



NEVADA DIVISION OF
**ENVIRONMENTAL
PROTECTION**

STATE OF NEVADA
Department of Conservation & Natural Resources

Joe Lombardo, *Governor*
James A. Settelmeyer, *Director*
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April 24, 2025

Ms. Robyn S. Colosimo

Senior Official Performing the Duties of the
Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310

Ms. Benita Best Wong

Deputy Assistant Administrator for Management
Office of Water, Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

Provided to the Docket via Regulations.gov

<https://www.regulations.gov/document/EPA-HQ-OW-2025-0093-0001>

Re: WOTUS Notice: The Final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations; Docket ID No. EPA-HQ-OW-2025-0093

Dear Acting Assistant Secretary of the Army Colosimo and Deputy Assistant Administrator Best-Wong:

The Nevada Division of Environmental Protection (NDEP) thanks the agencies for the opportunity to provide comment on the request for recommendations informing the regulatory definition of waters of the United States (WOTUS) under the Federal Water Pollution Control Act, 33 U.S.C. §1251 ("Clean Water Act"). NDEP has regularly engaged with, and will continue to actively engage, in state-federal coregulator opportunities provided related to redefining WOTUS. Many of our comments from prior rulemaking activities still apply today, as the agencies embark on the effort once again. As has been done with the U.S. Environmental Protection Agency (EPA) Office of Water in the past, due consideration should be given to allowing a small subset of states to participate closely with the federal agencies in the rule development process as part of a state-EPA-U.S. Army Corps of Engineers (USACE) workgroup. As implementers of the rule, states are in a unique position to have perspective on how implementable the finer points of the rule proposals may be and have a vested interest in helping to ensure the new definition has the clarity and durability the federal agencies are seeking.

NDEP recognizes the inherent complexity in defining WOTUS; however, we also seek to assist in the formulation of a rule that is clear and able to be applied rationally. NDEP agrees with the federal agencies' desire to have a rule that is both durable and stable, prioritizing practical implementation practices. With the use of regulatory communication tools, such as interactive mapping, we also seek to find an end point that provides the public with the ability to easily identify the jurisdictional status of a waterbody segment.

The Clean Water Act clearly acknowledges the importance of cooperative federalism and the role of states and tribes as the primary authority over regulating water quality. "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter" (33 U.S.C. §1251(b)). The coregulator approach to managing water quality is inherent in the development of multiple Clean Water Act programs which enable delegated states and tribes to regulate water quality within their respective jurisdictions such as §303 (water quality standards and total maximum daily loads), §401 (water quality certifications) which works hand-in-hand with §404 (federal permitting of dredge and fill material), and §402 (pollutant discharge permits). The definition of WOTUS determines the extent to which the Clean Water Act provides federal oversight, or coregulator

partnerships over water bodies for these programs. Regulatory uncertainty and limited scopes of WOTUS revisions emphasize the potential need to develop state-equivalent programs to manage water quality. For example, the USACE regulates the discharge of dredge and fill material through Clean Water Act §404, a service that does not cost the regulated community to obtain a permit. However, a narrow scope of WOTUS, and the resulting limitations of the aforementioned Clean Water Act programs, would stress the importance of state-administered programs which could result in additional fees for the regulated community in order to administer state discharge programs in the absence of federal programs.

During upcoming revisions to the WOTUS definition, NDEP believes that much of the difficulty in both writing and implementing a WOTUS definition is rooted in attempts to craft a national rule. Previous rule changes have avoided developing regulations for areas with similar hydrology, which has led to rules that are impractical to be implemented consistently on a national scale. NDEP is interested in exploring a proposal that evaluates jurisdiction based on differences in hydrology (examples include the Arid West, Atlantic and Gulf Coastal Plain, Eastern Mountains and Piedmont, Great Plains, Western Mountains, Valleys, and Coast) and recognizes the vast variability in hydrology across the country. As part of the desert southwest with an average of eight inches of rain a year, or less in some parts of Nevada, it is simply not viable to craft regulation for this region that fits with precipitation and flow regimes of the eastern or northwest United States. This complexity is also illustrated by reference in Nevada's 2014 letter and Nevada's 2021 letter.

