ("e.g.") to be adjusted to account for regional differences in hydrology and seasonality.[8] The Agencies have noted, for example, that it would often be infeasible for the regulated community or agency staff to determine whether a stream ordinarily flows or whether a lake contains standing water for 12 weeks as opposed to 11 weeks per year.[9] Even if it were possible to determine this in the field, such a bright line would not reflect hydrological diversity among different regions and alterations in flow characteristics, and, therefore, would be less consistent with the CWA's goal of restoring the chemical, physical, and biological integrity of the nation's waters.

Additional challenges have arisen because a single tributary can plausibly become ephemeral, intermittent, and back again several times on its journey to a traditional

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[4] EPA and the Army Corps, *CWA Jurisdiction Following the U.S. Supreme Court Decision in Rapanos v. United States and Carabell v. United States,* December 2, 2008, at 6.
[5] 85 Fed.Reg. 22250, 22286 (April 21, 2020); 33 C.F.R. 328(c)(12).
[6] Id. See also 328.3(b)(3).
[7] 88 Fed.Reg. 3004, 3066 (January 18, 2023).
[8] *See* EPA and the Army Corps of Engineers, "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States,"* 1, 6 (December 02, 2008).
[9] 88 Fed.Reg. 3004, 3086-7 (January 18, 2023).

navigable water. Under the NWPR, a jurisdictional determination was required to determine whether a stream is intermittent or ephemeral at various locations or project sites, resulting in an increase in site visits and case-by-case determinations. Corps staff have said that it is labor intensive to determine the difference between an intermittent versus an ephemeral stream.[10] The definition of relatively permanent itself has remained vague and has led to inconsistent interpretations.

NAWM and ASFPM recommend that a revised definition of WOTUS should not establish a specific national minimum number of flow days necessary to be "relatively permanent," but should instead identify factors for consideration and allow the resulting case-specific threshold to reflect regional hydrology, flow duration, topography, soils, and other scientifically relevant factors.

The current implementation of the "relatively permanent" standard relies on Strahler stream order to define a reach, after which the entire reach is assessed as relatively permanent or not. However, this approach lacks transparency, efficiency, and predictability. The current process has at least two approaches to assessing flow when flow is not consistent throughout the entire reach. Many Corps staff decide where stream orders begin, assess whether the majority of a reach meets the relatively permanent characteristics, and then determine jurisdiction based on a percentage comparison of relatively permanent versus non-relatively permanent waters. Other Corps staff assign flow at the confluence of tributary orders so if at the juncture of orders a stream is intermittent or ephemeral, it is assigned that flow characteristic upstream until the next confluence of orders. Because different staff members may interpret stream reaches differently, or may assess flow regime differently, the resulting classification of a particular stream reach is difficult to predict. Also, many stream reaches extend beyond project boundaries, meaning Corps staff cannot visually inspect the entire reach when making jurisdictional calls and thereby making it difficult to reach a final determination. This reliance on incomplete information further reduces transparency, as often a jurisdictional determination lacks a clear explanation of how conclusions were reached.

A variety of tools are available to help assess whether a tributary or other water is relatively permanent, but it is essential that such tools have been validated as accurate in the regional conditions where they are being used. Direct observations and various remote tools and resources can be used to identify tributary reaches based on stream order, and topographic characteristics can assist in determining tributary status and stream order.

[10]Groves, "How the Trump Administration Eased Destruction of the Nation's Wetlands and Streams," 41 ELR 10194, 10195 (March 2021).

However, as discussed above, use of those tools can be unclear and inconsistent. The Agencies have been developing regionalized streamflow duration assessment methods (SDAMs), which are rapid field-based assessment methods that can be used to classify streamflow duration and assist in determining whether tributaries are relatively permanent.[11] SDAMS may be more accurate in some areas that during development had extensive data validation points (such as Pacific Northwestern mountains) than areas with fewer data validation points (such as the karst areas of Kentucky and elsewhere). Remote or desktop tools, such as local maps and stream gauge data, can help agencies better understand streamflow and whether tributaries have continuously flowing or standing water year-round or during certain times of the year for more than a short duration in direct response to precipitation.

