April 23, 2025

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

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

The Waters Advocacy Coalition ("WAC") appreciates the opportunity to provide the following recommendations to the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps") (collectively, "Agencies") on defining "waters of the United States" ("WOTUS"), consistent with the U.S. Supreme Court's interpretation of the scope of Clean Water Act (the "Act" or "CWA") jurisdiction.

WAC's members are committed to both building modern, resilient infrastructure and protecting and restoring America's wetlands and waters. WAC represents a diverse cross-section of the nation's agriculture, construction, transportation, real estate, mining, manufacturing, forestry, energy, recreational, wildlife conservation, and public health and safety sectors—all of which are vital to a thriving national economy and provide much needed American jobs.[1] WAC and its members have extensive expertise relevant to rulemaking proceedings related to the definition of WOTUS. We have submitted comments on all of the Agencies' prior rulemakings and guidance documents on this issue. In those comments, WAC has consistently urged the Agencies to provide certainty to the business community and landowners and avoid adopting expansive theories of CWA jurisdiction that: (i) fail to preserve the States' traditional and primary authority over land and water use; (ii) are not based in relevant Supreme Court precedent on the definition of WOTUS; (iii) effectively read the term "navigable" out of the statute; and (iv) improperly redraw the line between federal and state authority based on ecological considerations. A clear and consistent WOTUS definition is foundational to delivering a streamlined and workable federal permitting approach that enables needed new infrastructure, while protecting the environment.

In response to the Supreme Court's decision in *Sackett*,[2] EPA and the Corps issued a "Conforming Rule" that was not subject to notice and comment on September 8, 2023.[3] That rule

[1] A complete list of WAC members is attached to these recommendations as Appendix A.

[2] 598 U.S. 651 (2023).

[3] 88 Fed. Reg. 61,694 (Sept. 8, 2023).

did little more than strike language from the 2023 Rule[4] related to the significant nexus test as well as from the definition of "adjacent." The Agencies did not provide any explanation for or analysis of how their interpretations of "relatively permanent" and "continuous surface connection" in the 2023 Rule's preamble—which were even more expansive than the Agencies' roughly contemporaneous interpretations of those phrases set forth in the 2008 *Rapanos* Guidance—survived *Sackett*. Put simply, the Conforming Rule was not a defensible or durable response to *Sackett*. And the proof is in the pudding, as lower courts have begun rejecting the Agencies' attempts to circumvent the limits that the Supreme Court has placed on the scope of their CWA jurisdiction. The Agencies should bring an end to this familiar pattern of responding to Supreme Court decisions on WOTUS with narrow interpretations of the Court's holdings in hopes of asserting jurisdiction over as many features on the landscape as possible. Those narrow interpretations are inconsistent with both the Court's holdings and the Act's emphasis on the states' primary authority over water resources and land use. And as WAC has long emphasized, the Agencies need not define water features as WOTUS to ensure they are protected, as many state and local laws exist to protect such resources.

If the Agencies proceed to conform the regulatory definition of WOTUS to the Supreme Court's holdings through a new final rule that articulates the correct limits on the Agencies' regulatory jurisdiction, such a rule could indeed be the "Final Response to SCOTUS" that brings lasting clarity for all regulators and stakeholders. As explained more fully below, the interpretations of "relatively permanent" and "continuous surface connection" set forth in the 2023 Rule preamble, the Agencies' subsequent guidance under the previous Administration, and the Agencies' litigating positions under that Administration cannot be squared with the *Rapanos* plurality's test, which the *Sackett* majority firmly endorsed and clarified. Moreover, other aspects of the 2023 Rule are no longer viable under *Sackett*. WAC offers the following recommendations on how to revise the definition of WOTUS in the wake of *Sackett*.

I. The Definition of WOTUS Must Adhere to the Supreme Court's Authoritative Interpretations of the Clean Water Act.

After over a decade of litigation, *Sackett* produced a clear majority opinion from the Supreme Court on "what the [Clean Water] Act means by 'the waters of the United States.'"[5] The Court concluded that "the *Rapanos* plurality was correct: the CWA's use of 'waters' encompasses 'only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'"[6] The Court acknowledged that the phrase WOTUS does extend to some wetlands, but only those wetlands that are "indistinguishably part of a body of water that itself constitutes" WOTUS.[7] "Wetlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby."[8] For a wetland to be

[4] 88 Fed. Reg. 3,004 (Jan. 18, 2023).

[5] 598 U.S. at 592.

[6] *Id.* at 671 (quoting *Rapanos v. United States*, 574 U.S. 715, 739 (2006) (plurality)).

[7] *Id.* at 676.

[8] *Id.*

jurisdictional under the CWA, it must be adjacent to a "'relatively permanent body of water connected to traditional interstate navigable waters'" and it must have a "continuous surface connection with that water, making it difficult to determine where 'water' ends and the 'wetland' begins."[9]

Sackett leaves no doubt that the *Rapanos* plurality's test for jurisdiction, as further clarified by the *Sackett* majority, is now the law. *Sackett* sets forth the following findings and conclusions that any definition of WOTUS must adhere to:

- The CWA's reach extends only to "the waters of the United States." To be jurisdictional, a water feature must qualify as a WOTUS in its own right, *i.e.*, it must be indistinguishably part of a body of water that itself constitutes "waters" under the CWA.[10] "Waters" under the CWA include only "bodies of open water," specifically those "relatively permanent, standing or continuously flowing bodies of water . . . described in ordinary parlance as 'streams, oceans, rivers, and lakes.'"[11]

- The CWA's coverage does not extend beyond "certain relatively permanent bodies of water connected to traditional interstate navigable waters" and "wetlands with such a close physical connection to those waters that they [a]re as a practical matter indistinguishable from waters of the United States."[12] It is not enough that a wetland is merely located nearby a jurisdictional water because, as *Sackett* explained, the term "'adjacent' cannot include wetlands that are not part of covered 'waters.'"[13].

- Wetlands satisfy the "continuous surface connection" requirement only where "there is no clear demarcation between 'waters' and wetlands," although "temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells."[14] A "surface connection" means the presence of surface water extending from the body of water over the wetland.[15] Barriers separating a wetland from a WOTUS remove the wetland from federal jurisdiction unless illegally constructed.[16]

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[9] *Id.* at 678-79 (quoting *Rapanos*, 547 U.S. at 742 (plurality)).

[10] *Id.* at 676.

[11] *Id.* at 671 (quoting *Rapanos*, 547 U.S. at 739 (plurality)).

[12] *Id.* at 667 (quoting *Rapanos*, 547 U.S. at 742, 755 (plurality)).

[13] *Id.* at 682.

[14] *Id.* at 678.

[15] *United States v. Sharfi*, 2024 WL 5244351, at *1 (S.D. Fla. Dec. 30, 2014).

[16] 598 U.S. at 678 n.16.

- The Agencies cannot read the term "navigable" out of the statute; that term "shows that Congress was focused on 'its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.'"[17]

- The term "waters" does not encompass everything defined by the ordinary presence of water. Such an interpretation would be "tough to square with *SWANCC*, which held that the Act does not cover isolated ponds[.]"[18] It would also run contrary to the Congressional policy outlined in CWA section 101(b) because "it is hard to see how the States' role in regulating water resources would remain 'primary' if the [Agencies] had jurisdiction over anything defined by the presence of water."[19]

- Correcting the Agencies' overbroad misunderstanding of WOTUS was needed because of the significant penalties that business and property owners face even for inadvertent violations.[20]

- The Agencies have no statutory basis to impose the significant nexus test, which is a "particularly implausible" interpretation of the CWA. The Agencies' "conception of 'the waters of the United States' is truly staggering when this vast territory [of wetlands] is supplemented by all of the additional area, some of which is generally dry, over which the Agency asserts jurisdiction [under the Biden WOTUS Rule]."[21] Though the significant nexus test fails under the plain text of the CWA, there also is no clear statement in the statute that would allow this impingement on traditional state authority, "[p]articularly given the CWA's express policy to 'preserve' the States' 'primary' authority over land and water use."[22]

- Assertions of jurisdiction based on "freewheeling inquir[ies]" that "provide[] little notice to landowners of their obligations under the CWA" will not pass muster. "Due process requires Congress to define penal statutes with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[23]

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[17] *Id.* at 672 (quoting *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs* (*SWANCC*), 531 U.S. 159, 172 (2001)).

