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Re: WOTUS Notice: The Final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations, Dkt. ID EPA–HQ–OW–2025–0093

Dear Senior Official Colosimo and Deputy Assistant Administrator Best-Wong:

Thank you for this opportunity to comment on the U.S. Environmental Protection Agency's ("EPA") and U.S. Army Corps of Engineers' ("Corps") notice[1] requesting recommendations on the regulatory definition of "waters of the United States" ("WOTUS") under the Federal Water Pollution Control Act, 33 U.S.C. §1251 *et seq*. ("Clean Water Act"), and the implementation of the WOTUS definition in light of the Supreme Court's 2023 decision in *Sackett v. EPA,* 598 U.S. 651 (2023) ("*Sackett*").

On behalf of Milwaukee Riverkeeper and our thousands of members, volunteers, and supporters, we write to emphasize the importance of maintaining, and where possible, consistent with Supreme Court precedent, restoring longstanding protections for the nation's waters. As the agencies contemplate additional administrative action regarding the WOTUS definition, it is imperative that the protections in the current regulatory definition be maintained and that any amendments and reinterpretations of that regulatory definition through rulemaking, guidance,

[1] WOTUS Notice: The Final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations, Dkt. ID EPA–HQ–OW–2025–0093, 90 Fed. Reg. 13428 (Mar. 24, 2025) ("March 24, 2025 Notice").

memoranda, or other means, fully restore protections consistent with the objective, structure, and text of the Clean Water Act, the entire body of case law interpreting the Act, and sound science.[2]

Milwaukee Riverkeeper is a science-based advocacy organization dedicated to protecting water quality and wildlife habitat and advocating for sound land management in the Milwaukee River Basin. We envision a future in which people from all walks of life can enjoy the clean and healthy waters of the Milwaukee River Basin, which drains to Lake Michigan in southeast Wisconsin.

We understand and have seen first-hand how important a broad definition of "waters of the United States" is to the functioning and effectiveness of the Clean Water Act to protect and restore water quality across the country. The Clean Water Act is the bedrock of our work to protect rivers, streams, lakes, wetlands, and coastal waters for the benefit of all of our members and supporters, as well as to protect people and communities that depend on clean water for drinking, subsistence fishing, recreation, their livelihoods, and their survival.

Protecting wetlands and intermittent and ephemeral streams is crucial to protecting the water quality of our rivers, minimizing flooding, and protecting our surface and groundwater drinking water supplies, including Lake Michigan. Lake Michigan provides drinking water for over 1.3 million people in southeast Wisconsin. Wisconsin has lost about 40 percent of the estimated 10 million acres of wetland that existed before colonization, with around 5.3 million acres of wetland remaining. While a precise number for wetland loss within the Milwaukee River Basin is difficult to know, it's likely that the more urban parts of the state have experienced even greater loss of wetlands with some estimates at over 75%. Losing wetlands is a huge problem, especially in more developed areas, as wetlands are estimated to save Wisconsin $4.6 billion in flood mitigation each year, that would otherwise be spent combating flooding. This is based on a recent study from the Union of Concerned Scientists that estimated that each acre of wetland provides $745 in flood control benefits to residential properties across the U.S. The continuing change in WOTUS regulations over the last few decades has led to an acceleration of wetland loss between 2009 and 2019, which is a 50% increase from the five years prior, according to the most recent National Wetlands Status and Trends report from the Fish and Wildlife Service released in March 2024.

The Milwaukee River Basin is approximately 900 square miles, containing 500 miles of perennial stream and 400 miles of intermittent stream. Intermittent and ephemeral streams have been damaged due to recent changes to WOTUS, but the true extent of this loss is hard to estimate, because Wisconsin generally doesn't map ephemeral waters. A Trout Unlimited Study in 2019 estimated that for there are 1.4 miles of ephemeral stream for every mile of mapped stream in Wisconsin. Ephemeral and intermittent stream channels are often the smallest creeks in a watershed, and often represent the headwaters of a stream. These smallest branches of the watershed "tree" are important sources of sediment, water, nutrients, and organic matter for downstream rivers, and provide important habitat. Ephemeral streams are unique in that they generally lack permanent flow except in response to rainfall events, are not connected to groundwater supplies, and generally aren't visible in aerial maps that are used by agencies to

[2] *See, e.g.*, County of Maui v. Haw. Wildlife Fund, 590 U.S. 165, 185-86 (2020).

designate and identify waterways as part of the National Hydrography Dataset. Ephemeral streams perform the same critical ecological functions as perennial and intermittent streams: they move water, sediment, nutrients, and organic matter (e.g., wood, debris) through the watershed, and provide important connectivity to habitat for resting, reproducing, and feeding. Protection of these streams from development and degradation is crucial to protecting our drinking water, water quality, wildlife, and water-based tourism and recreation economy.

