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6560-50-P

## **DEPARTMENT OF DEFENSE**

### **Department of the Army, Corps of Engineers**

#### **33 CFR Part 328**

## **ENVIRONMENTAL PROTECTION AGENCY**

#### **40 CFR Part 120**

**[EPA-HQ-OW-2025-0093; FRL–12683-01-OW]**

### **WOTUS Notice: The Final Response to SCOTUS; Establishment of a Public Docket;**

#### **Request for Recommendations**

**AGENCY:** Department of the Army, Corps of Engineers, Department of Defense; and Environmental Protection Agency (EPA).

**ACTION:** Notice; announcement of listening sessions and solicitation of stakeholder feedback.

**SUMMARY:** The U.S. Environmental Protection Agency (EPA) and the Department of the Army intend to engage with State and Tribal co-regulators; industry and agricultural stakeholders; environmental and conservation stakeholders; and the public on certain key topics related to the implementation of the definition of “waters of the United States” in light of the Supreme Court’s 2023 decision in *Sackett v. Environmental Protection Agency*. The agencies are committed to learning from the past regulatory approaches—the pre-2015 regulations and guidance, the 2015 Clean Water Rule, the 2020 Navigable Waters Protection Rule, the 2023 Rule, and the Amended 2023 Rule—while engaging with stakeholders before taking further

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administrative action to provide any additional clarification to agency staff, co-regulators, and the public on specific aspects of the definition of “waters of the United States.”

This notice includes an announcement of forthcoming listening sessions on specific key topic areas to hear interested stakeholders’ perspectives on defining “waters of the United States” consistent with the Supreme Court’s interpretation of the scope of Clean Water Act jurisdiction and how to implement that interpretation as the agencies consider next steps. The agencies are also accepting written recommendations from members of the public via a recommendations docket. These opportunities are intended to provide for broad, transparent engagement with a full spectrum of stakeholders.

**DATES:** Written recommendations must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Please refer to the **SUPPLEMENTARY INFORMATION** section for additional information on the forthcoming listening sessions.

**ADDRESSES:** You may send written feedback, identified by Docket ID No. EPA-HQ-OW-2025-0093, by any of the following methods:

- Federal eRulemaking Portal: <https://www.regulations.gov/> (our preferred method).  
Follow the online instructions for submitting written feedback.
- Email: [OW-Docket@epa.gov](mailto:OW-Docket@epa.gov). Include Docket ID No. EPA-HQ-OW-2025-0093 in the subject line of the message.
- Mail: U.S. Environmental Protection Agency, EPA Docket Center, Water Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.

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- Hand Delivery or Courier: EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue, NW, Washington, DC 20004. The Docket Center’s hours of operations are 8:30 a.m. – 4:30 p.m., Monday – Friday (except Federal Holidays).

*Instructions:* All submissions received must include Docket ID No. EPA-HQ-OW-2025-0093.

Written feedback received may be posted without change to <https://www.regulations.gov/>, including any personal information provided. For detailed instructions on sending written recommendations and additional information on the forthcoming listening sessions, see the **SUPPLEMENTARY INFORMATION** section of this document.

**FOR FURTHER INFORMATION CONTACT:** Stacey Jensen, Oceans, Wetlands and Communities Division, Office of Water (4504–T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: (202) 564-2281; email address: *WOTUS-outreach@epa.gov*, and Milton Boyd, Office of the Assistant Secretary of the Army for Civil Works, Department of the Army, 108 Army Pentagon, Washington, DC 20310-0104; telephone number: (202) 761-8546; email address: *milton.w.boyd.civ@mail.mil*.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

The U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Army (“Army”; collectively, “the agencies”) understand that farmers, landowners, and developers across the country have concerns and questions about certain key issues related to the definition of “waters of the United States” following the Supreme Court’s decision in *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023) (*Sackett*). The agencies are committed to providing additional clarity regarding which waters are “waters of the United States” under the

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Federal Water Pollution Control Act, also known as the Clean Water Act. The Trump Administration is going to take a close look at critical aspects of “waters of the United States” and ensure that the definition follows the Supreme Court’s *Sackett* decision to provide realistic durability and consistency.

