

**April 23, 2025**

Comments regarding:

**March 24, 2025 WOTUS Notice: The Final Response to SCOTUS; Establishment of a Public Docket; Request for Recommendations**

Submitted by:

**Energy and Wildlife Action Coalition**

Filed electronically:

Docket No. EPA-HQ-OW-2025-0093

The Energy and Wildlife Action Coalition (“EWAC”)<sup>1</sup> submits these comments in response to the U.S. Environmental Protection Agency (“EPA”) and U.S. Army Corps of Engineers (“Corps”) (collectively, “Agencies”) March 24, 2025 notice (“Notice”) announcing listening sessions and solicitation of stakeholder feedback in connection with the definition of “waters of the United States” (“WOTUS”).<sup>2</sup> The Agencies seek input from the public on how to clarify what features<sup>3</sup> qualify as WOTUS under the Clean Water Act (“CWA”) and how to ensure the definition of WOTUS abides by the holding in the U.S. Supreme Court (“SCOTUS”) decision in *Sackett v. EPA* (“*Sackett*”).<sup>4</sup> EWAC provides these comments based on the knowledge and experience of its membership.

As the Agencies are aware, recent Executive Orders issued by President Trump and Secretarial Orders issued by Secretary of the Interior Burgum emphasize the need for domestic electricity generation and streamlined permitting processes.<sup>5</sup> In EWAC’s experience, uncertainty in the implementation of the CWA and, particularly, the determination of whether WOTUS are present within a project site, can substantially delay and increase costs for energy and transmission projects. These delays and increased costs are antithetical to the policies outlined by President Trump and Secretary Burgum, which call for removing roadblocks to advancing the nation’s domestic supply of electricity.

As an initial matter, EWAC appreciates the Agencies’ commitment to promulgating a WOTUS definition that is consistent with the CWA and relevant SCOTUS decisions<sup>6</sup> and that will “provide for durability and stability”<sup>7</sup> which has long been needed with respect to CWA implementation. EWAC supports the development of a WOTUS definition that is consistent with the CWA and SCOTUS’ direction in *Sackett*, and encourages the Agencies to develop implementation regulations or guidance to ensure that WOTUS determinations are made consistently across the Agencies’ regions and divisions. EWAC’s detailed recommendations follow below and are intended to assist the Agencies in developing a durable and workable WOTUS definition.

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<sup>1</sup> EWAC is a national 501(c)(6) trade association formed in 2014 whose members consist of electric utilities, electric transmission providers, and renewable energy entities operating throughout the United States, and related trade associations. The fundamental goals of EWAC are to evaluate, develop, and promote sound environmental policies for federally protected wildlife and closely related natural resources while ensuring the continued generation and transmission of reliable and affordable electricity. EWAC supports public policies, based on sound science, that protect wildlife and natural resources in a reasonable, consistent, and cost-effective manner. EWAC is a majority-rules organization and therefore specific decisions made by the EWAC Policy Committee may not always reflect the positions of every member.

<sup>2</sup> 90 Fed. Reg. 13,428 (Mar. 24, 2025) (“WOTUS Notice”).

<sup>3</sup> As referenced throughout the term “features” refers to those non-traditional navigable waters, such as a non-jurisdictional ditch, swale, pipe, or culvert.

<sup>4</sup> *Sackett v. EPA*, 598 U.S. 651 (2023).

<sup>5</sup> See, e.g., Executive Order 14156, “Declaring a National Energy Emergency”; Executive Order 14154, “Unleashing American Energy”; Secretarial Order 3418, “Unleashing American Energy”; Secretarial Order 3417, “Addressing the National Energy Emergency.”

<sup>6</sup> WOTUS Notice at 13,431.

<sup>7</sup> *Id.*

**I. Agencies should adopt clear standards to limit inconsistent application of WOTUS and reduce delays and costs associated with production and delivery of electricity.**

On May 25, 2023, SCOTUS issued its decision in *Sackett*, which narrowed the applicability of CWA jurisdiction over wetlands and other features that are adjacent to traditionally navigable waters. Under *Sackett*, in order for an adjacent wetland to be, itself, a WOTUS, the feature must be “indistinguishable” from traditionally navigable waters due to a continuous surface connection. To make this determination, SCOTUS provided the following two-part test:

1. The body of water to which the wetland is connected must be a “relatively permanent body of water” that is connected to traditional navigable waters; and
2. The wetland must have a “continuous surface connection” with that connected water, “making it difficult to determine where the ‘water’ ends and the wetland begins.”<sup>8</sup>

Following SCOTUS’ decision in *Sackett*, there continues to be confusion surrounding which features should and should not be considered adequate to bestow CWA jurisdiction over an adjacent wetland or similar feature, and the various Corps districts are inconsistent in how they apply *Sackett*. For example, some Corp districts viewed *Sackett* as prohibiting a manmade ditch or canal from constituting WOTUS because of language in *Sackett* indicating that while “temporary interruptions in surface connection may sometimes occur because of phenomena like low tides or dry spells,”<sup>9</sup> WOTUS includes “only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams, oceans, rivers, or lakes’”.<sup>10</sup> Other districts, however, take a different view. Likewise, federal courts interpreting the meaning of the “relatively permanent” standard described in *Sackett* have also been inconsistent, with some courts holding that a manmade channel or ditch qualifies as WOTUS<sup>11</sup> and others coming to the opposite conclusion.<sup>12</sup> In member experiences, Corps districts also seem to be grappling with whether a wetland connected to a traditional navigable water by a feature that is mostly dry has the requisite “continuous surface connection” to qualify as a WOTUS.

