



April 23, 2025

Submitted via Regulations.gov

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RE: Comments on WOTUS Notice: The Final Response to SCOTUS, Docket No. EPA-HQ-OW-2025-0093, 90 Fed. Reg.13428 (Mar. 24, 2025)

Ms. Colosimo and Ms. Best-Wong:

The Western Urban Water Coalition (WUWC) appreciates the opportunity to submit comments on the U.S. Environmental Protection Agency's (EPA) and the Department of the Army's (collectively, the Agencies') notice of request for recommendations on the meaning of key terms to conform future agency guidance on the definition of "waters of the United States" (WOTUS) to recent Supreme Court precedent.¹

WUWC is a coalition of 21 of the largest western water utilities formed more than 30 years ago to address the unique water supply and water quality challenges facing the western United States.²

¹ WOTUS Notice: The Final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations, 90 Fed. Reg. 13428 (EPA, Mar. 24, 2025).

² WUWC was established in 1992 to address the West's unique water supply and water quality challenges, and consists of the following members: *Arizona* (Central Arizona Project, City of Phoenix and Salt River Project); *California* (Eastern Municipal Water District, East Bay Municipal Utility District, City of Los Angeles Department of Water and Power, The Metropolitan Water District of Southern California, San Diego County Water Authority, Santa Clara Valley Water District, and City and County of San Francisco Public Utilities Commission); *Colorado* (Aurora Water, Colorado Springs Utilities, and Denver Water); *Idaho* (City of Boise); *Nevada* (Las Vegas Valley Water District, Southern Nevada Water Authority, and Truckee Meadows Water Authority); *New Mexico* (Albuquerque Bernalillo County Water Utility Authority); *Utah* (Salt Lake City Public Utilities and Washington County Water Conservancy District); and *Washington* (Seattle Public Utilities).

WUWC members are nonprofit public utilities dedicated to providing a reliable, high-quality urban water supply for present and future generations. Our members serve over 40 million water consumers in major metropolitan areas in eight western states. WUWC has been very active in the regulatory initiatives to define what constitutes a jurisdictional water under the Clean Water Act (CWA) and administrative efforts to implement a WOTUS definition. We have appeared before congressional committees and Members of Congress and commented on various rulemakings and guidance documents. WUWC has also met with the Agencies on numerous occasions over the past decade to discuss the technical aspects of a WOTUS definition as it may impact the arid West.

Our previously submitted comments include the following:

- Comments on the Proposed Rule to Clarify the Definition of “Waters of the United States” under the Clean Water Act, Docket ID No. EPA-HQ-OW-2011-0880 (November 14, 2014)
- Clarification Sought on Final Rule to Clarify the Definition of “Waters of the United States” under the Clean Water Act (August 7, 2015)
- Comments on the Proposed Rule to Re-Codify the Pre-Existing Definition of “Waters of the United States,” Docket ID No. EPA-HQ-OW-2017-0203 (September 27, 2017)
- Comments on the Proposed Rule to Add Applicability Date to 2015 Clean Water Rule, Docket ID No. EPA-HQ-OW-2017-0644 (December 13, 2017)
- Comments on the Proposed Rule on the Revised Definition of “Waters of the United States,” Docket ID No. EPA-HQ-OW-2018-0149 (April 15, 2019)
- Comments on Notice of Public Meetings Regarding “Waters of the United States,” Docket ID No. EPA-HQ-OW-2021-0328 (September 3, 2021)
- Comments on the Proposed Rule on the Revised Definition of “Waters of the United States,” Docket No. EPA-HQ-OW-2021-0602 (Feb. 7, 2022)

WUWC members have a strong interest in clean water for municipal water supplies and in the regulatory processes protecting water quality. In particular, WUWC members are concerned with the predictability and certainty of whether a water body is subject to the CWA and in reducing costs and delays in obtaining necessary permits. The requirements for issuance of permits under sections 402 and 404 of the CWA are of great significance to WUWC members because, as municipal water providers, WUWC members build reservoirs and other essential water supply related infrastructure, including long pipelines, as well as recharge and reuse facilities. In addition, many of our members are multi-service utilities and also provide stormwater and wastewater services to our customers. For these reasons, WUWC supports the Agencies’ intention to clarify the areas qualifying as WOTUS and ensure transparent, efficient, and predictable implementation for our members. As efforts to explain the definition of WOTUS progress, WUWC encourages the Agencies to consider how their actions impact the ability of water providers to balance competing water supply and environmental protection needs, especially in the West.