“Waters of the United States” is a threshold term in the Clean Water Act that establishes the geographic scope of federal jurisdiction under the Act.<sup>1</sup> Many Clean Water Act programs, including sections 303 (water quality standards and total maximum daily loads), 311 (oil spill programs), 401 (water quality certifications), 402 (pollutant discharge permits) and 404 (dredged and fill material discharge permits), address “navigable waters,” defined in the statute as “the waters of the United States, including the territorial seas.” *See* 33 U.S.C. 1362(7). Since the 1970s, the agencies have defined “waters of the United States” by regulation. On May 25, 2023, the Supreme Court decided *Sackett*. In light of the decision, on September 8, 2023, the EPA and the Army published a final rule to amend the January 2023 definition of “waters of the United States” without notice and comment to conform to the Supreme Court’s decision.

The “Amended 2023 Rule” refers to the final rule “Revised Definition of ‘Waters of the United States,’” 88 FR 3004 (January 18, 2023) (“2023 Rule”) as amended by the rule “Revised Definition of ‘Waters of the United States’; Conforming,” 88 FR 61964 (September 8, 2023) (“Conforming Rule”) (codified at 33 CFR 328.3 (U.S. Army Corps of Engineers (Corps)) & 40 CFR 120.2 (EPA)) which was issued without notice and comment under the “good cause”

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<sup>1</sup> Note that Section 301(a) of the Clean Water Act prohibits unauthorized discharges “of any pollutant by any person,” to “navigable waters,” defined as “the waters of the United States, including the territorial seas.” *See* 33 U.S.C. 1311(a), 1362(7), (12).

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exemption to the Administrative Procedure Act. However, due to ongoing litigation,<sup>2</sup> the Amended 2023 Rule is not operative in certain States.<sup>3</sup> In the jurisdictions where the Amended 2023 Rule is subject to a preliminary injunction, the agencies are interpreting “waters of the United States” consistent with the pre-2015 regulatory regime<sup>4</sup> and the Supreme Court’s decision in *Sackett*, pursuant to the recent 2025 guidance memorandum released by the agencies.<sup>5</sup>

## **II. Implementation of the Definition of “Waters of the United States” Post-*Sackett***

On March 12, 2025, the EPA and the Army signed a memorandum providing guidance for implementing the “continuous surface connection” requirement and related issues under both regulatory regimes that are currently in effect across the country. In that memorandum, the agencies stated that they planned to issue a public notice in the *Federal Register* and docket on “WOTUS Notice: The Final Response to SCOTUS,” outlining a process to gather recommendations on the meaning of key terms in light of *Sackett* to inform any potential future administrative actions to clarify the definition of “waters of the United States” and to ensure transparent, efficient, and predictable implementation. This notice fulfills the commitment provided for in the memorandum.

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<sup>2</sup> Multiple States and industry associations, as well as one individual, have filed complaints challenging the Amended 2023 Rule in four different district courts. *Texas v. EPA*, Nos. 23-00017 & 23-00020 (S.D. Tex.); *West Virginia v. EPA*, No. 23-00032 (D.N.D.); *Kentucky v. EPA*, No. 23-00007 (E.D. Ky.); *White v. EPA*, No. 24-00013 (E.D.N.C.).

<sup>3</sup> For more information about the operative definition of “waters of the United States” for specific geographic areas in light of litigation, please visit <https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>.

<sup>4</sup> The “pre-2015 regulatory regime” refers to the agencies’ pre-2015 definition of “waters of the United States,” implemented consistent with relevant case law and longstanding practice, as informed by applicable guidance, training, and experience, consistent with *Sackett*.

<sup>5</sup> 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. 11, 2025), <https://www.epa.gov/wotus/current-implementation-waters-united-states>.

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The agencies have heard numerous concerns raised by stakeholders about the Amended 2023 Rule, including implementation-related issues and issues raised in ongoing litigation challenging the amended regulations. The EPA and the Army have heard concerns that the Amended 2023 Rule does 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 connection” requirement and to which features that phrase applies, and which ditches are properly considered to be “waters of the United States.” The agencies intend to use the listening sessions and the recommendations docket to inform any future administrative actions on the definition of “waters of the United States,” including learning from States, Tribes, and interested stakeholders about their experiences under the Amended 2023 Rule, the pre-2015 regulatory regime as informed by *Sackett*, and other previous definitions of “waters of the United States” relevant to the *Sackett* decision. The agencies’ administrative actions will be consistent with the Clean Water Act and relevant Supreme Court decisions.<sup>6</sup> Going forward, the agencies’ will seek to provide clear and transparent direction regarding the definition and will prioritize practical implementation approaches, provide for durability and stability, as well as for more effective and