Regardless of the definition, it is imperative that a national mapping system be established to support knowledge of current jurisdictional status and potential change in such status of waterbodies. A mapping system is key to productive discussion about any proposed definition of WOTUS. Multiple revisions of WOTUS have occurred without the requisite understanding of the associated impacts across the country. This has resulted in confusion and uncertainty for the public, stakeholder community, and state coregulators when there is a poor understanding of the aquatic resources that the federal government regulates. Additionally, the state coregulators the public, and the stakeholder community depend on transparency and consistency when determining whether waterbodies meet the definition of WOTUS. Mapping resources outlining the extent of federal jurisdiction should be clearly discernable to allow for ease in understanding which waters are WOTUS and make informed permitting decisions. *In the process of re-writing the definition of WOTUS, NDEP would seek to have the federal agencies ensure that all the needed tools for successful implementation are in place prior to rule finalization.*

Throughout this process, Nevada will seek to ensure that the federal agencies provide clear and continued exemption of groundwater from the definition of WOTUS. Any rule revision must ensure that groundwater, including shallow subsurface flow, is clearly exempted from CWA jurisdiction and does not conflict with State's rights over management of their groundwater resources.

NDEP offers the following comments in response to the agencies' solicitation for stakeholder feedback issued in the Federal Register associated with the WOTUS Final Response to the Supreme Court of the United States (SCOTUS) notice.

Request: Input on the scope of "relatively permanent" waters and to what features this phrase applies.

Feedback: Attempting to define a relatively permanent waterbody on a nationwide basis will pose challenges considering hydrology, geology, and precipitation across the country varies significantly. Defining WOTUS based on areas with similar hydrology will allow the agencies to consider regional factors when determining relative permanence (hydrology, geology, ecology, vegetation, and soils). Hydrology in the Arid West differs considerably from elsewhere in the country, so applying a single Rule defining relative permanence across the country is problematic and will likely lead to insufficient consideration of hydrologic variability of the Arid West.

A hydrology-based approach to defining “relatively permanent” waters would create an interpretable and more realistic and scientifically defensible framework for the regulated community in Nevada. Determining WOTUS based on hydrology would allow for consideration of the inherent variability in environmental conditions, especially in the Arid West, and would be easier to interpret for state coregulators and the regulated community.

On average, Nevada receives eight inches of precipitation for the year. As a result of very low amounts of precipitation, the majority of Nevada’s surface waters are seasonal and certain surface waters have direct connections to Traditionally Navigable Waters (TNW). Strict definitions of “relatively permanent” waters that do not account for this type of hydrologic regime could remove federal oversight from ecologically important streams and drainages which may have deleterious downstream impacts to a TNW.

Request: Input on whether certain characteristics, such as flow regime, flow duration, or seasonality should inform a definition of “relatively permanent”

Feedback: Characteristics such as flow regime, flow duration, seasonality, hydroperiod (frequency, timing, and duration of water presence), vegetation, and soils should be considered when determining which waters meet the definition of WOTUS. However, the one-size-fits-all approach to defining WOTUS has proved to be problematic for implementation as evidenced by the myriad legal challenges to iterations of the WOTUS Rule over time. Revision to the definition of WOTUS should account for spatial variability in aquatic resources, land uses, land types, ecology, weather patterns, etc., across the nation. This approach can be supported by the existing and extensive resources that agencies have developed including U.S. Geological Survey’s National Hydrography Dataset, EPA’s ecoregion framework, USDA’s Land Resource Regions and Major Land Resource Areas, USACE’s Delineation Manual, National Ordinary High Water Mark Field Delineation Manual for Rivers and Streams, and the regionally-developed supplements to the delineation manual (https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/reg_supp/).

An additional resource that should be considered when assessing relative permanence includes Streamflow Duration Assessment Models (SDAM). The EPA has used best available science to develop this rapid assessment framework to classify stream flow duration, which is one of the most ecologically important aspects of a stream’s hydrology. In support of a hydrology-based approach to defining WOTUS, regionally developed models consider “differences and geographical variation in climate, geology, biogeography, and topography that can influence the relationships between field indicators and streamflow duration” (<https://www.epa.gov/streamflow-duration-assessment/development-regional-sdams>).

