



# RESOURCE DEVELOPMENT COUNCIL

Growing Alaska Through Responsible Resource Development

April 23, 2025

U.S. Environmental Protection Agency  
Office of Water (4504-T)  
1200 Pennsylvania Ave. NW  
Washington, DC 20460

U.S. Army Corps of Engineers  
Headquarters, Operations and Regulatory (CECW-CO-R)  
441 G Street NW  
Washington, DC 20314



Submitted electronically via <http://www.regulations.gov>

Re: WOTUS Notice: The Final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations (90 FR 13428, March 24, 2025); Docket ID No. EPA-HQ-OW-2025-0093

Dear Administrator Zeldin and Secretary Driscoll:

On behalf of the Resource Development Council for Alaska (RDC), please accept these comments in response to the above referenced docket and the guidance set forth in 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”* (March 12, 2025) (hereafter the Guidance Memorandum). For the reasons that follow, RDC agrees with the Guidance Memorandum’s goals to clarify, provide consistency, and eliminate confusion about the scope of adjacent wetlands pursuant to the Supreme Court’s decision in *Sackett v. EPA*, 598 U.S. 651 (2023) (hereafter *Sackett*).

## About RDC

RDC is an Alaskan statewide, non-profit professional trade association founded in 1975. Our diverse membership is comprised of individuals and companies from Alaska’s fishing, tourism, forestry, mining, and oil and gas industries and includes Alaska Native corporations, local communities, organized labor, and industry support firms. RDC’s purpose is to advocate on behalf of these

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industries and encourage a strong, diversified private sector in Alaska and expand the state's economic base through the responsible development of our natural resources.

Part of our legislative and regulatory priorities are to advocate for a stable regulatory regime to enhance our economic competitiveness for all our industries. This includes a policy to advocate for predictable, timely, and efficient state and federal permitting processes based on sound science and economic feasibility. The Guidance Memorandum providing guidance to the agencies regarding the implementation of the definition of WOTUS consistent with *Sackett* is overdue and appreciated by the resource development industries of Alaska.

## History: Alaska is unique

Alaska contains approximately 174 million acres of wetlands (65% of the nation's total), with nearly 80% of the state underlain in permafrost. Alaska has 63% of the nation's jurisdictional waters and is one-fifth of the U.S. land mass. Any expansion of WOTUS has a disproportionate impact to Alaska. Alaska also has more coastline than any other state.

Much of Alaska is currently off-limits, preserved in vast Conservation System Units (CSUs). In 1980, when Congress passed the Alaska National Interest Lands Conservation Act (ANILCA), a staggering 106 million acres of the public domain was withdrawn into CSUs, such as national parks and refuges, bringing Alaska's total withdrawn acreage to 158 million acres.

Unlike the "Lower 48" states, where most of the land is owned by the private sector, less than one percent of the 365 million acres in Alaska is under conventional private ownership. Currently, the federal government owns 60 percent of Alaska and the State of Alaska owns 28 percent. Alaska Native Corporations account for approximately 12 percent of the state as a result of the Alaska Native Claims Settlement Act (ANCSA) which Congress enacted in 1971 to provide a means by which Alaska Native people could derive economic benefits from the development of natural resources on their lands.

Given the state's reliance on natural resource development for economic stability and the funding of essential public services, it is imperative the federal government provide balanced federal policies that encourage multiple use activities on our vast federal lands and responsible resource development on state, Alaska Native, and private lands.

Alaska is an expensive and challenging environment. The added expense and uncertainty in the process for obtaining a permit under the CWA discourages investment in Alaska, a place where the



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cost of doing business is already high and the extreme weather conditions often delay or impact projects. This is particularly the case in Alaska’s many small and remote communities and regulating small and remote waters.

To maintain and attract investment to Alaska, the state and resource development industries need stability. All Alaskans want clean air and clean water, and we believe responsible resource development can be done while protecting and preserving the environment.

## Waters of the United States & Adjacent Wetlands

The Water of the United States (WOTUS) rule is one of the more far-reaching federal rules. RDC has long been concerned the WOTUS rule would be used as a zoning power, triggering an onerous permitting process for areas in Alaska that would be considered waters of the United States. In addition, WOTUS asserts additional jurisdiction over non-federal lands and waters triggering permitting under the Clean Water Act (CWA) Section 404. RDC is concerned any further expansions will have significant negative consequences for the Alaska economy. The *Sackett* case has changed that – for the better – in determining when adjacent wetlands are subject to CWA jurisdiction.