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<sup>6</sup> In *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), the Supreme Court deferred to the Corps’ judgment and upheld the inclusion of adjacent wetlands in the regulatory definition of “waters of the United States.” In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), the Court held that the use of “isolated” non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of Federal regulatory authority under the CWA. In *Rapanos v. United States*, 547 U.S. 715 (2006), a four-Justice plurality interpreted “waters of the United States” as covering “relatively permanent” waters as well as wetlands with a “continuous surface connection” to such water bodies. Justice Kennedy’s concurring opinion concluded that a water or wetland must possess a “significant nexus” to traditional navigable waters to be a “water of the United States.” In *Sackett*, the Supreme Court “conclude[d] that the *Rapanos* plurality was correct” and rejected Justice Kennedy’s “significant nexus” standard, calling it a “particularly implausible” “theory” and stating that “the CWA never mentions the ‘significant nexus’ test, so the EPA has no statutory basis to impose it.” *Sackett*, 598 U.S. at 680.

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efficient jurisdictional determinations, permitting actions, and other actions consistent with relevant decisions of the Supreme Court. Any actions will reflect consideration of the experiences of, and input received from, landowners, industry groups, the agricultural community, States, Tribes, local governments, community organizations, environmental groups, and the general public.

### **III. Stakeholder Feedback Opportunities**

To assist the agencies in further clarifying the definition of “waters of the United States,” the agencies welcome feedback on specific key topic areas that can be provided by participating in one of several listening sessions or by submitting written recommendations through the open public docket. This feedback will inform any future administrative actions; however, the agencies will not be providing a specific written response to individual submissions and recommendations. When providing feedback, it will be helpful to the agencies if information is provided to support input on the particular issues described below, such as statutory citations, case law, references to longstanding agency practice, etc. The agencies are seeking input on the following issues:

- *The scope of “relatively permanent” waters and to what features this phrase applies.* The agencies have used a wide variety of descriptive terminology and criteria for determining which tributaries are “waters of the United States” under multiple regulatory regimes and rules. However, in light of the *Sackett* decision, only “relatively permanent” tributaries may be subject to Clean Water Act jurisdiction. Under the pre-2015 regulatory regime, “relatively permanent” tributaries are those that typically flow year-round or that have continuous flow at least seasonally (*e.g.*, typically three months). Ephemeral streams were categorically

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excluded from jurisdiction in the 2020 Navigable Waters Protection Rule (NWPR), and only those perennial and intermittent tributaries that contributed flow downstream in a typical year to a traditional navigable water or the territorial seas were considered jurisdictional. Under the interpretation provided in the preamble to the 2023 Rule, relatively permanent tributaries 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.

- The agencies seek feedback on whether certain characteristics, such as flow regime, flow duration, or seasonality should inform a definition of “relatively permanent” as well as to which features this phrase should apply to in light of *Sackett* and in consideration of the agencies’ objectives described in this document.
- The agencies are particularly interested in feedback regarding how to identify “relatively permanent” tributaries in the field to assist with transparent, efficient, and predictable implementation.
- *The scope of “continuous surface connection” and to which features this phrase applies.* Each regulatory definition of and regulatory regime for “waters of the United States” has taken a different approach to determining adjacency for purposes of assessing jurisdiction over “adjacent” wetlands under the Act and for assessing the jurisdiction of certain intrastate, non-navigable waters that do not meet the definition of “waters of the United States” under other jurisdictional categories (*e.g.*, relatively permanent lakes and ponds assessed under paragraph (a)(5) of the Amended 2023 Rule and waters assessed under the comparable paragraph (a)(3) of the pre-2015 regulations). In *Sackett*, the Supreme Court held that “adjacent” wetlands are those that have a “continuous surface connection” to a requisite



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jurisdictional water.<sup>7</sup> Under the 2020 NWPR, which relied heavily on the plurality standard in *Rapanos v. United States*, 547 U.S. 715 (2006), adjacent wetlands and jurisdictional lakes, ponds, and impoundments included those that abutted traditional navigable waters, the territorial seas, tributaries, or lakes, ponds, or jurisdictional impoundments; those with certain surface water connections; and those physically separated from a jurisdictional water only by a natural berm, bank, dune, or similar natural feature. Under the pre-2015 regulatory regime as informed by *Sackett*, the agencies are interpreting “waters of the United States” to include “only those adjacent wetlands that have a continuous surface connection because they directly abut the [requisite jurisdictional water] (*e.g.*, they are not separated by uplands, a berm, dike, or similar feature).”<sup>8</sup>

The preamble to the 2023 Rule states that wetlands and relatively permanent lakes and ponds meet the continuous surface connection requirement if they physically abut or touch a requisite jurisdictional water; if they are connected to a requisite jurisdictional water by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert; or if they are behind a natural berm or similar natural landform where that natural landform provides evidence of a continuous surface connection. However, the agencies recently rescinded any components of agency interpretation, guidance, or training materials that assumed a discrete feature established a continuous surface connection to align the agencies’ implementation with the

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<sup>7</sup> 598 U.S. at 684.