[18] *Id.* at 674 (citing *SWANCC*, 531 U.S. at 171).

[19] *Id.* at 674 (citation omitted).

[20] *See id.* at 660 (citing *Army Corps of Eng'rs v. Hawkes Co.,* 578 U.S. 590, 602 (2016) (Kennedy, J., concurring)).

[21] *Id.* at 680.

[22] *Id.* at 680 (quoting 33 U.S.C. § 1251(b)).

[23] *Id.* at 681.

- "[T]he CWA does not define the EPA's jurisdiction based on ecological importance," and neither courts nor the Agencies can "redraw the Act's allocation of authority" between federal and state governments.[24]

Sackett thus reinforces numerous key principles that WAC has long highlighted. For instance, to be durable and defensible, any definition of WOTUS must not significantly impinge on the States' traditional and primary authority over land and water use. A definition that pushes the outer limits of the Agencies' CWA authority and fails to give adequate weight to the Section 101(b) policy would be legally vulnerable and would undermine the Agencies' stated goal of establishing a durable rule. Just as important, the Agencies' interpretation of WOTUS must give effect to the term "navigable."[25] Relatedly, the Agencies must avoid adopting an overly narrow reading of *SWANCC*. That case stands for far more than just a rejection of the "migratory bird rule." Indeed, *Sackett* confirms that *SWANCC* stands more broadly for the holding that the Corps lacks jurisdiction over "ponds that are *not* adjacent to open water."[26] The Agencies also must avoid adopting an overly broad reading of *Riverside Bayview Homes*[27] as authorizing the regulation of a wetland merely because it abuts an open water body. Nothing in the *Sackett* or *Rapanos* plurality decisions indicate that mere abutment satisfies the "continuous surface connection" requirement. Rather, the crucial inquiry is whether it is "difficult to determine where the 'water' ends and the 'wetland' begins."[28]

The need for a clear and easily implementable definition of WOTUS is beyond debate. *Sackett* emphasizes the important due process considerations that cannot be ignored in delineating the limits of the Agencies' regulatory authority. It is incumbent on the Agencies to refrain from adopting another "hopelessly indeterminate" interpretation of the phrase WOTUS that runs afoul of both due process and common sense.[29]

II. The Agencies Should Ensure Faithful Implementation of *Sackett* Through a Targeted Rulemaking Effort, Not Merely Guidance.

WAC supports the Agencies' stated intent to expeditiously obtain stakeholder input on the WOTUS definition and to undertake a rulemaking process to revise the 2023 definition with a focus on clarity, simplicity, and durable improvements.[30] As a general matter, the outlines of a clear, simple, and durable rule started to take shape through the 2023 Rule's codification of the phrases "relatively permanent, standing or continuously flowing bodies of water" and

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[24] *See id.* at 683 (citing *Rapanos*, 598 U.S. at 756 (plurality)).

[25] *See id.* at 672.

[26] *See id.* at 666 (quoting *SWANCC*, 531 U.S. at 168).

[27] *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

[28] 598 U.S. at 678-79 (quoting *Rapanos*, 547 U.S. at 742 (plurality)).

[29] *Id.* at 681 (quoting *Sackett v. EPA*, 566 U.S. 120, 133 (2012) (Alito, J., concurring)).

[30] *See* U.S. EPA, Administrator Zeldin Announces EPA Will Revise Waters of the United States Rule (Mar. 12, 2025), *available at* https://www.epa.gov/newsreleases/administrator-zeldin-announces-epa-will-revise-waters-united-states-rule.

"continuous surface connection" as required by *Sackett*.[31] But additional regulatory revisions are necessary to ensure full alignment with *Sackett*. In the forthcoming rulemaking,[32] it is critical that the Agencies codify clear jurisdictional limitations in the regulatory text, rather than continue to leave the key phrases undefined and open to improperly expansive interpretations by agency staff in the field.

WAC appreciates that the Agencies have already begun taking measures to correct such misinterpretations by issuing guidance on the "continuous surface connection" requirement.[33] WAC agrees with the rationales advanced by the Agencies in that guidance, as discussed below in Part III.B of these comments. This new guidance is a good start to ensuring true alignment between the definition of WOTUS and *Sackett*, but the Agencies must do more. Specifically, they must: (1) define and implement the "relatively permanent" standard as the *Rapanos* plurality envisioned; (2) eliminate the standalone interstate waters, impoundments, and intrastate lakes and ponds categories; and (3) revise the list of exclusions to clearly state that features such as ephemeral channels and any artificial features constructed in non-jurisdictional waters are *not* WOTUS.

III. Specific Recommendations for a Revised Definition of WOTUS.

A. The Agencies Must Adopt an Interpretation of "Relatively Permanent, Standing or Continuously Flowing Bodies of Water" that is Consistent with the *Rapanos* Plurality and *Sackett* Opinions.

Although the current definition of WOTUS appropriately incorporates the phrase "relatively permanent, standing or continuously flowing bodies of water" from the *Sackett* and *Rapanos* plurality opinion, the regulatory text does not shed any light on this key phrase. The preamble to the 2023 Rule, however, sets forth an overly broad interpretation of "relatively permanent, standing or continuously flowing bodies of water" that is incompatible with the Supreme Court's holdings.

First, the 2023 Rule's interpretation of the relatively permanent standard would extend WOTUS far beyond the sorts of open water bodies that *Sackett* found to be jurisdictional. *Sackett* stated that "the CWA's use of 'waters' encompasses only those relatively permanent, standing or

[31] WAC recognizes that the 2023 Rule is preliminarily enjoined in over half of the states and that the pre-2015 regime currently governs in those states. But for ease of reference, WAC refers to the 2023 Rule as setting forth the "current definition."

[32] The Agencies should avoid pursuing two separate rulemaking processes to repeal and replace the 2023 Rule, as that would require considerable resources and unduly delay much needed clarity to the definition of WOTUS. Instead, the Agencies should retain aspects of the 2023 Rule and promulgate revisions to that rule to ensure full conformity with the Court's authoritative interpretation of the CWA.

[33] *See* U.S. EPA, 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" Under the Clean Water Act (Mar. 12, 2025).

continuously flowing bodies of water forming geographic features that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'"[34] The 2023 Rule's interpretation of this language, however, would encompass any channels, ditches, and other often dry features that the Agencies characterize as "tributaries" (another undefined term), as well as any "other" intrastate water feature that they believe fits within the (a)(5) category. This approach is far too amorphous and thus fails to provide property owners with sufficient notice of their obligations under the CWA.