As the Supreme Court has repeatedly recognized, Congress passed the Clean Water Act with a singular objective—to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters"[3]—and it intended to achieve that objective, primarily, by regulating pollution at its source.[4] The ultimate goal of the Clean Water Act is to eliminate all discharges of pollutants into those waters.[5] The Clean Water Act applies to the Nation's waters—i.e., the "waters of the United States"—including, but not limited to, waters specifically referenced in the text of the Clean Water Act, such as navigable waters, interstate waters, intrastate waters, wetlands, streams, rivers, lakes, territorial seas, coastal waters, sounds, estuaries, tributaries, and bays.[6]

The Clean Water Act regulatory definition of "waters of the United States" is critically important to the protection of human health, the wellbeing of communities, the success of local, state and national economies, and the functioning of our nation's vast, interconnected aquatic ecosystems, as well as the many endangered and threatened species that depend upon those resources. As a nation, we cannot have clean water unless we control pollution at its source—wherever that source may be.

Waterways excluded from the WOTUS definition can be dredged, filled, and polluted with impunity because the Clean Water Act's most fundamental human health and environmental safeguard—the prohibition of unauthorized discharges in 33 U.S.C. § 1311(a)—no longer applies. Unregulated pollution discharged into waterways that fall outside the agencies' regulatory definition will not only harm those receiving waters but will also travel through well-known hydrologic processes before harming other water resources, drinking water supplies, recreational waters, fisheries, industries, agriculture, endangered and threatened species, and, ultimately, human beings.

Protection of ephemeral and intermittent streams is crucial to protecting water quality and wildlife, and minimizing flooding in the Milwaukee River Basin. Wisconsin largely doesn't identify or regulate ephemeral waters, so removing coverage of ephemeral waters as WOTUS will have a

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[3] PUD No. 1 of Jefferson County v. Wash. Dep't. of Ecology, 511 U.S. 700, 704 (1994) (quoting 33 U.S.C. § 1251(a)).

[4] *County of Maui*, 590 U.S. at 178-79 (citing EPA v. Cal. *ex rel.* State Water Res. Control Bd., 426 U.S. 200, 202-04 (1976) (basic purpose of the Clean Water Act is to regulate pollution at its source)).

[5] 33 U.S.C. § 1251(a).

[6] 33 U.S.C. § 1362(7); *see e.g.*, City of Milwaukee v. Illinois & Michigan, 451 U.S. 304, 318–19 (1981); 33 U.S.C. § 1313 (applying water quality standard to "interstate waters," "intrastate waters," "navigable waters" and simply "waters."); 33 U.S.C. § 1252(c)(3) ("rivers and their tributaries, streams, coastal waters, sounds, estuaries, bays, lakes"); N. William Hines, *History of the 1972 Clean Water Act: The Story Behind How the 1972 Act Became the Capstone on a Decade of Extraordinary Environmental Reform*, 4 J. ENERGY & ENV'T L. 80 (2013), https://gwujeel.files.wordpress.com/2013/10/4-2-hines.pdf.

big impact in Wisconsin where historically there may have been more federal oversight of dredging and filling projects and other waterway modifications impacting these waters, or where these waters were given benefit of the doubt. Historically, Wisconsin has stronger wetland regulations than federal law, which protected many non-federal or non-jurisdictional wetlands. Changes to state law a few years ago, now allow discharges into urban wetlands up to 1 acre, if wetlands are not rare or high-quality, and allow discharge into rural wetlands up to 3 acres (if the development is agricultural-related); these projects are given an exemption to state law. Rule changes responsive to the Sackett decision have created even more "non-federal" wetlands, which will lead to functionally more wetland destruction in Wisconsin. Requiring wetlands to be physically connected or closely associated with navigable streams due to the Sackett decision, and past rulemaking changes, will lead to degraded water quality and wildlife habitat in Wisconsin where many wetlands are connected to streams or other wetlands via culverts or groundwater connections such as Prairie Potholes.

The March 25, 2025 Notice states that the agencies are seeking "to gather recommendations on the meaning of key terms in light of *Sackett* to inform any potential future administrative actions to clarify the definition of 'waters of the United States' and to ensure transparent, efficient, and predictable implementation."[7] Despite this outreach and the upcoming Listening Sessions soliciting feedback on the definition, it appears that the outcome is predetermined. EPA Administrator Zeldin's March 12, 2025 press release indicates that the agencies have already decided to revise the current regulatory WOTUS definition, which was just revised in response to the *Sackett* decision in September of 2023. Specifically, EPA Administrator Zeldin announced that, in adopting the current definition, "EPA has failed to follow the law and implement the Supreme Court's clear holding in *Sackett*," and that this definition "placed unfair burdens on the American people and drove up the cost of doing business."[8]

Congress did not charge the agencies with defining WOTUS in order to "reduce[] red-tape, cut[] overall permitting costs, and lower[] the cost of doing business," which are the policy goals that EPA Administrator Zeldin stated are motivating the agencies' actions to quickly revise the definition.[9] Additionally, the previous administration did not adopt a regulatory WOTUS definition that expanded protections to additional waters or increased regulatory burdens. To the contrary, the September 2023 WOTUS definition dramatically reduced protections for rivers, streams, lakes, wetlands, and waters across the country. For example, after finalizing the September 2023 definition in response to *Sackett*, EPA estimated that 63% of wetlands and roughly 1.2 to 4.9 million miles of streams would no longer be protected by the Clean Water Act.[10]

Many isolated wetlands and lakes in Wisconsin have already lost protection, and we likely don't know how many ephemeral streams have been destroyed by agriculture and development,

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[7] 90 Fed. Reg. at 13429.