The term “relatively permanent” waters should clearly address the jurisdictional status of streams, rivers, wetlands, and lakes that might dry up in extraordinary circumstances, such as drought or seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months. Clearly identifying the jurisdictional status of these waters will enable the State of Nevada to determine the impacts associated with a revision of the WOTUS definition. The Arid West is characterized by low annual precipitation, high temperatures, and limited water resources meaning that Nevada’s precious aquatic resources may only flow intermittently. Physical characteristics such as discernable bed, banks, and course should be considered when assessing whether a waterbody is relatively permanent to fully consider aquatic resources in arid geographic regions. The purpose of the Clean Water Act is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters [...]” 33 U. S. C. §1251(a). To meet this goal, the scope of WOTUS should incorporate waterbodies that materially contribute to the chemical, physical, and biological integrity of the Nation’s waters.

The United States of America is a large and diverse nation, characteristics of “relatively permanent” waters should be made based on areas of similar hydrologic conditions with the ability to break out inclusions within and between ecozones. Prior to any changes in regulation, the agencies should provide the regulated community with

scientifically defensible hydrologic data and resources, such as flow regime and flow duration, to effectively evaluate the impacts of changing the definition of WOTUS across the Nation. To create a durable regulation, formal documentation of approved resources the agencies will reference when redefining WOTUS should be provided to allow for defensible jurisdictional determinations. Note, USDA NRCS, USGS, and the USFWS mapping scale and quality is not uniform across the nation.

Request: Input on how to identify “relatively permanent” tributaries in the field to assist with transparent, efficient, and predictable implementation.

Feedback: The agency’s stated objective is “transparent, efficient, and predictable implementation”. The agencies should also include “accurate” since it is equally important to accurately identify “relatively permanent” tributaries in the field. The agencies should be clear in the resources they intend to use for evaluating a WOTUS and also identify a means of recourse available to states or tribes if “relatively permanent” tributaries are not accurately identified in a jurisdictional determination.

As previously suggested in NDEP’s prior WOTUS rule change responses (2014, 2017, 2019, 2021, and 2022 comments, incorporated below), NDEP requests the agencies enhance the coregulator partnership with states and tribes regarding the Jurisdictional Determination (JD) process. The requests are responsive to the current docket, as well as a reiteration of prior requests made by Nevada. These requests are for a change in the agencies’ internal guidance or implementation policies and are not expected to require a change to the Rule. NDEP requests that the following occur:

- (1) The Corps needs to actively solicit state involvement and provide the state with a meaningful role when making JDs;
- (2) JDs made by one of the agencies (i.e., USACE) should apply to other applications of the Clean Water Act (i.e., §402); and
- (3) Case-by-case JDs should remain in place for longer than 5 years (2017, 2019, 2021 comments). Enabling approved JDs (AJDs) to remain in place until they are revisited, updated, or challenged would improve Rule durability and provide greater certainty to both the regulator and stakeholder communities.

Request: Input on 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.

Feedback: Consistent with the definition of wetlands as used by USACE and EPA since the 1970s for regulatory purposes, wetlands are defined as areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands should be considered abutting if the wetland materially contributes to the chemical, physical, and biological integrity of a federally jurisdictional waterbody. Analysis of the aquatic resources’ natural state, before anthropomorphic influence, should be taken into consideration when evaluating these systems to support their highest future uses.

However, as stated, Nevada seeks to ensure that the federal agencies provide clear and continued exemption of groundwater from the definition of WOTUS. Any rule revision must ensure that groundwater, including shallow subsurface flow, is clearly exempted from CWA jurisdiction and does not conflict with State’s rights over management of their groundwater resources.

Request: Input 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.”

Feedback: In the Arid West, intermittent connectivity of aquatic resources is typical, and consideration of this process should be considered when developing a rule that reflects differences in hydrology across the Nation. Native species in Nevada exhibit physical and behavioral adaptations to the temporary and long-term interruptions in surface connectivity.

Request: Input on the definition of “adjacent” as well as which are the appropriate categories to properly assess using the continuous surface connection requirement. Input on the scope of “continuous surface connection” and to which features this phrase applies. Input on developing an approach for continuous surface connection.