Second, under the 2023 Rule, the Agencies provided very little guidance on what meets the relatively permanent standard. Indeed, the Agencies deliberately declined to include any flow duration benchmarks or minimum flow duration. Instead, they included a vague and confusing explanation that "[r]elatively permanent waters do not include surface waters with flowing or standing water for only a short duration in direct response to precipitation."[35] Accordingly, the 2023 Rule opined that "tributaries in the arid West" that are "dominated by coarse, alluvial sediments and exhibit high transmission losses, resulting in streams that often dry rapidly following a storm event" are not relatively permanent,[36] whereas "relatively permanent flow may occur as a result of multiple back-to-back storm events throughout a watershed" or even a single "larger storm event[]."[37] This lack of guidance has generated considerable confusion for all stakeholders.

Because of the overbroad interpretations advanced in the preamble, the 2023 Rule's interpretation of "relatively permanent, standing or continuously flowing bodies of water" does not conform to *Sackett* or the *Rapanos* plurality opinion. *Sackett* reinforced that Congress's deliberate use of the plural term "waters" in the phrase "waters of the United States" means that the Act's reach extends only to bodies of water like streams, oceans, rivers, and lakes.[38] *Sackett* also held that Congress's use of the term "waters" elsewhere in the CWA "confirm[s] the term refers to bodies of *open* water" and that Congress's "use of 'waters' elsewhere in the U.S. Code likewise correlates to rivers, lakes, and oceans."[39] Equally important, in *Rapanos*, the plurality explained that the relatively permanent standard "do[es] not necessarily exclude streams, rivers, or lakes that might dry up *in extraordinary circumstances*, such as drought," nor does it necessarily exclude "*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months—such as [a] *290-day, continuously flowing stream*."[40] In other words, an open water body that dries up during drought or a stream that flows continuously for 290 days *might* be, but are not categorically, WOTUS under the relatively permanent standard.

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[34] 598 U.S. at 671 (quoting *Rapanos*, 574 U.S. at 739 (plurality)).

[35] 88 Fed. Reg. at 3,039.

[36] *Id.* at 3,086.

[37] *Id.* at 3,086-87.

[38] 598 U.S. at 671 (quoting *Rapanos*, 547 U.S. at 739) (plurality)).

[39] *Id.* at 672-73 (emphasis added).

[40] *Rapanos*, 547 U.S. at 732 n.5 (emphases added).

The Agencies must bear in mind that the *Rapanos* plurality developed the "relatively permanent" standard in the context of a case in which it criticized the Corps for "stretch[ing] the term 'waters of the United States' beyond parody" and in which it repeatedly stated that it did *not* consider *intermittent* flow to meet its standard.[41] For instance, the plurality stated:

- Terms included in the dictionary definition of "waters" all "connote continuously present, fixed bodies of water, *as opposed to ordinarily dry channels through which water occasionally or intermittently flows*."[42]

- "It suffices for present purposes that channels containing permanent flow are plainly within the definition, and that the dissent's 'intermittent' and 'ephemeral' streams…—that is, streams whose flow is '[c]oming and going at intervals . . . [b]roken, fitful,'…, or 'existing only, or no longer than, a day; diurnal . . . short-lived,'…—are not."[43]

- "The restriction of 'the waters of the United States' to exclude channels containing merely intermittent or ephemeral flow also accords with the commonsense understanding of the term."[44]

- "Most significant of all, the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from 'navigable waters,' by including them in the definition of 'point source'. . . . The separate classification of 'ditches, channels, and conduits—which are terms ordinarily used to describe the watercourses through which *intermittent* waters typically flow—shows that these are, by and large, *not* 'waters of the United States.'"[45]

- "On its only natural reading, such a statute that treats 'waters' separately from 'ditch[es], channel[s], tunnel[s], and conduit[s],' thereby distinguishes between continuously flowing 'waters' and channels containing only an occasional or intermittent flow."[46]

- "The phrase ["waters of the United States"] does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall."[47]

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[41] *Id.* at 733-34.

[42] *Id*. at 732-33 (emphasis added).

[43] *Id.* at 732 n.5 (citation omitted).

[44] *Id.* at 733-34.

[45] *Id.* at 735-36 (emphasis in original; cleaned up).

[46] *Id.* at 736 n.7.

[47] *Id.* at 739.

- "Even if the phrase 'the waters of the United States' were ambiguous as applied to intermittent flows, our own canons of construction would establish that the Corps' interpretation of the statute is impermissible."[48]

Again, the plurality did acknowledge that unusual conditions, such as a seasonal drought that would interrupt year-round flow, would not necessarily mean that a water is excluded from the meaning of "relatively permanent." But that limited acknowledgment does not mean that all water features that have flowing or standing water for more than just a "short duration in direct response to precipitation"[49]—or even all streams with ninety days of continuous flow—meet the relatively permanent test. The plurality only suggested that a river that flowed continuously for 290 days *might* be considered a WOTUS.[50] It is unreasonable to interpret that language to mean that anything with a few months of continuously flowing or standing water meets the relatively permanent standard.[51]

Now that *Sackett* has clarified that the *Rapanos* plurality was correct in holding that CWA jurisdiction extends only to relatively permanent rivers, streams, oceans, and lakes, the Agencies must revise the definition of WOTUS accordingly. WAC recommends simplifying the (a)(3) category to simply state "**Rivers, streams, lakes, and ponds that are relatively permanent, standing, or continuously flowing bodies of water and are connected to waters identified in paragraph (a)(1)**." Relatedly, as detailed below, WAC recommends deleting "interstate waters" from the (a)(1) category, deleting the (a)(2) impoundments category, and deleting the (a)(5) intrastate lakes and ponds category. Finally, WAC recommends that the Agencies provide clear standards in the regulatory text for determining how much flow constitutes relatively permanent flow, rather than force property owners to have to once again feel their way in assessing this question on a case-by-case basis.

B. The Agencies Must Revise the Definition of "Adjacent" to Clarify That Wetlands are Jurisdictional Only When They Are Indistinguishably Part of Another WOTUS.

Sackett clarified that, to be jurisdictional, wetlands must directly abut a WOTUS in such a way that the WOTUS and the wetland are *indistinguishable* from one another. Wetlands must be adjacent to a WOTUS in such a way that "the wetland has a continuous surface connection with that water, making it difficult to determine where the water ends and the wetland begins."[52]

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[48] *Id.* at 737.

[49] 88 Fed. Reg. at 3,084.

[50] 547 U.S. at 732 n.5.

[51] To be sure, the plurality was nonplussed by the lack of "scientifically precise distinctions between 'perennial' and 'intermittent' flows." *Id.* at 732 n.5. It deliberately left for another day the decision of when the drying-up of a streambed is continuous and frequent enough to disqualify the channel from WOTUS. Yet the plurality at least clarified that "waters" that the dissent characterized as intermittent and ephemeral "(i.e., flowing for only part of the year)" are *not* WOTUS. *Compare id.* at 732 n.5 *with id.* at 801.

[52] 598 U.S. at 678-79 (citation and internal quotation marks omitted).