A. Regulatory certainty in the application of WOTUS is crucial for effective implementation of the CWA.

Since the enactment of the Clean Water Act in 1972, the Agencies tasked with administering the statute have sought several times to issue regulations and guidance defining what qualifies as WOTUS.³ The definition of WOTUS is one of the most heavily litigated issues in environmental law.⁴ The scope of the Agencies' jurisdiction has oscillated dramatically over the last two decades.⁵ Most recently, in *Sackett v. EPA*,⁶ the Court concluded that the "CWA's use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'"⁷ Only wetlands that are "as a practical matter indistinguishable from waters of the United States" fall within the Act's purview.⁸ To establish jurisdiction, a party must prove "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."⁹

While the Court's opinion focuses on jurisdiction over wetlands, two terms used in the *Sackett* opinion are key to its broader applicability to jurisdictional interpretations of WOTUS: "relatively permanent flow" and "continuous surface connection." The meaning of these terms is ambiguous; resolving that ambiguity is key to alleviating the longstanding regulatory confusion that has characterized WOTUS determinations in the arid West and unnecessarily complicated the construction, maintenance, and operation of infrastructure critical to our members' water supply activities.

³ The history of WOTUS regulation and litigation is well-documented. *See, e.g., See* Brief for Respondents at 3-13, 31-38, *Sackett v. Env't Prot. Agency*, 598 U.S. 651 (2023); *see also* 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), <https://www.epa.gov/system/files/documents/2025-03/2025cscguidance.pdf>. This comment letter does not seek to add to the voluminous explanations of the many changes to the definition and implementation of WOTUS.

⁴ *See, e.g., United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006); *County of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165 (2020). Notably, none of the features at issue in these cases were like the ephemeral drainages prevalent in the arid West as discussed below.

⁵ *Compare Rapanos*, 547 U. S. at 722 (plurality opinion) (noting that the Agencies had "interpreted their jurisdiction over 'the waters of the United States' to cover 270-to-300 million acres" of wetlands and "virtually any parcel of land containing a channel or conduit . . . through which rainwater or drainage may occasionally or intermittently flow."), with *The Navigable Waters Protection Rule: Definition of "Waters of the United States,"* 85 Fed. Reg. 22250, 22340 (EPA, Apr. 21, 2020) (Final Rule) (limiting jurisdictional authority to traditional navigable waters and their tributaries, lakes, and "adjacent" wetlands.).

⁶ *Sackett*, 598 U.S. 651 (2023).

⁷ *Id.* at 671 (citing *Rapanos*, 547 U.S. at 739 (Scalia, J., plurality opinion)). The case also rejected the "significant nexus" standard, stating that "the CWA never mentions the 'significant nexus' test, so the EPA has no statutory basis to impose it." *Id.* at 680.

⁸ *Id.* at 678.

⁹ *Id.* at 678-79 (citing *Rapanos*, 547 U.S. at 742, 755 (plurality opinion) (citations omitted) (emphasis added) (bracketed language in original)).

B. WUWC advocates for regulations and informed guidance that account for the arid West in defining key terms like “relatively permanent,” “continuous surface connection,” and “jurisdictional ditches.”

1. “Relatively Permanent”

The term “relatively permanent” should include water features that typically flow year-round or that have continuous surface flow at least three months of the year. This is consistent with the *Rapanos* Guidance, pursuant to which waters that have a continuous flow at least seasonally (e.g., typically three months) are subject to CWA jurisdiction.¹⁰ Additionally, the Agencies have previously stated that “[t]he seasonal ‘typically three month’ approach is current practice, subject to case-by-case analysis, and is therefore familiar to agency staff and the regulated public, but like a one-month limitation, it may not provide for regional variation in the implementation of flow regime.”¹¹ Any definition of “relatively permanent” should ensure that navigable waters are protected while avoiding the kind of confusion that results when the Agencies rely on standards that are not suited to a determination of jurisdiction over the mostly dry ephemeral drainages found in the arid West.¹²

Dry ephemeral and intermittent drainages are very common in the western U.S. Future rulemakings should clarify that these features are outside the scope of “relatively permanent.” WUWC requests that “ephemeral” and “intermittent” streams be formally defined in any future rulemaking using the longstanding definitions employed throughout the U.S. Army Corps of Engineers (Corps) guidance:

- “An *ephemeral stream* has flowing water only during and for a short duration after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow.”¹³
- “An *intermittent stream* has flowing water during certain times of the year, when groundwater provides water for stream flow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow.”¹⁴

¹⁰ EPA, Clean Water Act Jurisdiction Following the U.S. Supreme Court’s Decision in *Rapanos v. United States & Carabell v. United States* (Dec. 2, 2008) (2008 *Rapanos* Guidance) at 1, available at https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.

