THE STATE of ALASKA
GOVERNOR MIKE DUNLEAVY

Department of Environmental Conservation

OFFICE OF THE COMMISSIONER

Post Office Box 111800
Juneau, Alaska 99811-1800
Main: 907.465.5066
Fax: 907.465.5070

April 23, 2025

United States Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

RE: WOTUS Notice: The Final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations (EPA-HQ-OW-2025-0093)

Dear Docket Manager:

On behalf of the State of Alaska (Alaska), we submit the following comments on the implementation of the definition of "Waters of the United States" (WOTUS) post-Sackett under the Clean Water Act (CWA), (Docket N. EPA-HQ-OW-2025-0093) publicly noticed on March 24, 2025 (90 Fed Reg. 13428). The United States Army Corps of Engineers (USACE) and the United States Environmental Protection Agency (EPA) seek engagement with states and other stakeholders on 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*. *Sackett* significantly curtailed the reach of the CWA through its interpretation of WOTUS, leaving the regulation of non-WOTUS waters to states. This rule requires significant and substantive changes in order to respect and honor the Supreme Court's reduction in federal CWA jurisdiction. Also, failing to make these changes thwarts President Trump's call for energy independence since expansive readings of WOTUS jurisdiction have an inordinate impact on development in Alaska. Alaska's recommendations set out below must be enacted.

Alaska is uniquely affected by the CWA.

Alaska's unique circumstances mean that it is critical for Alaska to be involved in the determination of what waters (including wetlands) are, post *Sackett*, subject to CWA requirements. Alaska's stake in this question cannot be understated; Alaska has more coastline than the entire conterminous United States, over three million lakes greater than five acres in size, and over 15,000 water bodies that are known to support resident or anadromous fish.[1] At least one inventory estimates that Alaska has over 174 million acres of wetlands, more wetlands than all other states combined. These wetlands comprise approximately 43 percent of the surface area of Alaska.[2] Of course, not all of these waters are jurisdictional under the CWA. For those that are not, Alaska has long protected these important resources under statutory and regulatory authorities.

For years, Alaska has advocated for federal/state collaborative rulemaking on the issue of CWA jurisdiction. This advocacy has fallen on deaf ears. Alaska appreciates that the current federal agencies are seeking input and are undertaking formal rulemaking rather than simply issuing guidance for this critical matter. Furthermore, Alaska cannot stress enough that the language of any rulemaking effort for WOTUS must, first, take into account Alaska's

[1] Alaska Department of Fish and Game, *Catalog of Waters Important for the Spawning, Rearing or Migration of Anadromous Fishes,* available at: http://www.adfg.alaska.gov/sf/SARR/AWC/index.cfm?ADFG=main.overview.
[2] Alaska Department of Environmental Conservation. *Final 2014-2016 Integrated Report*, available at: https://dec.alaska.gov/water/water-quality/integrated-report/

unique circumstances and, second, enable the average landowner to confidently assess if their property contains jurisdictional waters without the need for professional hydrologists.

Congress has previously recognized and legislated Alaska's uniqueness.

Alaska's unique status has been explicitly recognized multiple times by Congress. Alaskan permafrost wetlands were excluded from the Food Security Act's definition of "wetland" by the 1986 amendments to the Act.[3] The Alaska National Interest Lands Conservation Act created "Alaska-specific carve-outs to the National Park Service's authority," which had the effect of setting aside extensive land in Alaska for national parks and preserves "on terms different from those governing such areas in the rest of the country."[4] The Crude Oil Windfall Profit Tax Act of 1980 contained a tax exemption for crude oil extracted from certain areas of Alaska.[5] This repeated federal recognition of Alaska's central role as a critical source of natural resources must again be recognized in any new federal regulations related to the CWA and the definition of WOTUS.

Such Alaska-specific exceptions are also necessary from a technical perspective. As the United States Supreme Court recognized in the context of the crude-oil tax exemption, it was "Alaska's 'unique climatic and geographic conditions'" that justified the differential tax treatment.[6] Here, too, in the WOTUS context, Alaska's unique climate and geography require this exceptionalism be reflected in regulation.

"Relatively Permanent Waters" should reflect waterbodies that are actually flowing on a year-round basis.

EPA and USACE are seeking input on the scope of the definition "relatively permanent" and to what features this phrase applies.