As the *Rapanos* plurality explained, and as *Sackett* endorsed, there must be "no clear demarcation between 'waters' and wetlands."[53] For instance, a wetland abutting a coastal water that has an "unimpaired connection with the open sea up to the head of tidal influence" meets the continuous surface connection requirement.[54] By contrast, "[w]etlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States'" are not jurisdictional.[55]

Sackett and *Rapanos* thus make it clear that indistinguishability is an essential element in establishing that a wetland has a continuous surface connection.[56] Indeed, *Sackett* acknowledged that the indistinguishability requirement "is the thrust of observations in decisions going all the way back to *Riverside Bayview*."[57] In that case, the Court deferred to the Corps' regulation of wetlands "actually abut[ting] on a navigable waterway."[58] In so holding, the Supreme Court noted that "respondent's property is a wetland adjacent to a navigable waterway" only because "the area characterized by saturated soil conditions and wetland vegetation extended beyond the boundary of respondent's property to Black Creek, a navigable waterway."[59] Decades later, the *Rapanos* plurality clarified that the Court's holding in *Riverside Bayview* "rested upon the inherent ambiguity in defining where waters end and abutting ('adjacent') wetlands begin[.]"[60]

Lower courts have adhered to and enforced the indistinguishability requirement. For instance, the Fifth Circuit has held that "the *Sackett* 'adjacent' test" is whether a wetland is "indistinguishable from those waters" that meet the definition of WOTUS.[61] That court rejected the Government's attempt to assert jurisdiction over a wetland where the "nearest relatively permanent body of water [was] removed miles away from the Lewis property by roadside ditches, a culvert, and a non-relatively permanent tributary," because "it is not difficult to determine whether the 'water' ends and any 'wetlands' on Lewis's property begin."[62] Similarly, in another case, a district court faulted the Government for "ignor[ing] this indistinguishability requirement, which becomes meaningless if abutment alone establishes a 'continuous surface

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[53] *Id.* at 678 (quoting *Rapanos* 547 U.S. at 742 (plurality)).

[54] *Id.* at 678 (citation omitted).

[55] *Rapanos*, 547 U.S. at 742 (plurality).

[56] The Agencies have asked for feedback on the scope of "connection to" within the context of the continuous surface connection requirement. *See* 90 Fed. Reg. at 13,430. For the reasons discussed in this section of WAC's comments, *Sackett* and *Rapanos* make it clear that the connection must be so close that there is no clear demarcation between the WOTUS and the adjacent wetland. Plainly, indirect connections do not suffice, nor do subsurface hydrologic connections, or ecological connections.

[57] 598 U.S. at 677.

[58] *Riverside Bayview Homes, Inc.,* 474 U.S. at 135.

[59] *Id.* at 131.

[60] *Rapanos*, 547 U.S. at 741-42.

[61] *Lewis v. United States*, 88 F.4th 1073, 1078 (5th Cir. 2023) (citing *Sackett*, 598 U.S. at 684).

[62] *Id.* at 1079.

connection.'"[63] To ensure that the definition conforms to the holdings in *Sackett* and *Rapanos*, the Agencies must codify the indistinguishability requirement in the regulatory text. If a wetland that is not indistinguishable from a WOTUS is jurisdictional, that would "effectively amend and substantially broaden" the definition of "navigable waters" to be "waters of the United States and adjacent wetlands."[64] The Supreme Court has made it clear that a regulatory definition of WOTUS cannot "do any such thing."[65]

Sackett provides further direction to the Agencies on when a wetland no longer has the sort of continuous surface connection that makes it difficult to determine where the WOTUS ends and the adjacent wetland begins. First, wetlands that are separated by man-made dikes or barriers, natural river berms, beach dunes and the like, do not have a continuous surface connection, unless such barriers were unlawfully constructed specifically to remove CWA jurisdiction.[66] Notably, when the Agencies first interpreted *Rapanos* in their 2008 Guidance, they adopted the same interpretation of "continuous surface connection" by describing that requirement to mean wetlands are "not separated. . . by uplands, a berm, dike, or similar feature."[67] That interpretation aligns with *Sackett*, as the Agencies have only recently acknowledged in their March 2025 guidance on "continuous surface connection."

Second, *Sackett* and the *Rapanos* plurality make it clear that there must ordinarily be a continuous surface *water* connection between a wetland and the abutting WOTUS. In other words, physical abutment is necessary, but it is not sufficient, to establish a continuous surface connection. The Agencies must therefore correct their prior misstatement that "[a] continuous surface connection is not the same as a continuous surface water connection."[68] Although *Sackett* stated that a wetland can still satisfy the continuous surface connection even if there are "temporary interruptions" in the connection such as "low tides or dry spells,"[69] that language makes it clear that the requisite connection is a *water* connection. This interpretation is also supported by the *Rapanos* plurality's holding that "[w]etlands are 'waters of the United States' if they bear the 'significant nexus' of physical connection, which makes them as a practical

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[63] *United States v. Sharfi*, No. 2:21-cv-14205, 2024 WL 4483354, at *13 (S.D. Fla. Sept. 21, 2024), *report and recommendation adopted*, 2024 WL 5244351; *see also Glynn Env't Coal., Inc. v. Sea Island Acquisition, LLC*, 2024 WL 1088585, at *5 (S.D. Ga. Mar. 1, 2024) (dismissing citizen suit alleging CWA violation where plaintiffs "failed to allege facts indicating the" wetland "has such a continuous surface connection to [WOTUS] it that it is 'indistinguishable' from it").

[64] 598 U.S. at 676.

[65] *Id.* at 677.

[66] *Id.* at 678 & n.16.

[67] 2008 *Rapanos* Guidance, at 7 n.29 (Dec. 2, 2008) *available at* https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf; *see also* USACE JD Form Instruction Guidebook, at 6 (May 30, 2007), *available at* https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll11/id/2310.

[68] 88 Fed. Reg. at 3,096.

[69] 598 U.S. at 678.

matter *indistinguishable* from waters of the United States."[70] Indeed, lower courts have confirmed that "'continuous surface connection' means a surface water connection" and explained that any interpretation to the contrary would result in these assertions from *Sackett* and the *Rapanos* plurality as "hav[ing] no practical meaning."[71]

Finally, *Sackett* makes it clear that features such as pipes and ditches cannot satisfy the continuous surface connection requirement, as such features, just like man-made dikes or barriers and natural barriers, make it easy to determine as a practical matter where the WOTUS ends and the wetland begins. Such barriers and features constitute "clear demarcation[s] between 'waters' and wetlands" such that the wetland is no longer indistinguishably part of another WOTUS (and hence, is not a WOTUS in its own right). Until recently, the Agencies advanced the remarkable positions that the following wetlands meet the continuous surface connection requirement: (i) a wetland connected to an alleged jurisdictional tributary by a 70-foot long pipe under a road;[72] (ii) a wetland connected to a "shallow," "non-relatively permanent swale," "350 feet in length," that conveys water "at low frequency and low volume" that would still be jurisdictional even if there were no flow at all in the swale;[73] and (iii) a wetland connected to a WOTUS by a "non-relatively permanent drainage ditch" that "carr[ies] only ephemeral flow after precipitation events" "for a length of approximately 115 feet, including through two culverts underneath driveways."[74] Fortunately, the Agencies have recently rescinded the guidance memoranda that set forth these positions, as well as other memoranda that assert that a discrete feature can establish a continuous surface connection, as contrary to *Sackett* and the *Rapanos* plurality. WAC agrees that the positions set forth in those memoranda and in the 2023 Rule preamble are directly contrary to *Sackett* and *Rapanos*. Wetlands that are connected only by virtue of a discrete feature—regardless of whether there is any ecologic or hydrologic connection—do not present any boundary-drawing problem between the wetland and any WOTUS. Rather, the

[70] 547 U.S. at 755.

[71] *Sharfi*, 2024 WL 5244351, at *1; *accord United States v. Ace Black Ranches, LLP*, No. 1:24-cv-00113, 2024 WL 4008545, at *4 n.2 (D. Idaho Aug. 29, 2024) (dismissing the government's complaint for failure to "connect any wetlands" it alleged to be WOTUS with a traditional, navigable water "via a sufficient surface-water connection").

[72] MEMORANDUM ON NAP-2023-01223, *available at* https://www.epa.gov/system/files/documents/2024-07/joint_memorandum_for_nap-2023-01223_508c_0.pdf.