Ultimately, determining if a water is relatively permanent or ephemeral requires multiple indicators and sources of information that have been validated for use in the region where a jurisdictional determination is being developed. As the regulatory definition of relatively permanent waters evolves, the field and desktop tools will need to evolve with the definition in order to ensure the definition is capable of being implemented.

NAWM and ASFPM recommend EPA and the Corps focus on developing and updating accurate tools for assessing relative permanence, that are consistent with law and sound science and validated for use in the region. Training on how to appropriately use existing and emerging tools will be essential for staff at the Agencies, states, Tribes, and others. When used properly and kept up-to-date, such tools will help ensure that waters that should be jurisdictional or non-jurisdictional after *Sackett* are efficiently and correctly identified.

Continuous Surface Connection and Wetlands

The WOTUS Notice discusses the challenges of determining when wetlands are considered "adjacent" and jurisdictional and seeks information on how to interpret the phrase "continuous surface connection" from *Rapanos*.

Elements of a "Continuous Surface Connection".

The Supreme Court's *Sackett* decision focuses on the plurality's opinion in *Rapanos* and its "continuous surface connection" standard for when wetlands are adjacent and therefore WOTUS. The *Sackett* Court noted that:

> In *Rapanos*, the plurality spelled out clearly when adjacent wetlands are part of covered waters. It explained that "waters" may fairly be read to include only those

[11] SDAMs are available at https://www.epa.gov/streamflow-duration-assessment.

> wetlands that are "as a practical matter indistinguishable from waters of the United States," such that it is "difficult to determine where the 'water' ends and the 'wetland' begins." That occurs when wetlands have "a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands." . . . We agree with this formulation of when wetlands are part of "the waters of the United States.[12]

After the *Rapanos* decision, the Agencies issued guidance discussing the plurality's "continuous surface connection" standard for when wetlands were jurisdictional. The *Rapanos* Guidance indicated "[o]nly those adjacent wetlands that have a continuous surface connection because they directly abut the [relatively permanent] tributary (e.g., they are not separated by uplands, a berm, dike, or similar feature) are considered jurisdictional under the plurality standard."[13] The *Rapanos* Guidance applied the *Rapanos* plurality's standard to jurisdiction over wetlands that directly abut a relatively permanent tributary.[14]

Both before and after *Rapanos* and *Sackett*, the Agencies interpreted culverts as not severing connections between wetlands and other WOTUS. As a result, any wetlands connected via culverts during road construction or other projects were viewed as not severing jurisdiction and did not require mitigation. The preamble to the 2023 Rule revising the definition of WOTUS indicated that under the *Rapanos'* plurality standard for adjacent wetlands, wetlands meet the continuous surface connection requirement if "they physically abut, or touch" a relatively permanent water, or "if the wetlands are connected to these waters by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert."[15]

However, the Agencies recently issued guidance on wetlands with a continuous surface connection that expressed concern about the "discrete features" language in the 2023 Rule.[16] The guidance quotes the *Rapanos* plurality stating "[w]etlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States … do not have the 'necessary connection' to covered waters that triggers CWA jurisdiction."[17]

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[12] *Sackett v. Environmental Protection Agency*, 598 U.S. 651, 678 (2023).
[13] EPA and the Army Corps of Engineers, "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States,"* 1, 7 FN 29 (December 02, 2008).
[14] *Id.* at 1.
[15] 88 Fed.Reg. 3004, 3090 (January 18, 2023).
[16] Memorandum to the Field between the U.S. Department of the Army, U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency Concerning the Proper Implementation of "Continuous Surface Connection'' under the Definition of "Waters of the United States'' under the Clean Water Act (Mar. 12, 2025).
[17] *Id.* at 5, quoting *Rapanos*, 547 U.S. at 742 (Scalia, J., plurality).

