



Trump Administration Launches Comprehensive Review of Clean Water Act Definition for “Waters of the United States” (WOTUS)

MARCH 31, 2025

By [Duncan Greene](#), [Jenna Mandell-Rice](#), and [James Garland](#)

On March 24, 2025, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the “Army Corps”) (collectively the “Agencies”) announced a comprehensive stakeholder engagement process to revise the definition of “waters of the United States” (WOTUS), a phrase that defines the geographic scope of regulatory jurisdiction under the Clean Water Act (CWA). In a formal [notice](#) published in the Federal Register, the Agencies stated that they intend to use stakeholder feedback from this process to “inform future administrative actions” on the WOTUS definition, including rulemaking.

This initiative follows decades of WOTUS litigation and shifting WOTUS rules promulgated by the Agencies during the Obama, Biden, and Trump administrations (discussed in [prior VNF alerts](#)), and it responds to ongoing challenges in implementing the Supreme Court’s landmark decision in *Sackett v. EPA*, issued in 2023, which significantly narrowed federal jurisdiction over wetlands.

The *Sackett* Decision and Ongoing Regulatory Challenges

The *Sackett* case was a dispute over wetlands, but the Supreme Court’s holding is also relevant to other water bodies:

- As to **wetlands**, *Sackett* held that CWA jurisdiction covers “only those wetlands with a **continuous surface connection** to bodies that are [WOTUS] in their own right, so that they are indistinguishable from those waters.” The Court rejected EPA’s position that jurisdiction extended to wetlands that are “separated from [WOTUS] by dry lands.”
- As to **streams, lakes, and other water bodies**, *Sackett* held that CWA jurisdiction covers only those waters that are “**relatively permanent, standing or continuously flowing**.”

Scope of “Relatively Permanent” Waters: To date, the Supreme Court has not clearly defined “relatively permanent” waters. This category includes certain streams and other water conveyances. In *Sackett*, the Court held that jurisdiction is not cut off by “temporary interruptions in surface connection” that “may sometimes occur because of phenomena like low tides or dry spells.” *Sackett* also adopted Justice Scalia’s plurality opinion from *Rapanos v. United States*, issued in 2006. In that opinion, the plurality confirmed that “intermittent” and “ephemeral” streams do not fall within the scope of CWA jurisdiction. Besides saying CWA jurisdiction could potentially extend to a hypothetical “seasonal river” that flowed continuously for 290 days per year, the plurality declined to spell out “exactly when the drying-up of a streambed is continuous and frequent enough” to cut off jurisdiction.

Jurisdiction over Ditches: The *Rapanos* plurality also analyzed the contentious issue of CWA jurisdiction over ditches. The Agencies have historically treated ditches as a type of jurisdictional “tributary” unless exempted by regulation, but the *Rapanos* plurality suggested that most ditches are not jurisdictional because the CWA defines ditches as “point sources” rather than “navigable waters” and because ditches typically convey “intermittent” flow. *Sackett*’s majority opinion did not directly analyze CWA jurisdiction over ditches, but a concurring opinion in *Sackett* stated that a roadside ditch at issue in that case was not a jurisdictional “tributary”—because the ditch “is not, has never been, and cannot reasonably be made a highway of interstate or foreign commerce.”

The 2023 “Conforming Rule” and Agency Interpretations: In 2023, the Biden administration adopted a rule that attempted to conform the regulatory definition of WOTUS to *Sackett* (the “2023 Conforming Rule”). In the 2023 Conforming Rule, the Agencies took a minimalistic approach to the task at hand: they removed language that was clearly inconsistent with *Sackett*, but did not attempt to clarify the meaning of “continuous surface connection” or “relatively permanent” waters.