[73] *Id.*

[74] MEMORANDUM ON SWG-2023-00284, *available at* https://www.epa.gov/system/files/documents/2024-07/joint_memorandum_for_swg-2023-00284_508c.pdf.

discrete, physical connection is itself a clear demarcation between waters and wetlands, making it possible to determine where one ends and the other begins.

WAC urges the Agencies to further clarify that the positions articulated in the rescinded Memos LRB-2021-01386[75] and NWO-2003-60436[76]—relying on discrete connections and subsurface connections to determine whether two distinct wetlands should be considered one wetland—are also contrary to *Sackett*. Under *Sackett*, a barrier, *e.g.*, a road that stands between a relatively permanent water and a wetland, plainly severs jurisdiction, regardless of whether there are subsurface connections or connections via culverts that link the wetland to the adjacent WOTUS. That is true whether a wetland is separated from a WOTUS only by a road (or some other barrier) or whether a wetland is separated from a WOTUS by both a road (or some other barrier) *and* another wetland. In both instances, the road serves as a clear demarcation between the wetland and the WOTUS. The wetland is not jurisdictional because it has no continuous surface connection to the WOTUS, and there are no line drawing problems between the wetland and the WOTUS. Those facts do not change merely if a second, distinct wetland sits on the other side of the road between the road and the WOTUS. The Agencies' "two wetlands are really one wetland" approach improperly rewrites the *Sackett* test to allow for jurisdiction over not just wetlands that have a continuous surface connection such that they are practically indistinguishable from the adjacent WOTUS, but also any *additional* wetlands that the Agencies can establish have any hydrologic connection—either surface or subsurface—to the jurisdictional wetland. Given the *Sackett* Court's emphasis on barriers, as well as predictability and due process, the Agencies cannot extend the lateral extent of their jurisdiction via a daisy chain of wetlands separated by clear barriers such as a road. Indeed, the Agencies have long held that wetlands are not WOTUS merely because they are adjacent to other wetlands.[77]

To sum up, WAC agrees with the Agencies' conclusion, in their March 12, 2025, guidance on "continuous surface connection," that the prior Administration's interpretation of the continuous surface connection requirement does not conform to key holdings in *Sackett* or the *Rapanos* plurality. WAC recommends that the Agencies provide additional clarity by amending the definition of "adjacent" to incorporate the "indistinguishability" element of the continuous surface connection requirement and to clarify that: (i) discrete features such as non-jurisdictional channels, pipes, and ditches cannot serve as continuous surface connections; (ii) wetlands separated by natural and man-made barriers do not satisfy the continuous surface connection requirement; and (iii) a continuous surface connection requires both direct abutment

[75] Memorandum on LRB-2021-01386 *available at* https://www.epa.gov/system/files/documents/2024-02/lrb-2021-01386-joint-decision-memo_final_508c.pdf.

[76] Memorandum to Re-evaluate Jurisdiction for NWO-2003-60436 *available at* https://www.epa.gov/system/files/documents/2024-01/nwo-2003-60436-joint-decision-memo_final_12-18-23_508c.pdf.

[77] *See* 51 Fed. Reg. 41,206, 41,250 (Nov. 13, 1986) (codified at 33 C.F.R. § 328.3(a)(7): "Wetlands adjacent to waters (*other than waters that are themselves wetlands*) identified in paragraphs (a)(1)-(6) of this section").

and a continuous surface *water* connection between the water and the wetland, though temporary interruptions can occur during times of low tides or dry spells.

C. The Definition of WOTUS Should Exclude Most Ditches.

Defining which ditches are jurisdictional, and which are appropriately excluded from the definition of WOTUS, remains a top priority for WAC members. Ditches long pre-date the CWA's enactment, and they are prevalent in every type of landscape across the country. Every day, WAC members rely on a wide variety of ditches as part of the construction, operation, and maintenance of homes, electric transmission and distribution lines, transportation-related infrastructure such as roads and railways, agricultural irrigation infrastructure, flood control infrastructure, rural drains and roads, mines, golf courses, and other important activities. Ditches play a critical role in all of these activities, ensuring that stormwater is properly channeled away from facilities and land where it would otherwise collect and interfere with the intended use of the land and facilities. Ditches are also critical to ensuring proper drainage and flood prevention on agricultural fields, roads, and urban spaces.

Following *Sackett*, ditches should generally be excluded from WOTUS because they are not bodies of water described in ordinary parlance as streams, oceans, rivers, and lakes. Moreover, as the *Rapanos* plurality explained, "[o]n its only natural reading, such a statute that treats 'waters' separately from 'ditches, channels, tunnels, and conduits,' thereby distinguishes between continuously flowing 'waters' and channels containing only an occasional or intermittent flow."[78] Regulation of ditches as WOTUS threatens to read the term "navigable" out of the statute, and it impermissibly intrudes upon state and tribal authority. Equally important, it is unnecessary to define WOTUS to include ditches in order to protect water quality; the Agencies can rely on existing Section 402 permitting requirements to protect downstream waters.

The 2023 Rule excludes from the definition of WOTUS "[d]itches (including roadside ditches) excavated wholly in and draining only dry land and that do not carry a relatively permanent flow of water."[79] This exclusion is too narrow and vague. Because of the very purpose of ditches—to collect and convey water from a saturated or ponded area—and because of modern drainage engineering criteria, which call for slowing drainage and runoff to reduce erosive force and potential collection in flood areas, there is a high likelihood that few ditches could meet the 2023 Rule's requirements for a ditch to be excluded from WOTUS. As explained more fully above, the 2023 Rule advances an overly expansive interpretation of the phrase "relatively permanent" that cannot be squared with what the *Rapanos* plurality intended. The plurality emphasized that the term "waters of the United States" excludes "channels through which water flows *intermittently* or ephemerally, or channels that periodically provide drainage for rainfall."[80] Upland ditches and ditches constructed in non-navigable features that contain

[78] *Rapanos*, 547 U.S. at 736 n.7.

[79] 88 Fed. Reg. at 3,103.

[80] 547 U.S. at 739 (plurality) (emphasis added).

merely intermittent or ephemeral flow should therefore be expressly excluded from the definition.[81]

The ditch exclusion in the 2023 Rule also incorporates ambiguous terms that leave too much room for inconsistent and arbitrary implementation. For example, the phrase "excavated wholly in and draining only dry land" raises a number of questions. If a ditch crosses a wetland, is it possible for the portion that is excavated in dry land to be excluded even if the portion downstream of the wetland crossing is jurisdictional, or is the entirety of the ditch jurisdictional? And what does it mean to drain only dry land? What if a ditch was constructed in a wetland before the CWA's enactment? It may be the case that such a ditch now drains only dry land because it long ago drained the wetland, so would the Agencies still consider that ditch to meet the "draining only dry land" requirement? Is a ditch jurisdictional if it intersects a wetland that is not WOTUS (*e.g.,* the wetland lacks a continuous surface connection to a WOTUS)?

WAC recommends that the Agencies exclude ditches unless they convey perennial flow to downstream traditional interstate navigable waters and were undisputedly constructed in a WOTUS or relocate or alter a WOTUS. WAC recognizes that this reformulated exclusion still requires an inquiry into the historical status of ditches—namely, whether they were constructed in or relocate or alter a jurisdictional water. This can be challenging given that many ditches were constructed well before the CWA's enactment and before tools were as readily available to help demonstrate historic conditions. WAC recommends that the Agencies revert to the approach from the 2020 Navigable Waters Protection Rule ("NWPR") of placing the burden of proof on the Agencies to show that a ditch should be jurisdictional. This approach is appropriate given the difficulty of evaluating historic geological conditions and where landowners could be subject to severe civil and criminal penalties if they guess wrong about whether a ditch was excavated in a WOTUS. If either historical information confirms that a ditch is properly excluded or if the Agencies are unable to carry their evidentiary burden, the ditch should remain excluded.