One of the most significant impediments to the production and transmission of electricity is a lack of certainty and consistency in the regulatory landscape. Inconsistent application of statutes and regulations frequently results in delays in project timelines, increased costs, and an

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<sup>8</sup> *Sackett*, 598 U.S. at 678-79 (citation omitted).

<sup>9</sup> *Id.* at 678.

<sup>10</sup> *Id.* at 671 (citation omitted).

<sup>11</sup> *Baykeeper v. City of Sunnyvale*, No. 5:20-cv-00824-EJD, 2023 U.S. Dist. LEXIS 220102, at \*11-14 (N.D. Cal. Dec. 11, 2023)(upholding pre-*Sackett* holding that a manmade channel qualifies as WOTUS); *Waste Action Project v. Girard Res. & Recycling LLC*, No. 2:21-cv-00443-RAJ-GJL, 2024 U.S. Dist. LEXIS 179264, at \*37 (W.D. Wash. Sep. 4, 2024)(a ditch flowing into a creek offers grounds for WOTUS).

<sup>12</sup> *Ragsdale v. JLM Constr. Servs., Inc.*, 737 F. Supp. 3d 449, 461 (W.D. Tex. 2024)(holding that post-*Sackett* WOTUS does not apply to channels “through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.”(citation omitted)); *United States v. Sharfi*, No. 21-CV-14205-MARRA/MAYNARD, 2024 U.S. Dist. LEXIS 171175, at \*36 (S.D. Fla. Sep. 21, 2024)(holding that ditches fail to meet *Sackett* standard of “relatively permanent, standing or continuously flowing body of water” to qualify as WOTUS.” (citation omitted)).

increase in enforcement exposure. In the forthcoming rulemaking, the Agencies should consider clearly stating whether a manmade ditch, canal, tank, or other feature may qualify as WOTUS and, if so, under what specific circumstances. Direction should also be given about what kinds of temporary interruptions to a continuous surface connection would disqualify a feature from qualifying as WOTUS. Having clear direction from the Agencies on these baseline issues will result in a significant reduction in time, cost, enforcement, and litigation associated with individual WOTUS determinations.

## **II. WOTUS definition should closely follow *Sackett*, so as not to unnecessarily hinder production or delivery of electricity.**

Expansion of the WOTUS definition over time has substantially increased involvement by agencies other than the Corps in the review and approval of energy production and transmission infrastructure where such involvement would otherwise not be required. For example, EWAC members have experienced increased costs and delays due to protracted negotiations with the U.S. Fish and Wildlife Service and state offices of historic preservation due to CWA Nationwide Permit General Conditions 18 and 20 where the total amount of potential WOTUS to be impacted by projects was far less than the general trigger for pre-construction notification. In many cases, without the presence of WOTUS, there would be no independent requirement to coordinate with other federal or state agencies and, thus, important energy infrastructure projects could proceed on a more expedient and cost-efficient basis.

To prevent unnecessarily impeding energy infrastructure, EWAC recommends that any updated WOTUS definition closely adhere to SCOTUS' direction in *Sackett* and should not extend to features that have attenuated connection to traditionally navigable waters. For example, any ultimate WOTUS definition should adopt the position taken by the court in *United States v. Sharfi*, in which the U.S. District Court for the Southern District of Florida held post-*Sackett* that seasonal drainage ditches with varying flow throughout the year did not constitute WOTUS under *Sackett* because they are not ordinarily described as streams, oceans, rivers, or lakes and because flow was intermittent. EWAC agrees that such features should be specifically excluded from the definition of WOTUS.

## **III. WOTUS definition should retain exemptions established by prior rulemaking.**

As the Agencies consider how to clarify the definition of WOTUS, EWAC encourages the Agencies to retain existing exemptions to the WOTUS definition. These exemptions are currently set forth in 40 C.F.R. § 120.2(b). It has been EWAC members' experience that the exemptions provide clarity to agency personnel and project proponents on whether certain features would ever qualify as WOTUS. In addition to retaining the exemptions, EWAC encourages the Agencies to consider how to further clarify their application.

For example, the exemption found at 40 C.F.R. § 120.2(b)(2) applicable to “[w]aste treatment systems, including treatment ponds or lagoons, designed to meet the requirements of the [CWA]”, aids owners and operators of such systems efficiently to comply with the CWA, including in connection with proper treatment of stormwater, cooling water and related thermal impacts, as well as oil spill prevention and treatment. Without this explicit exemption, these facilities could be subjected to a case-by-case analysis regarding WOTUS jurisdiction and CWA

compliance that would likely result in a burdensome regulatory regime that interferes with effective and efficient operation of waste treatment facilities. In order to ensure that waste treatment systems continue to have an efficient means to comply with the CWA, EWAC recommends revising the exemption to explicitly include not just those facilities *built* to meet the requirements of the CWA, but those facilities that were *built prior to CWA enactment but otherwise meet CWA requirements*. As such, EWAC recommends modifying the language of the waste treatment exemption to state that it is applicable to “waste treatment systems, including treatment ponds or lagoons, designed to meet *or that otherwise meet* the requirements of the Clean Water Act.”<sup>13</sup> Retaining the other exemptions set forth in 40 C.F.R. § 120.2(b) and incorporating similar clarity for each of the exemptions would reduce unnecessary regulatory processes that overburden the Agencies and project proponents alike and will not otherwise hinder the underlying purposes of the CWA.

#### **IV. Conclusion.**

EWAC urges the Agencies to adopt clear standards for when features qualify as WOTUS and to carefully follow SCOTUS’ direction as set forth in *Sackett* in order to ensure consistent application of the WOTUS definition across Corps districts and to avoid hindering deployment of domestic energy sources. EWAC appreciates the Agencies’ consideration of these comments and welcomes the opportunity to discuss further.

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<sup>13</sup> Proposed revision to the waste treatment system exemption set forth in italics.