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U.S. Environmental Protection Agency
EPA Docket Center - Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue NW
Washington, DC 20460

Submitted via email to OW-Docket@epa.gov; and through the online portal at <https://www.regulations.gov/docket/EPA-HQ-OW-2025-0322>

RE: Comments on EPA's Proposed Revisions to Waters of the United States Rule (Docket ID No. EPA-HQ-OW-2025-0322)

Wisconsin Wetlands Association is a 501(c)(3) organization dedicated to the protection, restoration, and enjoyment of Wisconsin's wetlands and associated ecosystems. Our work is science-based, and is focused on improving wetland policies, practices, understanding, and acceptance.

Founded in 1969, Wisconsin Wetlands Association (WWA) has long advocated for policy solutions that simultaneously improve the administrative efficiency of state and federal wetland laws, while maintaining legally available and scientifically defensible protections.

We oppose the proposed revisions to the Waters of the United States (WOTUS) rule because none of the proposed or alternative provisions achieve these essential objectives. Instead, the rule significantly reduces the wetlands and streams subject to federal Clean Water Act jurisdiction, while also making it substantially more difficult for regulators and affected landowners to determine when and where that jurisdiction applies.

We substantiate this assertion in the comments below. While our overall position is that this rule is both an overreach and unnecessary, our comments include feedback on which alternatives are more and less feasible to implement and protective of wetland and water resources

1. The proposed rule fails to uphold the purpose and intent of the federal Clean Water Act.

The published rule justifies the proposed reduction of protections for wetlands and streams based on a finding in the Sackett decision that the protections of the Act "cannot be drawn in response to ecological concerns."

This faulty rationale overlooks the fact that the stated purpose of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the nation's waters." These three factors drive the ecology of river and stream systems. EPA acknowledges this in their description of an ecological conditions paradigm when they state that "ecological condition refers to the state of ecological systems, which includes their physical, chemical, and biological characteristics and the

processes and interactions that connect them.¹ Ecological concerns are thus central to achieving Clean Water Act goals.

2. The proposed rule goes farther than the decision in Sackett vs EPA requires.

The proposed rule reinterprets rather than clarifies the Sackett decision. New definitions for relatively permanent waters and continuous surface connections, and proposed provisions for how to administer them, will effectively reduce the scope of federal waters far beyond what the decision requires. This is inappropriate and will undoubtedly spur yet another round of litigation. It is also unnecessary because the 2023 conforming rule already incorporated all the relevant tests required by the U.S. Supreme Court in Sackett v EPA.

Feedback provided to us by private sector wetland consultants with decades of combined experience indicates that the administration of the 2023 rule has been clear and efficient, and generally works well for their clients. They predict the opposite will be true under the proposed revisions.

3. The proposed revisions sow further confusion on what waters are and are not subject to federal jurisdiction. Specific concerns and recommendations to address this include:

a. Relatively permanent waters “during the wet season.”

While the concept of tying jurisdiction to the presence of relatively permanent waters during the “wet season” attempts to ensure that rivers and streams in more arid regions remain subject to federal protections, it does not offer the desired bright line framework for making jurisdictional determinations.

The difficulty of this approach is evident in the lack of a clear proposal for how to define the “wet season” and the presentation of multiple alternatives for what duration of flow during a designated wet season is required to trigger jurisdiction. Because the term “wet season” does not appear in related statute or case law we recommend abandoning this principle altogether.

Given the options presented, the only workable alternative appears to be defining relatively permanent waters consistent with the pre-2015 regulatory regime such that relatively permanent waters are those that typically have standing or flowing water year-round or that have standing or continuously flowing water at least seasonally (e.g., typically three months).

b. Tributaries

The proposed approach to determining jurisdictional tributaries would require knowledge of the physical and flow characteristics of individual stream reaches and whether there are any non-relatively permanent features downstream of the review area that would sever jurisdiction. This would require surveys of an entire tributary system to make a site-specific determination.

Absent a massive commitment to improve available data on the physical and flow characteristics of the nation’s stream network, including reaches where downwelling sends stream flow below the surface, there is no reliable, efficient way to implement the proposed provisions.