IV. Additional Recommendations for Defining WOTUS and Implementing the Definition

A. The Agencies Should Eliminate the Standalone Interstate Waters Category.

A water feature is not a WOTUS solely because it crosses state lines. Yet the 2023 Rule designates interstate waters as "(a)(1)" waters even if they are non-navigable and are not used in commerce. Consequently, the rule also improperly defines the following as WOTUS: (i) relatively permanent waters that are connected to a non-navigable interstate water; (ii) impoundments of any interstate waters; and (iii) wetlands adjacent to a non-navigable interstate water. None of these categorical assertions of jurisdiction is viable following the *Sackett* decision; thus, the Agencies should remove these categories from the definition.

The Agencies previously explained in detail why the statutory text, legislative history, historical context, and case law all show that the term WOTUS does not include standalone

[81] *See, e.g., Sharfi*, slip op. at 26 (ditches are not relatively permanent, standing, or continuously flowing bodies of water even where testimony showed water flowing for at least five months of the year).

interstate waters.[82] For instance, the Agencies correctly recognized that, because their "authority flows from Congress' use of the term 'navigable waters' in the CWA, the agencies lack authority to regulate waters untethered from that term," and "[n]othing in the legislative history of the 1972 amendments 'signifies that Congress intended to exert anything more than its commerce power over navigation."[83] The Agencies further emphasized that the history "supports the agencies' conclusion that Congress did not consider interstate waters and navigable waters to be two separate and distinct categories, and instead referred to terms in the pre-1972 statutory regime conjunctively as 'interstate navigable waters.'"[84]

Not surprisingly, *Sackett* reinforced that Congress's use of the term "navigable" means that WOTUS "principally refers to bodies of navigable water like rivers, lakes, and oceans."[85] And *Sackett* leaves no doubt that the CWA's coverage does not extend beyond the following categories of water bodies: (i) traditional interstate navigable waters; (ii) relatively permanent bodies of water connected to traditional interstate navigable waters; and (iii) wetlands with a continuous surface connection to bodies of water in the categories (i) and (ii) so that they are as a practical matter indistinguishable from such bodies of water.[86]

The Agencies correctly removed "interstate wetlands" from the WOTUS definition following *Sackett*, recognizing that "the provision authorizing wetlands to be jurisdictional simply because they are interstate is invalid."[87] But the Agencies should have also removed "interstate waters" from the definition. Non-navigable, non-relatively permanent waters are not WOTUS merely because they are interstate. For a non-wetland water body to be jurisdictional, it must either be a traditional interstate *navigable* water or it must be relatively permanent, standing, or continuously flowing *and* connected to a traditional interstate navigable water. It is true that the *Sackett* majority referenced the CWA's predecessor statute, which covered "interstate or navigable waters," in the context of explaining that the statutory term "waters" is not naturally read to encompass wetlands.[88] But Congress specifically removed the term

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[82] *See* 85 Fed. Reg. 22,250, 22,283-86 (Apr. 21, 2020).

[83] *Id.* at 22,284 (quoting *SWANCC,* 531 U.S. at 168 n.3).

[84] *Id.* (citing S. Rep. No. 92-414, at 2 (1971) ("These standards were to be applied to all *interstate navigable waters* flowing through the State; intrastate waters were not included." (emphasis added)); *id.* at 4 ("The setting of water quality standards for *interstate navigable waters*. . . is the keystone of the present program for control of water pollution." (emphasis added)); *id.* ("The States have first responsibility for enforcement of their standards. When approved by the [EPA], however, the standards for *interstate navigable waters* become Federal-State standards." (emphasis added))).

[85] 598 U.S. at 672 (citing *Rapanos,* 547 U.S. at 734 (plurality)).

[86] *See id.* at 666-67, 678-79, 684.

[87] 88 Fed. Reg. at 61,966.

[88] 598 U.S. at 673.

"interstate waters" from the Act in 1972,[89] and nothing in *Sackett* even hints at the possibility that interstate waters are categorically WOTUS even when they are not navigable in fact. On the contrary, *Sackett* reiterated the Court's longstanding view that traditional navigable waters are "interstate waters that [are] either navigable in fact and used in commerce or readily susceptible to being used in this way."[90]

B. The Agencies Should Eliminate the Standalone Impoundments Category.

Under the 2023 Rule, *all* impoundments of any (a)(1), (a)(3), and (a)(4) waters are WOTUS. The Agencies should eliminate this as a standalone category, as it conflicts with *Sackett*. Specifically, there is no basis in either *Sackett* or the *Rapanos* plurality to put impoundments on the same footing as traditional interstate navigable waters, yet that is what the 2023 Rule did. For example, "[t]ributaries of waters identified in paragraph (a)(1) *or (2)* of this section that are relatively permanent, standing or continuously flowing bodies of water" are *per se* jurisdictional regardless of whether the (a)(2) impoundment is itself a traditional interstate navigable water or has any connection to a traditional interstate navigable water. To compound that error, an impoundment of that relatively permanent tributary is also categorically jurisdictional, and so on, *ad infinitum*, without any express requirement in the regulatory text that the impoundment be connected to a traditional interstate navigable water.

Furthermore, under the (a)(4)(ii) category, the Agencies assert jurisdiction over wetlands that have a continuous surface connection to "[r]elatively permanent, standing or continuously flowing bodies of water identified in paragraph (a)(2)," but do not explicitly require the (a)(2) impoundment to have any connection to a traditional interstate navigable water. These assertions of jurisdiction have no grounding in either *Sackett* or the *Rapanos* plurality opinion, both of which require a connection to a traditional interstate navigable water as the lynchpin for asserting jurisdiction over non-navigable, relatively permanent, standing, or continuously flowing bodies of water.

To the extent impoundments are jurisdictional because they are relatively permanent, standing, or continuously flowing bodies of water *connected to* a traditional interstate navigable water or because the impoundments are themselves traditional interstate navigable waters, they should be regulated under those other categories of jurisdiction. There is no need or legal basis to retain a standalone impoundments category after *Sackett*. Much like wetlands that are separated from other WOTUS by a barrier are not jurisdictional under *Sackett*, impoundments that are not connected to any WOTUS cannot be jurisdictional.

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[89] *Compare* Water Pollution Control Act, ch. 758, 62 Stat. 1155, 1156 (1948) ("interstate"), and Pub. L. No. 87-88, 75 Stat. 204, 208 (1961) ("interstate or navigable"), *with* 33 U.S.C. 1362(7) ("navigable").

[90] 598 U.S. at 659 (citation omitted).

C. The Agencies Should Eliminate the Standalone Intrastate Lakes and Ponds Category.

The standalone "intrastate lakes and ponds" category—*i.e.*, the (a)(5) category—is neither consistent with *Sackett* nor is it necessary. Under the current definition, such lakes and ponds constitute WOTUS if they are "relatively permanent, standing or continuously flowing" and have "a continuous surface connection to" traditional navigable waters, the territorial seas, interstate waters, tributaries, *or* impoundments. This category unlawfully encompasses waters that are not "connected to traditional interstate *navigable* waters," which is contrary to *Sackett* and the *Rapanos* plurality opinion.[91] Nothing in those opinions suggests that intrastate lakes and ponds are WOTUS merely because they connect to a non-navigable interstate water, impoundments of such interstate waters, or relatively permanent tributaries of impoundments of interstate waters. Yet that is what the current WOTUS definition allows.

