

Remarks of Mark Ryan, EPN, at OMB Meeting on the Revised Definition of WOTUS, October 17, 2022

I worked as a Clean Water Act attorney at EPA for many years, including on the original Sackett case, and I now work on CWA issues in the private sector, so I've seen both sides of the issues confronting WOTUS. It's important to remember that WOTUS affects far more than wetlands, even though wetlands is what gets most of the attention. WOTUS is at the core of the CWA and if WOTUS is rewritten, we cut out much of the protections provided by the CWA. The current rule is a good balance of competing interests between state and federal and protecting the environment without trampling on private and state property rights. The rule follows the 2008 guidance, which was overly complex, but that complexity grows out of the Supreme Court precedent, which EPA must follow. The rule has essentially been around since 2008 and people know how to work with it.

Remarks of Betsy Southerland, EPN, at OMB Meeting on the Revised Definition of WOTUS, October 17, 2022

Once EPA and the Army Corp of Engineers made the decision to use Justice Kennedy's significant nexus standard, they had two more decisions to make.

The first decision is whether to assess both ephemeral and intermittent waters or to assess only intermittent waters as having a significant nexus. The agencies wisely chose to assess both ephemeral and intermittent waters.

From a practical standpoint it is very difficult to distinguish ephemeral from intermittent streams. Any stream can become ephemeral further downstream due to natural conditions or manmade water withdrawals.

From a scientific standpoint, both ephemeral and intermittent streams provide the same ecological and hydrological functions as perennial streams by moving water, nutrients, sediments, and aquatic organisms to downstream waters. Wetlands associated with both these types of streams filter agricultural and urban runoff, trap sediment, mitigate flooding, provide a nursery for wildlife, and recharge ground water. They have cascading, cumulative effects on downstream navigable waters that cannot be examined in isolation and affect the drinking water quality of over 117 million people.

The second decision is how to quickly make decisions about significant nexus in cases where jurisdiction is called into question. The Corps has years of experience interpreting significant nexus under the pre-2015 conditions so that experience will facilitate jurisdictional determinations once this proposed rule is finalized. In addition, determinations can be accelerated by using the extensive data EPA has collected in National Aquatic Resource Surveys on coastal waters, lakes, rivers and streams, and wetlands since 2007. EPA and the

Corps of Engineers can use the robust data gathered in these surveys to identify the physical characteristics of jurisdictional streams and wetlands on an ecoregional basis that quickly distinguish them from non-jurisdictional waters.