



April 23, 2025

U.S. Environmental Protection Agency
EPA Docket Center, Water Docket
Mail Code 28221T
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Submitted electronically via www.regulations.gov.

RE: Comments of the American Public Power Association on Army Corps of Engineers and the Environmental Protection Agency WOTUS Notice: The Final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendation (90 Fed. Reg. 13428, Docket ID No. EPA-HQ-OW-2025-0093, March 24, 2025)

I. Introduction

The American Public Power Association (APPA or the Association) 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) (together, the Agencies) on defining “waters of the United States” (WOTUS), consistent with the U.S. Supreme Court’s 2023 ruling interpretation of the scope of Clean Water Act (CWA) jurisdiction as directed by *Sackett v. EPA* (*Sackett*).^{1,2}

The American Public Power Association is the voice of not-for-profit, community-owned utilities that power 2,000 towns and cities nationwide. We represent public power before the federal government to protect the interests of the more than 49 million people that public power utilities serve, and the 96,000 people they employ. Our association advocates and advises on electricity policy, technology, trends, training, and operations. Our members strengthen their communities by providing superior service, engaging citizens, and instilling pride in community-owned power.

¹ 598 U.S. 651 (2023).

² 90 Fed. Reg. 13428, March 24, 2025.

WOTUS significantly influences the operations of our members' electric utilities, as the construction, maintenance, and expansion of essential energy infrastructure, including generation facilities, substations, transmission lines, and distribution systems—often necessitates work in or near wetlands or jurisdictional waters. As such, APPA supports the Agencies' efforts to revise the WOTUS definition to better reflect the legal standards set forth in *Sackett* while placing an emphasis on clarity, simplicity, and durable improvements.³ A clear and predictable definition of WOTUS is critically needed to prevent unnecessary delays and burdens for the public power utilities that may hinder our members' ability to deliver affordable and reliable power. We offer the following recommendations to ensure that a forthcoming rule provides clarity and adheres to the court's ruling.

II. The WOTUS Definition Must Conform to the U.S. Supreme Court's Authoritative Clean Water Act Interpretations

After extensive litigation, *Sackett* clarified that WOTUS includes only "relatively permanent bodies of water forming geographical features" described as "streams, oceans, rivers, and lakes," and adjacent wetlands with continuous surface connections making them "indistinguishably part" of those waters. The court rejected the "significant nexus" test as "particularly implausible" and emphasized that jurisdiction cannot be based on "ecological importance." Any WOTUS definition must respect states' primary authority over land and water use, give meaning to "navigable", and provide clear notice to landowners of their obligations, avoiding "freewheeling inquiries" that create due process concerns. *Sackett* sets forth the following findings regarding CWA jurisdiction:

- Applies only to "waters of the United States" defined as "relatively permanent, standing or continuously flowing bodies of water" commonly understood as "streams, oceans, rivers, and lakes."
- Covers only "relatively permanent bodies of water connected to traditional interstate navigable waters" and wetlands with such close physical connections are "indistinguishable" from WOTUS.
- Includes wetlands only where "no clear demarcation" exists between waters and wetlands, though temporary interruptions (low tides, dry spells) may occur.

³ See U.S. EPA, [Administrator Zeldin Announces EPA Will Revise Waters of the United States Rule | US EPA](#) (Mar. 12, 2025).

- Requires the term “navigable” to have meaning, reflecting Congress's focus on traditional navigable waters.
- Prohibits defining “waters” simply by water presence, as this contradicts *SWANCC* and undermines states' primary regulatory role.⁴
- Rejects the “significant nexus” test as “particularly implausible” and prohibits jurisdiction based on ecological importance alone.
- Demands clear jurisdictional standards to provide landowners notice of obligations and avoid due process concerns.

