



April 15, 2025

Peggy Browne
Acting Assistant Administrator
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Robyn S. Colosimo, PE
Assistant Secretary of the Army for
Civil Works
U.S. Army Corps of Engineers
441 G Street, NW
Washington, DC 20314

Submitted to Regulations.gov, Docket ID No. EPA-HQ-OW-2025-0093

Re: Notice of Consultation and Coordination on Upcoming Efforts to Revise the Definition of “Waters of the United States”

Dear Acting Assistant Administrator Browne and Assistant Secretary Colosimo:

The National Tribal Water Council (NTWC), in collaboration with the National Tribal Caucus (NTC), submits the following comments to Docket No. EPA-HQ-OW-2025-0093, in response to the U.S. Environmental Protection Agency (US EPA) and U.S. Department of the Army’s (agencies) request for early input on the definition of Waters of the United States (WOTUS).

The request for input is relevant to implementing the 2023 WOTUS Rule,¹ as amended,² and the pre-2015 regulatory regime. The agencies raise questions about the application of *Sackett v. EPA* and determining jurisdictional waters under new administrative guidance and consistent with *Sackett*.

In the Tribal consultation notice, Tribes are being asked to evaluate the effects on treaties, sacred sites, and the integration of traditional indigenous knowledge. The NTWC and NTC have

¹ Revised Definition of “Waters of the United States”, 88 Fed. Reg. 3004 (Jan. 18, 2023).

² Revised Definition of “Waters of the United States”; Conforming, 88 Fed. Reg. 61964 (Sept. 8, 2023). The Conforming Rule directed the agencies to interpret the definition of WOTUS consistent with the *Sackett* decision.

decided not to address these issues in this submission. This decision was reached due to limited time and the complexity of reaching consensus among Tribes in a short time.

The NTWC and NTC offers early feedback on the impacts of the *Sackett* decision on Tribes, the inclusion of Tribal boundaries in the definition of Interstate Waters, and two categories of water – tributaries and adjacent wetlands – that are considered jurisdictional if they fulfill the relatively permanent or the continuous surface flow standards.

1. Potential Impacts of WOTUS Definition on Tribes.

A narrow definition of WOTUS used to determine whether a water body is subject to the Clean Water Act (CWA) has consequences for Tribes and raises concerns about the protection of their waters.

Tribes must decide whether and how to comply with changing federal coverage under the Clean Water Act, for example by relying on federal regulation or adopting and implementing Tribal protections for their reservation waters. The change in the interpretation of WOTUS resulting from judicial decisions or federal rulemaking can place a substantial burden upon Tribes. Waters that were formerly protected by federal law but are no longer, now require Tribes to determine whether to fill the gap through Tribal water programs under their own inherent authority. However, enacting new regulatory programs can be challenging; many Tribes cannot enact their own regulations because they lack the ability or funding to hire professional staff to develop and implement regulatory programs. And even if fully funded, enacting such programs takes time. Thus, it is not realistic for the agencies to assume that Tribes can choose to protect additional waters beyond those covered by the CWA.

Furthermore, as of this date, no Tribes have their own CWA permitting programs; only 84 of the 574 federally recognized tribes have obtained EPA authorization for treatment in a similar manner to a state (TAS) under CWA section 303(c); and only 83 are eligible to administer certifications under CWA Section 401. Section 401 allows eligible Tribes to review proposed federal permits and licenses that may result in a discharge into a WOTUS. But the narrow definition of WOTUS and scope of federal authority have significantly reduced the issuance of CWA permits and licenses, both inside and outside reservation boundaries, limiting these Tribes' opportunities to protect reservation waters.

In addition, Tribes located in dry regions, such as the arid southwest, rely heavily on streams and wetlands that depend on seasonal precipitation. Tribes are facing rising negative health and economic repercussions because of growing land development adjacent to and within Tribal lands, which has diminished vital cultural resources. As extreme heat and drought events become more common in this region, Tribes are at greater risk of losing aquatic ecosystems that provide clean drinking water and vital habitat for subsistence uses. The *Sackett* decision and the 2023 Amended Rule leave most of these seasonal flowing streams unprotected and will increase the loss of these important streams and wetlands.