Permanence is defined[7] as "lasting, stable" but in the context of WOTUS, the definition of "relatively permanent" needs to be coupled with regional geomorphic and hydrologic differences to truly be useful in the decision-making process. The term "relatively permanent" must differ based on the regional characteristics of the waterbody.

Wetlands, tributaries, and ephemeral streams each have significant differences in appearance, seasonal flow, and level of input to downstream waters in a wetter climate than a drier climate. Alaska has 32 different ecoregions.[8] These ecoregions range from temperate rainforests in southeast Alaska with average annual precipitation rates of up to 153.3 inches (Ketchikan) and drier climates in the interior and northern portions of the state, which receive annually less than 5 inches of "rainfall equivalent" precipitation (Utqiagvik).[9] In approximately two-thirds of the state the majority of the waters (surface and subsurface) exist as a solid (i.e., frozen) for a significant portion of the year and only exhibit some of the traits and provide some of the functions normally attributed to "relatively permanent" waters and wetlands found in other parts of the U.S. These climatic attributes of northern latitude limit or preclude connectivity and the potential to impact traditional navigable waters.

---

[3] 16 U.S.C.A. § 3801(27) ("For purposes of this Act, and any other Act, this term"—wetland—"shall not include lands in Alaska identified as having high potential for agricultural development which have a predominance of permafrost soils."); PL 99–349, 100 Stat. 710 (1986) (adding this language).

[4] *Sturgeon v. Frost*, 139 S. Ct. 1066 (2019); *see* 94 Stat. 2371, 16 U.S.C. § 3101 *et seq.*

[5] 26 U.S.C. §§ 4986–4998 (since repealed).

[6] Specifically, the Court noted that "development and production of oil in arctic and subarctic regions is hampered by 'severe weather conditions, remoteness, sensitive environmental and geological characteristics, and a lack of normal social and industrial infrastructure[.]'" *United States v. Ptasynski*, 462 U.S. 74, 78 (1983) (quoting H.R.Conf.Rep. No. 96-817, p. 103 (1980)). These conditions increase the cost of drilling wells in Alaska to "as much as 15 times greater than that of drilling a well elsewhere in the United States." *Id.* These circumstances justified the exemption of certain Alaska crude oil from a federally imposed tax. *Id.*

[7] Merriam-Webster Dictionary. 11th Edition. 2004

[8] https://www.adfg.alaska.gov/static/lands/ecosystems/images/ecoregions_lg.png

[9] www.ncdc.noaa.gov

The Corps' 1987 wetlands delineation manual (1987 Manual) was developed to provide criteria for identifying wetlands and was viewed approvingly by Congress in subsequent legislation as a tool to assist the federal agencies in determining what may be jurisdictional wetlands under the CWA. Due to regional differences in vegetation, soils, and hydrology, application of the 1987 Manual to all regions in the U.S. proved unworkable. This is particularly the case for Alaska, given that permafrost, a condition present under ~85% of Alaska's lands and waters,[10] is not even discussed in the 1987 Manual. To address these and other issues, the federal agencies have developed regional supplements to the 1987 Manual to provide a more regional approach to wetland delineations. These supplements, including the 2007 Regional Supplement for Alaska, are guidance rather than rule. However, because they established criteria for determining whether a wetland is jurisdictional under the CWA, they should have been adopted under formal Administrative Procedure Act rulemaking.

EPA and USACE must create regionalized rulemaking for jurisdictional determinations to assist in determining whether wetlands contain the geophysical conditions to qualify as "relatively permanent." To qualify as "relatively permanent" in Alaska, waters must exhibit the following attributes:

- A waterbody that has measurable flow or standing water at least seasonally based on regional climatic conditions;
    - The term "seasonal" refers to
        - extended periods of standing or continuously flowing water occurring in the same geographic feature year after year, except in times of drought; and
        - does not include tributaries with flowing or standing water for only a short duration in direct response to precipitation.
- Contributes flow directly to a WOTUS; and
- The waterbody must be readily identified by a defined bed and bank with an ordinary high-water mark or high tide line.