The 2023 Conforming WOTUS rule did not fully align with the U.S. Supreme Court's decision in *Sackett*.⁵ While the Agencies appropriately removed the “significant nexus” test following the court's ruling, further revisions are necessary to ensure complete compliance with the court's interpretation of the CWA. A forthcoming rule to revise the WOTUS definition should incorporate these essential principles:

- First, WOTUS should encompass only three specific categories: traditional interstate navigable waters, waters that maintain a relatively permanent presence, and wetlands immediately adjacent to either of these water types.
- Second, the definition of “relatively permanent” waters should be strictly limited to water features that contain flowing or standing water consistently throughout most of the year.
- Third, jurisdictional “adjacent wetlands” should only include those wetlands that directly connect to covered waters in a way that makes them essentially indistinguishable from one another. This requires two specific conditions: there must be no natural or artificial barriers separating the wetland from the water body, and a continuous surface water connection must exist between them.

⁴ Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, No. 99-1178 (January 9, 2001) (“*SWANCC*”).

⁵ 88 Fed. Reg. at 61,964 (September 8, 2023). This conforming rule amends the provisions of the agencies’ definition of “waters of the United States” that was invalid under the Supreme Court’s interpretation of the Clean Water Act in the 2023 decision.

These principles reflect the court's authoritative interpretation of the Clean Water Act's scope and should guide the development of compliant WOTUS regulations in the future.

III. The Agencies Must Prioritize Durable Rulemaking Rather Than Relying on the Issuance of Guidance

On March 12, 2025, EPA Administrator Lee Zeldin announced the Agency's intention to revise the definition of WOTUS.⁶ As such, APPA would like to reiterate the importance of issuing a durable rule. The definition of WOTUS has changed repeatedly over the past two decades, often with each new administration, creating a regulatory whiplash that frustrates long-term planning, investment, and environmental stewardship. Public power utilities—many of which serve small or rural communities with limited resources—cannot continue to operate under a moving target. A durable rulemaking is needed to facilitate long-term planning.

APPA also finds that the current definition of WOTUS lacks clarity and precision, leaving substantial room for varied interpretation by federal agencies. This creates significant challenges for stakeholders, as inconsistent application complicates compliance efforts and disrupts effective planning processes. For electric utilities, whose infrastructure projects often intersect with wetlands or jurisdictional waters, this ambiguity can delay project timelines, increase costs, and discourage investment in needed upgrades to the electric grid. Revising the definition presents an important opportunity to eliminate these ambiguities, offering stakeholders the clarity and predictability needed to meet regulatory requirements efficiently while advancing critical energy infrastructure projects.

APPA acknowledges and appreciates the Agencies' effort to clarify aspects of WOTUS jurisdiction—specifically the “continuous surface connection” requirement—through interim guidance.⁷ While guidance can help address short-term uncertainty, it is not an adequate substitute for legally binding rulemaking. Guidance documents lack the force of law, may shift with changing administrations, and cannot provide the stability or predictability that stakeholders need to make long-term planning decisions. To strengthen both clarity and enforceability, the Agencies should incorporate the substance of the guidance directly into the text of any

⁶ See U.S. EPA, [Administrator Zeldin Announces EPA Will Revise Waters of the United States Rule | US EPA](#) (Mar. 12, 2025).

⁷ March 12, 2025, “[Memorandum to the Field Between the U.S. Department of the Army, U.S. 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.](#)”

forthcoming regulation. Doing so will ensure that these principles are binding and consistently interpreted.

While APPA supports reconsidering the definition of WOTUS, we do not believe that a complete overhaul of the 2023 “Revised Definition of the Waters of the United States” (Conforming Rule) is necessary.⁸ The Conforming Rule codifies the phrase “relatively permanent, standing or continuous flowing bodies of water” and “continuous surface connection” as *Sackett* requires, providing a strong basis for revisions.⁹ Further regulatory specificity is needed to align with *Sackett*. In the upcoming rulemaking, the Agencies must incorporate detailed definitions directly in the regulatory text, rather than leaving key terms undefined and susceptible to overly broad interpretation by field staff.