¹¹ 84 Fed. Reg. 4154, 4178 (Feb. 14, 2019).

¹² The “arid West” means the arid and semiarid portions of the western states. The arid West region consists of desert and shrubsteppe ecosystems in the rain shadow of the Cascade and Sierra Nevada Mountain ranges, plus portions of central and southern California that have a Mediterranean climate with mild winters and dry summers. See ARID WEST WATER QUALITY RESEARCH PROJECT, ARID WEST WATER QUALITY RESEARCH PROJECT FINAL REPORT (2007).

¹³ See, e.g., U.S. ARMY CORPS OF ENGINEERS, DEFINITIONS OF TERMS, <https://www.nap.usace.army.mil/Missions/Regulatory/Definitions/> (last visited Apr. 23, 2025).

¹⁴ See, e.g., *id.*

EPA's 2020 Navigable Waters Protection Rule heavily relied on the "relative permanence" test.¹⁵ Though many ephemeral drainages of the arid West were excluded from WOTUS under the Navigable Waters Protection Rule, that rule did not fully clarify the CWA's application to the arid West. For example, although the Navigable Waters Protection Rule provided evidence-intensive methods to determine if a channel was intermittent (which would be a basis for being characterized as WOTUS under that rule), many such methods would require years of study and would be very expensive.¹⁶ Clarity in future guidance documents about the jurisdiction of ephemeral drainages is critical for our members. Solidifying the longstanding Corps definitions in future regulations would provide much needed clarity for our members.

2. "Continuous Surface Connection"

Under both the pre-2015 and amended 2023 rule regulatory regimes that are currently operative across the country,¹⁷ the Agencies are implementing "continuous surface connection" to mean abutting (or touching).¹⁸ In request for comment, the Agencies ask if a "continuous surface connection" includes wetlands behind a natural berm or similar natural landforms to the extent the natural landforms provide evidence of a continuous surface connection. Further, the Agencies ask whether certain features, such as flood or tide gates, pumps, or similar artificial features do or do not remove a wetland from being considered "adjacent" to the jurisdictional water on the other side of the feature. There are other features beyond those listed in the request for comment that should be considered in properly defining what constitutes a continuous surface connection. The features of a continuous surface connection may vary dramatically across the vast geographic scope of the United States, and, in particular, in the arid West.

a. The Pre-2015 Regulations

In *Rapanos*, the Court found that "only those wetlands with 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, are 'adjacent to' such waters and covered by the Act."¹⁹ Agency

¹⁵ The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. at 22340. Multiple challenges to the Navigable Waters Protection Rule were filed, but the rule ultimately went into effect until the Agencies halted its implementation in response to the decision in *Pascua Yacqui Tribe v. United States Env't Prot. Agency*, 557 F. Supp. 3d 949 (D. Ariz. 2021) (remanding and vacating the rule). See The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. at 22340.

¹⁶ See The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. at 22275–76.

¹⁷ See ENVIRONMENTAL PROTECTION AGENCY, DEFINITION OF "WATERS OF THE UNITED STATES": RULE STATUS AND LITIGATION UPDATE, <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update> (last visited Apr. 1, 2024) ("As a result of ongoing litigation on the January 2023 Rule, the agencies are implementing the January 2023 Rule, as amended by the conforming rule, in 24 states, the District of Columbia, and the U.S. Territories. In the other 26 states, the agencies are interpreting 'waters of the United States' consistent with the pre-2015 regulatory regime and the Supreme Court's decision in *Sackett* until further notice.").

¹⁸ WOTUS Notice: The Final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations, 90 Fed. Reg. at 13430. Recent agency guidance rescinded guidance implementing an interpretation of "continuous surface connection" allowing "for wetlands far removed from and not directly abutting covered waters to be jurisdictional as adjacent wetlands" – noting that such guidance "has the potential to violate the direct abutment requirement for 'adjacent wetlands.'" Memorandum, *supra* note 3.

¹⁹ *Rapanos*, 547 U.S. at 742 (Scalia, J., plurality) (emphasis in original)

guidance post-*Rapanos* affirmed this interpretation, noting that a continuous surface connection means that the waters are *not* separated by “uplands, a berm, dike, or similar feature.”²⁰

b. The Amended 2023 Rule and Post-*Sackett* Guidance

The *Sackett* Court tacitly recognized the innate difficulties in determining whether a “continuous surface connection” exists.²¹ The ensuing guidance document issued by the Agencies explicitly noted this difficulty:

The *Sackett* Court recognized that there may be some instances where that line drawing problem is difficult, such as during periods of drought or low tide or in those instances where there may be *temporary interruptions* in surface connection. The agencies will work to resolve these scenarios on a case-by-case basis and provide further clarity when appropriate to guide future implementation.²²

c. Future Guidance

Future guidance should define the characteristics that distinguish jurisdictional from non-jurisdictional areas and features. As noted in *Sackett*, the definition of a “continuous surface connection” should account for temporary interruptions in surface connections that may sometimes occur because of phenomena like low tides or dry spells, which are common in the arid West. Ideally, such guidance would obviate most case-by-case determinations and realize important time and cost savings for critical infrastructure projects.