Feedback: The “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’ ” dated March 12, 2025 stated “[...] an interpretation of “continuous surface connection” which allows for wetlands far removed from and not directly abutting covered waters to be jurisdictional as adjacent wetlands has the potential to violate the direct abutment requirement for “adjacent wetlands” under the plurality’s standard and now Sackett’s endorsement of that standard. Therefore, any components of guidance or training materials that assumed a discrete feature established a continuous surface connection are rescinded.” The memo further stated that discrete features include “[...] non-jurisdictional ditch, swale, pipe, or culvert.”

If the agencies are now interpreting that discrete features can sever federal jurisdiction, then previous permitting decisions involving the construction of ditches, swales, pipes, or culverts that now sever jurisdiction did not fully consider the loss of WOTUS that resulted from the construction of federally permitted, non-jurisdictional features under this new interpretation on continuous surface connection. NDEP does not agree with all aspects of the Agencies’ March 12, 2025, memorandum disclaiming jurisdiction of aquatic resources that are adjacent to WOTUS but are separated by a discrete feature since the permanent loss of these features could not have been considered in light of these new parameters during USACE’s historic permitting decisions, nor were they necessarily subject to compensatory mitigation requirements when USACE authorized the structures severing jurisdiction. Wetlands adjacent to WOTUS will need careful reconsideration regarding whether they have a connection that plays a vital role in regulating water quality, quantity, and supply, providing fish and wildlife habitat, recreation, economic benefits, or attenuating flood waters which can reduce damage to life and property.

If the aquatic feature meets the relatively permanent standard, then a non-jurisdictional structure separating the aquatic feature does not cease to make the feature relatively permanent and hydrologically connected to a WOTUS. During the jurisdictional determination process, USACE should evaluate present and historic physical, chemical, and biological connection, landscape position, and interaction of adjacent or abutting aquatic resources when determining continuous surface connection to jurisdictional waters. Another consideration is the role an aquatic resource plays in transmitting water, nutrients, and energy while connecting upstream aquatic resources to downstream channels. Jurisdictional determinations should consider the roles and the environmental benefits of retaining hydrologic connectivity within a watershed prior to disclaiming jurisdiction. Factors related to the functions and services provided by the aquatic resource relative to a jurisdictional water should be able to overrule adjacency; “adjacency” should not be a sole diagnostic characteristic of jurisdiction.

Request: Input on the scope of jurisdictional ditches. In practice, different types of ditches have generally been considered non-jurisdictional in different regulatory regimes.

Feedback: Ditches are described as features excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water (40 CFR 120.2(b)(3)). Clean Water Act §404(f) identifies activities that are exempt from Clean Water Act §404 permitting, including maintenance of drainage ditches, construction and

maintenance of irrigation ditches and farm or stock ponds (<https://www.epa.gov/cwa-404/exemptions-permit-requirements-under-cwa-section-404>). NDEP continues to support exclusions for ditches to be explicit in applying the exclusion to agricultural features. NDEP supports the exclusion definition for ditches to be revised to explicitly exclude agricultural features from the definition of WOTUS.

The Rule should include language stating that “Nothing in this section shall be interpreted to limit or otherwise conflict with the exemptions set forth in 33 U.S.C. 1344(f) and in 33 C.F.R. 323.4 and 40 C.F.R. 232.3.” Further clarity can be provided in the Rule that emphasizes points related to §402 such as, “The Clean Water Act exempts a number of activities from permitting or from the definition of “point source,” including agricultural storm water and irrigation return flows in 33 U.S.C. 1362(14).”

Ditches do not intuitively constitute “waters,” that is, “geographic[al] features that are described in ordinary parlance as ‘streams, oceans, rivers, and lakes,’ ” *Sackett*, 598 U.S. slip op. at 1 (2023). Furthermore, Ditches that *diverge* from jurisdictional waters and do not return (e.g. irrigation ditches) are *distributaries* not *tributaries*. Because the purpose of the CWA is to prevent pollution of traditional interstate navigable waters (and their tributaries), regulating *distributaries* that do not return (like most irrigation ditches) goes beyond the CWA’s intent because *distributaries* do not contribute flow (and potentially pollution) into jurisdictional waters.