In part because the 2023 Conforming Rule left room for interpretation by the Agencies, the WOTUS definition remains controversial. In the March 24 notice, the Agencies noted stakeholder concerns that the Conforming Rule does not “adequately comply with the *Sackett* decision” on its face. The Agencies also noted concerns about how the Agencies have interpreted and applied to 2023 Conforming Rule in particular cases, raising questions such as: which features are “connected to” waters that are “relatively permanent” WOTUS; which waters are “relatively permanent” in the first place; how to implement the “continuous surface connection” requirement; and “which ditches are properly considered to be [WOTUS].”

These concerns have sometimes played out in court, where the Agencies have argued that ditches and channels with “intermittent” flow can still be WOTUS after *Sackett*. At least [one district court](#) has agreed, holding that a channel conveying only “intermittent” flow was jurisdictional because it conveyed flow “continuously during certain times of the year.” As a result of the 2023 Conforming Rule’s ambiguity and the continuing WOTUS litigation, the regulated community continues to face significant uncertainty.

March 12 Announcement and Policy Memo on “Abutting” Wetlands: The March 24 notice follows a March 12 announcement by EPA Administrator Zeldin of the WOTUS stakeholder engagement effort. The March 12 announcement included an unpublished preview of the March 24 notice. As part of the announcement, EPA also issued a new policy memorandum discussing “abutting” wetlands. The memo provides guidance on how to distinguish non-jurisdictional wetlands that are near but separated from jurisdictional waters by a berm, a dike, uplands, or a similar feature, from jurisdictional wetlands (which “directly abut” and have a “continuous surface connection” to jurisdictional waters).

Comprehensive Stakeholder Engagement Strategy

The Agencies will conduct a multi-pronged approach to gather input on the WOTUS definition through listening sessions and written comments, as follows:

Listening sessions: Six targeted listening sessions will be held in April and May 2025. Two sessions will be open to all stakeholders, and one session held for each of the following: industry and agricultural stakeholders; States; environmental and conservation groups; and Tribes. Oral comments will be accepted on a first-come, first-serve basis.

Written comments: Comments are due by April 23, 2025, and can be submitted through the [Federal eRulemaking Portal](#), via [email](#), or by mail or hand delivery.

Specific topics for input: The Agencies are seeking stakeholder input on key WOTUS implementation issues that impact a wide range of private and public stakeholders, including:

- The geographic scope of “relatively permanent” waters;
- The meaning of “continuous surface connection” and related issues, including the *Sackett* court’s statement that “temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells”; and
- How to determine the jurisdictional status of ditches and related issues, including whether the Agencies should consider factors such as 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 drainage), or “biological indicators like the presence of fish.”

Implications for the Regulated Community

This initiative represents a critical opportunity for stakeholders in the regulated community to influence the future interpretation of WOTUS by the Agencies and the courts. The Trump Administration and the Agencies have emphasized their commitment prioritizing “practical implementation approaches” and seeking to provide durability, stability, and more efficient regulatory processes. This suggests that the Agencies will be especially receptive to comments from the regulated community.

After reviewing the full Federal Register notice, stakeholders impacted by WOTUS issues should consider submitting comments. In the past, many WOTUS commenters have provided detailed descriptions of their own properties, operations, infrastructure, and projects, along with examples of particular local waters. These kinds of comments can help the Agencies better understand how the WOTUS definition impacts different stakeholders “on the ground.” The most

effective comments will also include arguments explaining how particular waters fit within the *Sackett-Rapanos* legal framework discussed above.

For More Information

Van Ness Feldman closely monitors and counsels clients on water, air, and other environmental regulatory developments. If you would like more information about implementation of the Clean Water Act, please contact [Duncan Greene](#), [Jenna Mandell-Rice](#), [James Garland](#), [Joseph Nelson](#), [Jonathan Simon](#), or any member of our Land Use, Water, or Natural Resources practices in Seattle, WA at (206) 623-9372 or Washington, D.C. at (202) 298-1800.

© 2025 Van Ness Feldman, LLP. All Rights Reserved. This document has been prepared by Van Ness Feldman for informational purposes only and is not a legal opinion, does not provide legal advice for any purpose, and neither creates nor constitutes evidence of an attorney-client relationship.