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EPN Comments on "WOTUS Notice: the Final Response to SCOTUS"
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The Environmental Protection Network (EPN) harnesses the expertise of more than 650 former Environmental Protection Agency (EPA) career staff and confirmation-level appointees from Democratic and Republican administrations to provide the unique perspective of former regulators and scientists with decades of historical knowledge and subject matter expertise.

In March 2025, EPA published a Federal Register Notice announcing listening sessions and soliciting stakeholder feedback on certain topics related to the definition of "waters of the U.S." (WOTUS) in light of the Supreme Court's 2023 decision in *Sackett v. EPA*. EPA stated that the amended 2023 WOTUS rule did not adequately comply with the *Sackett* decision, especially as it relates to implementation of which features are "connected to" "relatively permanent" waters and to which waters those phrases apply; implementation of the "continuous surface water connection" requirement and to which features that phrase applies; and which ditches are properly considered "WOTUS."

Under the Water Quality Act of 1965, federal regulatory authority was limited to interstate waters, and protection of all other waters relied on state enforcement of state water quality standards. The dramatic failures of the state regulatory system led to Congressional passage of the Federal Water Pollution Control Amendments of 1972 which established the Clean Water Act (CWA) and expanded federal jurisdiction to "navigable waters," defined as "waters of the U.S. and the territorial seas." Navigable waters had traditionally been identified as waters that had been, were now, or could be used in interstate commerce. However, the conference committee report accompanying the CWA stated that Congress intended the term "navigable waters" "be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." The 1972 CWA has been amended several times. This explicit conference report language regarding WOTUS importantly identifies Congressional intent on the scope of navigable waters under the CWA.

The scope of the waters and wetlands under the jurisdiction of the CWA is critically important to the goals of the CWA "to restore and maintain the chemical, physical and biological integrity of the Nation's waters" 33 U.S.C. 1251(a). To achieve this goal, the statute prohibits discharging pollutants into "the waters of the U.S., including the territorial seas" without a permit. In addition, CWA requirements for water quality standards, impaired water processes, oil spill prevention, preparedness and response, tribal and state certifications also rely on the scope of WOTUS.

EPN is submitting to the docket our comments on the three key issues identified in the Notice – the definition of relatively permanent waters, the definition of continuous surface water connection, and the definition of which ditches are WOTUS. Additionally, as noted below, EPN has concerns with EPA's complete dismissal of EPA's prior interpretations of WOTUS under *Rapanos v. United States* and *Sackett* "in guidance or training materials that assumed a discrete feature establishing a continuous surface connection

[is] rescinded."[1] The rescinded guidance and training materials reflected the agencies' reasonable interpretation of the *Sackett* decision and relied on and incorporated the Scalia plurality opinion from the *Rapanos* decision. In the March 12, 2025 Memorandum, the new interpretation maintains the necessary connection through a continuous surface connection, but restricts the interpretation to an expansion of what the connection must be beyond a discrete conveyance, and recognizing the "line drawing problem is difficult" without explaining how the existing interpretation was incorrect. This new directive to abandon an established, reasonable and implementable application of *Sackett* has itself no basis in law to add unnecessary restrictions inconsistent with the Congressional goals of the statute.

EPN encourages the agencies to maintain the previous articulated interpretation of the Court's decisions regarding "Continuous Surface Connections" and "Relatively Permanent Waters" which provides for a clearly articulated standard to follow. Moreover, it should be made clear that the terms "continuous surface connections" refer to the question of adjacency for "wetlands" and are not relevant to the scope of "relatively permanent waters." The *Sackett* Court itself recognized that some tributaries may have reaches that are subject to "dry spells" and yet remain jurisdictional.[2]

