

water mark, or mean high tide line, will affect the water quality of the other waters within that aquatic system. For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of **or are in reasonable proximity to other waters of the United States**, as these wetlands are part of this aquatic system.⁷⁹

The agencies' March 24, 2025 Memorandum that "rescinded any components of agency interpretation, guidance, or training materials that assumed a discrete feature established a continuous surface connection"⁸⁰ and requires adjacent wetlands to physically touch or abut a jurisdictional water is contrary to the Court's holdings in *Sackett*, *Rapanos*, and *Riverside Bayview*. It is also contrary to the agencies' interpretation of *Rapanos*, *Riverside Bayview* and other precedent set forth in the Preamble to the September 2023 Definition.⁸¹

C. Ditches

The agencies seek comment on several issues related to ditches, including whether various characteristics could provide clear and implementable distinctions between jurisdictional and non-jurisdictional ditches and whether the agencies should adopt the definition of ditch from the 2020 NWPR.⁸² The agencies should not create unique jurisdictional criteria for ditches and should not adopt the definition of ditch from the 2020 NWPR, as that definition is a piece of a larger, seriously flawed legal approach to defining "waters of the United States" that was ultimately vacated.⁸³ The agencies specifically found the NWPR requirements for identifying jurisdictional ditches to be unworkable, "impractical," and inconsistent with the objective of the Clean Water Act.⁸⁴ The NWPR definition is also overbroad and could incorrectly encompass a broad array of "channels" that are not, in fact, ditches, including altered or relocated rivers and streams and man-made canals.

Consistent with *Rapanos* and numerous other precedents, ditches, canals, and similar bodies of water should be categorically included in the definition of "waters of the United States" when they otherwise meet the definition of a "water of the United States." The approach to determining the jurisdictional status of non-navigable ditches and drains was at issue in *Rapanos* and the plurality set forth the standard as follows: "the lower courts should determine, in the first instance, whether the ditches or drains near each wetland are '**waters**' in the ordinary sense of containing a **relatively permanent flow**"; and (if they are) whether the wetlands in question are 'adjacent' to

⁷⁹ *Id.* at 133-34 (emphasis added) (citing 42 Fed. Reg. 37128 (1977)).

⁸⁰ March 24, 2025 Notice, 90 Fed. Reg. at 13430.

⁸¹ See, e.g., January 2023 Definition, 88 Fed. Reg. at 3095-96.

⁸² March 24, 2025 Notice, 90 Fed. Reg. at 13431; NWPR, 85 Fed. Reg. at 22338.

⁸³ See e.g., *Pascua Yaqui Tribe v. EPA*, 557 F. Supp. 3d 949, 957 (D. Ariz. 2021).

⁸⁴ See, e.g., January 2023 Definition, 88 Fed. Reg. at 3061.