*Sackett* established a clear, commonsense two-part test: First, the adjacent body of water must be a “water of the United States” (generally a traditional navigable water (TNW) or a relatively permanent body of water connected to a TNW). Second, the wetland must have a continuous surface connection to a requisite covered water making it difficult to determine where the water ends and the wetlands begin. *Sackett* expressly rejected the “significant nexus” test established by previous Supreme Court precedent. RDC agrees with the Guidance Memorandum’s statement on page 4 that “[r]emoving the significant nexus [test] leaves the *simple fact* that unless a wetland has a continuous surface connection – directly abutting a requisite jurisdictional water – it cannot be determined to be jurisdiction as an adjacent wetland.” (Emphasis added.)

RDC also agrees with the Guidance Memorandum’s analysis that the 2023 WOTUS Rule issued January 18, 2023 (prior to but while pending the Supreme Court’s decision in *Sackett*) is in tension the *Sackett* and the pre-2015 regime. RDC agrees the 2023 rule improperly tries to establish a “continuous surface connection” for purposes of CWA jurisdiction over wetlands “that are connected ... by a discrete feature like a non-jurisdictional ditch, swale, pipe, or culvert.” Ditches, uplands, man-made features like pipes and culverts that are the only means to strain a connection are an improper expansion of establishing adjacency.



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## Years of Uncertainty

RDC is on record submitting comments on the numerous proposed changes to the WOTUS rule in 2014, 2017, 2018, 2019, 2021, and 2022. Talk about uncertainty! The many changes to the WOTUS definition and regulatory interpretations and guidance over the past several decades have created a lack of certainty in application. This lack of certainty has increased costs significantly and caused permitting delays to our members engaged in responsible resource development projects that have been determined to require a federal CWA permit.

Most of those previous concerns were with regard to rules and guidance that expanded definitions and, therefore, expanded federal jurisdiction over areas that should be left to local and state regulation. Those previous broadened definitions, now rejected by *Sackett* but ignored by the last administration, required more projects to unnecessarily be subjected to additional federal permits – leading to increased project expenses, timelines, and uncertainty without a corresponding environmental benefit.

It is clear the EPA and Corps' guidance is intended to increase CWA program predictability and consistency by increasing clarity as to the scope of WOTUS. This guidance will also implement the overall objective of the CWA to restore and maintain the quality of the nation's waters while respecting State and tribal authority over their own land and water resources. Although the prior concerns referenced above are not entirely applicable to the current Guidance Memorandum, it is a reminder to not return to that path of expanding definitions during the rulemaking phase expected to follow this part of the process.

At a time when we should be “Unleashing Alaska’s Energy Potential” (see Executive Order 14153, January 20, 2025), *Sackett* and the Guidance Memorandum provide a common-sense approach (by using common sense definitions) to help streamline our permitting systems without sacrificing environmental standards for our waters.

## Regional Approaches and Exceptions

Although the Guidance Memorandum indicates a desire to provide national consistency to WOTUS, RDC believes that where warranted, there should be a regional approach. Alaska is one such place where a regional approach should be considered given our unique geographic and hydrologic characteristics. Alaska and other states should have the authority to develop land use practices and protections, not the federal government. Moreover, state and local protections are already in place and working to protect Alaska’s water resources and communities that adhere to and are consistent



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with the CWA. Alaska has some of the most stringent regulatory protections in place. In fact, because of this, RDC has supported the assumption of state primacy over the 404 program for many years.

The pre-2015 definition of WOTUS, which is what *Sackett* reverts to, did not always work for Alaska. The pre-2015 definition, including the 1986 definition as amended, was too much a “one-size-fits-all” approach that increased uncertainty and hindered development without added protections for the environment. RDC previously is on the record for supporting regional, Alaska-specific rules. For example, RDC previously urged the retention of the Navigable Waters Protection Rule of 2020 (NWPR) and encouraged a return to that approach specifically because it afforded Alaska, as well as other states, more oversight of waters and provided more clarity on regulatory applicability. The NWPR provided clarity and ended a one-size-fits-all approach that did not work for Alaska, or other areas of the United States.

The prime example is permafrost, which is not addressed by the Corps’ 1987 wetlands delineation manual identifying criteria for determining CWA jurisdiction. The characteristics of permafrost as being frozen solid for significant portions of the year should not be considered relatively permanent or as creating a continuous surface connection so as to subject wetlands to the CWA.

This is an opportunity to codify regional specific needs and not leave these needs subject to guidance manuals and future agency discretion that leads us back down the roller coaster of rulemaking and litigation that has beleaguered WOTUS for decades.

RDC appreciates the agencies’ effort to find a lasting solution to WOTUS and generally agrees with the approach set forth in the Guidance Memorandum. Thank you for your consideration of these comments.

Sincerely,

Leila Kimbrell  
Executive Director  
Resource Development Council for Alaska  
***Celebrating 50 Years of Responsible Resource Development in Alaska***



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