To provide repeatable and predictable results when determining whether a water is relatively permanent, Alaska needs the agencies to put resources into the development of a region-specific streamflow duration assessment methodology[11] to account for its diverse hydrologic landscape. Federal agencies have developed these tools for the contiguous U.S., but to date, only a literature review has been completed for Alaska.[12] Alaska contains more wetlands than the conterminous U.S. yet has been regularly overlooked during the development of hydrologic tools for making jurisdictional determinations. Any new rule must remedy this substantive lapse.

Permafrost wetlands are not relatively permanent surface water connection.

Continuous and discontinuous permafrost wetlands exist across the northern latitudes, including 85% of Alaska, and create a distinct water and groundwater ecosystem. Permafrost can form a nearly impervious layer of soil, which then creates seasonally saturated soil conditions above the frozen layer – these are permafrost wetlands. These permafrost wetlands result from frozen groundwater that restrict any water permeation for all of or the majority of the year. Depending on topography, soil types, and other features, permafrost tends to be associated with wetlands. While wetlands in areas with permafrost may serve certain valuable habitat functions, these functions do not make them subject to federal CWA jurisdiction. Moreover, due to a very short growing season (that may be interrupted by frosts) and hydric soils that generally hover around a "biological zero" temperature, it can be difficult to demonstrate a significant nexus to downstream waters and wetlands within permafrost areas. There is often a significant temporal lag in hydrology (freeze/thaw cycle and lack of slope) that is more equivalent to groundwater flow, and in most cases, there is little evidence of a significant subsurface connection. Additionally, permafrost wetlands constitute unique and widespread features that do not fit under the guidance of a relatively permanent

[10] https://dggs.alaska.gov/hsg/permafrost.html
[11] https://www.epa.gov/streamflow-duration-assessment
[12] https://www.epa.gov/streamflow-duration-assessment/development-regional-sdams

surface water connection. It is for these reasons that *Alaska's permafrost wetlands must be categorically excluded from consideration as jurisdictional wetlands.*

The definition of "Ordinary High-Water Mark" must have a clear and consistent definition.

In WOTUS, the term "Ordinary High-Water Mark" (OHWM) is typically used to establish the jurisdictional boundary of a water. In the past, OHWM had a variety of definitions, which created regulatory uncertainty. OHWM should be defined as that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, or change vegetation susceptible to permeant flooding as defined by existing wetland characterization methods. Importantly, the "presence of litter and debris" must be eliminated from the definition of OHWM. *Litter and debris, as a means of measuring OHWM is imprecise and arbitrary and therefore should not be included in such a definition due to its subjective nature.*

Continuous Surface Connection means a wetland that actually abuts the underlying navigable water, not wetlands that are chained together through intermittent wetlands and uplands.

EPA and USACE are seeking input on the scope of "continuous surface connection" and to which features this phrase applies.

Alaska appreciates the publication of 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" Under The Definition Of "Waters Of The United States" Under The Clean Water Act* (March 12, 2025) and considers it a meaningful step forward in defining the scope of "continuous surface connection" as it serves to reconcile the agencies' case-specific policy memoranda issued post-*Sackett* that may contain inconsistent interpretations of "continuous surface connection."

Alaska concurs with the agencies' interpretation that "waters of the United States" include "only those adjacent wetlands that have a continuous surface connection because they directly abut (i.e, touch) the [requisite jurisdictional water] (e.g., they are not separated by uplands, a berm, dike, or similar feature)."[13]

Alaska further concurs with the Supreme Court *Sackett* majority that the two-part test for determining CWA jurisdiction over adjacent wetlands is appropriate.[14] First, the adjacent body of water must be a "water of the United States," which generally means traditional navigable waters, or a relatively permanent body of water connected to a traditional navigable water. Second, the wetland, assuming it satisfies the agencies' longstanding regulatory definition of "wetlands" at 33 C.F.R. 328.3 and 40 C.F.R. 120.2, must have a continuous surface connection to a requisite covered water, making it difficult to determine where the water ends and the wetland begins. Only nontidal wetlands that are delineated and coded with water regimes as permanently flooded satisfy the condition of a relatively permanent surface water connection to the traditional navigable water to which it abuts. *To resolve issues regarding drought or low tide conditions that may make such decisions challenging, the Agencies must consider Alaska's above comments regarding the definition of a relatively permanent condition and regional rulemaking.*

Connectivity of waters must reflect actually connected surface waters.