Request: 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, (11) would provide additional clarity.

Feedback: This definition is acceptable for a base definition, however ditches should be categorized and evaluated based on their use category (agricultural, irrigation, drainage, etc.). Pollution transport is a function of use.

Request: Input on experiences under the Amended 2023 Rule.

Feedback: Nevada’s definition of waters of the State is broad and includes “all waters situated wholly or partly within or bordering upon [the] State, including but not limited to: (1) [a]ll streams, lakes, ponds, impounding reservoirs, marshes, water courses, waterways, wells, springs, irrigation systems and drainage systems; and (2) [a]ll bodies or accumulations of water, surface and underground, natural or artificial” (Nevada Revised Statute (NRS) 445.415). Further, NRS 445.455 specifically prohibits the discharge of a pollutant without a permit.

While the State of Nevada does regulate activities occurring within waters of the State, a *reduced scope of waters meeting the definition of WOTUS will lead to the loss of cooperative federalism, technical knowledge, resources, and staffing that USACE provides through their Regulatory Divisions*. Notably, USACE regulated activities are evaluated consistent with Clean Water Act §Section 404(b)(1) guidelines (40 CFR 230) which constitute the substantive environmental criteria used in evaluating federally authorized activities. Reduction in scope of WOTUS, and the associated *reduction in federal coregulation partnerships, places increased regulatory responsibility on the state to enhance or develop comparable state-level programs to protect federally de-regulated waters*. Such program development coincides with resource limitations. The time and effort associated with state-level program development could have a chilling effect on economic growth because project permitting may necessarily be halted until replacement products could be put in place. *If a rule revision results in a reduction in the scope of WOTUS, States must be afforded a reasonable amount of time prior to the effective date of a revised rule to adapt and develop state regulations to avoid temporal loss of water quality protections.*

Other Comments

- NDEP believes political boundaries should be part of the definition, at least on a case-by-case basis wherein an interstate water is impaired under the Clean Water Act (CWA) §303(d). The agencies have a responsibility to oversee and resolve overarching state-to-state water quality issues if conflict exists between states over implementation activities to restore waterbodies. An example is a river system that is a critical resource to

a region that flows from one state to another and is impaired from upriver activities that are out of the second states control. EPA regulatory oversight would be helpful since the upstream activities are out of the downriver state's regulatory jurisdiction. In instances such as this, Nevada values EPA oversight and partnership as a co-regulator in restoration of waterbodies that cross state lines and believes issues would be resolved more readily if federal jurisdiction over these waters is maintained.

As the agencies compile the vast responses and answers to the inquiries set out in the Request for Recommendations, we encourage active ongoing engagement with state coregulators. This should be conducted with states directly or through the Association of Clean Water Administrators, National Association of Wetland Managers, the Western States Water Council and the Environmental Council of the States. As future implementers of the final rule, the states have a vested interest in ensuring that there is the clarity that the agencies seek at the end of the day. Since responses to the request for recommendation could result in changes to the definition of WOTUS, it is critical that states and tribes be included in the process of moving toward a rule revision. We take the role of coregulator seriously and will continue to engage with the agencies.

Please feel free to reach out to further discuss the topics covered herein, or others for which the agencies seek a western perspective. I can be reached at EMAIL [at] ndep.nv.gov or 775-PHONE.

Sincerely,



Jason Kuchnicki
Chief, NDEP Bureau of Water Quality Planning

Incorporated by Reference:

NDEP 2014 comments – Docket No. EPA-HQ-OW-2011-0880

NDEP 2017 comments – Docket No. EPA-HQ-OW-2017-0203

NDEP 2019 comments – Docket No. EPA-HQ-OW-2018-0149

NDEP 2021 comments – Docket No. EPA-HQ-OW-2021-0328

NDEP 2022 comments – Docket No. EPA-HQ-OW-2021-0602

cc: Jennifer Carr, Administrator
Danilo Dragoni, Deputy Administrator
Jeff Kinder, Deputy Administrator
Andrew Dixon, Water Pollution Control Bureau Chief