IV. The Agencies Must Make Targeted Revisions to the Definition of WOTUS as it Pertains to the Scope of “Adjacent” Wetlands and the Treatment of Ditches

- a) The Agencies Must Clarify That “Adjacent” Wetlands are Jurisdictional Only When They Are Indistinguishably Part of Another WOTUS.

Under *Sackett*, wetlands are only jurisdictional if they directly abut a WOTUS in such a way that the boundary between the two is *indistinguishable*, meaning it should be “difficult to determine where the water ends and the wetland begins.”¹⁰ Furthermore, the *Rapanos* plurality states that there should be “no clear demarcation between ‘waters’ and wetlands.”¹¹ Thus, both *Sackett* and *Rapanos* clearly convey that indistinguishability is vital to establishing a wetland's continuous surface connection.

Lower courts have also reinforced this principle by applying *Sackett*. In *Lewis v. United States*, the U.S. Court of Appeals for the Fifth Circuit rejected jurisdiction where the nearest relatively permanent water was miles away and separated from the wetland by roadside ditches, culverts, and non-permanent tributaries.¹² Likewise, in *United States v. Sharfi*, a federal district court rejected an interpretation that allowed abutment alone to establish a continuous surface

⁸ 40 C.F.R. Part 120.

⁹ 40 C.F.R. Part 120.2.

¹⁰ 598 U.S. at 678.

¹¹ *Id.* (quoting *Rapanos* 547 U.S. at 742).

¹² *Id.* at 1079.

connection, warning that such an approach renders the indistinguishability standard meaningless.¹³

Sackett further directs the Agencies on when a wetland no longer has a continuous surface connection, making 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.¹⁴ Second, 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,”¹⁵ that language makes 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. 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.

Thus, to ensure compliance with *Sackett* and *Rapanos*, the Agencies must include indistinguishability into the definition of “adjacent” wetlands. Furthermore, the Agencies must 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 and a continuous surface water connection, though temporary interruptions can occur during times of low tides or dry spells.

b) The Agencies Should Exclude Most Ditches from the Definition of WOTUS.

APPA supports the general exclusion of most ditches from the WOTUS definition due to their critical role in the electric utility industry. Ditches play a vital role in operating and maintaining electric generation facilities, transmission and distribution lines, and other energy infrastructures. These man-made conveyances are frequently constructed for drainage, flood control, or right-of-way maintenance. Treating them as jurisdictional waters would impose

¹³ *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 Environmental Coalition, Inc. v. Sea Island Acquisition, LLC*, 2024 WL 1088585, at *5 (S.D. Ga. Mar. 1, 2024).

¹⁴ *See* 143 S. Ct. at 1340-41 & n.16.

¹⁵ *Id.* at 1340-41.

excessive permitting obligations on electric utilities, potentially requiring permits for routine maintenance or repairs. This outcome would significantly disrupt the development and modernization of grid infrastructure.

The legal rationale for excluding ditches is grounded in both *Sackett* and *Rapanos*. Under *Sackett*, ditches should generally be excluded from jurisdiction because they are not bodies of water described in ordinary parlance as streams, oceans, rivers, and lakes. Moreover, as the *Rapanos* plurality explained, “on 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.”¹⁶ Thus, regulating ditches as WOTUS risks undermining the statutory focus on being “navigable.”

Furthermore, regulating ditches as WOTUS is unnecessary from an environmental protection standpoint. Most ditches are already subject to oversight under other Clean Water Act programs, including National Pollutant Discharge Elimination System (NPDES) permits, Municipal Separate Storm Systems (MS4) permits, and state-level regulations. Many ditches are required components of stormwater and runoff management systems. Subjecting these same systems to jurisdiction as WOTUS would create a duplicative regulatory cycle that adds complexity and cost without tangible water quality benefits.