Definition of Relatively Permanent Waters

It is vitally important for the health and welfare of the American people that intermittent waters continue to be protected by the CWA, as they have been protected since its inception, both before and after the 2015, 2020, 2022, and 2023 rules were promulgated. Regulations promulgated by the U.S. Army Corps of Engineers (COE) in 1986 and EPA in 1988 defined WOTUS as traditionally navigable waters, all interstate waters, and "all other waters," including intermittent streams and wetlands, "the use, degradation or destruction" of which "could affect interstate or foreign commerce" and wetlands "adjacent to" other jurisdictional waters. Those regulations now comprise the "pre-2015 WOTUS" and are in effect in 26 states. The 2020 rule removed ephemeral waters from CWA jurisdiction but retained "perennial and intermittent tributaries which contribute surface water flow in a typical year to traditional navigable waters and the territorial seas." The 2022 and 2023 amended rule also included perennial and intermittent tributaries as WOTUS. The 2023 amended rule is in effect in 24 states, the District of Columbia, and U.S. territories.

EPN is aware that the Competitive Enterprise Institute (CEI) has developed a set of recommendations for EPA which calls on Congress to limit CWA jurisdiction to: 1) hydrologic features where standing or flowing water is ordinarily present on the surface for more than 270 days annually or 2) waterways that are used or capable of use for transporting goods in interstate or international commerce. CEI recognizes that such a narrow definition of relatively permanent waters would require a statutory change and could not be accomplished with a regulation change. Unfortunately, the Pacific Legal Foundation (PLF) submitted similar comments to the docket on this Notice, calling for a required minimum flow volume and duration to limit CWA jurisdiction only to waters flowing for a majority of the year and those that are navigable. EPN agrees with CEI that such a narrowing would require a statutory change and thus should not be included in any new regulations, as PLF has recommended. EPN further notes that such a narrowing would be inconsistent

[1] 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. March 12, 2025.

[2] "We also acknowledge that temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells." *Sackett v. USEPA,* 598 U.S. 27 (2023).

with the goals of the CWA in section 101(a) and could impair the protection of the Nation's waters and public health.

In order to fully understand the scope of WOTUS, it is important to note in its opinion, the *Sackett* Court specifically cited to and relied on the Scalia plurality position articulated in *Rapanos*. EPA and COE also relied on and adopted the positions articulated in these decisions. Accordingly, even though EPA in its recent notice has rescinded prior WOTUS guidance and training materials, it is still instructive to look to how the Scalia plurality decision was cited in the guidances issued by EPA and COE to understand the Court's view of the scope of jurisdiction for wetlands in particular, and the discussion about a "continuous surface connection." [3]

In the 2008 *Rapanos* Guidance, EPA quoted from the *Rapanos* case:

> "Four Justices, in a plurality opinion authored by Justice Scalia, rejected the argument that the term waters of the United States, is limited to only those waters that are navigable in the traditional sense and their abutting wetlands. However the plurality concluded that the agencies' regulatory authority should extend only to 'relatively permanent, standing, or continuously flowing bodies of water' connected to Traditionally Navigable Waters, and to 'wetlands with a continuous surface connection to' such relatively permanent waters."

To further explain the term "continuous surface connection", the *Rapanos* Guidance further quotes from the *Rapanos* decision, which is also quoted in the preamble to the most recent proposed definition of waters of the U.S. issued in January 2023. Citing to the *Rapanos* decision, the January 2023 preamble states at 88 FR 3095:

> "A continuous surface connection does not require a constant hydrologic connection. Rather, the agencies will identify a continuous surface connection consistent with the *Rapanos* plurality opinion, which indicates that the continuous surface connection requirement is a "physical-connection requirement." 547 U.S. at 751 n.13; see also *Rapanos* Guidance at 7."

And at 88 FR 3096:

> "A continuous surface connection is not the same as a continuous surface *water* connection, by its terms and in effect. Therefore, because the *Rapanos* plurality opinion requires only a "continuous surface connection," the relatively permanent standard in this rule, consistent with the plurality opinion, does not require surface water to be continuously present between the wetland and the tributary."