[8] *Administrator Zeldin Announces EPA Will Revise Waters of the United States Rule*, EPA (Mar. 12, 2025), https://www.epa.gov/newsreleases/administrator-zeldin-announces-epa-will-revise-waters-united-states-rule ("March 12, 2025 Press Release").

[9] *Id.*

[10] *See* EPA, *Policy Webinar: Updates on the Definition of "Waters of the United States",* YOUTUBE, 24:01-24:18 (Sept. 12, 2023), https://www.youtube.com/watch?v=lcCVelsAy2c.

especially because the State didn't identify or protect ephemeral waters. Removing protection for ephemeral streams and wetlands threatens drinking water supplies for at least 400,000 people in Wisconsin that get some or all of their drinking water from public drinking water systems that rely, at least in part, on small and at risk, seasonal streams including Ashland, Brown, Marinette, and Outagamie Counties. In 1993, a flood event in the Milwaukee River Basin coincided with a cryptosporidium outbreak that killed over a hundred people and sickened tens of thousands when this pathogen got into the public drinking water supply (Lake Michigan). Protecting headwaters areas and wetlands filters pollution before it finds its way downstream, and protects water supplies. In one study, nutrients traveled less than 65 feet in a small headwater stream before being removed from the water. If not filtered out, these pollutants imperil water supplies, increase drinking water treatment costs, fill in streams and lakes used for navigation/commerce, and damage fisheries and water-based recreation, which is estimated at over $10 billion in Wisconsin. Destruction of more ephemeral streams and non-adjacent wetlands will further imperil water supplies. In addition, more than 200 facilities with Clean Water Act permits are located on at-risk Wisconsin streams as well, and if those streams lose protections under the Clean Water Act, federal discharge permits (and likely state permits) will no longer be necessary, and these facilities may be able to pollute at will, further threatening public health.

The uncertainty due to recent Supreme Court decisions, and constantly changing WOTUS definitions with each recent federal administration, has added more work for States like Wisconsin that need to upgrade their regulations and guidance, and complete time-consuming investigations to determine which waters are covered and not covered under the Clean Water Act. This drains resources from other areas, which could also impact the goals of protecting our water, air, and natural areas, and ensuring that our communities are healthy.

The March 24, 2025 Notice specifically seeks perspectives from stakeholders on jurisdictional scope and technical questions regarding three discrete regulatory categories from the "Revised Definition of 'Waters of the United States.'"[11] However, the scope of jurisdiction over relatively permanent waters and adjacent wetlands has already been resolved by the Supreme Court. Similarly, the agencies previously engaged in extensive evaluations of the technical issues identified in the notice, including multiple outreach efforts to stakeholders, and the results of those evaluations are already reflected in the September 2023 regulatory definition.

If the agencies go through with their predetermined plan to revise the WOTUS definition in pursuit of their current deregulatory policy objective, it will be the fifth time since 2014 that the agencies will improperly attempt to create a novel regulatory interpretation of the Clean Water Act that would eliminate water quality protections for the nation's waters contrary to the intent of Congress. As a unanimous Supreme Court determined in *United States v. Riverside Bayview Homes*, "[p]rotection of aquatic ecosystems, Congress recognized, demanded broad federal authority to control pollution, for '[w]ater moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source.' . . . [This is precisely why] Congress chose to define the

[11] Revised Definition of "Waters of the United States," 88 Fed. Reg. 3004 (Jan. 18, 2023) (''2023 Rule''), as amended by the Revised Definition of "Waters of the United States"; Conforming, 88 Fed. Reg. 61964 (Sept. 8, 2023) (''Conforming Rule'') (codified at 33 C.F.R. § 328.3 (U.S. Army Corps of Engineers) and 40 C.F.R. § 120.2 (EPA)).

waters covered by the Act broadly."[12] The agencies do not possess the authority to exclude waters that Congress intended to cover from the definition of "waters of the United States" to achieve their own independent (and ever-shifting) bureaucratic policy goals.[13]

Instead of pursuing this course of action, we urge the agencies to provide clarity and certainty, as well as consistency with the law, by maintaining the protections provided in the September 2023 regulatory definition. Any revisions to the regulatory definition, guidance, memoranda, or other administrative actions must fully encompass waters necessary to adequately protect the chemical, physical, and biological integrity of the nation's waters as intended by Congress. A clear WOTUS definition that protects the integrity of the nation's waters greatly benefits the public, farmers, businesses, landowners, and state and tribal governments in myriad ways, including reduced compliance and production costs. Constantly reinterpreting this more than 50-year-old law to suit the most recent bureaucratic objectives and justify the adoption of yet another new WOTUS definition creates uncertainty, benefits no one, and endangers everyone.

Respectfully submitted,

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Riverkeeper
Milwaukee Riverkeeper

[12] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131-35 (1985) (citation omitted).
[13] *See* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 325, 328 (2014) ("An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms. . . . We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.")