Accordingly, APPA urges the Agencies to exclude roadside, agricultural, irrigation, industrial, stormwater, and process water ditches from the WOTUS definition unless they were constructed in a WOTUS, were designed to relocate or alter a natural WOTUS, and convey perennial flow to downstream interstate navigable waters. In determining whether such exceptions apply, the burden of proof - namely, whether they were constructed in or relocate or alter a jurisdictional water- should rest with the Agencies, consistent with the approach taken under the Navigable Waters Protection Rule (NWPR).¹⁷ Where historical records confirm exclusion, or where the Agencies are unable to meet their evidentiary burden, the ditch should remain non-jurisdictional.

¹⁶ *Rapanos*, 547 U.S. at 736 n.7.

¹⁷ 40 C.F.R. Parts 110, 112, 116, 117, 120, 122, 230, 232, 300, 302, and 401.

V. The Agencies Should Retain the Waste Treatment Systems Exclusions with Certain Revisions

The Waste Treatment Systems (WTS) exclusion is critical for electric utilities to provide reliable and affordable electricity across the country. The electric utility industry relies on many water features, such as storm water sedimentation ponds, cooling ponds, and associated conveyances to and from those features, to handle various types of wastewaters. The purpose of these industrial features is to contain, control and treat waste streams to make productive use of internal features and to prevent pollution from entering external waters. WTS features often dissipate heat and control total dissolved solids before wastewater reaches the facility's NPDES-permitted discharge into WOTUS.

Discharges from WTS features are already regulated by the NPDES program, making it unnecessary, duplicative, and inefficient to treat these internal systems as WOTUS. For instance, requiring permits for routine activities like installing pumps or transferring water between cooling ponds would impose excessive costs and delays without improving environmental outcomes. Under the NWPR, these features were excluded from the WOTUS definition.

APPA supports the continued exclusion of WTS with certain revisions to the exclusion as it is described in the NWPR. First, the Agencies should restore NWPR's clarifying language which defined features that qualify for the exclusion, including cooling and settling ponds, confirmed that the exclusion applied to the system as a whole, including related conveyances; confirmed that features need not perform active treatment to qualify, and make other needed ministerial changes. These clarifications in the NWPR did not expand the exclusion's scope but codified existing interpretations and provided necessary regulatory certainty. Second, the Agencies should make it clear that the exclusion applies "to all waste treatment systems constructed prior to the 1972 CWA amendments," as was clearly stated in the NWPR.¹⁸ Alternatively, the Agencies could consider revising the forthcoming rule preamble language to clarify that WTS can include natural and engineered features. The Agencies should also clarify that equalizing and storing activities associated with pollutant removal, such as balancing wastewater flows, retaining water for treatment, or temporary storage of waste, are encompassed within the concept of "waste treatment systems." This would provide essential interpretative clarity.

¹⁸ 40 C.F.R. Parts 110, 112, 116, 117, 120, 122, 230, 232, 300, 302, and 401.

VI. Conclusion

APPA supports the Agencies' initiative to revise the WOTUS definition to uphold the principles set forth in *Sackett*. The Conforming Rule provides a solid starting point for these revisions, but any final rule must prioritize durability to ensure stakeholders can plan and operate accordingly with confidence. Specifically, APPA recommends revising the definition of "adjacent" to clarify that wetlands are jurisdictional only when they are indistinguishable from another WOTUS. Additionally, APPA urges the exclusion of most ditches from the definition to reduce unnecessary regulatory burdens and calls on the Agencies to retain the WTS exclusion to prevent duplicative requirements for electric utilities. By adopting these revisions, the Agencies can establish a clear WOTUS definition that aligns with *Sackett*, supports essential electric utility operations, and preserves meaningful environmental protections under the CWA.

Sincerely,

A handwritten signature in black ink that reads "Carolyn Slaughter". The signature is written in a cursive, flowing style.

Carolyn Slaughter, Senior Director of Environmental Policy
American Public Power Association