¹ <https://www.epa.gov/report-environment/ecological-condition>

The same is true for the proposed approach that “adjacent wetlands with non-relatively permanent flow through them cannot serve as a connection and therefore sever jurisdiction upstream of the tributary network.” We agree with EPA’s assessment that it will be difficult to ascertain if there are downstream wetlands located at any point in the tributary’s path to a traditional navigable water and whether those wetlands have relatively permanent flow through them.

Of the options presented, the only workable alternative is the one where a tributary does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water through a channelized non-jurisdictional surface water feature, through a subterranean river, through a culvert, dam, tunnel, or other similar artificial feature, or through a debris pile, boulder field, or similar natural feature.

c. Wetlands

As recommended for relatively permanent waters, we recommend abandoning the concept of tying jurisdiction for wetlands to hydrologic conditions during some as yet undefined “wet season.”

EPA notes that “having surface water at least during the wet season is intended to include wetlands that have at least semipermanent surface hydrology that is persistent surface water hydrology uninterrupted throughout the wet season except in times of extreme drought and would not include wetlands without semipermanent surface hydrology, including wetlands with only saturated soil conditions supported by groundwater.”

Implementation of this definition is not feasible because it would require collection of data on both the duration and source of wetland hydrology to make a jurisdictional determination at every site. This approach is also not consistent with the law because, as noted by EPA, it would sever federal jurisdiction for the majority of wetlands abutting relatively permanent waters - not just in the arid west, but everywhere.

The same is true for any of the proposed alternatives that would define jurisdiction based on the duration of the presence of surface water (i.e., during the growing season, permanently wet).

As such, the only workable alternative is the one where simple abutment (touching) renders wetlands “indistinguishable” from surface waters. As noted by EPA, under this alternative approach, a landowner or other interested party could determine immediately whether a wetland is jurisdictional by looking at its proximity to the jurisdictional water, without having to take an additional step of evaluating the wetland’s surface hydrology or assess records from other times during the year.

Because wetlands adjacent to rivers and streams interact with flowing waters in ways that drive the chemical, physical, and biological characteristics of those waters, jurisdiction based on abutment is also the correct answer for the restoration and maintenance of relatively permanent waters.

Under this recommendation, the proposal that jurisdiction in wetland mosaics would only apply to the portions of the mosaic that have continuous surface water during the wet season should also be abandoned. Not only would this approach to jurisdictional determinations result in significant reduction of protection for wetlands that are indistinguishable from adjacent surface waters, it would also require an approach to wetland delineation that differs substantially from what's required in the 1985 manual. We question the feasibility of this approach. At the very least would result in increased expenses and project delays for applicants, and likely substantial additional training for practitioners before it could be implemented.

4. The proposed rule does not provide the administrative efficiencies claimed.

As noted above, the proposal to tie jurisdictional determinations to the presence of relatively permanent flow or continuous surface water connections during the wet season requires data that is not readily available for most waters.

Absent such data, jurisdictional determinations (JDs) will require either privately funded hydrologic monitoring or multiple site visits over the duration of the wet season. This will add time and expense for applicants and a situation where JDs are largely done on a case-by-case basis.

It also creates an increased workload for regulatory agency staff. Given recent workforce reductions, we question whether the agencies have the workforce needed to complete JDs and associated site visits.

The proposed treatment of wetland mosaics is particularly problematic from a JD perspective as it requires data collection that goes far beyond what is typically gathered in a wetland delineation and is likely beyond the general expertise of many professional delineators. We therefore recommend that federal jurisdiction automatically extend to the entirety of any wetland mosaic that abuts and has a continuous surface connection to a relatively permanent water.

5. The proposed revisions place an undue burden on private sector consultants and their clients.

The proposed revisions fundamentally expand the job of a wetland delineator from having to answer "is this area a wetland and where is the boundary?" to also determining "is this wetland connected to a water of the United States?" Though the agencies retain the responsibility for jurisdictional determinations, developers want the determination prior to designing a site. This places a burden and liability on the private sector consultants and creates expense and risk for their clients.

In closing, the proposed rule unnecessarily complicates administration of the federal Clean Water Act. Both the resource and the regulated public are better off if the proposed rule is abandoned in favor of continued implementation of the 2023 Navigable Waters Protection Rule. Absent that preferred approach, we respectfully request your consideration of the recommendations provided above.

Questions about these comments can be directed to Erin O'Brien, Policy Programs Director at 609-250-9971 or erin.obrien@wisconsinwetlands.org.