We recognize EPA has decided to rescind all the prior guidance and training materials that discuss this issue. However, since the guidance was based on and cited specifically to the court's opinions in *Rapanos* and *Sackett,* it helps inform the discussion, and **we recommend that EPA define relatively permanent waters using the 2023 rule's description of "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."**

[3] Clean Water Act Jurisdiction Following the US Supreme Court's Decision in Rapanos v. United States & Carabell v. United States.

We do not recommend that the definition include a specific flow regime, flow duration, or seasonality information because those characteristics are too site specific for a national definition.

The US Geological Survey (USGS) was aware of these site specific differences and simply defined intermittent waters as "a stream that flows only when it receives water from rainfall runoff or springs, or from some surface source such as melting snow"; defined ephemeral waters as "a stream or part of a stream that flows only in direct response to precipitation; it receives little or no water from springs, melting snow, or other sources; its channel is at all times above the water table"; and defined perennial waters as "a stream that normally has water in its channel at all times." EPN recommends that EPA use these definitions in any future rulemaking on WOTUS.

EPA has documented the unequivocal scientific evidence on the importance of intermittent streams in two key reports: The "Ecological and Hydrological Significance of Ephemeral and Intermittent Streams in the Arid and Semi-Arid Southwest" [4] and the "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence." [5] Those reports explain that intermittent and ephemeral streams comprise almost 60% of stream miles in the continental U.S. and over 80% of stream miles in the arid and semiarid Southwest. It is thus critically important that intermittent waters remain protected in order to preserve and protect these scarce resources in the arid Southwest. In the continental U.S., about 117 million people, over one-third of the U.S. population, get some or all of their drinking water from public drinking water systems that rely at least in part on intermittent and ephemeral streams. EPA provides a map showing these data for each county in the country.[6] In addition to clean drinking water, intermittent waters are critical for achieving the CWA goal of fishable swimmable waters and provide: 1) flood and erosion protection by absorbing significant amounts of rainwater, runoff, and snowmelt that moderates downstream flooding; 2) groundwater recharge through the stream bed which is gradually released into stream channels, a major source of annual flows in Southwest rivers; 3) pollution reduction by retaining sediments and excess nutrients; and 4) critical wildlife habitat including spawning and nursery areas, seasonal feeding areas, refuge from predators and competitors, shelter from extreme weather, and travel corridors.

In addition to protecting public health from contaminated water and fish, intermittent waters are key to providing the quantity and quality of water needed for the economic vitality of the U.S. manufacturers of multiple products and America's farmers whose farm irrigation requires clean, plentiful water that will no longer be available if intermittent waters are no longer protected from discharges of pollutants. There are currently permitted pollutant discharges into intermittent waters throughout the country that will lose national permitting limits designed to protect human health and the environment if these waters lose CWA jurisdiction.

Field Identification of Relatively Permanent Waters

There are three new developments that will aid landowners in determining whether their activities will affect a relatively permanent water. First, the USGS National Hydrography Dataset, which did not do a good job differentiating ephemeral from intermittent streams, is being replaced with the new 3D Hydrography

[4] https://www.epa.gov/sites/default/files/2015-03/documents/ephemeral_streams_report_final_508-kepner.pdf
[5] https://cfpub.epa.gov/ncea/risk/recordisplay.cfm?deid=296414
[6] https://www.epa.gov/cwa-404/geographic-information-systems-analysis-surface-drinking-water-provided-intermittent

Program (3DHP)[7]. Building on decades of experience maintaining the National Hydrography Dataset, the Watershed Boundary Dataset, and the NHDPlus High Resolution, the USGS is remapping the nation's waters with much greater accuracy. Those new maps will be available to the public. Second, EPA has developed rapid, field-based Regional streamflow duration assessment methods (SDAMs) to determine whether flows are perennial, intermittent, or ephemeral.[8] Third, the Arizona Department of Environmental Quality (ADEQ) developed an award-winning method for identifying intermittent waters using satellite imagery, snowpack records, and groundwater depth.[9] ADEQ uses satellite imagery and geographic information systems (GIS) software to measure the shrubs and vegetation that grow within water channels. If more than 50% of the channel has vegetation, that indicates an intermittent flow. Elevation and snowpack records are used to identify waterways likely to be affected by snowmelt for more than 30 days, and groundwater records showing shallow depths indicate intermittent waters. Within one year, ADEQ was able to analyze 5,712 miles of waterways using this approach.