2. Interstate Waters.

The NTWC and NTC strongly support the incorporation of Tribal boundaries into the definition of “interstate,” and for the consideration of a water crossing or the forming of a Tribal boundary as an interstate water for the purposes of the WOTUS definition. The NTWC advocated for this change in its pre-proposal comments dated February 7, 2022, urging that “interstate waters” encompass waters linked to Tribal boundaries.³

The NTWC and NTC remain confident that identifying such waters as “interstate” would be completely consistent with the long-standing approach to interstate waters, particularly when a water flows between state and Tribal lands, forming both a state and Tribal boundary. A similar case may be made for the “interstate” characteristics of the United States’ international boundaries. As a result, this interpretation is consistent with a long line of treaties, legislative efforts, and court decisions that recognize Tribal governments as sovereign entities. Explicitly recognizing waters linked with Tribal boundaries as “interstate” would be clearer than any previous WOTUS definition and would fulfill the federal government’s trust and treaty commitments to protect Tribal waters and water-dependent resources.

The NTWC and NTC recommend that the agencies incorporate waters that cross or create Tribal boundaries in the updated WOTUS definition. Similarly, for rivers and streams, interstate waters encompass the entire segment of the river or stream that corresponds to the same stream order⁴ at the point at which it intersects or delineates a state/Tribal or Tribal/Tribal boundary. This would offer a more precise definition of WOTUS.

3. Tributaries.

The determination of “relatively permanent” waters, including the identification of tributaries in the field, requires a site-specific assessment to determine if the tributary meets the standards for relative permanence. The agencies define tributaries that meet the relatively permanent standard as having continually flowing or standing water connected to traditional navigable waters, territorial seas, or interstate waters. *See* 40 C.F.R. § 328.3(a)(3); 88 Fed Reg. at 61965, 61968. Tributaries that exhibit flow or standing water only temporarily in response to precipitation are not classified as relatively permanent waters.

The 2023 Amended Rule doesn't set a minimum flow duration because flow durations vary significantly from region to region. For instance, establishing a uniform flow number that is equally applicable to the arid western region, the Great Lakes region, and the New England Forest would be scientifically inaccurate. The agencies have opted for a more adaptable

³ National Tribal Water Council’s Comments on Proposed WOTUS Rule 1, Docket ID No. EPA-HQ-OW-2021-0602-Updated Letter, at 9 (February 7, 2022), available at <https://www.regulations.gov/comment/EPA-HQ-OW-2021-0602-0593>.

⁴ 86 Fed. Reg. 69372, 69418 (December 7, 2021).

implementation method that accounts for the distinct conditions in each region. The agencies should utilize “direct response to precipitation” to distinguish between episodic flow resulting from discrete precipitation events and sustained flow over extended durations that meet the threshold of relatively permanent. Tributaries could be classified as relatively permanent in the same geographic area year after year if they flow or have standing water continuously at specified periods of the year, but for a longer period than just in response to precipitation.

The NTWC and NTC recommend that the agencies continue to recognize the importance of seasonal waters across the country, particularly in arid regions. Such waterways should be governed as tributaries, with appropriate regional considerations, using field guidance and general permits.

The 2023 Amended Rule also supports relatively permanent flow where long periods of standing, or continuously flowing water do not correspond to naturally occurring yearly or seasonal trends. *See* 88 Fed. Reg. at 3085. Specifically, the Rule would consider as WOTUS relatively permanent waters, including tributaries, whose flow is mostly determined by various water management regimes and practices. Examples include tributaries affected by artificial flow alternation, such as diversions, bypass canals, and water transfers, as well as effluent-dependent streams. In an effort to manage flood control, government agencies frequently restrict or block off tributaries that might otherwise flow between adjacent waterbodies. The Miccosukee Tribe have raised concerns over the impacts of such water management practices in the Florida Everglades. Artificial structures, such as flood gates, when opened or closed, define a relatively permanent relationship to WOTUS.

The NTWC and NTC recommend that the agencies maintain this interpretation and make clear in an amended definition of WOTUS that relatively permanent waters encompass tributaries whose flow is directly or indirectly influenced by various water management regimes and practices rather than solely by annual or seasonal cycles.

