

April 23, 2025

Stacey Jensen
U.S. Environmental Protection Agency
Office of Water
Oceans, Wetlands and Communities Division
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Milton Boyd
U.S. Army Corps of Engineers
Department of the Army
Office of the Assistant Secretary of the Army for Civil Works
108 Army Pentagon
Washington, D.C. 20310

Submitted electronically via: <https://www.regulations.gov>

RE: U.S. Environmental Protection Agency and U.S. Army Corps of Engineers Revised WOTUS definition— Docket ID No. EPA-HQ-OW2025-0093

On behalf of the National Water Resources Association (NWRA), thank you for the opportunity to provide comment on the agencies' implementation of the Supreme Court's ruling in Sackett v. EPA, 598 U.S. 651 (2023).

NWRA is a nonprofit federation of state water resources associations, regional associations, agriculture and municipal water agencies, and industrial water groups. Our members provide water and hydropower to approximately 50 million individuals, families, agricultural producers, and other industries that support our communities large and small, our economy, and our environment. We represent water managers who are directly impacted by the scope of federal Clean Water Act (CWA) jurisdiction and its practical implementation.

Key Points

1. Irrigation Conveyances and Return Flows Are Not WOTUS

Consistent with Sackett and prior court decisions (Rapanos, SWANCC), NWRA reaffirms that manmade irrigation infrastructure—canals, drains, wasteways, and ditches—must be categorically excluded from WOTUS. These features serve essential public purposes and are often constructed in uplands. Their inclusion under federal jurisdiction is inconsistent with the CWA and would mischaracterize managed systems as natural waters.

Moreover, return flows from agricultural use that pass through constructed drains should not create jurisdiction. As noted in our 2019 comments, western systems such as those in the Yakima Valley rely on engineered drains and coulees to convey return flows that, in their natural state, were dry for years at a time. These systems, even when flowing due to irrigation, remain non-jurisdictional.

2. Artificial Wetlands Are Not Subject to the CWA

Water originating from project sources—such as seepage from canals or on-farm irrigation—may saturate land and promote vegetation. But these are artificial conditions, not jurisdictional wetlands. Federal regulation must draw a clear line between natural hydrology and artificially induced surface conditions.

3. Sackett Must Be Fully Enforced

The Sackett decision offers clear and enforceable limitations on federal jurisdiction. WOTUS must be restricted to:

- i) Relatively permanent, standing, or continuously flowing water bodies that fit within common understanding—streams, rivers, oceans, lakes.
- ii) Wetlands that have both a continuous surface water connection to such waters and are indistinguishable from them, with no clear boundary between water and wetland. Regulatory definitions or field implementation that ignore either requirement, or suggest that a mere surface connection is sufficient, violate Sackett and must be rejected.

4. End the “Significant Nexus” Test and Related Concepts

The 'significant nexus' test is not only legally defunct but remains a lingering source of confusion in agency guidance. Concepts such as “ecological connectivity” or “adjacency” that hinge on hydrologic proximity rather than visible, physical continuity must be removed from all jurisdictional interpretations.

5. A Functional Wetlands Manual Is Urgently Needed

The U.S. Army Corps of Engineers Wetlands Manual must be updated to incorporate Sackett. The three-part test—hydrology, hydric soils, and hydrophytic vegetation—must include clear time thresholds and seasonal saturation criteria. Manmade surface expressions or short-term moisture should never satisfy federal wetland jurisdiction.

6. Reinforce Federalism and State Primacy

As articulated in NWRA’s 2019 comments and recognized in 33 U.S.C. §1251(g), Congress explicitly preserved state authority to allocate water and manage water resources. Federal definitions of WOTUS must respect state law and long-standing compacts, particularly in the West where complex infrastructure is necessary to ensure water reliability across great distances.

Clarifying the Definition of Navigability

NWRA supports a definition of 'navigable' that aligns with Justice Thomas’s concurring opinion in Sackett. Under this rationale, jurisdiction should apply only to waters that are used—or are susceptible to being used—for the transportation of goods in interstate commerce. Infrastructure that was not constructed for navigation—such as flood control channels, aqueducts, or treatment ponds—should be categorically excluded. The presence of water alone is not sufficient to warrant federal jurisdiction under the Clean Water Act.