The guidance rescinds all guidance or training materials that assumed a discrete feature established a continuous surface connection.[18]

The Supreme Court decisions in *Rapanos* and *Sackett* providing the "continuous surface connection" test for wetland jurisdiction have at times been interpreted in an unnecessarily narrow manner. For example, both opinions hold that wetlands must have a "continuous surface connection" but do not say that continuous connection must be hydrologic. As a result, the required connection might be an unbroken physical connection such as a gully or ditch so long as the wetland is not physically remote from a relatively permanent water. A connection consistent with the Court's opinions might be established through a non-jurisdictional feature, such as an ephemeral stream that forms a continuous physical connection with occasional flows between the wetland and relatively permanent water, so long as the feature is continuous. Similarly, the Court's opinions do not require a wetland to immediately abut a jurisdictional water to be considered as having a continuous surface connection. Extensive peer-reviewed science indicates the important roles that adjacent wetlands play in the broader aquatic ecosystem. Those roles are not necessarily dependent on a hydrologic or jurisdictional connection or abutting another water.[19] Wetland hydrology fluctuates across wetland types, landscape position, and groundwater connection. It is worth noting that wetlands and their associated floodplains are often directly connected with navigable waters during flooding episodes, which are common natural phenomena.

Interpreting "continuous surface connection" as including non-hydrologic connections, connections through culverts, and connections made through non-jurisdictional features would be consistent with the CWA's overarching goal of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters.

NAWM and ASFPM recommend that the agencies interpret "continuous surface connection" consistent with Supreme Court decisions, while not adding additional limitations such as requiring hydrologic and jurisdictional features. The Agencies should clarify that culverts do not sever a surface connection between wetlands and other WOTUS.

Relevance of berms and other landforms to a "continuous surface connection."

The legal effect of berms, dikes, and other landforms on WOTUS jurisdiction has changed over time. A longstanding definition of "adjacent" included wetlands that were "bordering,

[18] *Id.* at 5.
[19] *See, e.g.,* EPA, *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence* [Final Report]. EPA/600/R-14/475F, (Washington D.C.: 2015).

contiguous, or neighboring [a WOTUS], including wetlands separated by constructed dikes or barriers, natural river berms, beach dunes, and the like."[20] The 2015 CWR considered wetlands to be adjacent when within 1,500 feet of an interstate or traditional navigable waters regardless of the intervening presence of a berm or similar feature.[21] The 2020 NWPR limited the term "adjacent" to wetlands that abut jurisdictional waters, are flooded by those waters, or are separated from those waters by berms or similar barriers.[22] The 2023 Rule indicated that any "intrastate lakes and ponds, streams, or wetlands that have either a continuous surface connection to categorically included waters or have a significant nexus to interstate or traditional waters.[23]

Sackett requires that a continuous connection serving as a jurisdictional basis for wetlands must be a "surface connection." Often a berm or similar structure will appear to sever a surface connection. However, the presence of a natural or man-made berm does not invariably mean that there is no continuous surface connection between the wetland and the jurisdictional water. As noted in two *Sackett* concurring opinions, berms, dunes, dikes, and levees "do not block all water flow," and "in fact are usually evidence of a significant connection between the wetland and water."[24] Natural features such as coastal or riverine berms or dunes can be challenging in a jurisdictional context since they frequently change location and size over time. Man-made features like berms and levees are often specifically engineered to allow temporal connections to manage changes in flow, such as through gates and overflow elevations. Natural and man-made features such as ice berms, beaver activity, underground drains, or crushed gravel can make it difficult to determine a surface connection, particularly without onsite inspection. As the Agencies interpret the term "continuous surface connection," it is important that the definition not establish that presence of a natural or man-made berm or similar barrier always eliminates a surface connection. Instead, presence of a surface connection should remain a case-by-case determination.

If construction of a berm, dike, levee, or similar man-made feature requires a CWA section 404 permit, and wetlands are newly made non-jurisdictional as a result of the construction, that fact should be reflected in the permit's requirement for mitigation.