Alaska's previous comments related to "relatively permanent" and "adjacency" are applicable in the context of "in connection to" as such waters need to abut or have a continuous surface water connection to satisfy the conditions provided by the Supreme Court in *Sackett*.

---

[13] March 12, 2025 "Memorandum to the Field."

[14] *Sackett v. EPA,* 598 U.S. 651, 678 (2023).

Any proposed rule cannot allow jurisdiction to 'jump over" the uplands/non-wetlands to other wetlands to assert federal jurisdiction simply because the agency determines an area to be a "wetland mosaic." The Supreme Court held that federal jurisdiction is not limitless; jurisdiction and the "continuous surface connection" cannot be stitched together by chaining together multiple wetland and upland areas to haphazardly and eventually connect these various ecosystems to a traditionally navigable water.[15] Such jurisdictional stitching stretches the definition of contiguous beyond the breaking point when wetlands that have an insignificant effect on traditional navigable waters are jurisdictional based on contiguity, particularly when the insignificant effects occur over timescales more akin to groundwater than surface water flow.

The definition of "adjacent" should equate to "abut" as they are characterizations of physical proximity and reflect the intent of the CWA pre-2015 regulatory language and Sackett.

Jurisdictional ditches cannot be used to establish jurisdiction.

Core to the question of connectivity of waters and the definition of "continuous surface connection" within the WOTUS context is the role of so-called "jurisdictional ditches," artificial or regularly dry ditches that have previously been used to improperly expand the scope of CWA jurisdiction. Alaska asserts that all such jurisdictional ditches must contain the same attributes as WOTUS tributaries; they must, *inter alia*, have continuous seasonal flow, exist as more than just a response to a precipitation event, and feed into a traditionally navigable water. Jurisdictional ditches should be excluded from the definition of WOTUS, and an exclusion for jurisdictional ditches must encompass those ditches constructed for the sole purpose of managing precipitation and that do not meet the definition of "relatively permanent."

"Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow" cannot be used to extend WOTUS jurisdiction. Any rule promulgated must state that such ditches that drain uplands but eventually discharge to waters of the U.S. are not jurisdictional throughout the portion of the ditch excavated in uplands. The exclusion of these ditches must be clear and unambiguous, including both ditches that do not contribute flow to a downstream navigable water, and those with flow that will not contribute "significantly" to the water quality in a downstream navigable water.

Summary

The State of Alaska is glad to see that EPA and USACE are seeking input on these terms referenced in the CWA, which have been subject to litigation for many years. The present rule is woefully inadequate and not consistent with the Supreme Court's decision in *Sackett* and requires substantive change. In addition, if Alaska is to be the focus of energy projects for the entirety of the United States, it is important to remove inappropriate roadblocks to this development. Alaska's previous comments on matters associated with WOTUS have not been incorporated into previous rulemaking efforts; this is something the agencies can now rectify.

To establish a definition of WOTUS in regulation consistent with the language of the CWA and Supreme Court interpretation, any regulation must provide that:

1. To qualify as "relatively permanent," waters must exhibit the following attributes:
    - A waterbody must have measurable flow or standing water at least seasonally based on regional climatic conditions;
        - The term "seasonal"
            - refers to extended periods of standing or continuously flowing water occurring in the same geographic feature year after year, except in times of drought; and
            - Does not include tributaries with flowing or standing water for only a short duration in direct response to precipitation.

[15] *Id.* at 684.

- Flows directly into a WOTUS; and
- The waterbody must be readily identified by a defined bed and bank with an ordinary high-water mark or high tide line.

2. Permafrost wetlands must be specifically excluded from the WOTUS definition.

3. Use of litter or debris must be eliminated from the definition of OHWM.

4. Use of the two-part test identified by the Supreme Court plurality when determining a "continuous surface connection."

5. Non-tidal wetlands that abut a traditional navigable water shall only be considered to form a relatively permanent surface water connection if the wetland feature is delineated with a permanently flooded water regime.

6. The definition of "adjacent" must equate to "abut" as they are characterizations of physical proximity and reflect the intent of the CWA pre-2015 regulatory language and *Sackett*.

7. "Ditches that are excavated wholly in uplands, drain only uplands, and have less than perennial flow" must be excluded from the WOTUS definition.

Thank you for your consideration of our comments.

Christina Carpenter
Acting Commissioner