<sup>8</sup> See U.S. EPA & U.S. 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* (June 5, 2007), superseded December 2, 2008 (the “*Rapanos* Guidance”) at 7, footnote 29.

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pre-2015 regime and *Sackett*.<sup>9</sup> Currently, under both the pre-2015 and Amended 2023 Rule regulatory regimes that are currently operative across the country, the agencies are implementing “continuous surface connection” to mean abutting (or touching).

- The agencies seek feedback on defining “continuous surface connection,” including what it means to “abut” a jurisdictional water; if it includes wetlands behind a natural berm or similar natural landforms to the extent the natural landforms provide evidence of a continuous surface connection; and 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.
- The agencies specifically seek feedback on the scope of “connection to” as well as to which features this phrase applies, to describe wetlands as adjacent to relatively permanent waters when they have a continuous surface “connection to” those waters.
- The agencies also specifically seek feedback on the interpretation and implementation of the language in *Sackett* providing that “temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells.”<sup>10</sup>
- Under the Amended 2023 Rule, the agencies have defined adjacent as “having a continuous surface connection” and the continuous surface connection requirement

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<sup>9</sup> 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. 11, 2025), <https://www.epa.gov/wotus/current-implementation-waters-united-states>.

<sup>10</sup> 598 U.S. at 678

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- applies to both adjacent wetlands and relatively permanent lakes and ponds assessed under paragraph (a)(5). The agencies seek input on the definition of “adjacent” as well as which are the appropriate categories to properly assess using the continuous surface connection requirement.
- The agencies are interested in developing an approach for continuous surface connection that provides for clarity and implementability, including whether there are factors to limit continuous surface connection and whether there are certain characteristics that could provide clear distinctions to meet the continuous surface connection requirement. The agencies are also interested in recommendations for implementation approaches to address continuous surface connection.
  - *The scope of jurisdictional ditches.* In practice, different types of ditches have generally been considered non-jurisdictional in different regulatory regimes. The 2015 Clean Water Rule, the 2020 NWPR, and the Amended 2023 Rule excluded certain types of ditches explicitly in rule language. Currently, ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water are considered to be generally non-jurisdictional under the pre-2015 regulatory regime, while similarly, ditches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water are excluded by rule in the Amended 2023 Rule.
    - The agencies solicit feedback on whether flow regime (*e.g.*, relatively permanent status or perennial or intermittent flow regimes), physical features, excavation in aquatic resources versus uplands, type or use of the ditch (*e.g.*, irrigation and

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drainage), biological indicators like presence of fish, or other characteristics could provide clear and implementable distinctions between jurisdictional and non-jurisdictional ditches.

- The agencies also seek input on whether a definition of ditch, as was provided in the 2020 NWPR, which defined ditch to mean a constructed or excavated channel used to convey water<sup>11</sup>, would provide additional clarity.

#### **IV. Public Listening Sessions**

The agencies will hold a series of listening sessions intended to solicit recommendations as the agencies seek to pursue further administrative action. During these sessions, the agencies intend to present brief background information and provide an opportunity for stakeholders to share input, with regard to the topics above. The agencies will hold at least six listening sessions, with two open to all stakeholders, one open to States, one open to Tribes, one open to industry and agricultural stakeholders, and one open to environmental and conservational stakeholders.

The listening sessions will be held as web and in-person conferences in late March-April 2025. Registration instructions and dates will be forthcoming at the following website: <https://www.epa.gov/wotus/public-outreach-and-stakeholder-engagement-activities>. Persons or organizations wishing to provide verbal recommendations during the listening sessions will be selected on a first-come, first-serve basis. Due to the expected number of participants, individuals will be asked to limit their spoken presentation to three minutes. Once the speaking slots are filled, participants may be placed on a standby list to speak or continue to register to listen to the recommendations. The listening sessions will be recorded and posted on EPA's

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<sup>11</sup> 85 FR 22250, 22338 (Apr. 21, 2020).

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website. Supporting materials and written feedback from those who do not have an opportunity to speak can be submitted to the docket as described above.