Further, the presence of a gate or other control mechanism that disrupts flow into or out of a feature should be considered a break in continuity. This approach respects the Sackett decision and provides practical, enforceable guidance for field staff and regulated parties.

Regulatory Impacts on Infrastructure Operations

A WOTUS designation imposes complex Clean Water Act permitting requirements under Sections 402 and 404, as well as associated Section 401 certifications. These requirements can delay or block routine maintenance, inhibit construction of new infrastructure, and result in costly mitigation obligations. According to the U.S. Supreme Court in *U.S. Army Corps of Engineers v. Hawkes Co.*, the average cost of obtaining an individual 404 permit exceeds \$270,000 and takes over two years. For infrastructure that was not constructed for navigation, these burdens are disproportionate and unnecessary.

Designating infiltration basins, stormwater channels, or terminal reservoirs as WOTUS can also create regulatory contradictions—such as requiring compliance with water quality standards before water enters a facility specifically designed to provide treatment. This not only creates inefficiencies but undermines public health and environmental goals.

Categorical Exclusions for Water Infrastructure

The Agencies should adopt clear categorical exclusions for infrastructure that serves essential public health and safety functions. This includes municipal separate storm sewer systems (MS4s), aqueducts, irrigation canals, infiltration basins, percolation ponds, treatment wetlands, and terminal reservoirs. These features are often human-made, constructed outside of traditionally navigable waters, and do not maintain a continuous surface connection to WOTUS. As such, they fall outside the Supreme Court’s definition of jurisdictional waters under Sackett.

Federal precedent already supports categorical exclusions. For example, wastewater treatment systems have long been excluded from WOTUS. EPA’s Water Transfer Rule also recognizes that infrastructure essential to water delivery and management should not be subject to duplicative CWA regulation. These principles should be extended explicitly to stormwater, flood control, and water supply infrastructure.

Infrastructure such as MS4s and aqueducts may appear hydrologically connected or operate near surface waters but were built for distinct, non-navigational purposes—typically to move, store, or treat water for human use. Their inclusion in WOTUS undermines their function, creates costly permitting delays, and introduces redundant regulation where other federal and state laws already provide oversight.

As the agencies solicit feedback on whether factors such as flow regime (e.g., relatively permanent, perennial, or intermittent), physical characteristics, location of excavation (in uplands versus aquatic resources), intended use (e.g., irrigation or drainage), or biological indicators (such as the presence of fish) could help distinguish jurisdictional from non-jurisdictional ditches, NWRA urges clarity rooted in function, construction context, and water source. These practical considerations—especially for irrigation conveyances constructed in uplands—provide a defensible and implementable basis for exclusion under the Clean Water Act.

Additionally, the agencies ask whether a definition of 'ditch' like that used in the 2020 Navigable Waters Protection Rule (NWPR) would provide greater clarity. NWRA strongly supports reinstating a clear and functional definition, such as: 'a constructed or excavated channel used to convey water.' This definition appropriately reflects the essential role of ditches in water delivery, return flow management, and stormwater conveyance—particularly in arid regions—and will assist with consistent implementation aligned with the Sackett decision.

The Supreme Court's Sackett ruling provides a well-reasoned and constitutionally grounded framework and NWRA and its members thanks the Agencies for their work to develop a durable WOTUS definition that can safeguard our members waters while not unduly hindering water supply and quality.

Please let us know if there are further opportunities for NWRA to collaborate on WOTUS efforts that balances the broad interest of the Clean Water Act or if we can provide additional information and resources.

If you have any questions or would like to follow up on this matter, please contact NWRA Executive Vice President, Greg Morrison, at gmorrison@nwra.org or (951) 326-0922.

Respectfully submitted,



Greg Morrison
Executive Vice President
National Water Resources Association

Also signed by:

- Washington State Water Resources Association
- Oregon Water Resources Congress
- Montana Water Resources Association
- New Mexico Water Resources Association
- North Dakota Water Users Association
- Utah Water Users Association
- Agribusiness & Water Council of Arizona
- North Dakota Department of Water Resources
- Nebraska Water Resources Association
- South Columbia Basin Irrigation District
- Weber Basin Water Conservancy District
- Irrigation and Electrical Districts Association of Arizona, Inc.
- Wellton-Mohawk Irrigation & Drainage District
- East Columbia Basin Irrigation District
- Central Utah Water Conservancy District
- Sunnyside Valley Irrigation District