NAWM and ASFPM recommend that the definition of "continuous surface connection" allow for the possibility of berms and similar barriers not severing the surface

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[20] 38 C.F.R. §328.3 (2014).
[21] 80 Fed.Reg.37054, 3716-3737 (June 29, 2015).
[22] 85 Fed.Reg. 22250, 22340 (April 21, 2020)
[23] 88 Fed.Reg. 3004, 3006 (January 18, 2023)
[24] *See, e,g, Sackett v. Environmental Protection Agency*, 598 U.S. 651, 678, Kagan, J., opinion concurring in judgement at 3 (2023).

connection on a case-by-case basis. Similarly, if wetlands are made newly non-jurisdictional due to a CWA section 404-permitted berm or other barrier severing the necessary surface connection, the permit should require mitigation for the newly non-jurisdictional wetlands.

Sackett Calls for One Test for Jurisdictional Wetlands, Not Two.

In *Sackett,* the U.S. Supreme Court held that jurisdictional "adjacent" wetlands are those with a "continuous surface connection to bodies that are 'waters of the United States' in their own right, so that they are "indistinguishable from those waters."[25]

Despite assertions by various stakeholders, no lower court thus far has read *Sackett* to mandate two jurisdictional tests, under which a wetland must have a continuous surface connection to a jurisdictional water and also be shown as practically indistinguishable from that water in order to be "adjacent." In *Lewis v. United States*, for example, the Fifth Circuit first acknowledged that *Sackett* requires the wetland be indistinguishable from a WOTUS to be jurisdictional but then indicated that a continuous surface connection to jurisdictional water "represents the *Sackett* adjacency test."[26] A similar pattern occurred in *Glynn Environmental Coal, Inc. v. Sea Island Acquisition, LLC*, where the United States District Court for the Southern District of Georgia also acknowledged that a wetland must be "practically indistinguishable" and then held that the property did not meet that definition because it failed the continuous surface connection test.[27]

The U.S. District Court for North Carolina specifically addressed whether "indistinguishable" was a separate test from presence of a continuous surface connection, and concluded it was not. The court in *White v. EPA* issued an order denying plaintiff's motion for a preliminary injunction that would stay implementation of the 2023 Amended Rule. Central to that denial was the court's conclusion that the plaintiff's assertion *Sackett* established a two-part test for when a wetland is jurisdictional was not correct.[28] The court noted "[t]he relationship between 'practically indistinguishable' and 'continuous surface connection' in *Sackett* is clear." After quoting the *Sackett* holding provided above, the district court stated "[p]ut another way, a wetland with a continuous surface connection is a 'water[] of the United States' because that continuous surface connection renders the wetland practically indistinguishable from the jurisdictional water to which it is connected. The continuous surface connection powers the test."[29]

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[25] *Rapanos v. United States*, 547 U.S., at 742, 755 (plurality opinion), quoted in *Sackett v. EPA*, Slip op. 27 (2023), internal quotation marks omitted.

[26] *Lewis v. United States,* 88 F.4th 1073, 1078 (5th Cir. 2023).

[27] *Glynn Environmental Coal, Inc. v. Sea Island Acquisition, LLC,* 2024 WL 1088585, at *4-6, 2024 U.S. Dist. LEXIS 45704, at *11-16 (S.D. Ga. Mar. 1, 2024.

[28] *White v. EPA*, E.D. N.C., No. 2:24-CV-00013-BO, order dated June 17, 2024.

[29] *Id*. at18.