Furthermore, there is simply no need for the standalone (a)(5) category. To the extent intrastate lakes and ponds are relatively permanent and connected to a traditional interstate navigable water, as they must be under *Sackett* and *Rapanos*, they are already jurisdictional under our proposed (a)(2) category—namely, relatively permanent, standing, or continuously flowing rivers, streams, lakes, and ponds connected to a traditional interstate navigable water. But if a relatively permanent intrastate lake or pond is *not* connected to a traditional interstate navigable water—if, for example, the lake or pond only connects to a non-navigable interstate water or to an impoundment of a non-navigable interstate water—both *SWANCC* and *Sackett* foreclose defining it as WOTUS. Similarly, as noted above, the continuous surface connection requirement should only apply to determine whether adjacent *wetlands* are jurisdictional. Non-wetland waters such as intrastate lakes and ponds "do not implicate the boundary-drawing problem" discussed in *Riverside Bayview*.

For these reasons, relatively permanent intrastate lakes and ponds can only be jurisdictional if they connect to a traditional interstate navigable water. If they do, they are jurisdictional under the proposed, revised (a)(2) category. If they do not, there is no other basis to define such features as WOTUS under the CWA and Supreme Court precedents interpreting the Act.

D. The Agencies Should Retain and Revise the Codified Exclusions.

WAC appreciates the Agencies' attempts in each of the recent WOTUS rules to codify in the regulatory text a list of waters that are categorically *not* jurisdictional. WAC strongly supports the codification of exclusions, so long as they provide clarity, are not overly restrictive in their applicability, and do not serve as the basis for establishing jurisdiction. As the Agencies consider revisions to the definition of WOTUS to ensure faithful alignment with *Sackett*, they

[91] *Id.* at 666-67 (quoting *Rapanos*, 547 U.S. at 742 (plurality)).

should make the following changes, in addition to revising the ditch exclusion in accordance with WAC's recommendations above.

1. Prior Converted Cropland

Since 1993, the definition of WOTUS has explicitly excluded prior converted cropland ("PCC"). In 2023, however, the Agencies upended nearly 30 years of largely consistent implementation of the exclusion by codifying the "change in use" principle for the first time. WAC strongly opposes this change, and we recommend that the Agencies revert to the longstanding, original policy that all land parcels remain PCC unless two things occur: (1) the relevant parcel is abandoned and (2) that parcel reverts to wetlands.

When the Agencies originally promulgated the PCC exclusion in 1993, they explained that PCC are "areas that, prior to December 23, 1985, were drained or otherwise manipulated for the purpose, or having the effect, of making production of a commodity crop possible [and that are] inundated for no more than 14 consecutive days during the growing season[.]"[92] This exclusion reflects the recognition that PCC generally have been subject to such extensive modification and degradation as a result of human activity that the resulting "cropped conditions" constitute the normal circumstances for such lands.[93] The 1993 rule specifically clarified that PCC do not lose their status merely because the owner changes use.[94] Thus, even if the PCC are used for a non-agricultural use, they remain excluded from the definition of "waters of the United States." That interpretation was upheld in *United States v. Hallmark Construction Company*, 30 F. Supp. 2d 1033, 1035, 1040 (N.D. Ill. 1998). The change in use issue was litigated again in *New Hope Power Company v. U.S. Army Corps of Engineers*, 746 F. Supp. 2d 1272 (S.D. Fla. 2010), and the court there found that change in land use does *not* cause a property to lose PCC status. Relatedly, another important clarification in the 1993 rule is that even if PCC are "abandoned," meaning not used for agricultural production at least once in five years, they do not automatically become subject to CWA regulation. Rather, the PCC merely become eligible for CWA regulation. The critical inquiry is whether wetland conditions (as determined using the Corps' 1987 Wetlands Delineation Manual) have returned to the area. If not, the land remains PCC and excluded from the definition of "waters of the United States."

Although the 1993 Rule strove to ensure consistency between determinations made by the U.S. Department of Agriculture ("USDA") under the Food Security Act of 1985 and those made by the Agencies under the CWA, the final authority regarding CWA jurisdiction has always remained with EPA. Thus, even though Congress made changes in the 1996 Farm Bill to how USDA makes PCC eligibility determinations for purposes of the conservation compliance programs it administers, that bill did not affect how EPA and the Corps make PCC determinations for CWA purposes.[95]

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[92] 58 Fed. Reg. 45,008, 45,031 (Aug. 25, 1993).

[93] *See id.* at 45,032.

[94] *See id.* at 45,033-34.

[95] *See* H.R. Conf. Rep. No. 104-494, at 380 (1996), *reprinted in* 1996 U.S.C.C.A.N. 683, 745 (clarifying "the amendments to abandonment provisions under swampbuster should not

Accordingly, the Agencies' decision to import the USDA's "change in use" principle into the CWA context was ill-advised. The 1996 Farm Bill adopted that concept relevant to USDA *wetlands* certifications (not Corps/EPA PCC certifications under the CWA), but as noted above, those changes did not affect the Agencies' determination of what constitutes "waters of the United States" for CWA purposes. This issue was litigated in the *New Hope* case—the "issue paper" overturned by that court asserted that USDA "change in use" principles applied to jurisdictional determinations under the CWA—and the court rejected the assertion that a change in land use, without abandonment and return of wetland conditions, makes PCC part of "the waters of the United States."[96]

For these reasons, WAC recommends that the Agencies revise the definition of PCC by re-codifying the definition in the 2020 NWPR. That definition codified the Agencies' decades-long interpretation that an area loses its PCC status for CWA purposes only where it is abandoned *and* has reverted to wetlands. The Agencies further made it clear that abandonment means an area is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. Finally, the Agencies appropriately recognized, in the 2020 NWPR, that a site can be PCC regardless of whether there is a PCC determination from either USDA or the Corps, as there is no specific requirement for issuance of a formal PCC determination, and USDA does not provide determinations unless a farmer is seeking benefits under the conservation compliance programs. The 2023 definition of PCC, by contrast, was too restrictive in limiting the PCC exclusion to areas that are designated as such by the USDA.

2. Waste Treatment Systems

WAC strongly supports retention of the decades-old waste treatment systems exclusion in the regulatory text, but we recommend two important changes to the exclusion:

First, the Agencies should remove the comma before the phrase "designed to meet the requirements of the Clean Water Act," which would make it clear that this phrase applies to only "treatment ponds and lagoons." The inclusion of this comma in the current definition is problematic, as it could be misinterpreted to mean that systems that were constructed prior to 1972—and thus, could not possibly have been designed to meet the requirements of a statute that Congress had not yet enacted—do not qualify for the exclusion. This change could have significant consequences for WAC's members that operate decades-old waste treatment systems constructed prior to 1972. We note that even if the "designed to meet" language were applied to all waste treatment systems, it need not be read as preventing application of the exclusion to

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supersede the wetland protection authorities and responsibilities" of the Agencies under the CWA). Similarly, when USDA amended its regulations following the 1996 Farm Bill, it specified that they "do[] not affect the obligations of any person under other Federal statutes, or the legal authorities of any other Federal agency including, for example, EPA's authority to determine the geographic scope of Clean Water Act jurisdiction." *See* 61 Fed. Reg. 47,019, 47,022 (Sept. 6, 1996).