3. Jurisdictional Ditches

WUWC recommends that the Agencies exclude water supply and delivery facilities and infrastructure from the scope of jurisdictional “ditches.” Many western municipalities and water districts utilize ditches and canals as a part of their water delivery systems.²³ Such ditches often have flows on a perennial, or at least seasonal, basis. In other cases, municipal water providers may cross ditches in the construction of their water collection and delivery infrastructure, triggering a potential Section 404 permitting situation. Additionally, some western utilities may use ditches in conjunction with their stormwater collection and conveyance systems. Therefore, whether the ditches are themselves considered WOTUS can significantly impact municipal operations.

Most western ditches not only go to the river or stream (traditional navigable waters) for their points of diversion, but often return water back to a perennial or intermittent stream. Such return

²⁰ EPA, *supra* note 10 (“[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.”).

²¹ *Sackett*, 598 U.S. at 678 (“We also acknowledge that temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells.”).

²² Memorandum, *supra* note 3.

²³ The inappropriate regulation of ditches as a consequence of WOTUS determinations may run afoul of the administration of state water rights contrary to the language of Sections 101(g) and 510(2) of the CWA.

flows may, in fact, be legally required under their state water right decrees. Will the mere interface (*i.e.*, the necessary diversion structure) between the ditch and a jurisdictional water result in a determination that the ditch is a WOTUS? Would the downstream discharge to a WOTUS result in a similar conclusion? To categorize such ditches as WOTUS based on these facts would significantly interfere with their construction, maintenance, and operation without any significant water quality benefit.

The Agencies' rule or guidance should focus on the functions (*i.e.*, the nature and character of the ditch) as compared to its location. Waters found in ditches that have been designed as man-made conveyances to meet the water supply needs of cities, towns, and agriculture have been removed from the natural system and, therefore, should not be considered WOTUS any more than are the waters found in municipal distribution systems, artificial lakes or ponds, or certain stormwater control features.²⁴ Thus, regardless of a potential interface with a jurisdictional water, a ditch should be categorically exempt from treatment as WOTUS if its primary purpose is to capture and control waters and place them to beneficial use under state law, including municipal or agricultural use, or to control and convey stormwater run-off.

Finally, though it is appropriate to exclude such ditches from treatment as WOTUS, it should also be clarified that the status of such features as point sources is an individual state determination. Any blanket statement to the effect that the ditches constitute point sources leaves the door open to unintended consequences. For example, as described above, many western municipal and irrigation ditches discharge back to a river and, in fact, may be obligated to do so as a matter of state water law. Pollutants could have been inadvertently added to the ditch water over its length or the natural water quality at the point of discharge may differ from that at the point of diversion. It would be impractical and cost prohibitive to always treat such water before discharge.

* * *

WUWC and its members strongly support the water quality goals of the CWA and depend upon full and effective implementation of its requirements to help deliver high quality water to their customers. WUWC believes that it is possible to fashion WOTUS regulations and guidance that meet the objectives of the CWA while allowing for the efficient and cost-effective construction, maintenance, and operation of necessary water and wastewater infrastructure in the arid West and throughout the country. Our members are experienced, on-the-ground partners with the Agencies and the states in ensuring the safety and reliability of public water supplies. Based on this experience, WUWC wants to work with the Agencies to clarify the definition of WOTUS.

²⁴ See *Rapanos*, 547 U.S. at 736 n.7 (“[H]ighly artificial, manufactured, enclosed conveyance systems — such as ‘sewage treatment plants,’ ...and the ‘mains, pipes, hydrants, machinery, buildings, and other appurtenances and incidents’ of the city of Knoxville’s ‘system of waterworks,’ ...likely do not qualify as ‘waters of the United States,’ despite the fact that they may contain continuous flows of water.”) (internal citations omitted).

Thank you for the opportunity to provide these comments. If you have any questions regarding these comments, please contact me at 951.203.2804 or walshj@emwd.org.

Sincerely,

A handwritten signature in black ink that reads "Jolene Walsh". The signature is written in a cursive, flowing style.

Jolene Walsh
WUWC Chair