The *White* court also quotes the *Rapanos* plurality: "'waters' may fairly be read to include only those wetlands that are 'as a practical matter indistinguishable from waters of the United States, … that occurs when wetlands have 'a continuous surface connection to bodies that are waters of the United States in their own right, so that there is no clear demarcation between waters and wetlands."[30] The White court concluded "[t]hus, whether using the phrasing from either *Rapanos* or *Sackett*, the [Supreme] Court has stated in no uncertain terms that the consequence of a 'continuous surface connection' with a covered water is indistinguishability with that water."[31]

Field staff would have substantial difficulty implementing a two-part test for adjacency, because of an internal logical inconsistency if a delineated wetland is required to be "indistinguishable" to be a WOTUS. Wetland delineation is a necessary step before an agency may determine if a wetland area is a WOTUS. Delineation identifies and maps the precise boundaries of wetlands on a property, based on the presence of wetland hydrology, soils, and vegetation. In effect, wetland delineation distinguishes the wetland area from uplands. If a definition of WOTUS required a jurisdictional wetland to be deemed "indistinguishable "from waters to which it is adjacent, no wetlands would be jurisdictional after they have been delineated.

NAWM and ASFPM recommend the Agencies interpret *Sackett* as establishing a single test for wetland adjacency, such that when a wetland has a continuous surface connection to a WOTUS it is viewed as indistinguishable from those waters and thus adjacent. A single test would be consistent with *Sackett* and could be readily implemented.

<u>The Definition and Scope of Jurisdictional Ditches</u>

The WOTUS Notice asks for information regarding how ditches should be defined, when such ditches should be considered WOTUS, and what characteristics could appropriately help distinguish between jurisdictional and non-jurisdictional ditches.

Under the 2015 CWR, ditches were considered WOTUS when they met the definition of "tributary" and were not expressly excluded.[32] Examples of jurisdictional ditches under the CWR included ditches with perennial flow, ditches with intermittent flow that are excavated in or relocating tributaries or are draining wetlands, and ditches excavated in or relocating a tributary regardless of flow.[33] The CWR expressly excluded ditches with ephemeral flow

[30] *Rapanos,* quoted in *Sackett*, 547 U.S at 742, 755, quoted in *White v. EPA*, E.D. N.C., No. 2:24-CV-00013-BO, order dated June 17, 2024, at 19.
[31] *Id.* at 19-20.
[32] 80 Fed.Reg. 37054, 37078 (June 29, 2015); 33 C.F.R. §328.3(c)(3).
[33] *Id*.

that are not excavated in or relocating a tributary, ditches with intermittent flow that are not excavated in or relocating a tributary and do not drain wetlands, and all ditches that do not flow into a traditional navigable water, interstate water, or territorial sea.[34]

Like the CWR, the 2020 NWPR identified some ditches as jurisdictional tributaries and excluded others from jurisdiction, based in part on their flow regime. Under the NWPR, ditches constructed in or relocating a tributary were considered WOTUS, as were ditches constructed in adjacent wetlands, so long as they contribute perennial or intermittent flow in a typical year to a traditional navigable water.[35] The 2023 WOTUS Rule noted that "[d]itches" (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water" are excluded from the definition of WOTUS. [36]

The CWA and its legislative history do not resolve the jurisdictional issue for ditches, other than indicating some ditches are jurisdictional by providing statutory exemptions for certain activities discharging dredged or fill material in jurisdictional ditches.[37] The Agencies have considered various approaches to ditches in the past, such as including as WOTUS all tidal ditches while excluding non-tidal ditches from WOTUS regardless of flow regime,[38] generally excluding ditches excavated on dry land but evaluating specific ditches on a case-by-case basis,[39] and excluding ditches (including roadside ditches) excavated wholly in and draining only uplands that do not carry a relatively permanent flow of water.[40] All approaches have been subject to criticism, whether for jurisdictional purposes they focused on the natural versus man-made characteristics, on flow regime, on use for which the ditch was created, or on the effects of the ditch on the tributary system and its downstream traditional navigable waters.

Definition of "Ditch."