[96] *New Hope*, 746 F. Supp. 2d at 1279, 1282; *see also* Pls' Mot. for Prelim. Inj., or in the Alternative, for Summ. J., at 14, 27-28, *New Hope*, No. 10-cv-22777-KMM, (S.D. Fla. filed July 2, 2010), ECF No. 18 (discussing USDA-related provisions in the "issue paper").

systems that predate the CWA. Reading the exclusion to encompass features that predate the CWA is clearly consistent with the way in which the exclusion has been applied in most cases. Rather than finalize this change, the Agencies should go back to the approach in the NWPR, when they made it clear that the exclusion applies "to all waste treatment systems constructed prior to the 1972 CWA amendments."[97]

Second, the 2023 iteration of the waste treatment systems exclusion unfortunately eliminated the additional clarity that the NWPR provided by expressly stating that: an excluded system includes "all components" of a system; the exclusion applies to both active and passive treatment prior to a wastewater discharge (or the elimination of such a discharge); *and* cooling ponds are waste treatment system features.[98] These helpful clarifications, which the NWPR codified, are consistent with longstanding agency practice and did not expand the exclusion in any way. The Agencies should ensure that the text of the regulation makes it clear that: the exclusion encompasses all components of a system; a variety of active and passive treatment systems fall within the exclusion; and cooling ponds are waste treatment system features.

3. Recommendations Regarding Other Exclusions

WAC recommends that the Agencies make the following changes to the exclusions that are currently codified in the definition of WOTUS:

- The Agencies should revise the existing (b)(8) exclusion, which currently covers "[s]wales and erosional features (*e.g.*, gullies, small washes) characterized by low volume, infrequent, or short duration flow," to also exclude "waters or water features that do not have relatively permanent, standing, or continuously flowing water, including but not limited to ephemeral streams, swales, gullies, rills, and pools."

- The Agencies should expressly exclude stormwater control features constructed to convey, treat, or store stormwater; and wastewater recycling, groundwater recharge, or water reuse structures. Both the 2015 Rule and the NWPR appropriately excluded such features in the regulatory text. Those exclusions provided much needed clarity for regulated entities, including MS4s in particular, and they were important to avoid discouraging or otherwise creating barriers to water reuse and conservation.

- The Agencies should expand the exclusion for artificial lakes and ponds by eliminating the requirement that such features be "used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing." Starting in 2015, the Agencies appropriately removed references to "use" and "exclusively" in describing what artificial lakes and ponds are excluded. That important change reflects the reality that excluded ponds are often used for more than one purpose without turning them into a jurisdictional water.[99] The Agencies also clarified since 2015 that the list

[97] 85 Fed. Reg. at 22,325.

[98] *See id.* at 22,341.

[99] *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. at 37,054, 37,099 (June 29, 2015).

of excluded ponds has always been illustrative and not exhaustive.[100] The exclusion should thus be updated accordingly.

- The exclusions that are conditioned on creation in dry land are too restrictive, and the Agencies should revise those exclusions to reflect the wording from the 2020 NWPR. That rule appropriately excluded various features so long as they were constructed or excavated in *either* upland or in non-jurisdictional waters.

E. Grandfathering of Approved Jurisdictional Determinations.

Prior to the 2023 Rule, the Agencies consistently maintained that changes to the WOTUS definition did *not* apply retroactively and that approved jurisdictional determinations ("AJDs") and permits issued under a prior rule will *not* be reopened following changes to the definition.[101] Yet in the 2023 Rule, the Agencies took the position that because two district courts vacated the 2020 NWPR, NWPR AJDs "may not reliably state the presence, absence, or limits of 'waters of the United States' on a parcel and will not be relied upon by the Corps in making new permit decisions following the Arizona district court's August 30, 2021 order vacating the 2020 NWPR."[102] Although the Agencies further stated that "stand-alone" NWPR AJDs generally will remain valid until their expiration date, they nevertheless cast doubt on the validity of those AJDs by warning recipients of such AJDs about "the unreliability of those jurisdictional findings" and cautioning those property owners to discuss their options with the Corps prior to any discharges into waters identified in the AJDs as non-jurisdictional.[103]

The Agencies should take the opportunity to clarify that AJDs remain valid for their full five-year terms; thus, to the extent an AJD was issued under the NWPR and has not yet expired, the Corps can and should make permit decisions in reliance upon that AJD if that is how the applicant wishes to proceed. A unanimous Supreme Court in *Sackett* made it clear that the Agencies erred in trying to reinstate the significant nexus test by repealing the NWPR. The NWPR abandoned the significant nexus test in favor of a definition of WOTUS that was more in line with the *Rapanos* plurality's relatively permanent test, and the decision in *Sackett* underscores the wisdom of that decision. In light of *Sackett*, the Agencies should make it clear that all AJDs that were issued when the NWPR was in effect—both stand-alone AJDs and AJDs associated with pending permit requests—are valid for the AJDs' full five-year terms *and* that the Corps can appropriately rely on such AJDs when making permit decisions.

Moreover, after the District of Arizona vacated the NWPR in 2021 without first holding it unlawful on the merits, the Ninth Circuit held that courts "granting a voluntary remand" "lack the authority" to also vacate the regulation without first holding it unlawful on the merits.[104] In

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[100] *See id.*

[101] *See, e.g.*, 80 Fed. Reg. at 37,073-74 (2015 WOTUS Rule); 84 Fed. Reg. 56,626, 56,664 (Oct. 22, 2019) (2019 Repeal Rule); 85 Fed. Reg. at 22,331-32 (2020 NWPR).

[102] 88 Fed. Reg. at 3,136.

[103] *See id.*

[104] *In re Clean Water Act Rulemaking*, 60 F.4th 583, 588 (9th Cir. 2023).

part for that reason, the District of Arizona's vacatur provides a shaky basis at best for the Agencies to continue to cast doubt on AJDs that were properly issued during the time when the duly promulgated NWPR was in effect.

V. Conclusion

WAC agrees that the Agencies should revise the 2023 definition of WOTUS to ensure full alignment with *Sackett* and that they do so expeditiously. The 2023 Rule correctly incorporates some of the language from the Supreme Court's *Sackett* and *Rapanos* plurality opinion into the regulatory text. But the 2023 Rule does not go far enough. The rule otherwise fails to ensure consistency with *Sackett* because the Agencies improperly retained certain jurisdictional categories and undercut the regulatory text by using preamble language and subsequent guidance memoranda to advance overly broad interpretations of the relatively permanent and continuous surface connection requirements that conflict with *Sackett*. The Agencies should take this opportunity to correct course and ensure full consistency with the *Rapanos* plurality and *Sackett* opinions.

Sincerely,

Courtney Briggs, WAC Chair (courtneyb@fb.org)
David Chung, Counsel for WAC (DChung@crowell.com)

WATERS ADVOCACY COALITION

APPENDIX A

American Exploration & Mining Association
American Exploration & Production Council
American Farm Bureau Federation
American Forest & Paper Association
American Fuel & Petrochemical Manufacturers
American Gas Association
American Petroleum Institute
American Public Power Association
American Road & Transportation Builders Association
American Society of Golf Course Architects
Associated Builders and Contractors
Associated General Contractors of America
Association of American Railroads
Club Management Association of America
Florida and Texas Sugar Cane Growers
Golf Course Builders Association of America
Golf Course Superintendents Association of America
Independent Petroleum Association of America
ICSC
Leading Builders of America
Liquid Energy Pipeline Association
National Asphalt Pavement Association
National Association of Home Builders
National Association of Realtors
National Association of State Departments of Agriculture
National Club Association
National Corn Growers Association
National Cotton Council of America
National Council of Farmer Cooperatives
National Federation of Independent Business
National Mining Association
National Multifamily Housing Council
National Pork Producers Council
National Rural Electric Cooperative Association
National Stone Sand & Gravel Association
Responsible Industry for Sound Environment
Southeastern Lumber Manufacturers Association
Texas Wildlife Association
The Fertilizer Institute
Treated Wood Council
United Egg Producers
USA Rice Federation
US Chamber of Commerce