



EPA Region 10 Tribal Operations Committee (RTOC)
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May 20, 2025

Mr. Lee Zeldin, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

SENT VIA EMAIL

**RE: EPA-HQ-OW-2025-0093; WOTUS Notice: The Final Response to SCOTUS;
Establishing a Public Docket; Request for Recommendations**

Dear Administrator Zeldin:

This letter is sent on behalf of the Tribal Caucus members of EPA Region 10's Tribal Operations Committee ("RTOC"). This letter is not sent on behalf of EPA Region 10 or any employees of EPA, but solely tribal government representatives of the RTOC. This letter is sent regarding the solicitation of feedback on the development of a definition for "waters of the United States." The RTOC recommends that any definition of waters of the United States be based on the hydrological connectivity of the wetlands, and notes that such a definition would be consistent with Congressional purpose and the precedent established by the Supreme Court. Further, the RTOC notes that the Court's holding in *Sackett v. EPA* uses "continuous" to refer to physical connection and not temporal permanence. Therefore, intermittent, seasonal, and even ephemeral connections would suffice.

1. A Broad Definition Better Upholds Trust Obligation to Alaska Natives

Of the 229 Alaska Native Tribes and Villages, only one has land held in trust by the federal government. Therefore, only one Tribe may obtain Treatment as a State status and assume administrative authority over the navigable waters of their lands.¹ For the remaining 228 Tribes and Villages, clean water can only be regulated through state or federal law. However, it is the

¹ 33 U.S.C. § 1377.

federal government, and not the state, that has a trust obligation towards native peoples.² A broader definition of wetlands that are waters of the United States would keep more water within the authority of the federal government, and therefore under the trust obligation which was established through the government's actions.

2. Any Definition Should be Based on Sound Science

RTOC urges that any WOTUS definition be based on sound science and public policy. The purpose and language of the Clean Water Act necessitate a scientific definition of WOTUS.

The purpose of the Clean Water Act is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”³ Clear statutory purpose provides a useful guide for the interpretation of a statute’s terms.⁴ Here, the statutory purpose is concerned with the integrity of the waters of the United States, and is therefore concerned with waterbodies which affect that integrity.⁵ Wetlands with a hydrological connection either through surface or ground water will have such an effect.⁶ As such, the best definition of waters of the United States would incorporate hydrologically connected wetlands to the greatest extent possible.

3. Constitution Permits Broad Regulatory Jurisdiction

The Constitution and current Supreme Court precedent permit broad federal regulatory authority over intrastate things that have substantial effects on interstate commerce.⁷ Undisputably, Congress has the ability to regulate navigable waters.⁸ Constitutionally, then, Congress has the ability to regulate all wetlands that have substantial effects on navigable waters. Statutorily, this ability is manifested by Congress’s definition that navigable waters are “waters of the United States.”⁹ The otherwise broad application is then limited by the Supreme Court’s interpretation of the statutory text. However, the Court’s rejection of the pre-2015 regime allows for regulation over hydrologically connected wetlands.

² See *United States v. Kagama*, 118 U.S. 375, 384 (1886) (referring to “the duty of protection”); *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (relying on “the undisputed existence of a general trust relationship between the United States and the Indian people”).

³ 33 U.S.C. § 1251.

⁴ See, e.g., *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 632 (2012) (rejecting interpretation which would undermine purpose of statute).

⁵ See *Rapanos v. United States*, 547 U.S. 715, 779-80 (Kennedy, J., concurring in judgement) (proposing “significant nexus” test for WOTUS, depending on whether wetlands “significantly affect the chemical, physical, and biological integrity” of jurisdictional waters).

⁶ Charles R. Lane et al., *Hydrological, Physical, and Chemical Functions and Connectivity of Non-Floodplain Wetlands to Downstream Waters: A Review*, 54(2) J. AM. WATER RES. ASS’N 346, (2018).

⁷ *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

⁸ *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870).

⁹ 33 U.S.C. § 1362(7).

4. Sackett’s Definition Allows for Many Types of Surface Connections

Adjacent wetlands are part of the waters of the United States.¹⁰ In *Sackett v. EPA*, the Court held that wetlands are only “adjacent” if they have “a continuous surface connection with [jurisdictional] water.”¹¹ However, this continuous connection may be interrupted by “low tides or dry spells” without compromising the wetland’s jurisdictional status.¹² Further, the private construction of a barrier does not change jurisdictional status.¹³ Taken as a whole, this definition stresses the hydrological continuity of wetlands in determining jurisdiction.

The Court’s allowance for “dry spells” severing surface connections suggests that perennial and intermittent surface connections would be permissible for finding waters of the United States. Within the opinion, “dry spells” are not well defined, but may be understood in relation to “low tide.” Low tide occurs twice a day, with a regular cadence. “Dry spell” in regular parlance suggests a longer period that is much less predictable. The term could refer to a dry month in summer, or to a 20-year drought. “Low tide” and “dry spell” capture two ends of a spectrum of predictability and duration. By allowing both things, the Court allows for intermittent, perennial, and certain ephemeral connections to be sufficient for defining jurisdictional wetlands.

5. Exercise of Appropriative Water Rights Should Not Affect Jurisdiction

Although the Supreme Court notes that man-made barriers cannot be used to cut off wetlands and thereby limit federal jurisdiction, the Court is silent on the use of appropriative water rights and diversion with the same effect. Logical consistency necessitates that lower water levels due to diversions should not be able to determine wetlands jurisdiction, even when the diversions are annually recurring.

In *Sackett*, the Court only briefly considered the significance of constructing a barrier to partition off wetlands which would otherwise be jurisdictional.¹⁴ However, it firmly asserted that such an act would not limit the government’s jurisdiction. But, the man-made barrier is only one way in which a private actor may change the hydrology of an area in order to break a surface connection. Alternatively, under a prior appropriation water rights regime, a private actor may divert water from its natural course and apply it to a beneficial use. This could result in drying of wetlands that would otherwise adjoin navigable waters, or it could drop the level of navigable waters such that a barrier is created between the wetlands and jurisdictional waters.

The diversion of water under state prior appropriative law necessarily recurs every year that water is available. As such, some hydrology is necessary to determine which wetlands *would* have continuous surface connections, but for the intervention of private appropriators. Nevertheless, the affected wetlands are still hydrologically connected to navigable waters and affect those waters’

¹⁰ 33 U.S.C. § 1344(g)(1); *Sackett v. EPA*, 598 U.S. 651, 675-76 (2023).

¹¹ *Sackett*, 598 U.S. at 678.

¹² *Id.*

¹³ *Sackett*, 598 U.S. at n.16.

¹⁴ *Id.*

chemical, physical, and biological integrity. Therefore, these wetlands should be considered waters of the United States.

6. Conclusion

Water connects all life. To effectively regulate the waters of the United States, and to keep them clean, any definition of “waters of the United States” must be based on science and the connectivity of the wetlands to other waters. While restrained by *Sackett*, the Court’s definition of “adjacent” invites the inclusion of wetlands that have an intermittent or perennial surface connection. Such a definition would further the Clean Water Act’s broad purpose, which is focused on water quality and an appreciation of the connectivity of the nation’s waters.

The RTOC appreciates your consideration of these comments.

Sincerely,

A handwritten signature in cursive script that reads "Raymond Paddock".

Raymond E. Paddock III
Central Council of the Tlingit and Haida Indian Tribes of Alaska
Region 10 Tribal RTOC Chair