Ditches have historically been one of the most challenging issues when defining WOTUS. The concept of "ditch" has remained vague and the term not well-defined, in part because

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[34] *Id.* at 37097; 33 C.F.R. §328.3(b)(3).
[35] 85 Fed.Reg. 22250, 22295 (April 21, 2020); 33 C.F.R. §328.3(c)(12).
[36] 88 Fed.Reg. 3004; 3142; 33 C.F.R. §328.3(b)(3).
[37] CWA §404(f), 33 U.S.C. §1344(f). Canons of statutory interpretation include the concept that Congress would not enact a nullity, suggesting that at least some ditches are WOTUS or certain activities would not need permit exemptions. See generally, e.g., Congressional Research Service, "Statutory Interpretation: Theories, Tools, and Trends" (April 5, 2018).
[38] 40 Fed.Reg. 31320, 31321 (July 25, 1975).
[39] 51 Fed.Reg. 41206, 41217 (November 13, 1986).
[40]88 Fed.Reg 3004, 3112 (January 18, 2023); *see also* EPA and the Army Corps of Engineers, "Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States,"* 1, 12, (December 02, 2008).

naturally occurring streams often have been modified by man, and from the scientific point of view, constructed ditches often function as tributary with effects on the stream network similar to a naturally occurring stream.

In 2020, the NWPR defined "ditch" for the first time, indicating "the term 'ditch' means a constructed or excavated channel used to convey water."[41] The 2023 WOTUS Rule neither retained the NWPR definition nor provided its own definition of "ditch."

The 2020 definition of "ditch" raised implementation challenges. For example, the NWPR emphasized that when the Agencies asserted a ditch was a WOTUS, the Agency had the burden of proof to determine that a ditch was originally constructed in a tributary or adjacent wetland that would have been jurisdictional under the NWPR.[42] The jurisdictional analysis and required data for tributaries or adjacent wetlands were challenging under the NWPR because of a lack of available historical data, and were more so when in the context of ditches built many years ago. Also, the NWPR provided that ditches are jurisdictional if they relocate a tributary but was unclear if the ditch needed to divert 100% of the tributary's flow or relocate the entire streambed.[43]

One amendment to the 2020 definition of "ditch" that might lessen these implementation challenges is to indicate that the term 'ditch' means a channel constructed or excavated *in uplands* used to convey water." Over 15 years of experience implementing the 2008 *Rapanos* Guidance indicates that field staff are able to determine if a channel was created in uplands. Limiting the definition of "ditch" to channels constructed or excavated in uplands would most likely protect channelized and relocated streams and thus be consistent with the goal of the CWA to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

NAWM and ASFPM recommend that a revised definition of WOTUS include a definition of "ditch" for clarity and indicate a feature must have been created in uplands to be considered a "ditch" for purposes of excluding ditches from WOTUS.

Distinctions Between Jurisdictional and Non-Jurisdictional Ditches.

NAWM and ASFPM agree with the WOTUS Notice that clarity about the status of ditches is very important and believes ditch status must be consistent with the goals and agency authorities under the CWA and be capable of being implemented. This suggests at least three possible approaches: focus on a ditch's role in the tributary system, focus on the purpose for which the ditch was created, or a focus on both a ditch's relationship to the

[41] 85 Fed.Reg. 22250, 22295, 22338 (April 21, 2020); 33 C.F.R. 328.3(c)(2).
[42] 85 Fed.Reg. 22250, 22299 (April 21, 2020).
[43] *Id*.

tributary system and whether it was created in upland or in waters. For reasons discussed below, NAWM and ASFPM are not supportive of a ditch's jurisdictional status being determined by its purpose.

The primary goal of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the nation's waters,"[44] indicating that agency decisions interpreting key terms and implementing statutory programs should be done in a manner consistent with that goal with results furthering that goal. This suggests an approach that regulates ditches functioning as tributaries and that have at least relatively permanent flow, regardless of their origins or purpose. This approach would protect as WOTUS those ditches functioning as tributaries with flow consistent with *Sackett*, as well as tidal ditches and ditches that are excavated in or relocate tributaries. Under this approach, ditches not connected to the tributary system would be excluded from jurisdiction. A challenge with this approach would be the number of ditches potentially jurisdictional and the associated administrative burden of applying CWA programs to those ditches, which would affect not only the number of jurisdictional determinations and discharge permits potentially required but also the number of waters in need of CWA water quality standards.