Definition of Continuous Surface Connection

The court in the *Sackett* decision Syllabus noted that "[t]o determine when a wetland is part of adjacent "waters of the United States," the Court agrees with the *Rapanos* plurality that the use of "waters" in §1362(7) may be fairly read to include only wetlands that are "indistinguishable from waters of the United States." This occurs only 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." 547 U.S., at 742.

> "In sum, the CWA extends to only wetlands that are "as a practical matter indistinguishable from waters of the United States." This requires the party asserting jurisdiction to establish "first, that the adjacent [body of water constitutes] . . . 'water[s] of the United States' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Rapanos,* 547 U.S., at 755, 742. Pp. 18–22." [10]

It is important that the *Sackett* court relied heavily on the language in *Rapanos*, focusing on the continuous surface connection which implies a hydrologic connection that allows water to flow into and out of the wetlands to the adjacent water body. EPN believes that the best reading of both *Sackett* and the *Rapanos* plurality is that the phrase "continuous surface connection" relates primarily to the adjacency of a wetland to a WOTUS and should not be confused with "relatively permanent" which may cover intermittent tributaries. Restricting the definition of continuous surface connection to a broader undefined area will result in confusion in application.

The January 2023 preamble states at 88 FR 3095: "Wetlands also meet the continuous surface connection requirement if they are connected to relatively permanent waters by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert. This is because a ditch or other such feature can serve as a physical connection that maintains a continuous surface connection between an adjacent wetland and a relatively permanent water."

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[7] https://www.usgs.gov/3d-hydrography-program
[8] https://www.epa.gov/streamflow-duration-assessment
[9] https://adeq.gov/flow-regimes
[10] https://www.supremecourt.gov/opinions/22pdf/21-454_4g15.pdf

Further, the 2023 preamble to the WOTUS rule states, "a natural berm, bank, dune, or similar natural landform between an adjacent wetland and a relatively permanent water does not sever a continuous surface connection to the extent it provides evidence of a continuous surface connection" 88 FR 3095.

In other words, if there is a connection between the wetlands and the downstream conveyance it is not severed by the presence of a berm or other similar feature.

Definition of Ditches

Many ditches are important drainage features that are connected to downstream waters and in themselves may be a continuous surface connection based on the Supreme Court's discussion. Since many ditches are adjacent to roads, or traverse farm fields or forestry operations, they have the potential to transport pollutants downstream to traditionally navigable waters and may be jurisdictional unless exempt under the existing provisions of the CWA and implementing regulations such as ongoing silvicultural operations and farming. The distinctions between ditches that meet the definition of a continuous surface connection and therefore should be considered jurisdictional and ditches that do not meet the definition of a continuous surface connection and are generally non-jurisdictional are not always clear. A ditch would be jurisdictional if it meets the definition of a tributary, if it is perennial or intermittent and contributes surface water flow to a traditionally navigable water or the territorial seas in a typical year. This can include ditches that have been merely redirected or channelized that would have otherwise been a tributary. Clearly these are factual inquiries and some ditches will meet the jurisdictional threshold using the methods referenced above. EPN clearly recognizes that many ditches are not jurisdictional. However, EPA should not take the position that all ditches are not jurisdictional or not considered a continuous surface connection if they otherwise meet the definition articulated by the *Sackett* and *Rapanos* cases. .

Also, it is important to note that non-jurisdictional ditches that drain into WOTUS may be conveyances of pollutants from a point source into WOTUS that require permits under Section 402 of the CWA.

In conclusion, as EPA and the Corps move forward with this analysis, EPN encourages the agencies to follow the previous interpretations of the *Rapanos* and *Sackett* cases and not define the connection between the wetland and abutting WOTUS so narrowly that millions of acres of wetlands will lose jurisdictional status.