4. Adjacent Wetlands.

On March 12, 2025, the agencies released a memorandum providing guidelines that would promote national clarity and eliminate confusion about the definition of a “continuous surface connection” as it relates to jurisdictional decisions of adjacent wetlands under the CWA.⁵ The memorandum provides guidance on how the agencies will decide which wetlands are protected under the CWA and establishes criteria for identifying federally protected waters. The new guidance defines a two-part test for linking one body of water to an adjacent wetland to qualify as WOTUS: first, the adjacent wetland must connect to a traditional navigable or relatively

⁵ Memorandum to the Field Between the U.S. Department of the 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), <https://www.epa.gov/system/files/documents/2025-03/2025cscguidance.pdf>.

permanent water body; second, the wetland must exhibit a direct surface water connection to that water,⁶ making it difficult to distinguish where the water ends, and the wetland begins.

The NTWC and NTC have concerns regarding the application of the two-part test, which establishes a narrow definition of adjacent wetlands, primarily those with a continuous surface water connection to WOTUS and that are characterized as indistinguishable from WOTUS itself. When evaluating a “continuous surface connection” for a relatively permanent water body, determining whether the wetland is indistinguishable as a two-part or single test may prove to be controversial.

In the Amended 2023 Rule, previously the agencies determined that if the covered water has a continuous surface connection, it is presumed to be indistinguishable and does not require passing both tests. *See* 40 C.F.R. § 328.3(a)(4) and (c)(2). A wetland that has a continuous surface connection to a covered water should be considered a WOTUS and end the inquiry. It would be contradictory for US EPA or the Army Corps to find a wetland that has a continuous surface connection to a covered water yet conclude the wetland is not a WOTUS because the agency did not find the wetlands boundaries indistinguishable from the covered water. A non-jurisdictional decision in this situation is ambiguous, open to judicial challenges, and would cause more uncertainty.

The NTWC and NTC recommend that the agencies continue to apply the continuous surface connection standard in establishing adjacency and thus WOTUS, with the indistinguishable boundaries used as one but not the only method to make that determination. Tribes and states need regulatory certainty. We strongly recommend applying the best available science to determine how the term should be used and implemented. Examining the science-based ecological interface between the wetland and covered water should be an option.

Furthermore, the NTWC and NTC recognize the need for further guidance on the implementation of a “continuous surface connection,” which could involve connections to WOTUS via ditches and ephemeral streams. Based on the Amended 2023 Rule’s definition of non-jurisdictional ditches, clarification is needed for wetlands that are connected to relatively permanent tributaries or other wetlands that directly abut covered waters via ditches that is upland-excavated but drains wetlands or is relatively permanent, with an ordinary high-water mark.

The NTWC and NTC recommend that for jurisdictional purposes, a revised definition of WOTUS should regard wetlands as jurisdictional if they possess the same characteristics of a tributary, which are relatively permanent (provided they do not flow only in “direct response to

⁶ The guidance interprets “continuous surface connection” to mean abutting (or physically touching) a requisite jurisdictional water—even if only at certain times of the year, such as during rainy seasons.

precipitation” as discussed above), and maintain a continuous surface connection between a wetland and the covered surrounding water.

5. Conclusion.

The numerous rulemakings and the *Sackett* decision triggered considerable changes to CWA jurisdiction at the federal level. Deciding whether a water is a WOTUS under the relatively permanent and/or continuous surface connection standards provides neither certainty nor clarity for the nation's waters. If courts continue to issue diverging opinions and undermine regulations governing waters that science shows are fundamentally connected, the CWA's purpose of maintaining hydrological, geochemical, and biological integrity regimes will be diminished, as will the quality of important Tribal waters. The revised definition of WOTUS under *Sackett* raises uncertainty in assessing coverage under the CWA and may require further clarification as the agencies move forward with their rulemaking.

The NTWC and NTC appreciate the opportunity to submit early input as the agencies consider revising the definition of WOTUS.

Sincerely,

A handwritten signature in black ink that reads "Ken Norton". The signature is fluid and cursive, with the first name and last name clearly distinguishable.

Ken Norton, Chair
National Tribal Water Council

A handwritten signature in blue ink that reads "Tabitha Langston". The signature is fluid and cursive, with the first name and last name clearly distinguishable.

Tabitha Langston, Chair
National Tribal Caucus