An alternative approach to ditches would be to not focus on whether a ditch is functioning as tributary, but instead to consider the ditch's origins and exclude specific categories of ditches from WOTUS based on the purpose for which the ditch was created, such as roadside drainage or agricultural water delivery. This approach would be responsive to various stakeholders who over the years have sought an exclusion for their ditches for various reasons, such as public safety, food security, or an aversion to regulation.

However, roadside ditches can drain roads and efficiently intercept the runoff from adjacent hill slopes, rapidly carrying that water to streams. Along with that water, ditches can transport road salts, fertilizers, viable pathogens, and other pollutants. Agricultural ditches can have similar functions. As a result, this approach would not be sensitive to the "restore and maintain" goal of the CWA because it would not consider a ditch's impact on the integrity of the tributary system and downstream waters and could result in channelized or relocated streams being excluded from jurisdiction. The approach also requires historic information about the ditch's original construction and purpose, which can be challenging to locate. In addition, the approach raises questions about jurisdictional status if the use of the ditch has changed since its construction.

A third possible approach to ditches is a blend, considering the ditch relationship to the tributary system as well as the ditch's origins and functions. As the Agencies have noted in

[44] CWA §101(a), 33 U.S.C. §1251(a).

past WOTUS-related preambles, modified and constructed ditches can perform the same functions as tributaries, especially the conveyance of water that carries organisms, nutrients, pollutants, and other constituents, both good and bad, to traditional navigable waters. Ditches that connect to the tributary system quickly move water downstream to traditional navigable waters due to their often straightened and channelized nature, transporting downstream sediment, nutrients, and other materials. The important relationship between a covered tributary and a traditional navigable water is not broken where the covered tributary flows through a culvert or other structure.

Under this third approach, tidal ditches would continue to be categorically considered WOTUS. Non-tidal ditches could only be WOTUS if they have a bed and banks and another indicator of relatively permanent flow, connect directly or indirectly through other tributaries to a traditional navigable water, and have at least one of the following four characteristics: (1) the ditch is a natural stream that has been altered, such as channelized, straightened, or relocated; (2) the ditch has been excavated in WOTUS including wetlands; or (3) the ditch connects two or more jurisdictional WOTUS. This third approach likely is not as expansive as the first approach or scientifically problematic as the second approach. It would exclude ditches excavated only in uplands that drain only uplands or non-jurisdictional waters and have no more than ephemeral flow. As a result, most roadside and agricultural ditches would be excluded if they are excavated in uplands and have only ephemeral flow. It also would exclude ditches not connected to the tributary system. This approach to ditches is familiar and capable of being implemented because it would be consistent with the *Rapanos* Guidance in effect for many years.

NAWM and ASFPM recommend that a revised definition of WOTUS consider ditches to be jurisdictional when they have the physical characteristics of a tributary and provide relatively permanent flow to a traditional navigable water as described above.

Closing

Thank you for the opportunity to submit information, policy recommendations, and other feedback in support of efforts by EPA and the Corps to develop a clear definition of WOTUS protected under by the CWA. NAWM and ASFPM support the agencies' objective of developing a clarified definition that is fully consistent with CWA goals and authorities while being informed by implementation experience and aquatic resource science.

Although these comments have been prepared by NAWM with input from the NAWM Board of Directors and in close coordination with ASFPM, they do not necessarily represent the individual views of all states and Tribes. Specifically in regard to Tribes, the United States retains a trust responsibility for water quality protections entirely distinct from its

regulatory authority under the CWA. This trust responsibility is a separate and standalone obligation from the CWA. It is stated in treaties, statutes, and executive orders, and supported by the courts. As such, we encourage your full consideration of the comments from the National Congress of American Indians, as well as those of individual states and Tribes, and other state and Tribal associations.

Sincerely,

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